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DEPARTMENT OF COMMERCE

Economic Development Administration

13 CFR Part 312

[Docket No.: 160615526–6999–02]

RIN 0610–AA68

Regional Innovation Program

AGENCY: Economic Development Administration, U.S. Department of Commerce.

ACTION: Final rule.

SUMMARY: The Economic Development Administration (''EDA'' or ''the Agency''), U.S. Department of Commerce (''DOC''), is issuing a Final Rule implementing the Regional Innovation Program as authorized by section 27 of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (''Stevenson-Wydler'' or the ''Act''). Through the Regional Innovation Strategies Program (''RIS Program''), the centerpiece of the Regional Innovation Program, EDA currently awards grants for capacity-building programs that provide proof-of-concept and commercialization assistance to innovators and entrepreneurs and for operational support for organizations that provide essential early-stage funding to startup companies. This Final Rule lays out the overarching regulatory framework for the Regional Innovation Program and specifically focuses on outlining the structure of the RIS Program.

On September 21, 2016, EDA published a Notice of Proposed Rulemaking (''NPRM'') and received two public comments, one non-germane and one substantive. The Final Rule responds to the substantive comment by making two clarifying edits and one conforming edit to the section regarding eligible RIS Program project activities. EDA also made one technical correction, unrelated to the substantive comment, to the general terms and conditions section relating to the RIS Program.

DATES: This Final Rule becomes effective on February 10, 2017.

ADDRESSES: EDA posted both public comments on the *Federal Rulemaking Portal, www.regulations.gov,* without change.

FOR FURTHER INFORMATION CONTACT: Mara Quintero Campbell, Regional Counsel, Office of the Chief Counsel, Economic Development Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Suite 72023, Washington, DC 20230; telephone: (202) 482–9055.

SUPPLEMENTARY INFORMATION:

Background on Regional Innovation Program

History

In recent years, concerns about America's global competitiveness led to calls for the Federal Government to more actively foster innovation and better coordinate Federal support for scientific and technological research and development, technology transfer, and commercialization. In particular, without Federal support, local communities struggled to effectively support the development of regional innovation clusters (defined below), which research has shown to be a significant catalyst of economic development. At the same time, regional innovation was hampered by limited access to the capital necessary to implement the innovative manufacturing technologies required to compete in the twenty-first century global economy.

In response to these concerns and with a desire to maintain America's role as a leader in innovation, Congress enacted section 27 of Stevenson-Wydler (''section 27'' or ''Regional Innovation Program'') as part of the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Reauthorization Act of 2010, Public Law 111–358 (Jan. 4, 2011) (''COMPETES Act''). As originally enacted by Congress, section 27 authorized the Secretary of Commerce (''Secretary'') to ''establish a regional innovation program to encourage and support the development of regional innovation strategies, including regional innovation clusters and science and research parks.'' In 2014, Congress enacted legislation that narrowed the scope of the Regional Innovation Program. *See* Public Law 113–235 (Dec. 16, 2014). This legislative change is discussed more fully below. The Regional Innovation Program now encompasses two complementary sub-programs: The Regional Innovation Strategies Program (''RIS Program'') set forth in section 27(b) of the Act, and the Regional Innovation Research and Information Program (''RIRI Program'') set forth in section 27(c) of the Act.

Given EDA's leadership in and support of innovation and entrepreneurship as key elements of a robust economy, the Secretary turned to EDA to develop and implement the Regional Innovation Program. Established under the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3121 *et seq.*) (''PWEDA''), EDA leads the Federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy. EDA makes investments to facilitate job creation for U.S. workers, increase private-sector investment, promote American innovation, and accelerate long-term sustainable economic growth. EDA's regulations, codified at 13 CFR parts 300 through 315, provide the framework through which the Agency administers its economic development assistance programs.

Structure

Through the RIS Program (section 27(b) of Stevenson-Wydler), the core of the Regional Innovation Program, EDA competitively awards grants to eligible applicants for activities related to the formation and development of regional innovation clusters. 15 U.S.C. 3722(b). Stevenson-Wydler defines a regional innovation cluster as ''a geographically bounded network of similar, synergistic, or complementary entities that—(A) are engaged in or with a particular industry sector and its related sectors; (B) have active channels for business transactions and communication; (C) share specialized infrastructure, labor markets, and services; and (D) leverage the region's unique competitive strengths to stimulate innovation and create jobs.'' 15 U.S.C. 3722(f)(1).

The RIRI Program (section 27(c) of Stevenson-Wydler) is designed to formulate and disseminate best practices for regional innovation strategies, provide technical assistance for the development and implementation of regional innovation strategies, support the development of metrics to evaluate regional innovation strategies, collect and publicize data on regional innovation cluster activity in the United States, and fund competitive research grants to support the goals of the RIRI Program.

This Final Rule (hereafter ''Rule'') focuses on the RIS Program because EDA has not yet implemented the RIRI Program. However, these regulations—and, in particular, the definition sections—are structured to incorporate the RIRI Program into a future subpart C of part 312 of title 13 of the Code of Federal Regulations once EDA implements the RIRI Program.

EDA's economic development assistance programs under PWEDA and the RIS Program seek to increase economic growth and resilience, enhance prosperity, and improve quality of life, but they approach the goal from different angles, as reflected in the enabling statutes and regulations. For example, the focus of PWEDA's core programs is increasing employment and private investment in economically distressed regions. Funding generally is limited to regions that meet chronic high unemployment or low per capita income criteria, and grant rates increase with the level of economic distress up to a maximum of 100 percent in limited circumstances. Conversely, the RIS Program focuses on encouraging scientific and technological innovation and collaboration; it thus provides funding to a broader range of entities and does not require applicants to demonstrate economic distress. Moreover, it also is capped at a 50 percent grant rate.

In addition to awarding grants under the RIS and RIRI Programs, EDA anticipates conducting at a future date COMPETES Act prize competitions that support the goals and objectives of the Regional Innovation Program. *See* 15 U.S.C. 3719.

Implementation

EDA publicly launched the RIS Program in September 2014 when it announced the first round of competitions for funding under the Program. The announcement of a Federal Funding Opportunity (''FFO'') identified three separate competitions for a total of $15 million in Federal funding: The i6 Challenge, Science and Research Park Development Grants, and Seed Fund Support (''SFS'') Grants (formerly known as Cluster Grants for Seed Capital Funds). The i6 Challenge, first launched in 2010 as part of the multi-agency Startup America Initiative, is designed to support the creation of programs for innovation and entrepreneurship—specifically, the development, creation, or expansion of proof-of-concept and commercialization programs that increase the development of innovations, ideas, intellectual property, and research into viable companies. Science and Research Park Development Grants supported feasibility and planning studies to create innovation hubs for driving the results of applied research and development to the commercial marketplace by supporting the entire product or process lifecycle from idea generation to business creation. SFS Grants support activities related to the feasibility, planning, formation, launch, or expansion of cluster-based seed capital funds to assist innovation-based startups with high growth potential. After considering 241 applications, in early 2015, EDA awarded 17 i6 Grants, 12 Science and Research Park Development Grants, and 9 SFS Grants to applicants throughout EDA's six regions.

In 2014, Congress amended the Regional Innovation Program in section 705 of the Revitalize American Manufacturing and Innovation Act of 2014, Public Law 113–235 (Dec. 16, 2014) (''RAMI''). Under RAMI, Congress eliminated the provisions authorizing Science and Research Park Development Grants and Loan Guarantees for Science Park Infrastructure but did maintain eligibility for such parks to apply for RIS Program awards. Accordingly, when EDA announced a second round of RIS Program competitions in August 2015, it included $10 million in Federal funding for i6 Challenge Grants and SFS Grants, and no longer had a separate Science and Research Park Development Grant competition. In addition, consistent with changes made by Congress in RAMI to section 27(b)(7) of the Act, EDA implemented a targeted outreach program to ensure that public and private sector entities in rural communities were aware of the opportunity. After considering 168 applications for funding, EDA awarded 17 i6 Grants and 8 SFS Grants in early 2016.

A third round of competitions for $15 million in funding for i6 Challenge Grants and SFS Grants was completed in November 2016. After considering 215 applications for funding, EDA awarded 27 i6 Grants and 8 SFS Grants.

With EDA's RIS Program funding, successful applicants have undertaken transformative projects such as the development of a hardware entrepreneurship ecosystem, expansion of a seed capital fund focused on commercializing water technology, and investigation of the feasibility of constructing a test track for connected and autonomous vehicles. Grant recipients are required to provide semi-annual reports, using EDA-developed metrics that are consistent across grantees, that EDA uses to evaluate the impact of the RIS Program.

Administration

Administration and management of the Regional Innovation Program is an EDA-wide responsibility. The Regional Innovation Program (including the RIS Program) is broadly overseen by the Office of Innovation and Entrepreneurship (''OIE''), which was established by the Secretary pursuant to section 25 of the Act. 15 U.S.C. 3720. Housed within EDA, OIE works to foster a more innovative U.S. economy focused on turning new ideas and inventions into products and technologies that spur job growth and competitiveness while promoting economic development through innovation and entrepreneurship. In addition, EDA's Deputy Assistant Secretary for Regional Affairs has served as the Grants Officer for RIS Program awards, with day-to-day administration of these awards being handled by the Agency's regional offices.

The Final Rule

Because of the significant differences in EDA's authority under PWEDA and Stevenson-Wydler, there is a need for a standalone regulatory framework for the Regional Innovation Program. This Rule creates such a framework. From the outset, the Rule makes it clear that the Regional Innovation Program is made up of two sub-programs, the RIS and RIRI Programs, administered by EDA. While focusing on the RIS Program given that EDA has not yet implemented the RIRI Program, the Rule is designed to accommodate future implementation of the RIRI Program by defining terms applicable to the RIRI Program and reserving a subpart for future implementing regulations.

The Rule establishes definitions applicable to the Regional Innovation Program generally and a set of terms specific to the RIS Program. In addition, the Rule describes the purpose and scope of the RIS Program and delineates the eligible recipients, eligible program activities, investment rate, matching share, application components,

application evaluation and selection criteria, and general terms and conditions applicable to the RIS Program.

Public Comments and Summary of Changes to Final Rule

On September 21, 2016 EDA published an NPRM in the **Federal Register** (81 FR 64805) requesting public comments on EDA's proposed regulations for the Regional Innovation Program. The public comment period closed on November 21, 2016. EDA received two public comments in response to the NPRM. One comment was non-germane. The other, from a nonprofit organization, was generally supportive of the Rule while raising five specific issues, which are addressed below. EDA is also making one technical correction to Section 312.12, unrelated to the substantive comment, that is discussed in more detail below.

Issue One: Eligible Project Activities for the RIS Program

The commenter advocates for removing several items from the list of ''Eligible project activities'' under Section 312.7—namely, the purchase of equipment (312.7(a)(9) of the NPRM), construction (312.7(a)(10) of the NPRM), and other activities approved by the Assistant Secretary (312.7(a)(11) of the NPRM). It suggests eliminating equipment and construction funding to avoid compromising the core value and unique nature of the RIS Program, or, in the alternative, it recommends permitting the purchase of equipment with matching share but not Federal funds. It similarly expresses concern that Section 312.7(a)(11) ''could be used to expand the program beyond the legislation's intent.''

While EDA disagrees with the commenter's position that these activities should be ineligible, EDA does acknowledge that some clarification of eligible activities will be helpful in overcoming any misperceptions that these regulations somehow dilute the essence of the RIS Program or conflict with Congressional intent. In response to the comment on equipment and construction, EDA is combining Sections 312.7(a)(9) and (10) into a new Section 312.7(a)(9) to make clear that construction activities may be funded only as ancillary activities necessary to permit the installation of equipment. The Rule further removes ambiguity by expressly providing in new Section 312.7(a)(9) that the purchase of equipment and its installation are allowable only if necessary to support another eligible activity. Accordingly, projects involving only the purchase and/or installation of equipment will not be funded, keeping the core purposes of the RIS Program intact. EDA is also modifying a cross-reference in Section 312.7(b)(3), part of the list of ineligible activities, to account for the consolidation of these sections.

Likewise, EDA is adding language to new Section 312.7(a)(10) (312.7(a)(11) in the NPRM) to address the commenter's concern that this provision has the potential to extend the RIS Program beyond what Congress intended. Stevenson-Wydler clearly affords the Assistant Secretary (through delegation from the Secretary) broad discretion to add to the inventory of activities already authorized by the statute by stating that ''[g]rants awarded under this subsection may be used for activities determined appropriate by the Secretary'' and then identifying a non-exhaustive list of some permissible activities. *See* 15 U.S.C. 3722(b)(2). However, EDA recognizes that the Assistant Secretary's discretion is appropriately limited by the statutorily established purpose of the RIS Program (''to encourage and support the development of regional innovation strategies, including regional innovation clusters'', *see* 15 U.S.C. 3722(a)). To emphasize this point, EDA is modifying new Section 312.7(a)(10) by adding the phrase ''consistent with section 27(b) of Stevenson-Wydler'' to the end of the paragraph.

Issue Two: Use of RIS Program Funds for Equity Investments

Referencing the NPRM preamble, the commenter agrees with EDA's position that Stevenson-Wydler does not permit the use of RIS Program funds or matching share for equity investments. However, the commenter takes issue with EDA's statement that early-stage companies can access other relevant Federal sources of investment capital, arguing that a Federally-funded seed fund program does not exist but is needed and would increase innovation and entrepreneurial activity.

While EDA appreciates the commenter's advocacy for Federal programs that would directly provide investment capital, the commenter's argument does not implicate the regulatory provision itself. For this reason, as well as the commenter's acknowledgment that the provision is consistent with Stevenson-Wydler, no change is being made in this Rule regarding the prohibition on the use of RIS Program funds for equity investments.

Issue Three: Application Components

The commenter also conveys its views on two aspects of Section 312.10. First, it suggests that the application components outlined in Section 312.10 ''will help ensure applicants apply a broad strategic framework to their cluster activities'' but nevertheless should not be scoring criteria for the RIS Program. Second, the commenter states that the nature of the workforce information requested in Section 312.10(e) is unclear and recommends replacing EDA's proposed Section 312.10(e) with ''the extent to which the regional innovation cluster is likely to improve the training or employment opportunities of the regional workforce''.

Regarding the commenter's first suggestion on scoring, section 27(b) of Stevenson-Wydler contains a list of required application components for the RIS Program and Section 312.10 simply mirrors this statutory scheme. *See* 15 U.S.C. 3722(b)(4)(B). As a result, all RIS Program applications must as a threshold matter address these required components to be complete. As the commenter itself implies, the components are not merely ''technical'' requirements but are instead clearly substantive, merits-based elements that are intended to be part of EDA's evaluation of the applicant's competitiveness relative to other applicants.

The commenter's second suggested modification is unduly narrow, focusing this selection factor exclusively on how the regional innovation cluster will improve workforce training or employment opportunities while overlooking the statute's explicitly broad and potentially multi-dimensional emphasis on the capacity of cluster participants to access or contribute to a well-trained workforce. Put another way, Section 312.10(e) parallels the statutory language, providing unambiguous flexibility to the applicant to demonstrate the extent and nature of the project's connection to and support of a well-trained workforce, of which training and employment opportunities may be a part. *See* 15 U.S.C. 3722(b)(4)(B)(iv).

In light of the above, the Rule leaves Section 312.10 unchanged from the NPRM.

Issue Four: Administration and Management of RIS Program Awards

The commenter also suggests that stronger national-level coordination of the RIS Program could provide greater value in terms of increased opportunities ''to share best practices in seed fund and cluster development across awardees and the innovation community as a whole.''

EDA has no plans at this time to significantly change how it administers and manages the Regional Innovation Program. Although the Agency comprises a Washington, DC headquarters (''HQ'') office and six regional offices, there is a unified EDA that leverages the strengths and skills of all of its geographically-dispersed staff. As explained above, the Regional Innovation Program is managed and overseen by OIE, based out of HQ. The day-to-day administration of RIS Program grants is handled by the regional offices, in close coordination with OIE. This integrated approach effectively balances resource allocation with program execution by providing a coordinated and responsive national agenda. At the same time, this puts grant administration in the hands of those who are the Agency's day-to-day grants experts and offers the program's diverse stakeholders valuable points of contact in the field. No change is being made to the regulations, as proposed, in response to the commenter's recommendation.

Issue Five: Prize Competitions

Finally, the commenter seeks additional clarity on the Agency's statement in the NPRM's preamble that EDA may in the future conduct prize competitions that support the goals and objectives of the Regional Innovation Program. The commenter notes that it strongly believes that the current scale and structure of the RIS Program awards is integral to the value of the program and should not change ''unless the program scales toward its original conception as a $100 million program.'' The commenter can, however, foresee a positive role for prize competitions if the Agency were to use remaining portions of the fiscal year's available funding on smaller projects that support regional innovation clusters.

EDA agrees with the commenter that the RIS Program is primarily a grant-making initiative. To allay any concerns, the Agency reiterates that it does not anticipate making any immediate and significant changes to the program's current funding model. The Agency, however, is exploring the use of prize competitions at some point as a complementary tool to respond to evolving regional innovation cluster needs and support the overall objectives of the Regional Innovation Program, particularly as it works to develop the RIRI Program. No change to the proposed regulations is necessitated by this issue raised by the commenter.

Additional Change Made to Final Rule

Unrelated to the substantive comment received, EDA is making one technical correction in this Rule. In Section 312.12, EDA is adding 13 CFR 302.17, dealing with conflicts of interest, to the list of PWEDA general terms and conditions that do not apply to the RIS Program. The conflict of interest provision contained in 13 CFR 302.17 is specific to the requirements of PWEDA and thus is inapplicable to the RIS Program, which is instead based on the statutory requirements of Stevenson-Wydler.

Classification

Prior notice and opportunity for public comment are not required for rules concerning public property, loans, grants, benefits, and contracts. 5 U.S.C. 553(a)(2). Because prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Executive Orders No. 12866 and 13563

This Rule was drafted in accordance with Executive Orders 12866 and 13563. It was reviewed by the Office of Management and Budget (''OMB''), which found that the Rule will be a ''significant regulatory action'' as defined by Executive Orders 12866 and 13563.

Congressional Review Act

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

Executive Order No. 13132

Executive Order 13132 requires agencies to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in Executive Order 13132 to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' It has been determined that this Rule does not contain policies that have federalism implications.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA'') requires that a Federal agency consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the PRA unless that collection displays a currently valid OMB Control Number. The Rule does not include a new information collection requirement and will, thus, use the previously approved Standard Form 424 family of forms to collect information relevant to the grant applications.

The following table provides a complete list of the collections of information (and corresponding OMB Control Numbers) set forth in this Rule. These collections of information are necessary for the proper performance and functions of EDA.

Part or section of this rule	Nature of request	Form/title/OMB control No.
312.10	All Eligible Applicants must submit required application materials using the Standard Form 424 family of forms.	SF–424 (4040–0004), SF–424A (4040–0006), SF–424B (4040–0007).

List of Subjects in 13 CFR Part 312

Application requirements, Cluster grants, Financial assistance, Regional innovation, Regional innovation clusters, Regional Innovation Program, Regional Innovation Research and Information Program, Regional Innovation Strategies Program, Research.

Regulatory Text

For the reasons set forth in the preamble, EDA amends title 13, chapter III of the Code of Federal Regulations by adding part 312 to read as follows:

PART 312—REGIONAL INNOVATION PROGRAM

Subpart A—General Provisions

Sec.
312.1 Purpose and scope of the Regional Innovation Program.
312.2 General definitions from Public Works and Economic Development Act regulations inapplicable to this part.
312.3 General definitions.

Subpart B—Regional Innovation Strategies Program

312.4 Purpose and scope of the Regional Innovation Strategies Program.
312.5 Regional Innovation Strategies Program definitions.
312.6 Eligible recipients.
312.7 Eligible project activities.
312.8 Investment rates.
312.9 Matching share requirements.
312.10 Application components.
312.11 Application evaluation and selection criteria.
312.12 General terms and conditions for investment assistance.

Subpart C—Regional Innovation Research and Information Program [Reserved]

312.13–312.17 [Reserved]

Authority: 15 U.S.C. 3701 *et seq.;* Department of Commerce Organization Order 10–4.

Subpart A—General Provisions

§ 312.1 Purpose and scope of the Regional Innovation Program.

The purpose of the Regional Innovation Program is to encourage and support the development of regional innovation strategies. The Regional Innovation Program includes two sub-programs. One is focused on the formation and development of regional innovation clusters and implemented through the Regional Innovation Strategies Program. 15 U.S.C. 3722(b). The second program is focused on best practices, metrics and the collection and dissemination of information related to regional innovation strategies, achieved through the Regional Innovation Research and Information Program. 15 U.S.C. 3722(c). The Secretary has delegated to the Economic Development Administration the authority to implement and administer the Regional Innovation Program.

§ 312.2 General definitions from Public Works and Economic Development Act regulations inapplicable to this part.

The definitions contained in § 300.3 of this chapter do not apply to this part.

§ 312.3 General definitions.

As used in this part, the following terms shall have the following meanings:

Act or *Stevenson-Wydler* means the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3701 *et seq.*).

Assistant Secretary means the Assistant Secretary of Commerce for Economic Development within the Department.

Department of Commerce, Department, or *DOC* means the U.S. Department of Commerce.

Economic Development Organization means an organization whose primary purpose is to support the economic development of a community or region.

EDA means the Economic Development Administration within the Department.

Eligible applicant means an entity qualified to be an eligible recipient or its authorized representative.

Eligible recipient means a recipient that meets the requirements of § 312.6.

Equipment is defined at 2 CFR 200.33.

Federal agency means any executive agency as defined in 5 U.S.C. 105, and the military departments as defined in 5 U.S.C. 102, as well as any agency of the legislative branch of the Federal Government.

Federal funding opportunity or *FFO* means an announcement that EDA publishes during the fiscal year on a Federal Government grants platform or on EDA's Internet Web site at *http://www.eda.gov, https://www.eda.gov/oie/,* or any successor Web site, that provides the funding amounts, application and programmatic requirements, funding priorities, special circumstances, and other information concerning a specific competitive solicitation under EDA's Regional Innovation Program.

Federal interest is defined at 2 CFR 200.41, in accordance with 2 CFR 200.316.

Federal laboratory means any laboratory, any federally funded research and development center, or any center established under section 7 or section 9 of the Act that is owned, leased, or otherwise used by a Federal agency and funded by the Federal Government, whether operated by the government or by a contractor.

Grant means the financial assistance award of EDA funds to an eligible recipient, under which the Eligible Recipient bears responsibility for meeting a purpose or carrying out an activity authorized under Stevenson-Wydler. *See* 31 U.S.C. 6304.

In-kind contribution(s) means non-cash contributions, which may include contributions of space, Equipment, services, and assumptions of debt that are fairly evaluated by EDA and that satisfy applicable Federal Uniform Administrative Requirements and Cost Principles as set out in 2 CFR part 200.

Indian tribe means an entity on the list of recognized tribes published pursuant to the Federally Recognized Indian Tribe List Act of 1994, as amended (Pub. L. 103–454) (25 U.S.C. 479a *et seq.*), and any Alaska Native Village or Regional Corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)). This term includes the governing body of an Indian tribe, nonprofit Indian corporation (restricted to Indians), Indian authority, or other nonprofit Indian tribal organization or entity; provided that the Indian tribal organization or entity is wholly owned by, and established for the benefit of, the Indian tribe or Alaska Native village.

Investment or *Investment assistance* means a grant entered into by EDA and a recipient.

Investment rate means, as set forth in § 312.8, the amount of the EDA investment in a particular project expressed as a percentage of the total project cost.

Matching share or *Local share* means the non-EDA funds and any in-kind contribution(s) that are approved by EDA and provided by a recipient or third party as a condition of an investment. The matching share may include funds from another Federal agency only if authorized by a statute that allows such use, which may be determined by EDA's reasonable interpretation of such authority.

Nonprofit organization is defined at 2 CFR 200.70.

Office of Innovation and Entrepreneurship or *OIE* means the office established by 15 U.S.C. 3720.

Project means the proposed or authorized activity (or activities), the purpose of which fulfills EDA's mission and program requirements as set forth in the Act and this part, and which may be funded in whole or in part by EDA investment assistance.

Public-private partnership means a relationship formalized by contractual agreement between a public agency and a private-sector entity that reasonably defines the terms of collaboration in the delivery and financing of a public project.

Real property means any land, whether raw or improved, and includes structures, fixtures, appurtenances, and other permanent improvements, excluding moveable machinery and equipment.

Recipient means an entity receiving EDA investment assistance, including any successor to the entity approved by EDA in writing. If investment assistance is awarded to more than one recipient under a single award, the recipients are referred to as ''co-recipients'' and,

unless otherwise provided in the terms and conditions of the investment assistance, each co-recipient is jointly and severally liable for fulfilling the terms of the investment assistance.

Region or *Regional* means an economic unit of human, natural, technological, capital, or other resources, defined geographically. Geographic areas comprising a region need not be contiguous or defined by political boundaries, but should constitute a cohesive area capable of undertaking self-sustained economic development.

Regional innovation clusters or *RICs* means a geographically bounded network of similar, synergistic, or complementary entities that are engaged in or with a particular industry sector and its related sectors; have active channels for business transactions and communication; share specialized infrastructure, labor markets, and services; and leverage the region's unique competitive strengths to stimulate innovation and create jobs.

Regional Innovation Program means the program enacted by Stevenson-Wydler at 15 U.S.C. 3722.

Regional Innovation Research and Information Program or *RIRI Program* means the program authorized by 15 U.S.C. 3722(c).

Regional Innovation Strategies Program or *RIS Program* means the cluster grant program authorized by 15 U.S.C. 3722(b).

Science or research park means a property-based venture that has: Master-planned property and buildings designed primarily for private-public research and development activities, high technology and science-based companies, and research and development support services; a contractual or operational relationship with one or more science- or research-related institutions of higher education or governmental or nonprofit research laboratories; a primary mission to promote research and development through industry partnerships, assisting in the growth of new ventures and promoting innovation-driven economic development; a role in facilitating the transfer of technology and business skills between researchers and industry teams; and a role in promoting technology-led economic development for the community or region in which the park is located.

Secretary means the Secretary of Commerce.

State means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or any other territory or possession of the United States.

United States means all of the States.

Subpart B—Regional Innovation Strategies Program

§ 312.4 Purpose and scope of the Regional Innovation Strategies Program.

Under the RIS Program, EDA makes grants on a competitive basis to eligible applicants to foster connected, innovation-centric economic regions that support commercialization and entrepreneurship. The grants are intended to build public and private capacity to invent and improve products and services and to bring those products and services to market through a process often referred to as technology commercialization, as demonstrated by methodologically sound metrics for output and outcome.

§ 312.5 Regional Innovation Strategies Program definitions.

In addition to the defined terms set forth in subpart A of this part, the following term applies specifically to the RIS Program:

Institution of higher education means:

(1) An educational institution in any State that—

(i) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of 20 U.S.C. 1091(d);

(ii) Is legally authorized within such State to provide a program of education beyond secondary education;

(iii) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary of Education; and

(iv) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary of Education for the granting of preaccreditation status, and the Secretary of Education has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(2) *Additional institutions included.* For purposes of this subpart, the term *Institution of higher education* also includes—

(i) Any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provisions of paragraphs (1)(i), (ii), and (iv) of this definition; and

(ii) An educational institution in any State that, in lieu of the requirement in paragraph (1)(i) of this definition, admits as regular students individuals—

(A) Who are beyond the age of compulsory school attendance in the State in which the institution is located; or

(B) Who will be dually or concurrently enrolled in the institution and a secondary school.

§ 312.6 Eligible recipients.

A recipient eligible for investment assistance includes:

(a) A State;

(b) An Indian tribe;

(c) A city or other political subdivision of a State;

(d) An entity that is a nonprofit organization and whose application for funding under the RIS Program is supported by a State or a political subdivision of a State;

(e) An entity that is an institution of higher education, a public-private partnership, a science or research park, a Federal laboratory, or an economic development organization or similar entity, and whose application for funding under the RIS Program is supported by a State or a political subdivision of a State; or

(f) A consortium of any of the entities described in paragraphs (a) through (e) of this section.

§ 312.7 Eligible project activities.

(a) Activities eligible for a RIS Program grant include:

(1) Feasibility studies;

(2) Planning activities;

(3) Technical assistance;

(4) Developing or strengthening communication and collaboration between and among participants of a regional innovation cluster;

(5) Attracting additional participants to a regional innovation cluster;

(6) Facilitating market development of products and services of a regional innovation cluster, including through demonstration, deployment, technology transfer, and commercialization activities;

(7) Developing relationships between a regional innovation cluster and entities or clusters in other regions;

(8) Interacting with the public and State and local governments to meet the goals of the regional innovation cluster;

(9) Purchase of equipment and equipment-related modifications or renovations of a facility, but only to the extent that such equipment and any related modifications or renovations are used to support another eligible activity as described in this section (the recipient may be required to secure and record the Federal interest in the equipment); and

(10) Any other activity determined appropriate by the Assistant Secretary and consistent with section 27(b) of Stevenson-Wydler.

(b) An ineligible activity includes, but is not limited to:

(1) Use of Federal funds or matching share for equity investments;

(2) Acquisition or improvement of real property;

(3) Construction except to the extent provided in paragraph (a)(9) of this section; and

(4) Lending programs, such as a direct loan program or capitalizing a revolving loan fund.

§ 312.8 Investment rates.

(a) *Minimum investment rate.* There is no minimum investment rate for a project.

(b) *Maximum investment rate.* The maximum investment rate for a project shall not exceed 50 percent.

§ 312.9 Matching share requirements.

The required matching share of a project's eligible costs may consist of cash or in-kind contribution(s) whose value can be readily determined, verified, and justified. Applicants must show at the time of application that the matching share is committed to the project, will be available as needed, and is not or will not be conditioned or encumbered in any way that would preclude its use consistent with the requirements of the investment assistance. EDA shall determine at its sole discretion whether the matching share documentation adequately addresses the requirements of this section.

§ 312.10 Application components.

In addition to the criteria set forth in the FFO, to be considered for a RIS Program grant, eligible applicants must provide the following information:

(a) A description of the regional innovation cluster supported by the proposed activity;

(b) The extent to which the regional innovation cluster is supported by the private sector, State and local units of government, and other relevant stakeholders;

(c) The methods that participants in the regional innovation cluster will use to encourage and solicit participation by all types of entities that might benefit from participation, including newly formed entities and rival existing participants;

(d) The extent to which the regional innovation cluster is likely to stimulate innovation and have a positive effect on regional economic growth and development;

(e) The capacity of participants in the regional innovation cluster to access, or contribute to, a well-trained workforce;

(f) The ability of participants in the regional innovation cluster to attract additional funds to support the cluster with non-Federal funds; and

(g) The likelihood that participants in the regional innovation cluster will be able to sustain activities after the grant expires.

§ 312.11 Application evaluation and selection criteria.

(a) EDA will evaluate and select complete applications in accordance with the evaluation criteria, funding priority considerations, availability of funding, competitiveness of the application, and requirements set forth in section 27(b) of Stevenson-Wydler, the FFO, and other applicable Federal statutes and regulations. All awards are subject to the availability of funds.

(b) EDA will endeavor to notify applicants as soon as practicable regarding whether their applications are selected for funding.

(c) Stevenson-Wydler does not require nor does EDA provide an appeal process for denial of applications for EDA investment assistance.

§ 312.12 General terms and conditions for investment assistance.

RIS Program grants are subject to all requirements contained in part 302 of this chapter, except §§ 302.2, 302.3, 302.9, 302.10, and 302.17.

Subpart C—Regional Innovation Research and Information Program [Reserved]

§§ 312.13–312.17 [Reserved]

Dated: January 3, 2017.

Roy K.J. Williams,

Assistant Secretary for Economic Development.

[FR Doc. 2017–00116 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–8181; Directorate Identifier 2016–NM–002–AD; Amendment 39–18765; AD 2016–26–07]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes. This AD was prompted by an evaluation by the design approval holder (DAH) indicating that the nose wheel well is subject to widespread fatigue damage (WFD). This AD requires modification, inspections, and corrective actions of the nose wheel body structure. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 15, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 15, 2017.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone: 562–797–1717; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–8181.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–8181; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory

evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Nathan Weigand, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6428; fax: 425–917–6590; email: *Nathan.P.Weigand@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes. The NPRM published in the **Federal Register** on July 28, 2016 (81 FR 49572) (''the NPRM''). The NPRM was prompted by an evaluation by the DAH indicating that the nose wheel well is subject to WFD. The NPRM proposed to require modification of the nose wheel body structure; a detailed inspection of the nose wheel body structure for any cracking; a surface HFEC or an open hole HFEC inspection of the vertical beam outer chord and web for any cracking; and all applicable related investigative actions including repetitive inspections, and other specified and corrective actions. We are issuing this AD to detect and correct fatigue cracking in the nose wheel well structure; such cracking could adversely affect the structural integrity of the airplane.

Comments

We gave the public the opportunity to participate in developing this AD. We have considered the comments received. Boeing and United Airlines supported the NPRM.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD as proposed, except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Since the NPRM was Issued

Since the NPRM was issued, we have updated the AD with Boeing's new contact information.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015. The service information describes procedures for modification of the nose wheel body structure; a detailed inspection of the nose wheel body structure for any cracking; a web surface HFEC and an open hole HFEC inspection of the vertical beam outer chord for any cracking; and repair. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 107 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Modification	408 work-hours × $85 per hour = $34,680.	$15,743	$50,423	$5,395,261.
Part 2 detailed inspection.	140 work-hours × $85 per hour = $11,900 per inspection cycle.	$0	$11,900 per inspection cycle	$1,273,300 per inspection cycle.
Surface HFEC inspection.	4 work-hours × $85 per hour = $340 per inspection cycle.	$0	$340 per inspection cycle	Up to $36,380 per inspection cycle.
Open hole HFEC inspection.	4 work-hours × $85 per hour = $340 per inspection cycle.	$0	$340 per inspection cycle	Up to $36,380 per inspection cycle.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2016–26–07 The Boeing Company: Amendment 39–18765; Docket No. FAA–2016–8181; Directorate Identifier 2016–NM–002–AD.

(a) Effective Date

This AD is effective February 15, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by an evaluation by the design approval holder indicating that the nose wheel well is subject to widespread fatigue damage. We are issuing this AD to detect and correct fatigue cracking in the nose wheel well structure; such cracking could adversely affect the structural integrity of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Modification for Groups 1 and 4 Airplanes

For groups 1 and 4 airplanes as identified in Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015: Except as required by paragraph (j)(1) of this AD, at the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015, modify the nose wheel body structure, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015.

(h) Inspection for Groups 1 and 4 Airplanes

For groups 1 and 4 airplanes on which the actions of paragraph (g) have been done: Except as required by paragraph (j)(1) of this AD, at the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015, do a detailed inspection of the nose wheel body structure for any cracking; do a surface high frequency eddy current inspection (HFEC) or an open hole HFEC inspection of the vertical beam outer chord and web for any cracking; and do all applicable related investigative, other specified actions, and corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015; except as required by paragraph (j)(2) of this AD. Do all applicable related investigative actions, other specified actions, and corrective actions before further flight. Repeat the detailed inspection of the nose wheel body structure, and either the surface HFEC or the open hole HFEC inspection of the vertical beam outer chord, thereafter, at the applicable interval specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015.

(i) Inspection for Groups 2, 3, 5 and 6 Airplanes

For groups 2, 3, 5 and 6 airplanes identified in Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015: Except as required by paragraph (j)(1) of this AD, at the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015, do a detailed inspection of the nose wheel well body structure for any cracking, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015; except as required by paragraph (j)(2) of this AD. Do all related investigative and corrective actions before further flight. Repeat the detailed inspection thereafter at the applicable intervals specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015.

(j) Exceptions to the Service Information

(1) Where Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015, specifies a compliance time ''after the original issue date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) If any crack is found during any inspection required by this AD, and Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015, specifies to contact Boeing for appropriate action, and specifies that action as ''RC'' (Required for Compliance): Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (k) of this AD.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) Except as required by paragraph (j)(2) of this AD: For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (k)(4)(i) and (k)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or sub-step is labeled ''RC Exempt,'' then the RC requirement is removed from that step or sub-step. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(l) Related Information

For more information about this AD, contact Nathan Weigand, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6428; fax: 425–917–6590; email: *Nathan.P.Weigand@faa.gov.*

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Boeing Alert Service Bulletin 747–53A2887, dated December 2, 2015.

(ii) Reserved.

(3) For Boeing service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone: 562–797–1717; Internet: *https://www.myboeingfleet.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on December 15, 2016.

Victor Wicklund,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–31187 Filed 1–10–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6428; Directorate Identifier 2015–NM–119–AD; Amendment 39–18764; AD 2016–26–06]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 787–8 airplanes. This AD was prompted by reports indicating that certain wing side-of-body upper stringer fittings have been installed with faying surface mismatch beyond the allowed machining tolerance. This AD requires inspections of certain stringer fittings, replacement if necessary, and replacement of certain fasteners. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 15, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 15, 2017.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740; telephone 562–797–1717; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6428.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6428; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Allen Rauschendorfer, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6487; fax: 425–917–6590; email: *allen.rauschendorfer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 787–8 airplanes. The NPRM published in the **Federal Register** on May 11, 2016 (81 FR 29206) (''the NPRM''). The NPRM was prompted by reports indicating that certain wing side-of-body upper stringer fittings have been installed with faying surface mismatch beyond the allowed machining tolerance. The NPRM proposed to require inspection of certain stringer fittings for faying surface mismatch common to the side-of-body rib chord, replacement if necessary, and replacement of the clearance fit fasteners common to the side-of-body fittings and upper side-of-body rib chord with tapered sleeve bolts. We are issuing this AD to prevent an unacceptable reduction of the fatigue life in the upper side-of-body rib chord. Associated fatigue cracks can reduce the structural capability of the upper side-of-body t-chord to a point where it cannot sustain limit load, which could adversely affect the structural integrity of the airplane.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Reference Revised Service Information

United Airlines (UA) and All Nippon Airways (ANA) asked that we revise the NPRM to reference Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 002, because Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015, is currently being revised by Boeing. UA and ANA added that by including the revised service information for accomplishing the specified actions, requests for alternative methods of compliance (AMOCs) will be reduced.

We do not agree because the revised service information is not yet released. In an AD, we cannot refer to service information that does not exist because doing so violates Office of the Federal Register (OFR) regulations for approval of materials incorporated by reference in rules. To allow operators to use service information issued after publication of an AD, either we must supersede the AD to reference specific service information, or operators must request approval to use the new service information as an AMOC for the AD under the provisions of paragraph (j) of this AD. We consider addressing the unsafe condition as soon as possible a necessity. We might consider issuing a global AMOC if revised service information is approved. We have not changed this AD in this regard.

Request for Clarification of the Reason for the AD

Boeing asked that we clarify that the proposed AD was prompted by reports indicating that the wing side-of-body stringer fittings that were installed with a faying surface mismatch beyond allowed tolerances were the upper stringer fittings.

We agree that clarification of the language describing what prompted the AD is necessary. We have changed the **SUMMARY** section of this final rule, as well as paragraph (e) of this AD, to

include ''upper'' before ''stringer fittings.''

Request for Clarification of Certain Language in the Discussion Section

Boeing asked that we clarify the Discussion section of the NPRM, which stated that the faying surface mismatch produces a gouge. Boeing requested that we revise this wording to indicate that a gouge produced from a faying surface mismatch is a possibility, not a certainty.

We do not agree that the description in the Discussion section of the NPRM is inaccurate, because excessive cutter mismatch will produce a gouge in the mating surface eventually. In addition, the Discussion section of NPRMs is not fully repeated in final rules. Therefore, we have not changed this AD in this regard.

Request for Clarification of Corrective Actions

Boeing asked that we clarify the description of the corrective actions in the ''Related Service Information under 1 CFR part 51'' section of the NPRM by distinguishing certain conditions associated with the various corrective actions.

We agree that clarification of the language is necessary. The ''Related Service Information under 1 CFR part 51'' section in an AD simply describes the various actions in the service information; it does not describe the detailed requirements with specific corrective actions for specific inspection findings. Therefore, we have changed that section in this final rule to simply list the different actions provided in Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015.

Request for Clarification of Certain Language in FAA's Determination Section

Boeing asked that the word ''other'' be removed from the ''FAA's Determination'' section of the NPRM, which specifies that the unsafe condition ''is likely to exist or develop in other products of the same type design.'' Boeing stated that the unsafe condition resulted from a quality escapement applicable to specific line numbers, and therefore is not likely to develop in other products of the same type design (*i.e.,* the entire 787–8 fleet).

We do not agree to remove the word ''other'' from the specified sentence. In 14 CFR 39.5, which defines the reason for issuing ADs, it states that an AD addresses ''a product'' when the unsafe condition is likely to exist or develop in ''other products'' of the same type design. The product addressed by an AD refers to the airplane(s) associated with the incident or specific findings that prompted the AD. In this case, the ''other products'' extends to Model 787–8 airplanes that are identified in paragraph (c) of this AD—that is, airplanes identified in Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015—not the entire fleet. We have not changed this AD in this regard.

Request for Clarification of Compliance Time

Boeing asked that we change the compliance time wording in paragraph (g) of the proposed AD for clarification by referring to Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015, instead of specifying the actual compliance time.

We do not agree with the request. Paragraph (g) of the proposed AD (which is retained in this final rule) provides the compliance time (before the accumulation of 18,000 total flight cycles, or within 13 years after the effective date of this AD, whichever occurs first) because the Accomplishment Instructions of the service information do not provide a compliance time for the inspection. We have not changed this AD regarding this issue.

Request for Clarification of Type of Inspections and Applicable Corrective Actions

Boeing asked that we clarify the description of the inspections specified in paragraphs (g)(1), (g)(2), and (g)(3) of the proposed AD as follows: (1) Do a detailed inspection for a machine mismatch condition of the stringer 1 fitting faying surface; (2) Do a detailed inspection of the faying surface of the aluminum T-chord common to stringer 1 fitting for fretting damage; and (3) Do an eddy current inspection for cracking of the fastener holes common to stringer fittings 1 and 5 through 11. Boeing stated that this will more closely match the information and sequence of the inspections specified in the referenced service information.

We agree with the commenter's request to clarify the inspection language specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD, for the reasons provided. We have clarified those paragraphs accordingly.

Boeing asked that we revise paragraph (h) of the proposed AD to clarify the corrective actions. The commenter defined four corrective actions (which are also defined in the service information).

We agree with the commenter's request in part. We do not agree to clarify the corrective actions because the actions described by the commenter are for the inspections required by paragraph (g) of this AD, and are clearly specified in Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015. Those corrective actions are identified in paragraph (g) of this AD as, simply, ''corrective actions,'' and are further defined by reference to Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015. However, we do agree to change the title of paragraph (h) of this AD to specify ''Modification, Inspection, and Repair'' to encompass the requirements specified in paragraph (h) of this AD.

Request for Clarification of RC Steps

To ensure that all provisions within the RC steps for contacting Boeing are captured, Boeing requested that we revise paragraph (i) of the proposed AD to refer to repair of the ''applicable condition'' instead of just ''cracking.''

We do not agree with the commenter's request. Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015, specifies contacting Boeing if there is a crack; corrective actions for other discrepancies are provided within the service information.

Boeing also asked that we add the following exception in paragraph (i) of the proposed AD:

> Additionally, where Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015, specifies a compliance time ''after the original issue date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

We do not agree to include the compliance time exception. As explained previously, the compliance times in this AD are defined using specific times instead of referring to the service information. Therefore, there are no exceptions to the service information regarding the compliance times in this AD. We have not changed this AD regarding this issue.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and

• Do not add any additional burden upon the public than was already proposed in the NPRM.

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015. The service information describes procedures for inspection of the left and right hand side stringer 1 fittings for faying surface mismatch common to the side-of-body rib chord, replacement of the stringer 1 fitting, and removal and replacement of the clearance fit fasteners common to the side-of-body fittings and upper side-of-body rib chord with tapered sleeve bolts from stringer 5 to stringer 11. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 5 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections and modification	144 work-hours × $85 per hour = $12,240	$100,079	$112,319	$561,595

We estimate the following costs to do any necessary corrective action for fretting damage or cutter mismatch based on the results of the inspection. We have no way of determining the number of aircraft that might need these corrective actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Repair for fretting damage or cutter mismatch	9 work-hours × $85 per hour = $765.	$0	$765

We have received no definitive data that enables us to provide cost estimates for the crack repair specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2016–26–06 The Boeing Company: Amendment 39–18764; Docket No. FAA–2016–6428; Directorate Identifier 2015–NM–119–AD.

(a) Effective Date

This AD is effective February 15, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 787–8 airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports indicating that certain wing side-of-body upper stringer fittings have been installed with faying surface mismatch beyond the allowed machining tolerance. We are issuing this AD to prevent an unacceptable reduction of the fatigue life in the upper side-of-body rib chord. Associated fatigue cracks can reduce the structural capability of the upper side-of-body t-chord to a point where it cannot sustain limit load, which could

adversely affect the structural integrity of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Inspection and Corrective Actions

Before the accumulation of 18,000 total flight cycles, or within 13 years after the effective date of this AD, whichever occurs first, do the inspections specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD, and all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015, except as required by paragraph (i) of this AD. Do all applicable corrective actions before further flight.

(1) Do a detailed inspection for a machine mismatch condition of the stringer 1 fitting faying surface.

(2) Do a detailed inspection of the faying surface of the aluminum T-chord common to the stringer 1 fitting for fretting damage.

(3) Do an eddy current inspection for cracking of the fastener holes common to stringer fitting 1 and stringer fittings 5 through 11.

(h) Modification, Inspection, and Repair

Concurrently with accomplishment of the requirements of paragraph (g) of this AD: Modify the stringer fitting fasteners, and do an eddy current inspection for cracking of the fastener holes, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015. If any crack is found, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(i) Exception to Service Information Specifications

Where Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015, specifies to contact Boeing for repair of cracking: Before further flight, repair the cracking using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (k)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) Except as required by paragraph (i) of this AD: For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (j)(4)(i) and (j)(4)(ii) apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(k) Related Information

For more information about this AD, contact Allen Rauschendorfer, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6487; fax: 425–917–6590; email: *allen.rauschendorfer@faa.gov.*

(l) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Boeing Alert Service Bulletin B787–81205–SB570018–00, Issue 001, dated July 1, 2015.

(ii) Reserved.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740; telephone 562–797–1717; Internet *https://www.myboeingfleet.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on December 15, 2016.

Victor Wicklund,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–31188 Filed 1–10–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9113; Directorate Identifier 2016–NM–042–AD; Amendment 39–18772; AD 2017–01–05]

RIN 2120–AA64

Airworthiness Directives; Airbus Defense and Space S.A. (Formerly Known as Construcciones Aeronauticas, S.A.) Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Airbus Defense and Space S.A. Model CN–235, CN–235–100, CN 235–200, and CN–235–300 airplanes. This AD was prompted by reports of cracks in certain areas of the rear fuselage. This AD requires repetitive borescope and detailed visual inspections of the rear fuselage lateral beam and its external area, and repair if necessary. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 15, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publications listed in this AD as of February 15, 2017.

ADDRESSES: For service information identified in this final rule, contact Airbus Defence and Space, Services/Engineering Support, Avenida de Aragón 404, 28022 Madrid, Spain; telephone +34 91 585 55 84; fax +34 91 585 31 27; email *MTA.TechnicalService@Airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9113.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9113; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1112; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus Defense and Space S.A. Model CN–235, CN–235–100, CN–235–200, and CN–235–300 airplanes. The NPRM published in the **Federal Register** on September 29, 2016 (81 FR 66872). The NPRM was prompted by reports of cracks in certain areas of the rear fuselage. The NPRM proposed to require repetitive borescope and detailed visual inspections of the rear fuselage lateral beam and its external area, and repair if necessary. We are issuing this AD to address the unsafe condition on these products.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued Airworthiness Directive 2016–0064, dated April 4, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus Defense and Space S.A. Model CN–235, CN–235–100, CN–235–200, and CN–235–300 airplanes. The MCAI states:

> During a scheduled visual inspection accomplished in accordance with the CN–235 Maintenance Review Board (MRB) Document task 53.160, cracking was found, affecting the rear fuselage lateral beam, both left hand (LH) and right hand (RH) sides. The investigation to determine the cause of these cracks is on-going.
>
> This condition, if not detected and corrected, could lead to failure of the affected components, resulting in reduced structural integrity of the fuselage.
>
> To address this potential unsafe condition, Airbus Defence and Space (D&S) issued Alert Operator Transmission (AOT) AOT–CN235–53–0002 Revision 1 (hereafter referred to as 'the AOT' in this AD) to provide inspection instructions.
>
> For the reasons described above, this [EASA] AD requires repetitive inspections [special detailed inspection with a borescope and detailed visual] of the rear fuselage lateral beam and its external area and, depending on findings, [cracks or discrepancies], accomplishment of applicable corrective action(s) [repair].

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9113.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

We reviewed Airbus Defense and Space Alert Operators Transmission (AOT), AOT–CN235–53–0002, Revision 1, dated September 17, 2015. This service information describes repetitive borescope and detailed visual inspection requirements for the rear fuselage lateral beam and its external area. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 13 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	2 work-hours × $85 per hour = $170	$0	$170	$2,210

We have received no definitive data that will enable us to provide cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2017–01–05 Airbus Defense and Space S.A. (Formerly Known as Construcciones Aeronauticas, S.A.): Amendment 39–18772; Docket No. FAA–2016–9113; Directorate Identifier 2016–NM–042–AD.

(a) Effective Date

This AD is effective February 15, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Defense and Space S.A. (formerly known as Construcciones Aeronauticas, S.A.) Model CN–235, CN–235–100, CN–235–200, and CN–235–300 airplanes, certificated in any category, all manufacturer serial numbers.

(d) Subject

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

(e) Reason

This AD was prompted by reports of cracks in certain areas of the rear fuselage. We are issuing this AD to detect and correct cracks in the rear fuselage lateral beam and its external area; such cracking could lead to failure of the affected components, and result in reduced structural integrity of the fuselage.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Repetitive Inspections on the Fuselage Lateral Beam

Within the compliance time specified in table 1 to paragraph (g) of this AD, and thereafter at intervals not to exceed the values specified in table 2 to paragraph (g) of this AD, as applicable to airplane model, accomplish the inspections as specified in paragraphs (g)(1) and (g)(2) of this AD, in accordance with the instructions of Airbus Defense and Space Alert Operators Transmission (AOT) AOT–CN235–53–0002, Revision 1, dated September 17, 2015.

(1) A special detailed inspection for cracks and other discrepancies with a borescope of the rear fuselage lateral beam between frame (FR) 31 and FR 45, left-hand (LH) and right-hand (RH) side.

(2) A detailed visual inspection for cracks and other discrepancies of the external area of the rear fuselage lateral beam, LH and RH side.

TABLE 1 TO PARAGRAPH (g) OF THIS AD—INITIAL INSPECTION COMPLIANCE TIME

A or B, whichever occurs later	
A	Before exceeding 15,000 flight cycles or 15,000 flight hours, whichever occurs first since airplane first flight.
B	Within 50 flight cycles or 50 flight hours, whichever occurs first after the effective date of this AD.

TABLE 2 TO PARAGRAPH (g) OF THIS AD—REPETITIVE INSPECTION INTERVALS

Airplane models	Repetitive interval (whichever occurs first, flight cycles or flight hours)
Model CN–235 and CN–235–100 airplanes	3,600 flight cycles or 3,100 flight hours.
Model CN–235–200 airplanes	3,600 flight cycles or 2,800 flight hours.
Model CN–235–300 airplanes	15,000 flight cycles or 15,000 flight hours.

(h) Repair

If any crack or discrepancy is found during any inspection required by paragraph (g) of this AD: Before further flight, contact and obtain repair instructions from Airbus Defense and Space S.A. in accordance with paragraph (k)(2) of this AD, and within the compliance time indicated in those instructions, accomplish the repair accordingly, including any post-repair maintenance task(s), as applicable.

(i) Continued Inspection of Repaired Areas

Accomplishment of a repair on an airplane, as required by paragraph (h) of this AD, does not constitute terminating action for the repetitive inspections as required by paragraph (g) of this AD for that airplane, unless specified in the applicable repair instructions obtained in paragraph (h).

(j) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD, using Airbus Defense and Space AOT AOT–CN235–53–0002, dated August 28, 2015.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1112; fax 425–227–1149. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus Defense and Space S.A.'s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(l) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2016–0064, dated April 4, 2016, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by

searching for and locating Docket No. FAA–2016–9113.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (m)(3) and (m)(4) of this AD.

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Airbus Defense and Space Alert Operators Transmission (AOT), AOT–CN235–53–0002, Revision 1, dated September 17, 2015.

(ii) Reserved.

(3) For service information identified in this AD, contact EADS–CASA, Military Transport Aircraft Division (MTAD), Integrated Customer Services (ICS), Technical Services, Avenida de Aragón 404, 28022 Madrid, Spain; telephone +34 91 585 55 84; fax +34 91 585 55 05; email *MTA.TechnicalService@casa.eads.net;* Internet *http://www.eads.net.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on December 27, 2016.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–31958 Filed 1–10–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–1015; Directorate Identifier 2013–NE–37–AD; Amendment 39–18768; AD 2017–01–01]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are superseding airworthiness directive (AD) 2014–05–25 for all Rolls-Royce plc (RR) RB211-Trent 970–84, RB211-Trent 970B–84, RB211-Trent 972–84, RB211-Trent 972B–84, RB211-Trent 977–84, RB211-Trent 977B–84, and RB211-Trent 980–84 turbofan engines. AD 2014–05–25 required inspections of the low-pressure turbine (LPT) exhaust case and support assembly or tail bearing housing (TBH) to detect cracks or damage. This AD modifies the inspection schedule for the affected engines and adds an optional terminating action. This AD was prompted by RR performing additional analysis of inspection results and determining that the existing inspections need to be modified. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD is effective January 26, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 26, 2017.

We must receive any comments on this AD by February 27, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE24 8BJ; phone: 011–44–1332–242424; fax: 011–44–1332–245418, or email: *http://www.rolls-royce.com/contact/civil_team.jsp.* You may view this service information at the FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2013–1015.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2013–1015; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the mandatory continuing airworthiness information, regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *robert.green@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–1015; Directorate Identifier 2013–NE–37–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Discussion

On February 27, 2014, we issued AD 2014–05–25, Amendment 39–17798 (79 FR 15665, March 21, 2014), ''AD 2014–05–25,'' for all RR RB211-Trent 970–84, RB211-Trent 970B–84, RB211-Trent 972–84, RB211-Trent 972B–84, RB211-Trent 977–84, RB211-Trent 977B–84, and RB211-Trent 980–84 turbofan engines. AD 2014–05–25 required inspections of the LPT exhaust case and support assembly or TBH to detect cracks or damage. AD 2014–05–25 resulted from an RR structural re-analysis indicating that the TBH may not retain full limit load capability in all fail-safe conditions. We issued AD 2014–05–25 to prevent failure of the

TBH, resulting in damage to the engine and to the airplane.

Actions Since AD 2014–05–25 Was Issued

Since we issued AD 2014–05–25, RR has analyzed inspection results and determined that the existing inspections need to be modified. Also since we issued AD 2014–05–25, the European Aviation Safety Agency (EASA) has issued AD 2016–0193, dated September 30, 2016, which modifies the inspection schedule for the affected engines and adds an optional terminating action.

Related Service Information Under 1 CFR Part 51

RR has issued Alert Non-Modification Service Bulletin (NMSB) RB.211–72–AG971, Revision 2, dated May 5, 2016; Alert NMSB RB.211–72–AH154, Revision 5, dated May 5, 2016; Alert NMSB RB.211–72–AJ101, dated May 5, 2016; and Service Bulletin (SB) RB.211–72–J055, dated March 22, 2016. RR Alert NMSB RB.211–72–AG971 describes procedures for on-wing or in-shop inspection of the TBH mount lug run-outs. RR Alert NMSB RB.211–72–AH154 describes procedures for an on-wing or in-shop inspection of a pre-mod 72–J024 TBH. RR Alert NMSB RB.211–72–AJ101 describes procedures for on-wing or in-shop inspection of a post-mod 72–J024 TBH. RR SB RB.211–72–J055 describes procedures for modifying the engine by introducing a revised TBH. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Other Related Service Information

RR has also issued Technical Variance (TV) No. 124801, Issue 2, dated July 4, 2012; TV No. 124851, Issue 2, dated July 4, 2012; Repeater TV No. 132043, Issue 1, dated March 25, 2013; and Repeater TV No. 132217, Issue 5, dated May 23, 2013. RR TV No. 124801 and RR TV No. 124851 provide details on the fluorescent penetrant inspection of the TBH mount lug run-outs. RR Repeater TV No. 132043 includes details of the inspection of the mount lug forging LE areas. RR Repeater TV No. 132217 makes the removal and installation of the exhaust nozzle and forward and aft exhaust plugs optional tasks.

FAA's Determination

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD modifies the inspection schedule for the affected engines and adds an optional terminating action.

FAA's Justification and Determination of the Effective Date

No domestic operators use this product. Therefore, we find that notice and opportunity for prior public comment are unnecessary and that good cause exists for making this amendment effective in less than 30 days.

Costs of Compliance

We estimate that this AD affects 0 engines installed on airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of the TBH	8 work-hours × $85 per hour = $680	$0	$680 per inspection cycle	$0

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2014–05–25, Amendment 39–17798 (79 FR 15665, March 21, 2014), and adding the following new AD:

2017–01–01 Rolls-Royce plc: Amendment 39–18768; Docket No. FAA–2013–1015; Directorate Identifier 2013–NE–37–AD.

(a) Effective Date

This AD is effective January 26, 2017.

(b) Affected ADs

This AD replaces AD 2014–05–25, Amendment 39–17798 (79 FR 15665, March 21, 2014).

(c) Applicability

This AD applies to all Rolls-Royce plc (RR) RB211-Trent 970–84, RB211-Trent 970B–84, RB211-Trent 972–84, RB211-Trent 972B–84,

RB211-Trent 977–84, RB211-Trent 977B–84, and RB211-Trent 980–84 turbofan engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7200, Engine (Turbine/Turboprop).

(e) Unsafe Condition

This AD was prompted by RR performing additional analysis of inspection results and determining that the existing inspections need to be modified. We are issuing this AD to prevent failure of the tail bearing housing (TBH), resulting in damage to the engine and to the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(1) Within the compliance times and using the service information specified in Table 1 to paragraph (f) of this AD, accomplish on-wing inspections of the TBH features using the following instructions, as applicable.

(i) If during any on-wing inspection of the TBH mount lug run-outs done using the Accomplishment Instructions, paragraph 3.A.(1), of RR Alert Non-Modification Service Bulletin (NMSB) RB.211–72–AG971, Revision 2, dated May 5, 2016, any cracks less than or equal to 2 mm in length are found, remove the engine from service within 10 flight cycles (FCs). If any cracks greater than 2 mm are found, remove the engine from service before further flight.

(ii) If during any on-wing inspection of the TBH mount lug run-outs done using the Accomplishment Instructions, paragraph 3.A.(2), of RR Alert NMSB RB.211–72–AG971, Revision 2, dated May 5, 2016, any crack indications resulting in an inspection signal with an amplitude of 50% full screen height or more are found, remove the engine from service before further flight.

(iii) If during any on-wing inspection of a pre-mod 72–J024 TBH, any crack or damage is found on the TBH mount lug forging leading edge (LE) areas, re-inspect the engine or remove the engine from service in accordance with the Accomplishment Instructions, paragraph 3.A.(3)(t), of RR Alert NMSB RB.211–72–AH154, Revision 5, dated May 5, 2016.

(iv) If during any on-wing inspection of a post-mod 72–J024 TBH, any crack is found on the TBH mount lug forging LE or cutback areas, re-inspect the engine or remove the engine from service in accordance with the Accomplishment Instructions, paragraph 3.A.(3)(t), of RR Alert NMSB RB.211–72–AJ101, dated May 5, 2016.

(2) Within the compliance times and using the service information specified in Table 2 to paragraph (f) of this AD, peform in-shop inspections of the TBH features using the following instructions, as applicable.

(i) If during any in-shop inspection of the TBH, any crack is found on the TBH mount lug or central male catcher run-outs, replace the TBH with a TBH eligible for installation before the engine is returned to service.

(ii) If during any in-shop inspection of the TBH, any crack is found on the top core vanes, reject as unserviceable or repair the TBH in accordance with the Accomplishment Instructions, paragraph 3.C.(1)(f), of RR Alert NMSB RB.211–72–AG971 Revision 2, dated May 5, 2016, before the engine is returned to service.

(iii) If during any in-shop inspection of a pre-mod 72–J024 TBH, any crack or damage is found on the TBH mount lug forging LE areas, reject as unserviceable or repair the TBH in accordance with the Accomplishment Instructions, paragraph 3.B.(2)(u)(ii), of RR Alert NMSB RB.211–72–AH154, Revision 5, dated May 5, 2016, or the Accomplishment Instructions, paragraph 3.C.(1)(f), of RR Alert NMSB RB.211–72–AG971, Revision 2, dated May 5, 2016, before the engine is returned to service.

(iv) If during any in-shop inspection of a post-mod 72–J024 TBH, any crack is found on the TBH mount lug forging LE or cutback areas, repair the TBH in accordance with the Accomplishment Instructions, paragraph 3.B.(2)(u)(ii), of RR Alert NMSB RB.211–72–AJ101, dated May 5, 2016, or the Accomplishment Instructions, paragraph 3.C.(1)(f), of Alert NMSB RB.211–72–AG971, Revision 2, dated May 5, 2016, before the engine is returned to service.

TABLE 1 TO PARAGRAPH (f)—TBH ON-WING INSPECTIONS

Affected TBH P/N and feature	Applicable NMSB and paragragph	Alternate NMSB instructions acceptable for prior compliance	Initial inspection	Repeat inspection interval (not to exceed)
All—Mount Lug Run-outs	RB.211–72–AG971 Revision 2, Paragraph 3.A.	In-shop: RB.211–72–AG971 Revision 2, Paragraph 3.B or 3.C.	Before exceeding 2,200 FCs since new.	2,200 FCs.
Pre-mod 72–J024 TBH—Mount Lug Forging LE Areas—for a TBH that has not exceeded 900 FCs since new on April 7, 2014.	RB.211–72–AH154, Revision 5, Paragraph 3.A.	In-shop: RB.211–72–AH154, Revision 5, Paragraph 3.B., or RB.211-72–AG971 Revision 2, Paragraph 3.C.	Before exceeding 1,000 FCs since new.	1,000 FCs.
Pre-mod 72–J024 TBH—Mount Lug Forging LE Areas—for a TBH that has exceeded 900 FCs since new on April 7, 2014.	RB.211–72–AH154, Revision 5, Paragraph 3.A.	In-shop: RB.211–72–AH154, Revision 5, Paragraph 3.B., or RB.211-72–AG971 Revision 2, Paragraph 3.C.	Within 100 FCs after April 7, 2014.	1,000 FCs.
Post-mod 72–J024 TBH—Mount Lug Forging LE and Cutback Areas.	RB.211–72–AJ101, Paragraph 3.A.	In-shop: RB.211–72–AG971, Revison 2, Paragraph 3.C, or RB.211–72–AJ101, Paragraph 3.B.	Before exceeding 1,000 FCs since NMSB RB.211-72-J024 embodiment.	1,000 FCs.

TABLE 2 TO PARAGRAPH (f)—TBH IN-SHOP INSPECTIONS

Affected TBH P/N and feature	Applicable NMSB and paragraph	Alternate NMSB instructions acceptable for prior compliance	Initial inspection	Repeat inspection interval (not to exceed)
All—Mount Lug Run-outs	RB.211–72–AG971, Revision 2, Paragraph 3.	On-wing: RB.211–72–AG971 Rev 2, Paragraph 3.A., or In-shop: RB.211–72–AG971 Revision 2, Paragraph 3.C.	Before exceeding 2,200 flight FCs since new.	2,200 FCs.
All—Top Core Vanes and Central Male Catcher Run-outs.	RB.211–72–AG971, Revision 2, Paragraph 3.C.	None	Before exceeding 3,800 FCs since new.	3.800 FCs.

TABLE 2 TO PARAGRAPH (f)—TBH IN-SHOP INSPECTIONS—Continued

Affected TBH P/N and feature	Applicable NMSB and paragraph	Alternate NMSB instructions acceptable for prior compliance	Initial inspection	Repeat inspection interval (not to exceed)
Pre-mod 72–J024 TBH—Mount Lug Forging LE Areas—for a TBH which has not exceeded 900 FCs since new on April 7, 2014.	RB.211–72–AH154, Revision 5, Paragraph 3.B.	On-wing: RB.211–72–AH154, Revision 5, Section 3.A, or In-shop: RB.211–72–AG971, Revision 2, Paragraph 3.C.	Before exceeding 1,000 FCs since new.	1,000 FCs.
Pre-mod 72–J024 TBH—Mount Lug Forging LE Areas—for a TBH which has exceeded 900 FCs since new on April 7, 2014.	RB.211–72–AJ101, Paragraph 3.B.	On-wing: RB.211–72–AH154 Rev 5, Section 3.A, or In-shop: RB.211–72–AG971, Revision 2, Paragraph 3.C.	Within 100 FCs after the effective date of this AD.	1,000 FCs.
Post-mod 72–J024 TBH—Mount Lug Forging LE and Cutback Areas.	RB.211–72–AJ101, Paragraph 3.B.	On-wing: RB.211–72–AJ101, Section 3.A, or In-shop: RB.211–72–AG971 Rev 2, Paragraph 3.C.	Before exceeding 1,000 FCs since NMSB RB.211-72–J024 embodiment.	1,000 FCs.

(g) Credit For Previous Actions

(1) If you performed inspections and corrective actions on an engine before the effective date of this AD, in accordance with earlier versions of RR Alert NMSB RB.211–72–AG971, Revision 2, dated May 5, 2016, or RR Alert NMSB RB.211–72–AH154, Revision 5, dated May 5, 2016, you met the requirements of paragraph (f)(1) or (2) of this AD, as applicable.

(2) If, on or before April 7, 2014, you performed the inspections and corrective actions required by paragraphs (f)(1) and (2) of this AD using RR Technical Variance (TV) No. 124801, Issue 2, dated July 4, 2012 or earlier versions; or RR TV No. 124851, Issue 2, dated July 4, 2012 or earlier versions; you met the requirements for a mount lug run-out inspection.

(3) If, on or before April 7, 2014, you performed the inspections and corrective actions required by paragraphs (f)(1) and (2) of this AD using RR Repeater TV No. 132043, Issue 1, dated March 25, 2013 or earlier versions; or using RR Repeater TV No. 132217, Issue 5, dated May 23, 2013 or earlier versions; you met the requirements for the mount lug forging LE inspections of this AD.

(h) Optional Terminating Action

(1) Accomplishment of corrective actions required by paragraphs (f)(1) and (2) of this AD does not constitute terminating action for the repetitive inspections required by this AD.

(2) Modification of an engine in accordance with the instructions of RR SB RB.211–72–J055, dated March 22, 2016, constitutes terminating action for the repetitive inspections required by paragraphs (f)(1) and (2) of this AD for that engine, provided that, following this modification, no affected TBH is installed on that engine.

(i) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: *ANE-AD-AMOC@faa.gov.*

(j) Related Information

(1) For more information about this AD, contact Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *robert.green@faa.gov.*

(2) Refer to MCAI European Aviation Safety Agency AD 2016–0193, dated September 30, 2016, for more information. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2013–1015.

(3) RR TV No. 124801, Issue 2, dated July 4, 2012; RR TV No. 124851, Issue 2, dated July 4, 2012, Repeater TV No. 132043, Issue 1, dated March 25, 2013, and Repeater TV No. 132217, Issue 5, dated May 23, 2013; which are not incorporated by reference in this AD, can be obtained from RR using the contact information in paragraph (k)(3) of this AD.

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Rolls-Royce plc (RR) Service Bulletin RB.211–72–J055, dated March 22, 2016.

(ii) RR Alert Non-Modification Service Bulletin (NMSB) RB.211–72–AJ101, dated May 5, 2016;

(iii) RR Alert NMSB RB.211–72–AG971, Revision 2, dated May 5, 2016; and

(iv) RR Alert NMSB RB.211–72–AH154, Revision 5, dated May 5, 2016.

(3) For RR service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE24 8BJ; phone: 011–44–1332–242424; fax: 011–44–1332–245418, or email: *http://www.rolls-royce.com/contact/civil_team.jsp.*

(4) You may view this service information at FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

(5) You may view this service information at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on December 22, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2017–00398 Filed 1–10–17; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 61, 68, and 91

[Docket No.: FAA–2016–9157; Amdt. Nos. 61–140, 68–1, and 91–347]

RIN 2120–AK96

Alternative Pilot Physical Examination and Education Requirements

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

ACTION: Final rule.

SUMMARY: This final rule will allow airmen to exercise pilot in command privileges in certain aircraft without holding a current medical certificate. This rule, which conforms FAA regulations with legislation, is intended to ensure that pilots who complete a medical education course, meet certain medical requirements, and comply with aircraft and operating restrictions are allowed to act as pilot in command for most part 91 operations.

DATES: This rule is effective on May 1, 2017.

Docket: Background documents may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: John Linsenmeyer, General Aviation and Commercial Division, AFS–800, Flight Standards Service, Federal Aviation Administration, 55 M Street SE., 8th floor, Washington, DC 20003; telephone: (202) 267–1100; email: *9-AWA-AFS-BasicMed@faa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Federal Aviation Administration (FAA) Extension, Safety, and Security Act of 2016 (Pub. L. 114–190) (FESSA) was enacted on July 15, 2016. Section 2307 of FESSA, Medical Certification of Certain Small Aircraft Pilots, directed the FAA to ''issue or revise regulations to ensure that an individual may operate as pilot in command of a covered aircraft'' without having to undergo the medical certification process under 14 CFR part 67 if the pilot and aircraft meet certain prescribed conditions as outlined in FESSA. The FAA is amending parts 61 and 91 and creating a new part 68 to conform to this legislation.

This final rule implements, without interpretation, the requirements of section 2307 of FESSA. This rule reiterates the provisions of section 2307 of FESSA and describes how the FAA is implementing those provisions.

II. Legal Authority and Administrative Procedure Act

A. Authority for This Rulemaking

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

This final rule is promulgated under the authority described in Subtitle VII, Part A, Subpart iii, section 44701, General Requirements; section 44702, Issuance of Certificates; and section 44703, Airman Certificates. Under these sections, the FAA is charged with prescribing regulations and minimum standards for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. The FAA is also authorized to issue certificates, including airman certificates and medical certificates, to qualified individuals. This rule is within the scope of that authority.

This rule is further promulgated under section 2307 of Public Law 114–190, the FAA Extension, Safety and Security Act of 2016. Section 2307, Medical Certification of Certain Small Aircraft Pilots, provides the requirements and terms of this rule.

B. Administrative Procedure Act

The Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)) requires an agency to conduct notice and comment rulemaking except when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. The FAA finds that notice and the opportunity to comment are unnecessary and contrary to the public interest in this action because the FAA has simply adopted the statutory language without interpretation and is implementing that language directly into the regulations. The FAA further finds that delaying implementation of this rule to allow for notice and comment would be contrary to the public interest as to do so would delay the new privileges Congress sought to provide.

III. Background

A. Current Situation

In general, a person may serve as a required pilot flightcrew member of an aircraft only if that person holds the appropriate medical certificate.[1] 14 CFR 61.3(c)(1). There are a few exceptions to this requirement, such as for pilots flying gliders, balloons, and/or light-sport aircraft. 14 CFR 61.3(c)(2).

A medical certificate provides validation that a person meets FAA medical certification requirements. Title 14, Code of Federal Regulations (14 CFR) part 67 provides for the issuance of three classes of medical certificates—first-, second-, and third-class medical certificates.[2] At minimum, a third-class medical certificate is required for operations requiring a private pilot certificate, a recreational pilot certificate, a flight instructor certificate (when acting as pilot in command or serving as a required flight crewmember in operations other than glider or balloon), or a student pilot certificate. An applicant who is found to meet the appropriate medical standards,[3] based on a medical examination and an evaluation of the applicant's history and condition, is entitled to a medical certificate without restriction or limitation.

A person obtains a medical certificate by completing an online application (FAA form 8500–8, Application for Medical Certificate) using the FAA's medical certificate application tool, MedXPress, on the FAA Web site and undergoing a physical examination with an FAA-designated Aviation Medical Examiner (AME). The majority of applicants are issued an unrestricted medical certificate by an AME. An AME may defer an applicant to the FAA for further review (which may include further examination by a specialist physician) when there is information indicating the existence or potential of an adverse medical finding that may warrant further FAA medical evaluation and oversight. Title 14 CFR 61.23 specifies the duration of validity for unrestricted medical certificates based on the applicant's age on the date of examination. For third-class medical certificates, certificates for airmen under age 40 are valid for 5 years and for airmen age 40 and over are valid for 2 years.

B. Section 2307, Medical Certification of Certain Small Aircraft Pilots

Section 2307, Medical Certification of Certain Small Aircraft Pilots, provides that, within 180 days of enactment of Public Law 114–190, the FAA Extension, Safety and Security Act of 2016, the Administrator of the FAA shall issue or revise regulations to ensure that an individual may operate as pilot in command of a covered aircraft if certain provisions stipulated in section 2307 of FESSA are met. Those provisions, discussed further below, include requirements for the person to:

- Possess a valid driver's license;
- Have held a medical certificate at any time after July 15, 2006;
- Have not had the most recently held medical certificate revoked, suspended, or withdrawn;

[1] When referring to a ''medical certificate'' in this final rule, the FAA is referring only to a current and valid first-, second-, or third-class FAA airman medical certificate issued under 14 CFR part 67, which may have been issued under an authorization for special issuance (''special issuance medical certificate'').

[2] In most cases, a first-class medical certificate is required for operations requiring an airline transport pilot (ATP) certificate. At minimum, a second-class medical certificate is required for operations requiring a commercial pilot certificate. The requirement to hold a first or second class medical certificate when exercising the privileges of a commercial or airline transport pilot certificate is not changed by this rulemaking.

[3] Part 67 contains the requirements for medical standards and certification.

- Have not had the most recent application for airman medical certification completed and denied;
- Have taken a medical education course within the past 24 calendar months;
- Have completed a comprehensive medical examination within the past 48 months;
- Be under the care of a physician for certain medical conditions;
- Have been found eligible for special issuance of a medical certificate for certain specified mental health, neurological, or cardiovascular conditions;
- Consent to a National Driver Register check;
- Fly only certain small aircraft, at a limited altitude and speed, and only within the United States;
- Not fly for compensation or hire.

The FAA notes that the use of this rule by any eligible pilot is voluntary. Persons may elect to use this rule or may continue to operate using any valid FAA medical certificate.[4] The FAA recognizes that a pilot who holds a medical certificate may choose to exercise this rule and not to exercise the privileges of his or her medical certificate. Even though a pilot chooses not to exercise the privileges of the medical certificate for a particular operation, the FAA retains the authority to pursue enforcement action to suspend or revoke that medical certificate where there is evidence that the pilot does not meet the FAA's medical certification standards. 49 U.S.C. 44709(a).

IV. Pilot Requirements of Section 2307 of FESSA

Section 2307(a)(1) through (7) contains several requirements the pilot must meet in order to act as pilot-in-command (PIC) of a covered aircraft. The FAA is implementing those requirements by revising § 61.23(c)(1) and by adding new § 61.23(c)(3).[5] The following sections discuss the pilot requirements of section 2307 and the FAA's implementation of those requirements in more detail.

A. Applicability of Section 2307

Section 2307(a) states that an ''individual'' may operate as PIC of a covered aircraft in accordance with the requirements of FESSA. Thus, the privileges of this rule are not limited to persons holding a private pilot certificate; it also applies to persons exercising student pilot, recreational pilot, and private pilot privileges and to persons exercising flight instructor privileges when acting as PIC.[6] Accordingly, §§ 61.3 and 61.23 indicate that persons exercising the privileges of these certificates may act as PIC of an operation conducted under the conditions and limitations set forth in § 61.113.[7] However, persons exercising privileges of a student pilot or recreational pilot certificate must continue to operate consistent with the limitations on their certificate.[8] The FAA is therefore adding new §§ 61.89(d) and 61.101(k) to make clear that while individuals exercising the privileges of a student pilot or recreational pilot certificates may operate under § 61.113(i), they must comply with the limitations in §§ 61.89 and 61.101, as applicable, when those limitations conflict with § 61.113(i). Individuals holding a private pilot certificate issued on the basis of a foreign pilot license under § 61.75 may also operate under this rule, provided they meet the requirements of §§ 61.23(c)(3) and 61.113(i). However, an individual who is applying for a U.S. private pilot certificate under § 61.75 is still required to hold a medical certificate issued under part 67 or a medical license issued by the country that issued the person's foreign pilot license.[9] Section 2307 does not apply to persons exercising privileges of a commercial pilot certificate or an airline transport pilot certificate because section 2307 prohibits operations for compensation or hire.[10] Persons exercising privileges of a commercial pilot or ATP certificate must continue to hold a first or second class medical certificate in accordance with § 61.23(a)(1) and (2).

B. Valid Driver's License (§ 61.23(c)(1) and (c)(3))

Section 2307(a)(1) of FESSA requires that, to be eligible to act as PIC without a medical certificate, an individual possess a valid driver's license issued by a State, territory, or possession of the United States and comply with all medical requirements or restrictions associated with that license. As with other FAA regulations, the FAA interprets ''valid driver's license'' to mean a current and valid U.S. driver's license. Each State will determine what, if any, medical requirements or restrictions are necessary and associated with each driver's license issued.

The FAA is implementing section 2307(a)(1) by revising § 61.23(c)(1) and by adding new § 61.23(c)(3). The FAA is adding paragraphs (v) and (vi) to § 61.23(c)(1) to require a person exercising a student pilot certificate, recreational pilot certificate, private pilot certificate, or flight instructor certificate (while acting as the pilot in command or as a required flight crewmember) to hold and possess either a medical certificate or a driver's license issued by a State, territory, or possession of the U.S. when operating under this rule. Additionally, the FAA is adding new § 61.23(c)(3) to require a person using a U.S. driver's license to meet the requirements of § 61.23(c)(1) while operating under section 2307 of FESSA to comply with all medical requirements or restrictions associated with his or her U.S. driver's license.

The FAA notes that, while some pilots use an official passport as a valid form of photo identification under § 61.3(a)(2), it does not meet the requirements of section 2307(a)(1) of FESSA. All pilots, including pilots who were issued U.S. private pilot certificates in accordance with § 61.75,

[4] Section 2307(k) states the provisions and requirements of the section do not apply to anyone who elects to operate under § 61.23(b) and (c)—which govern operations not requiring a medical certificate and operations requiring either a medical certificate or U.S. driver's license, respectively. Because this final rule amends § 61.23(c) to include the relief outlined in FESSA, the reference to § 61.23(c) in section 2307(k) applies to that section as it was written at the time the legislation was enacted.

[5] Section 61.23(c) currently addresses operations that may be conducted using either a medical certificate or a U.S. driver's license.

[6] The FAA has found that, in conducting flight training, the PIC is not carrying passengers or property for compensation or hire, nor is acting as PIC of an aircraft for compensation or hire. Final Rule, ''Pilot, Flight Instructor, Ground Instructor, and Pilot School Certification Rules,'' 62 FR 16220, at 16242 (Apr. 4, 1997).

[7] Section 61.113(i) contains the operating requirements of section 2307. Section 61.23(a)(3) requires a person to hold a third class medical certificate when taking a practical test in an aircraft for a recreational pilot, private pilot, commercial pilot, or airline transport pilot certificate, or for a flight instructor certificate. Accordingly, this rule contains a conforming amendment to allow these pilots to operate under the conditions and limitations of § 61.113(i) when taking a practical test.

[8] Section 61.89 contains the general limitations of a student pilot. Section 61.101 contains the privileges and limitations for recreational pilots.

[9] Under § 61.75(b), a person who holds a foreign pilot license issued by a contracting State to the Convention on International Civil Aviation may be issued a U.S. private pilot certificate based on the foreign pilot license without any further showing of proficiency, provided the applicant meets the requirements of § 61.75. One of these requirements is to hold a medical certificate issued under part 67 or a medical license issued by the country that issued the person's foreign pilot license. 14 CFR 61.75(b)(4).

[10] The FAA notes that § 61.113 provides that certain activities conducted by a private pilot acting as PIC are excepted from the general prohibition on operations conducted for compensation or hire. These activities are listed in § 61.113(b)–(h). Although the FAA considers these activities to be operations involving compensation or hire, the compensation or hire exceptions for these operations permit these operations to be conducted under this rule.

must hold a U.S. driver's license to operate under this rule. An international driver's license or any driver's license issued by a country or territory other than the United States does not suffice to meet this requirement.

Individuals who do not have a medical certificate and whose driver's license has been revoked or rescinded for any reason are not eligible to use this rule, unless and until the driver's license is reinstated. Any restrictions on a driver's license (*e.g.,* corrective lenses, prosthetic aids required, daylight driving only) also apply under this rule.

Since FESSA requires the individual to possess a driver's license, pilots are required to have the driver's license in their personal possession when operating using this rule.

C. Medical Certificate Issued by the FAA (§ 61.23(c)(3)(i)(B))

Section 2307(a)(2) of FESSA requires that the individual (1) hold a medical certificate issued by the FAA on the date of enactment of Public Law 114–190, (2) have held a medical certificate at any point during the 10-year period preceding the date of enactment, or (3) obtain a medical certificate after the date of enactment. Because Public Law 114–190 was signed into law on July 15, 2016,[11] the FAA calculates the 10-year period preceding the date of enactment as beginning on July 15, 2006. Thus, at any point after July 14, 2006, a person must have held a medical certificate issued under part 67. The FAA is implementing this requirement in § 61.23(c)(3)(i)(B).

Consistent with section 2307(a)(3) of FESSA, the medical certificate required under § 61.23(c)(3)(i)(B) may have been a first-, second-, or third-class medical certificate, including a medical certificate issued under an authorization for special issuance (''special issuance medical certificate'').

A person who has not held a medical certificate at any point after July 14, 2006, must obtain a medical certificate issued under part 67. After that medical certificate expires, that person may use, or continue to use, the alternative pilot physical examination and education requirements, provided that person meets the other conditions and limitations.

For individuals relying on an already expired certificate, a person should use the date that his or her most recent medical certificate expired to determine whether it meets the 10-year period look-back described in FESSA. Special-issuance medical certificates are always time-limited and will explicitly state the date when the certificate expires or is no longer valid. Therefore, any special-issuance medical certificate with an expiration date on or after July 15, 2006, would meet the 10-year look-back requirement.

Unrestricted (''regular issuance'') medical certificates do not list a specific expiration date. Therefore, persons with an unrestricted FAA medical certificate should refer to the ''Date of Examination'' displayed on the certificate, and then use § 61.23(d) to determine when it expired for operations requiring a third-class medical certificate.[12] The expiration date is based on a person's age on the date of the examination as calculated from his or her date of birth (*i.e.,* ''under age 40'' vs. ''age 40 and over''). For example, a person born on January 2, 1963 would be ''under age 40'' if the date of examination was January 1, 2003, but would be ''age 40 and over'' if the examination occurred one day later on January 2, 2003. The FAA advises individuals to carefully review § 61.23(d), which specifies the duration of medical certificates.[13]

Persons age 40 or over on the date of their examination would meet the 10-year period described in FESSA if their examination was on or after July 15, 2004. This date is based on the two-year validity period for third class medical certificates issued to persons age 40 or over. Persons under age 40 on the date of their examination would meet the 10-year period described in FESSA if their examination was on or after July 15, 2003. This date is based on the three-year validity period for third class medical certificates issued to persons under 40 years of age that was in effect prior to 2008.[14]

Individuals operating under this rule are not required to carry or possess the expired medical certificate when operating under this rule.

D. Requirements of a Medical Certificate (§ 61.23(c)(3)(ii) and (iii))

Section 2307(a)(3) of FESSA requires that the most recent medical certificate issued by the FAA to the individual: (1) Indicates whether the certificate is first-, second-, or third-class; (2) may include authorization for special issuance; (3) may be expired; (4) cannot have been revoked or suspended; and (5) cannot have been withdrawn.

The requirement that the medical certificate indicate whether the certificate is first-, second-, or third-class is captured in § 61.23(c)(3)(i)(B), which requires the medical certificate to have been issued under part 67.[15] The FAA is implementing the remaining requirements of section 2307(a)(3) in § 61.23(c)(3)(ii) and (iii). Accordingly, § 61.23(c)(3)(ii) now states that the most recently issued medical certificate: (1) May include an authorization for special issuance; (2) may be expired; and (3) cannot have been suspended, revoked, or withdrawn.

Thus, the most recently issued medical certificate, which the person must have held at any point after July 14, 2006, may have been a special issuance medical certificate and may be expired. However, it may not have been suspended or revoked, or in the case of an authorization for a special issuance (*i.e.,* a restricted medical certificate), it may not have been withdrawn. Unrestricted medical certificates can be suspended or revoked if the certificate holder does not meet the medical standards of part 67 or as the result of noncompliance with other regulatory requirements. The FAA may also suspend or revoke a medical certificate on the basis of a reexamination of that certificate under section 44709 of Title 49 of the United States Code.

Section 2307 of FESSA states that the medical certificate ''cannot have been revoked or suspended.'' Accordingly, if

[11] Public Law 114–190.

[12] The FAA notes that a first or second class medical certificate lapses into a third class medical certificate when it exceeds the duration period for first or second class medical certificates under § 61.23(d). For example, for a pilot under the age of 40, a first class medical certificate expires on the 12th month after the month of the date of examination shown on the medical certificate. Upon the date of expiration for a first class medical certificate, the certificate would lapse into a third class medical certificate.

[13] On July 24, 2008, the FAA published a final rule, ''Modification of Certain Medical Standards and Procedures and Duration of Certain Medical Certificates,'' that extended the duration of certain medical certificates (73 FR 43059). Before the 2008 final rule, first-class medical certificates had a maximum duration of 6 months, regardless of the person's age, while third-class medical certificates had a maximum duration of 3 years for individuals under age 40. With publication of the final rule, the duration of first- and third-class medical certificates for individuals under age 40 was extended to 1 year for first-class medical certificates and 5 years for third-class medical certificates. For persons over age 40, the duration of first- and third-class medical certificates remained 6 months and 2 years, respectively.

[14] Under the 2008 final rule that extended the duration of third class medical certificates for persons under the age of 40 from three years to five years, the FAA construed the extended validity period as ''reviving'' expired medical certificates if those certificates would have been valid under the extended period. For example, a third-class medical certificate issued in 2004 (four years before the effective date of the 2008 rule) expired in 2007. When the 2008 final rule became effective, the FAA applied the new five-year duration to the expired certificate. Thus, the medical certificate was revived and remained valid until 2009.

[15] Under part 67, a person may be issued a first-, second-, or third-class medical certificate.

a person's most recently issued medical certificate has been suspended or revoked, the person must apply for and be issued a new medical certificate prior to using the privileges afforded under this rule. This holds true even if the medical certificate was suspended and reinstated because FESSA expressly states that the certificate ''cannot have been . . . suspended.'' [16] Therefore, if a person's last medical certificate was under suspension at any point in time that medical certificate cannot be used for relief under this rule.

Further, if the person's medical certificate expired while under suspension, the person must apply for and be issued a new medical certificate to use the privileges of this rule. This requirement is based on the language in FESSA stating that the certificate ''cannot have been suspended.'' The fact that the certificate expired while under suspension does not change the fact that it was suspended (for purposes of exercising relief under this rule).

Finally, § 2307 requires that the most recently issued medical certificate ''cannot have been withdrawn.'' The FAA notes that unrestricted medical certificates may be denied, suspended, or revoked and authorizations for special issuances (*i.e.,* restricted medical certificates) may be denied or withdrawn. Accordingly, the requirement that the most recently issued authorization for special issuance cannot have been withdrawn is implemented in § 61.23(c)(3)(iii).

E. Application for an Airman Medical Certificate (§ 61.23(c)(3)(iv))

Section 2307(a)(4) of FESSA requires that the most recent application for airman medical certification submitted to the FAA by the individual cannot have been completed and denied. The FAA is implementing this requirement in § 61.23(c)(3)(iv).

Consistent with the Guide for Aviation Medical Examiners and online information on the Aerospace Medical Certification Subsystem (AMCS), the FAA considers an application to be completed once the AME imports the individual's MedXPress application data into AMCS.[17] If an individual submits a MedXpress application but the information is never imported into AMCS by an AME (*e.g.,* the individual never makes an appointment or does not show up for the appointment), then the un-imported application would not be completed and, as such, the FAA would have no basis to make a denial or other certification action.[18] Therefore, any un-imported application would not be subject to the portion of section 2307 relating to ''completed and denied'' applications, and the individual would look to the most recent application where the FAA either issued or denied a medical certificate in order to determine eligibility under this rule.

After importing a MedXPress application into AMCS, the AME may take one of three actions on the completed application. The AME may: (1) Issue a medical certificate; (2) defer issuance to the FAA; or (3) deny the issuance of a medical certificate. Guidance to AMEs makes clear that once the AME has imported the individual's application in MedXpress, the AME is required to transmit the application to the FAA,[19] regardless of whether (a) the applicant leaves the AME office in the middle of the examination, (b) all elements of the AME's examination have been accomplished, or (c) the applicant does/does not provide all additional information required by the AME or the FAA.[20] Whenever an AME defers an examination, the FAA makes a determination on that application (denial or issuance).

An individual's application is considered completed and denied and that individual is unable to use the privileges of this rule when:

(1) An AME denies an application immediately after completing the examination and the FAA does not reverse that decision.

(2) The FAA denies the application after the applicant has been deferred by the AME.

(3) A denied application remains under judicial appeal (*e.g.,* to the National Transportation Safety Board), since no valid medical certificate has been issued.

Additionally, if a person held a medical certificate within the 10-year period preceding July 15, 2016, but subsequently submitted a new application that was completed and denied, that person could not revert to the previous medical certificate meeting the 10-year look back requirement. That person would need to re-apply and be issued a new medical certificate to use the privileges of this rule.

F. Completion of Medical Education Course (§ 61.23(c)(3)(i)(C))

Section 2307(a)(5) of FESSA requires the individual to have completed a medical education course during the 24 calendar months before acting as pilot in command of a covered aircraft and demonstrate proof of completion of the course. The FAA notes that section 2307(c) prescribes the medical education course requirements, which are implemented in new part 68 and discussed in section VI of this preamble.

Section 61.23(c)(3)(i)(C) implements the requirement to have completed the medical education course during the 24 calendar months before acting as PIC of an operation under § 61.113(i).[21] The term ''24 calendar months'' as used throughout 14 CFR means ''24 unit months,'' and ''unit months'' is defined as beginning on the first of the month and ending on the last day of the month.[22] Thus, a pilot has from the beginning of the 24th calendar month before the month in which he or she wants to act as PIC of an operation under § 61.113(i) to complete the medical education course. For example, if a pilot wants to act as PIC of an operation under § 61.113(i) on August 19, 2019, that pilot must have, since August 1, 2017, completed the medical education course.

[16] If a person's medical certificate is suspended, modified, or revoked under § 67.413(b), that suspension or modification remains in effect until the person provides the requested information, history, or authorization to the FAA and until the FAA determines that the person meets the medical standards set forth in part 67. 14 CFR 67.413(c).

[17] ''Information for Aviation Medical Examiners Processing MedXPress Applications'' instructs AMEs that ''MedX applications *must* be imported before the applicant leaves your [the AME's] office'' and ''As soon as you [the AME] import an application into AMCS, it is a signed FAA form and should be treated accordingly.'' (*https://www.faa.gov/other_visit/aviation_industry/designees_delegations/designee_types/ame/amcs/media/MedXPress%20AME%20Procedures_Jan%202012.pdf.*)

[18] When an individual does not follow up a MedXPress application by presenting to an AME for an examination, the data entered through MedXPress system remains valid for 60 days, after which the application expires and is deleted from the MedXPress system. (*https://www.faa.gov/other_visit/aviation_industry/designees_delegations/designee_types/ame/amcs/media/MedXPress%20AME%20Procedures_Jan%202012.pdf.*)

[19] The AME Guide states that all completed applications and medical examinations, unless otherwise directed by the FAA, must be transmitted electronically via AMCS within 14 days after completion to the AMCD (*https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/app_process/general/disposition/.*

[20] The AME Guide states that, when an applicant is advised by an Examiner that further examination and/or medical records are needed, the applicant may elect not to proceed. The Examiner is directed to note this in Block 60 [of the FAA form 8500–8, Application for medical certificate]. No certificate should be issued, and the Examiner should forward the application form to the AMCD, even if the application is incomplete. (*https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/app_process/app_review/item62/.*)

[21] Section 61.113(i) implements the operating requirements of section 2307 of the Act.

[22] Legal Interpretation to Mr. Sean Conlin (Feb. 24, 2000).

G. Care and Treatment by a Physician (§ 61.23(c)(3)(i)(E))

Section 2307(a)(6) of FESSA requires that the individual, when serving as PIC, is under the care and treatment of a physician if the individual has been diagnosed with any medical condition that may impact the ability of the individual to fly. This requirement is implemented in § 61.23(c)(3)(i)(E).

H. Receipt of Medical Exam During the Previous 48 Months (§ 61.23(c)(3)(i)(D))

Section 2307(a)(7) of FESSA requires the individual to have received a comprehensive medical examination from a State-licensed physician during the previous 48 months. This requirement is implemented in § 61.23(c)(3)(i)(D). The FAA notes that section 2307(a)(7) contains additional requirements regarding the comprehensive medical examination. Those additional requirements are implemented in new part 68 and discussed in section VII of this preamble.

In implementing section 2307(a)(7), the FAA notes that section 2307(a)(5) uses the term ''calendar months'' and section 2307(a)(7) uses the term ''months.'' As evident from a legal interpretation issued on February 24, 2000,[23] the FAA interprets the terms ''calendar months'' and ''months'' differently. The term ''calendar months'' means ''unit months,'' as previously discussed, which is defined as beginning on the first day of the month and ending on the last day of the month. The term ''months,'' however, means months from the exact date at issue. For example, under § 61.23(c)(3)(i)(D), if an individual wants to act as PIC of an operation under § 61.113(i) on July 19, 2021, that individual must have received a comprehensive medical examination on or after July 19, 2017.

V. Covered Aircraft Requirements and Operating Requirements

Section 2307(j) of FESSA contains the covered aircraft requirements and section 2307(a)(8) contains the operating requirements. The FAA is implementing these requirements in new § 61.113(i).[24] The following sections discuss the FAA's implementation of the covered aircraft and operating requirements in more detail.

A. Covered Aircraft Requirements of Section 2307 of FESSA

Throughout section 2307, FESSA refers to a ''covered aircraft.'' Section 2307(j) of FESSA defines a covered aircraft as an aircraft that (1) is authorized under Federal law to carry not more than 6 occupants; and (2) has a maximum certificated takeoff weight of not more than 6,000 pounds.

The FAA is implementing these requirements for type certificated aircraft in § 61.113(i)(1). For type certificated aircraft, the aircraft's design approval would authorize the number of occupants the aircraft may carry and would contain the maximum certificated takeoff weight. The aircraft's design approval may be a type certificate (TC), a supplemental type certificate (STC), or an amended type certificate (ATC). The FAA recognizes that changes could be made to an aircraft's type design. For example, an aircraft type certificated to carry more than 6 occupants may be altered to carry 6 or less occupants. In order to make such a change, that aircraft would have to obtain a new design approval, such as an STC or an ATC. So long as an aircraft's design approval (*i.e.,* TC, STC, or ATC) authorizes the aircraft to carry no more than 6 occupants, that aircraft would meet the requirement of section 2307(j)(1). Additionally, if an aircraft with a maximum certificated takeoff weight of more than 6,000 pounds is altered to have a maximum certificated takeoff weight of less than 6,000 pounds, that aircraft would meet the requirement of section 2307(j)(2).

The FAA is implementing the requirements of section 2307(j) for experimental aircraft by adding paragraph (j) to § 91.319. Experimental aircraft, which are not type certificated, are issued special airworthiness certificates. The FAA prescribes operating limitations to accompany the special airworthiness certificates. Additionally, § 91.319 prescribes operating limitations for aircraft having experimental certificates. Consistent with section 2307(j) of FESSA, § 91.319(j) states that no person may operate an aircraft that has an experimental certificate under § 61.113(i) unless the aircraft is carrying not more than 6 occupants. The FAA is adding this paragraph to make clear that experimental aircraft meet the requirements for covered aircraft under this rule.

The FAA notes that the maximum takeoff weight of an experimental aircraft is determined as part of the special airworthiness certification process. Prior to issuing a special airworthiness certificate, the FAA checks the current weight and balance information for an aircraft, which includes the maximum gross weight established by the operator.

While a person may operate an aircraft that meets the requirements of section 2307(j) under this rule, the FAA notes that section 2307 does not relieve an aircraft from the requirement to be operated in accordance with its operating limitations.[25] Accordingly, if an aircraft being operated under this rule has any operating limitations that conflict with § 61.113(i),[26] that aircraft must comply with its operating limitations.

B. Operating Requirements of Section 2307 of FESSA

Section 2307(a)(8) of FESSA requires that the individual operate in accordance with the following operating requirements:

- The covered aircraft is carrying not more than 5 passengers.
- The individual is operating the covered aircraft under visual flight rules or instrument flight rules.
- The flight, including each portion of that flight, is not carried out—
- for compensation or hire, including that no passenger or property on the flight is being carried for compensation or hire;
- at an altitude that is more than 18,000 feet above mean sea level;
- outside the United States, unless authorized by the country in which the flight is conducted; or
- at an indicated airspeed exceeding 250 knots.

The following sections discuss the FAA's implementation of these requirements in more detail.

1. The Covered Aircraft Is Carrying Not More Than 5 Passengers

Section 2307(a)(8)(A) of FESSA requires that the covered aircraft carry no more than five passengers. This requirement is implemented in § 61.113(i)(1).

As previously discussed, section 2307(j) of FESSA requires the covered aircraft to be authorized to carry no more than six occupants. While section 2307(j) and section 2307(a)(8)(A) may appear to conflict, the FAA notes that it interprets the terms ''occupants'' and ''passengers'' differently. The term ''occupants'' includes all persons onboard an aircraft including any required flightcrew members.[27] A flightcrew member is required if he or she is required by type certification of the aircraft or by regulation. The term

[23] Id.

[24] Section 61.113 currently addresses private pilot privileges and limitations.

[25] 14 CFR 91.9(a).

[26] As noted previously, § 61.113(i) implements the covered aircraft requirements and operating requirements of the Act.

[27] A flightcrew member means a pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time. 14 CFR 1.1

''passengers'' does not include required flight crewmembers. Therefore, under this rule, a covered aircraft may be authorized to carry up to 6 occupants (including any required flight crewmembers) and may be operated with up to five passengers on board. For example, a person may operate an aircraft type certificated for one pilot flightcrew member under this rule with up to five additional occupants on board. An aircraft type certificated for two pilot flightcrew members may be operated under this rule with up to four additional occupants on board.[28] An occupant in the aircraft (other than the pilot operating under this rule) may be a passenger, a required pilot flightcrew member (if the aircraft is type certificated for more than one pilot or if the regulations require more than one pilot), or a flight instructor (if the flight is a training operation). If a pilot operating an aircraft under this rule carries another pilot on board who is not a required pilot flightcrew member, that additional pilot would be a passenger under the FAA's regulations.

The operations under this rule include training operations. As such, a person may receive flight training from an FAA-authorized flight instructor while the person receiving flight training is acting as PIC and operating under this rule. Alternatively, an individual may receive flight instruction from a flight instructor while the flight instructor is acting as PIC and operating under this rule.

This rule is applicable only to the person acting as the PIC. Thus, for any flight operated under this rule, the status of the medical certificate of any other pilot aboard who is not acting as the PIC is irrelevant. For example, flight instructors meeting the requirements of this rule may act as PIC while giving flight training without holding a medical certificate, regardless of whether the person receiving flight training holds a medical certificate. While flight training for compensation is considered ''other commercial flying'' for flight and duty requirements under parts 121 and 135,[29] ''a certificated flight instructor who is acting as PIC and is receiving compensation for his or her flight instruction is exercising flight instructor privileges for the flight training being provided and is exercising private pilot privileges while acting as PIC of the flight.''[30]

2. Operate the Aircraft Under Visual Flight Rules or Instrument Flight Rules

Section 2307(a)(8)(B) of FESSA permits an operation under that section to be conducted under visual flight rules or instrument flight rules. An individual operating under this rule may, therefore, conduct the flight in visual meteorological conditions or instrument meteorological conditions. The FAA notes, however, that FESSA does not relieve an individual from the requirement to hold an instrument rating and be instrument current to act as PIC under instrument flight rules. Nor does FESSA relieve an aircraft from the requirement to be approved for IFR operations in order to be operated under instrument flight rules.

3. The Flight, Including Each Portion of the Flight

Section 2307(a)(8)(C) requires that the flight, including each portion of the flight, is not carried out: (i) For compensation or hire, including that no passenger or property on the flight is being carried for compensation or hire; (ii) at an altitude that is more than 18,000 feet above mean sea level; (iii) outside the United States, unless authorized by the country in which the flight is conducted; or (iv) at an indicated air speed exceeding 250 knots.

Because the statute includes the phrase ''. . . flight, including each portion of the flight,'' all of the limitations for the operation set forth in section 2307(a)(8)(C)(i)–(iv) (*i.e.* compensation/hire prohibition, altitude, geographic, and airspeed limitations) apply to the entire flight. Accordingly, if this rule is being exercised in any flight, it must be applied for the entire flight (takeoff to full-stop landing) and all the operational restrictions apply for the entire flight. The FAA is implementing the requirements of section 2307(a)(8)(C)(i)–(iv) in § 61.113(i)(2)(i)–(iv). These requirements are discussed in more detail below.

i. Flight Is Not Conducted for Compensation or Hire

Section 2307(a)(8)(C)(i) of FESSA requires that the flight, including each portion of that flight, is not carried out for compensation or hire, including that no passenger or property on the flight is being carried for compensation or hire. Section 61.113(a) already prohibits private pilots from acting as PIC of an aircraft that is carrying passengers or property for compensation or hire and from acting as PIC for compensation or hire. Accordingly, this FESSA requirement is already addressed by the existing regulation.

ii. Altitude Restriction

Section 2307(a)(8)(C)(ii) of FESSA requires that the flight, including each portion of that flight, is not carried out at an altitude that is more than 18,000 feet above mean sea level (MSL). This requirement is implemented in § 61.113(i)(2)(ii).

For pilots operating aircraft capable of flight above 18,000 feet MSL, the pilot's preflight planning must accommodate the altitude limitation. For instance, if weather phenomena like icing or thunderstorms are forecast (or is within reasonable possibility) within the pilot's route of flight that would necessitate climbing above 18,000 feet MSL, the FAA considers initiating such a flight to be contrary to this rule. The aircraft must operate at or below 18,000 feet MSL during the entire flight.

iii. Geographic Restriction

Section 2307(a)(8)(C)(iii) of FESSA requires that the flight, including each portion of that flight is conducted within the United States, unless authorized by the country in which the flight is conducted. This requirement is implemented in § 61.113(i)(2)(iii).

Title 14 CFR 1.1 defines the United States as the States, the District of Columbia, Puerto Rico, and the possessions, including the territorial waters, and the airspace of those areas. Thus, a pilot operating in the United States, as defined in § 1.1, may elect to use this rule.

Airmen certificated by the FAA are represented to the International Civil Aviation Organization (ICAO) as compliant with ICAO standards for private pilots, among other requirements. As FESSA and this final rule describe standards that divert from ICAO requirements,[31] flights must be geographically limited to operations within the United States.

iv. Airspeed Restriction

Section 2307(a)(8)(C)(iv) of FESSA requires that the flight, including each portion of that flight, is conducted at an indicated airspeed not exceeding 250 knots. The FAA is implementing this requirement in § 61.113(i)(2)(iv).

[28] An operation requiring two pilots could not carry five passengers under § 2307(a)(8)(A) because it would exceed the number of occupants allowed under § 2307(j). The FAA considers that, due to the limitations for maximum certificated takeoff weight, all, or nearly all, covered aircraft will require only a single pilot.

[29] Legal Interpretation to Richard Martindell (March 11, 2009); Legal Interpretation to Arturo Rodriguez (July 2, 2012).

[30] Pilot, Flight Instructor, Ground Instructor, and Pilot School Certification Rules, 62 FR 16220 (Apr. 4, 1997).

[31] Annex 1 to the Convention on International Civil Aviation, ''Personnel Licensing,'' Chapter 6 ''Medical Provisions for Licensing,'' 11th Edition (July 2011).

Recognizing that many aircraft have airspeed indicators that read in miles per hour (mph), 250 knots is equivalent to 288 mph. No aircraft may be operated in any phase of flight at an airspeed greater than 250 KIAS (knots indicated airspeed).

VI. Medical Education Course Requirements of Section 2307 of FESSA

The following sections describe the medical education course requirements of section 2307 of FESSA and the FAA's implementation of those requirements.

A. Development and Availability of the Medical Education Course

Section 2307(c)(1) requires the medical education course to be available on the internet free of charge. Section 2307(c)(2) requires the course to be developed and periodically updated in coordination with representatives of relevant nonprofit and not-for-profit general aviation stakeholder groups.

To implement these requirements, the FAA will work with nonprofit and not-for-profit general aviation stakeholder groups to coordinate and develop a medical education course that meets the requirements of FESSA, which are discussed in more detail below. A nonprofit or not-for-profit general aviation stakeholder group may submit a medical education course to the FAA for consideration. Upon receipt of the submission, the FAA will verify the course meets the requirements of § 68.3. If the FAA accepts the course, the FAA will provide a link to the course on the FAA public Web site. Thus, for public awareness, the FAA's Web site will contain a list of each medical education course that the FAA has accepted.

The FAA has determined that it is appropriate to enter into agreements with nonprofit or not-for-profit general aviation stakeholder groups who elect to provide the course.

B. Course Requirements

Pursuant to the requirements of section 2307(c)(3) through (9) of FESSA, the course must:

- Educate pilots on conducting medical self-assessments;
- Advise pilots on identifying warning signs of potential serious medical conditions;
- Identify risk mitigation strategies for medical conditions;
- Increase awareness of the impacts of potentially impairing over-the-counter and prescription drug medications;
- Encourage regular medical examinations and consultations with primary care physicians;
- Inform pilots of the regulations pertaining to the prohibition on operations during medical deficiency and medically disqualifying conditions; and
- Provide the checklist developed by the Federal Aviation Administration in accordance with section 2307(b).

The FAA is implementing these requirements in § 68.3(a)(1)–(7). The FAA notes that the requirements for the checklist, which the course must provide, are implemented in § 68.5.

C. Documents the Course Must Provide to the Individual and Transmit to the FAA

Pursuant to the requirements of section 2307(c)(10) of FESSA, upon successful completion of the course, the medical education course must electronically provide to the individual and transmit to the FAA—

- A certification of completion of the medical education course;
- A release authorizing the National Driver Register through a designated State Department of Motor Vehicles to furnish to the FAA information pertaining to the individual's driving record;
- A certification by the individual that the individual is under the care and treatment of a physician if the individual has been diagnosed with any medical condition that may impact the ability of the individual to fly;
- A form that includes information regarding the individual, the physician, the comprehensive medical exam, and a certification by the individual that the checklist was followed and signed by the physician; and
- A statement signed by the individual certifying that the individual understands the existing prohibition on operations during medical deficiency. A copy of this signed statement must be provided to the pilot and retained by the pilot.

These requirements are implemented in § 68.3(b)(1)–(5) and are discussed in more detail below.

1. Certification of Completion

Section 2307(c)(10)(A) requires the certification of completion of the medical education course to be printed and retained in the individual's logbook and made available upon request. This certification of completion must contain only the individual's name, address, and airman certificate number.[32] The FAA is implementing this requirement in § 68.3(b)(1).

The PIC must maintain the certification of completion along with his or her pilot logbook. The certification must be available along with the logbook at any time the pilot is presenting the logbook to comply with any regulatory requirement (such as applying for a certificate or rating), or upon request by a representative of the FAA Administrator. Under the terms of FESSA, there is no requirement for pilots to carry compliance documentation that shows their compliance with the relief described in this rule.

The FAA recognizes that many pilots maintain logbooks electronically. Pilots may carry an electronic facsimile or representation of the certification along with their pilot logbook entries, as long as that representation of the certification is available and clearly legible when the logbook is being used to comply with a regulatory requirement or upon request by a representative of the FAA Administrator.

2. Authorization for Access to National Driver Register

Section 2307(c)(10)(B) requires a release authorizing the National Driver Register through a designated State Department of Motor Vehicles to furnish to the FAA information pertaining to the individual's driving record. Section 2307(d) states that the authorization under section 2307(c)(10)(B) shall be an authorization for a single access to the information contained in the National Driver Register. The FAA is implementing these requirements in § 68.3(b)(2).

The National Driver Register (NDR) is a division in the National Center for Statistics and Analysis under the National Highway Traffic Safety Administration (NHTSA). The NDR maintains the computerized database known as the Problem Driver Pointer System (PDPS), which contains information on individuals whose privilege to operate a motor vehicle has been revoked, suspended, canceled or denied or who have been convicted of serious traffic-related offenses.

Each time an individual indicates his or her consent for the NDR release, the FAA will conduct a single NDR check in an identical manner to the NDR check currently conducted when a person applies for a medical certificate. Similarly, the information the FAA receives from the NDR check will be used in the same way as for an applicant for a medical certificate.

[32] The term "certification" was used in the legislation. The FAA notes that this term may cause confusion with the general use of that term within FAA regulations. This document need only contain the information required by FESSA as set forth in § 68.3(b)(1).

3. Certification That the Individual Is Under the Care and Treatment of a Physician

Section 2307(c)(10)(C) requires a certification by the individual that the individual is under the care and treatment of a physician if the individual has been diagnosed with any medical condition that may impact the ability of the individual to fly, as required by section 2307(a)(6).[33] This requirement is implemented in § 68.3(b)(3).

The FAA recognizes that there are many thousands of diagnosable medical conditions, as well as innumerable medical treatments and medications. Many conditions, treatments, or medications are unlikely to impact a person's ability to safely operate an aircraft. However, there are numerous conditions, treatments, and medications that are aviation safety risks. Potential adverse effects may result from sudden incapacitation (*e.g.,* epilepsy, coronary artery disease, implantable cardioverter-defibrillators, etc.) or reduced cognitive, mental or physical abilities (*e.g.,* visual impairments, neurological diseases, psychiatric diseases, diabetes or other metabolic diseases, sedative-hypnotic medications, etc.). Each of these, independently or in combination, can adversely affect the pilot's ability to safely perform pilot duties and are a hazard to the national air space. Additionally, the adverse effects of many medical conditions and medications are exaggerated under typical flight conditions, including reduced air pressure, available oxygen, or acceleration forces. Pilots should consult with their physician or other medical care provider for care and treatment of their conditions, but also for guidance on the impact their conditions may have on flight safety. Pilots, in discussion with their physician/medical care provider, should also consult available aeromedical resources on the flight hazards associated with medical conditions/medications. The Do not Issue/Do not Fly list (*www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/pharm/dni_dnf/*) is readily available in the AME Guide on the FAA Web site. Chapter 8 of the FAA's Aeronautical Information Manual (AIM 8–1–1) also addresses medical factors for pilots. Additional resources include the FAA's AME Guide, other FAA flight safety Web sites, and the Web sites of non-profit and not-for-profit general aviation stakeholders.

While the pilot is required to attest that he or she is under the care and treatment of a physician for any condition that affects safe flight, the FAA emphasizes that all pilots are expected to exercise good judgment (whether operating under this rule or not) and conduct a personal self-assessment of their condition before every flight.[34] The FAA's recommended self-assessment guidance is found in the ''IMSAFE'' checklist found in Chapter 8 of the FAA Aeronautical Information Manual at *https://www.faa.gov/air_traffic/publications/media/aim.pdf.*

The FAA notes that under section 2307(e) of FESSA, which prescribes requirements for the special issuance process, an individual clinically diagnosed with a mental health condition or a neurological condition shall certify every 2 years,[35] in conjunction with the certification requirement of section 2307(c)(10)(C), that the individual is under the care of a State-licensed medical specialist for that mental health or neurological condition.[36] The requirements for the special issuance process are discussed in section VIII of this preamble.

4. Form

Section 2307(c)(10)(D) of FESSA requires the form, which must be electronically provided to the individual and transmitted to the FAA upon successful completion of the course, to include the following information:

- The name, address, telephone number, and airman certificate number of the individual;
- The name, address, telephone number, and State medical license number of the physician performing the comprehensive medical examination[37] required in section 2307(a)(7);
- The date of the comprehensive medical examination required in section 2307(a)(7); and
- A certification by the individual that the checklist described in subsection (b) was followed and signed by the physician in the comprehensive medical examination required in section 2307(a)(7).

These requirements are implemented in § 68.3(b)(4)(i)–(iv).

5. Certification Regarding the Prohibition on Operations During Medical Deficiency

Section 2307(c)(10)(E) of FESSA requires the individual to sign[38] a statement certifying that the individual understands the existing prohibition on operations during medical deficiency by stating: ''I understand that I cannot act as pilot in command, or any other capacity as a required flight crew member, if I know or have reason to know of any medical condition that would make me unable to operate the aircraft in a safe manner.'' This statement shall be electronically provided to the individual and transmitted to the FAA upon successful completion of the course. The FAA is implementing this requirement in § 68.3(b)(5).

The Advisory Circular (AC) 68–1, Alternative Medical Qualifications, contains additional information about the medical education course requirements.

VII. Comprehensive Medical Examination

In order to act as PIC under this rule, an individual must receive a comprehensive medical examination from a State-licensed physician during the previous 48 months in accordance with section 2307(a)(7). This requirement is reflected in § 61.23(c)(3)(i)(D).

Section 2307(a)(7)(A) requires that prior to the examination, the individual do the following: (1) Complete the individual's section of the medical examination checklist described in section 2307(b); and (2) provide the

[33] Section 2307(a)(6) requires the individual, when serving as PIC, to be under the care and treatment of a physician if the individual has been diagnosed with any medical condition that may impact the ability of the individual to fly. This requirement is implemented in § 61.23(3)(i)(E).

[34] Section 61.53(c) requires that for operations provided for in § 61.23(c), a person must meet the provisions of § 61.53(b). That paragraph states that a person shall not act as pilot in command, or in any other capacity as a required pilot flight crewmember, while that person knows or has reason to know of any medical condition that would make the person unable to operate the aircraft in a safe manner.

[35] The FAA notes that section 2307(e) uses the phrase ''two years'' when discussing the certifications made as part of the medical education course, whereas section 2307(c) uses the phrase ''24 calendar months.'' For purposes of these certifications, the FAA anticipates that the certification will occur in conjunction with completion of the medical education course.

[36] Section 2307(e)(3) contains the special rules for mental health conditions. Section 2307(e)(4) contains the special rules for neurological conditions.

[37] The FAA notes that the comprehensive medical examination occurs every 48 months while the medical education course must be completed every 24 calendar months. As such, a pilot may be reporting a medical exam that occurred 24 calendar months prior.

[38] Section 2307 indicates that the statement should be ''printed and signed'' prior to being transmitted to the FAA. The FAA is construing this requirement to allow for electronic signature and electronic retention of this statement. See Government Paperwork Elimination Act (GPEA), Public Law 105–277 Title XVII.

completed checklist to the physician performing the examination. The FAA is implementing these requirements in § 68.5(a)(1)–(2).

Section 2307(a)(7)(B) of FESSA requires the physician to: (1) Conduct the comprehensive medical examination in accordance with the checklist; (2) check each item specified during the examination; and (3) address, as medically appropriate, every medical condition listed and any medications the individual is taking. The FAA is implementing these requirements in § 68.5(b)(1)–(3).

VIII. Comprehensive Medical Examination Checklist

A. Checklist Requirements of Section 2307 of FESSA

Section 2307(b)(1) of FESSA requires that the FAA develop a checklist for an individual to complete and provide to the physician performing the required comprehensive medical examination.

Section 2307(b)(2) of FESSA requires the checklist to contain three sections: (1) A section for the individual to complete; (2) a section with instructions for the individual to provide the completed checklist to the physician performing the examination; and (3) a section for the physician to complete, which contains instructions for the physician performing the examination. Section 2307(b) prescribes requirements for each of these sections, which are discussed below. The FAA is implementing the comprehensive medical examination checklist requirements in § 68.7 and has developed the checklist in accordance with these requirements.

1. Section for the Individual To Complete

Section 2307(b)(2)(A)(i) of FESSA requires the checklist to contain a section for the individual to complete, which contains boxes 3 through 13 and boxes 16 through 19 of the FAA form 8500–8, Application for Airman Medical Certificate (3–99).[39] This requirement is implemented in § 68.7(a)(1). The AC contains the specific information required by boxes 3 through 13 and boxes 16 through 19.

Section 2307(b)(2)(A)(ii) of FESSA requires the checklist to contain (in the section for the individual) a signature line for the individual to affirm that:

- The answers provided by the individual on that checklist, including the individual's answers regarding medical history, are true and complete;
- The individual understands that he or she is prohibited under Federal Aviation Administration regulations from acting as pilot in command, or any other capacity as a required flight crew member, if he or she knows or has reason to know of any medical deficiency or medically disqualifying condition that would make the individual unable to operate the aircraft in a safe manner; and
- The individual is aware of the regulations pertaining to the prohibition on operations during medical deficiency and has no medically disqualifying conditions in accordance with applicable law.

The FAA is implementing these requirements in § 68.7(a)(2)(i)–(iii).

2. Section Containing Instructions for the Individual

Section 2307(b)(2)(B) requires the checklist to contain a section with instructions for the individual to provide the completed checklist to the physician performing the comprehensive medical examination. The FAA is implementing this requirement in § 68.7(b).

3. Section for the Physician To Complete With Instructions for the Physician

Section 2307(b)(2)(C)(i) of FESSA requires the checklist to include a section for the physician to complete, that instructs the physician to perform a clinical examination of the following:

- Head, face, neck, and scalp;
- Nose, sinuses, mouth, and throat;
- Ears, general (internal and external canals), and eardrums (perforation);
- Eyes (general), ophthalmoscopic, pupils (equality and reaction), and ocular motility (associated parallel movement, nystagmus);
- Lungs and chest (not including breast examination);
- Heart (precordial activity, rhythm, sounds, and murmurs);
- Vascular system (pulse, amplitude, and character, and arms, legs, and others);
- Abdomen and viscera (including hernia);
- Anus (not including digital examination);
- Skin;
- G–U system (not including pelvic examination);
- Upper and lower extremities (strength and range of motion);
- Spine and other musculoskeletal;
- Identifying body marks, scars, and tattoos (size and location);
- Lymphatics;
- Neurologic (tendon reflexes, equilibrium, senses, cranial nerves, and coordination, etc.);
- Psychiatric (appearance, behavior, mood, communication, and memory);
- General systemic;
- Hearing;
- Vision (distant, near, and intermediate vision, field of vision, color vision, and ocular alignment);
- Blood pressure and pulse; and
- Anything else the physician, in his or her medical judgment, considers necessary.

The FAA is implementing these requirements in § 68.7(c)(1)(i)–(xxii).

Section 2307(b)(2)(C)(ii) requires the physician to exercise medical discretion to address, as medically appropriate, any medical conditions identified, and to exercise medical discretion in determining whether any medical tests are warranted as part of the comprehensive medical examination. The FAA is implementing this requirement in § 68.7(c)(2).

Section 2307(b)(2)(C)(iii) of FESSA requires the checklist to instruct the physician to discuss all drugs the individual reports taking (prescription and nonprescription) and their potential to interfere with the safe operation of an aircraft or motor vehicle. The FAA is implementing this requirement in § 68.7(c)(3).

Furthermore, section 2307(b)(2)(C)(iv) of FESSA requires the checklist to instruct the physician to sign the checklist, stating: ''I certify that I discussed all items on this checklist with the individual during my examination, discussed any medications the individual is taking that could interfere with his or her ability to safely operate an aircraft or motor vehicle, and performed an examination that included all of the items on this checklist. I certify that I am not aware of any medical condition that, as presently treated, could interfere with the individual's ability to safely operate an aircraft.'' The FAA is implementing this requirement in § 68.7(c)(4).

Lastly, section 2307(b)(2)(C)(v) of FESSA requires the checklist to instruct the physician to provide the date the comprehensive medical examination was completed, and the physician's full name, address, telephone number, and State medical license number. This requirement is implemented in § 68.7(c)(5).

The FAA relies on the determination of each State (as well as each territory and possession of the United States) as

[39] Section 2307 of FESSA specifically references the FAA form 8500–8 revision dated 3–99. The FAA notes that since that revision the FAA has revised the form several times, most recently with publication of the final rule Student Pilot Application Requirements, 81 FR 1292 (Jan. 12, 2016). In accordance with the requirements of FESSA, the FAA has developed the comprehensive medical examination checklist using boxes 3–13 and 16–19 as they appeared on the FAA form 8500–8 revision 3–99.

to which persons it will license as physicians. If the person holds a license as a physician issued by any State, territory, or possession, then he or she meets the requirement as a State-licensed physician. The FAA notes that all States license medical doctors (M.D.s) and doctors of osteopathic medicine (D.O.s) as physicians, although Federal and some State laws may permit the licensure of other persons, such as doctors of dental surgery (D.D.S.) as physicians. While the FAA expects that a specialist physician, (*e.g.,* D.D.S., dentist, podiatrist) who does not also hold an M.D. or D.O. would not have the breadth of training to conduct a medical exam as required in this rule, the FAA will rely on each State-licensed physician to determine whether he or she is qualified to conduct the medical exam required by FESSA.

Existing FAA prohibitions against self-endorsements would apply, prohibiting a State-licensed physician from conducting the physical examination on himself or herself.

B. Inclusion of the Completed Checklist in the Pilot's Logbook

Section 2307(b)(3) of FESSA requires that the completed checklist be retained in the pilot's logbook and be made available upon request. The FAA is implementing this requirement in § 61.113(i)(3).

The FAA recognizes that many pilots now maintain logbook information electronically. Similar to the requirements described previously for the course completion certification described in section 2307(c)(10)(A), the FAA notes that pilots may retain an electronic version of the completed checklist using whatever method they choose so long as an accurate electronic or physical representation of the document can be made available upon request.

C. FAA Implementation of the Comprehensive Medical Examination Checklist Requirements of Section 2307 of FESSA

Section 2307(c)(9) of FESSA requires the medical education course to provide the medical examination checklist developed by the FAA. For purposes of implementation, the FAA will require that any nonprofit or not-for-profit general aviation stakeholder group that provides a medical course for this rule make the checklist available at that group's Web site.

To implement the medical checklist provisions of FESSA, the FAA has developed the Comprehensive Medical Examination Checklist. The checklist is a fillable PDF form available on the FAA Web site, in addition to the location discussed immediately above. Pilots may complete the form either electronically or may print it out and complete it. Regardless of how the pilot chooses to complete the form, the pilot must print the form, sign it, and take it to the State-licensed physician performing the medical examination. The FAA will provide the blank Comprehensive Medical Examination Checklist but will not be collecting and maintaining the checklist in any FAA system of records. As noted, the pilot will be required to retain the checklist as one of the items necessary for verification that he or she is eligible to operate under this rule.

IX. Special Issuance Process

A. Requirements of Section 2307 of FESSA

Section 2307(e)(1) of FESSA states that an individual who has qualified for the third-class medical certificate exemption under subsection (a) of section 2307 and is seeking to serve as a PIC of a covered aircraft shall be required to have completed the process for obtaining an Authorization for Special Issuance of a Medical Certificate if that person has any of the following: (1) A mental health disorder; (2) a neurological disorder; or a (3) cardiovascular condition.

Section 2307(e)(1)(A) states that a mental health disorder is limited to an established medical history or clinical diagnosis of:

- Personality disorder that is severe enough to have repeatedly manifested itself by overt acts;
- Psychosis, defined as a case in which an individual: (i) Has manifested delusions, hallucinations, grossly bizarre or disorganized behavior, or other commonly accepted symptoms of psychosis; or (ii) may reasonably be expected to manifest delusions, hallucinations, grossly bizarre or disorganized behavior, or other commonly accepted symptoms of psychosis;
- Bipolar disorder; or
- Substance dependence within the previous 2 years, as defined in § 67.307(a)(4) of title 14, Code of Federal Regulations.

Section 2307(e)(1)(B) states that a neurological disorder is limited to an established medical history or clinical diagnosis of any of the following:

- Epilepsy.
- Disturbance of consciousness without satisfactory medical explanation of the cause.
- A transient loss of control of nervous system functions without satisfactory medical explanation of the cause.

Section 2307(e)(1)(C) states that a cardiovascular condition is limited to a one-time special issuance for each diagnosis of the following:

- Myocardial infarction.
- Coronary heart disease that has required treatment.
- Cardiac valve replacement.
- Heart replacement.

The FAA is implementing the requirements of section 2307(e)(1)(A)–(C) in § 68.9(a)(1)–(3).

1. Special Rule for Cardiovascular Conditions

Section 2307(e)(2) of FESSA states that in the case of an individual with a cardiovascular condition, the process for obtaining an Authorization for Special Issuance of a Medical Certificate shall be satisfied with the successful completion of an appropriate clinical evaluation without a mandatory wait period.[40]

The FAA is implementing this requirement in § 68.9(b).

2. Special Rule for Mental Health Conditions

Section 2307(e)(3)(A)(i) of FESSA states that in the case of an individual with a clinically diagnosed mental health condition, the ability to operate without a third-class medical certificate under subsection (a) of section 2307 shall not apply if in the judgment of the individual's State-licensed medical specialist, the condition: (1) Renders the individual unable to safely perform the duties or exercise the airman privileges described in the operating requirements of subsection (a)(8); or (2) may reasonably be expected to make the individual unable to perform the duties or exercise the privileges described in the operating requirements of subsection (a)(8).

Additionally, section 2307(e)(3)(A)(ii) states that in the case of an individual with a clinically diagnosed mental health condition, the ability to operate without a third-class medical certificate under section 2307(a) shall not apply if the individual's driver's license is revoked by the issuing agency as a result of a clinically diagnosed mental health condition.

The FAA is implementing section 2307(e)(3)(A)(i)–(ii) in § 68.9(c)(1)(i)–(ii).

Section 2307(e)(3)(B) of FESSA requires that an individual clinically

[40] Current guidance establishes mandatory wait periods for certain cardiovascular conditions. For example, there is a 3-month recovery time after a myocardial infarction from non-coronary heart disease before an applicant may be considered for a medical certificate. 2016 Guide for Aviation Medical Examiners.

diagnosed with a mental health condition shall certify every 2 years, in conjunction with the certifications under subsection (c)(10)(C), that the individual is under the care of a State-licensed medical specialist for that mental health condition. The FAA is implementing this requirement in § 68.9(c)(2). This certification will be incorporated into the medical education course process. The FAA notes that the certifications required under subsection (c)(10)(C) of FESSA are implemented in § 68.3(b)(3).

3. Special Rule for Neurological Conditions

Section 2307(e)(4)(A)(i) states that in the case of an individual with a clinically diagnosed neurological condition, the ability to operate without a third-class medical certificate under subsection (a) of section 2307 shall not apply if in the judgment of the individual's State-licensed medical specialist, the condition: (1) Renders the individual unable to safely perform the duties or exercise the airman privileges described in the operating requirements of subsection (a)(8); or (2) may reasonably be expected to make the individual unable to perform the duties or exercise the privileges described in the operating requirements of subsection (a)(8).

Section 2307(e)(4)(A)(ii) states that in the case of an individual with a clinically diagnosed neurological condition, the ability to operate without a third-class medical certificate under subsection (a) of section 2307 shall not apply if the individual's driver's license is revoked by the issuing agency as a result of a clinically diagnosed neurological condition.

The FAA is implementing the requirements of section 2307(4)(A) in § 68.9(d)(1)(i)–(ii).

Section 2307(4)(B) of FESSA requires that an individual clinically diagnosed with a neurological condition shall certify every 2 years, in conjunction with the certification under subsection (c)(10)(C), that the individual is under the care of a State-licensed medical specialist for that neurological condition. As with the requirements for certain mental health disorders, this certification will be incorporated into the medical education course process.

Regarding the certification related to mental health disorders and neurological disorders, the FAA recognizes that the inclusion of such a certification could create confusion. So to clarify, the FAA has written the certifications for the individual to attest (1) that the individual does not have a mental health disorder or neurological disorder or, (2) if the individual has a mental health disorder or neurological disorder, that the individual is under the care of a State-licensed medical specialist for that mental health condition or neurological condition. The FAA's intent is to ensure that no medical information is collected. Rather, the FAA views these certifications as a place for the individuals to attest that if they have a mental health or neurological disorder listed in section 2307, then they meet the section 2307 requirement that they are under the care of a State-licensed medical specialist for that condition.

B. Special Issuance Medical Certificates

All persons who currently hold an FAA-issued special issuance medical certificate, or who have held an FAA-issued special issuance medical certificate within the 10-year period preceding the enactment of FESSA, for conditions other than the specified cardiovascular, mental health, and neurological conditions listed in FESSA, may elect to use this rule. These persons are no longer required to maintain their special issuance medical certificate if they choose to comply with the requirements of section 2307 of FESSA. The FAA emphasizes that it expects all pilots, including persons who hold or have held a special issuance medical certificate, to comply with care and treatment protocols recommended by their State-licensed physician.

If a pilot, while using this rule, is diagnosed with a condition that would have, in the past, required the pilot to be considered for a special issuance medical certificate, but is not one of the specified conditions described in FESSA, then that pilot may continue to exercise the privileges of this rule so long as all other requirements of section 2307 of FESSA are met.

FESSA prescribes specific responsibilities and prohibitions that must be met for pilots who have certain cardiovascular, neurological, or mental health conditions. Persons who have, or are newly diagnosed with, a cardiovascular, neurological, or mental health condition described in FESSA, may not use this rule until they have been found eligible for special issuance of a medical certificate. Once issued a medical certificate, the person may then use this rule if he or she meets all other requirements of FESSA.

X. Authority To Require Additional Information

Section 2307(l)(1) of FESSA states that if the Administrator receives credible or urgent information, including from the National Driver Register or the FAA Hotline Program, that reflects on an individual's ability to safely operate a covered aircraft under the third-class medical certificate exemption in subsection (a) of section 2307, the Administrator may require the individual to provide additional information or history so that the Administrator may determine whether the individual is safe to continue operating a covered aircraft. Section 2307(l)(2) states that the Administrator may use credible or urgent information received to request an individual to provide additional information or to take actions under section 44709(b) of title 49, United States Code.

The FAA has implemented the provisions of section 2307(l) in new § 68.11.

XI. Advisory Circular

To further implement this final rule, the FAA has developed Advisory Circular 68–1, Alternative Pilot Physical Examination and Education Requirements. The advisory circular describes the relief and provides guidance on how to comply with the rule's provisions. It also includes frequently asked questions and guidance on how a nonprofit or not-for-profit general aviation stakeholder group can offer an approved course under this rule.

XII. Section-by-Section Discussion of the Final Rule

In part 61, Certification: Pilots, flight instructors, and ground instructors, § 61.3, requirement for certificates, ratings, and authorizations, is revised to add operations conducted under this rule to the list of exceptions to the requirement to hold a medical certificate.[41] Section 61.3 is also amended to add the documents establishing alternative medical qualification under part 68 to the list of documents available for inspection under paragraph (l).

Section 61.23, medical certificates: requirement and duration, is revised to provide an exception for operations conducted under this rule for persons otherwise required to hold a third-class medical certificate.

For operations requiring either a medical certificate or U.S. driver's license, § 61.23(c)(1) is amended to state that a person must hold and possess either a medical certificate or a U.S. driver's license when exercising the

[41] The FAA notes that § 61.113(i) contains the operating requirements for this rule. The FAA also notes that persons operating under this rule without a medical certificate must hold a valid U.S. driver's license.

privileges of a student, recreational or private pilot certificate and operating under this rule, or when exercising the privileges of a flight instructor certificate and acting as the PIC or as a required flight crewmember if the flight is conducted under this rule.

The FAA is also adding § 61.23(c)(3), which contains the requirements for persons using a U.S. driver's license to operate under this rule.

In § 61.89, the FAA is adding paragraph (d) to allow the holder of a student pilot certificate to operate under this rule without holding a medical certificate.

In § 61.101, the FAA is adding paragraph (k) to allow a recreational pilot to operate under this rule without holding a medical certificate.

Section 61.113 is revised to add paragraph (i), which contains the operational requirements of section 2307.

The FAA is adding part 68, Requirements for operating certain small aircraft without a medical certificate, to title 14 of the Code of Federal Regulations. Section 68.1 provides the applicability of the part.

Section 68.3 provides the Medical Education Course Requirements.

Section 68.5 implements the requirements for the Comprehensive Medical Examination, including the requirements for the physician and the individual.

Section 68.7 provides the requirements for the Comprehensive Medical Examination Checklist.

Section 68.9 implements the requirements for the Special Issuance Process.

Section 68.11 provides the FAA with authority to require additional information as described in FESSA.

In § 91.319, the FAA is adding paragraph (j) to make clear that experimental aircraft may operate under the conditions and limitations of § 61.113(i).

XIII. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39 as amended) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule. We suggest readers seeking greater detail read the full regulatory evaluation, a copy of which we have placed in the docket for this rulemaking.

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

Total Benefits and Costs of This Rule

TOTAL SAVINGS AND COSTS OF THE RULE

[2017 to 2026]

SAVINGS		COSTS	
Medical Examination: 3rd Class Medical Certificates for Pilots Age 40-and-Over.	$290,421,038	Physical Examinations by State-Licensed Physician: Pilots Age 40-and-Over.	$262,656,213
		Physical Examinations by State-Licensed Physician: Special Issuance.	$3,055,973
Medical Examination: 3rd Class Medical Certificates with a Special Issuances.	90,679,136	Online Training Course	42,004,478
FAA Savings	1,782,230	NDR Checks	7,422,763
Total Savings	382,882,405	Total Costs	315,139,427
Present Value (7% discount rate)	272,835,610	Present Value (7% discount rate)	227,799,517

Totals may not add due to rounding.

Who is potentially affected by this Rule?

All pilots with eligible pilot certificates are affected by this rule. Eligible pilots will need to have held a valid FAA medical certificate within the 10 years preceding the date of enactment of FESSA, July 15, 2016, and will need a valid U.S. driver's license.

Assumptions:

- Costs and benefits are estimated over 10 years from 2017 through 2026.
- Costs and benefits are presented in 2016 dollars.
- The present value discount rate of seven percent is used as required by the Office of Management and Budget.
- An FAA medical examination with an AME is approximately $117.
- An FAA follow-up evaluation with an AME is approximately $58.50.
- A pilot's medical examination with a state-licensed physician is approximately $225.[42]
- An annual growth rate of 1.0 percent per year is applied to hourly

[42] Four Coding and Payment Opportunities You Might Be Missing, American Academy of Family Physicians. 2016 May–June;23(3):30–35. *http://www.aafp.org/fpm/2016/0500/p30.html.*

wages per Department of Transportation Guidance.[43]

• Vehicle operating cost per mile (VOC) as determined by the Internal Revenue Service (IRS) is $0.19.[44]

• The hourly rate of a pilot's travel time (VTTS) as determined by the Department of Transportation (DOT) is $12.50 in 2013. This value is augmented by 1.0 percent per year to project future benefits of travel time saved from 2013 to 2026.[45]

• The hourly rate of a pilot's time (VPT) as determined by DOT is $25.00 in 2013. This value is augmented by 1.0 percent per year to project the annual growth rate of real median household income from 2013 to 2026.[46]

• The FAA assumes 0.5 hours to complete the MedXpress form.

• The FAA assumes that the time required to fill out the MedXpress form will be the same time required to fill out section 1 of the medical checklist that must be partially completed by the pilot and taken to the physician.

• The FAA assumes 1 hour to complete a medical examination.

• The FAA assumes 0.5 hours to complete a follow-up evaluation.

• The value of FAA time to review medical applications per hour is shown in table 1 and includes fringe benefits for federal employees.[47]

TABLE 1—2016 WEIGHTED AVERAGE OF HOURLY WAGE FOR FAA EMPLOYEES REVIEWING APPLICATIONS FOR MEDICAL CERTIFICATES

	Wages with benefits A	Number of people b	a × b
Legal instrument examiners [48]	$50.46	42	$2,119
Regional Flight Surgeons [49]	139.59	9	1,256
Senior Executives [50]	139.59	3	419
Civil Aerospace Medicine Institute (CAMI) Medical Officers [51]	139.59	6	838
Civil Aerospace Medicine Institute (CAMI) Physicians [52]	139.59	3	419
Total		63	5,051
Weighted Average Wage Rate = $5,051/63			80.17

Totals may not add due to rounding.

Benefits of this Rule

The FAA estimates potential savings to pilots, based on age and a pilot's medical condition, from eliminating medical examinations with an AME. The elimination of these examinations will save pilots the time to complete the online medical application (MedXpress), travel time to the medical examination, the time required to complete the medical examination, vehicle operating costs based on miles traveled to the examination, and the cost of the medical examination. For pilots with special-issuances, the FAA anticipates added savings by eliminating follow-up medical evaluations, determined by their medical condition, with an AME. Additionally, the FAA will save time by reducing the number of applications reviewed for special-issuance medical certificates. Total savings are estimated at $382.9 million ($272.8 million at a 7 percent present value) over 10 years.

Costs of this Rule

Costs for this rule are attributed to the physical examination completed by a State-licensed physician every 48 months, the medical education course that pilots will complete every 24 calendar months, and an increase in NDR checks for pilots under age 40 with a special issuance medical certificate. Unlike pilots 40 years of age and older, who the FAA expects will benefit from the elimination of the AME examinations, the FAA expects the savings to pilots under 40 years of age will only occur for those pilots requiring Authorization for a special issuance medical certificate. Total costs are estimated at $315.1 million ($227.8 million at a 7 percent present value) over 10 years.

Overall, the rule results in a net benefit of $67.7 million over 10 years.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals

[43] 2015 Department of Transportation Value of Travel Time Guidance; *https://www.transportation.gov/administrations/office-policy/2015-value-travel-time-guidance*.

[44] Internal Revenue Service (IRS) Standard Mileage Rate for 2016, 0.19 cents per mile driven for medical or moving purposes; *https://www.irs.gov/uac/newsroom/2016-standard-mileage-rates-for-business-medical-and-moving-announced* Dec. 17, 2015.

[45] 2015 Departmental Guidance on Valuation of Travel Time in Economic Analyses; Table 4: Recommended Hourly Values of Travel Time Savings (Personal category for local surface modes of transportation). *https://www.transportation.gov/administrations/office-policy/2015-value-travel-time-guidance*.

[46] 2015 Departmental Guidance on Valuation of Travel Time in Economic Analyses; Table 3: Recommended Hourly Earning Rates for Determining Values of Travel Time Savings, *https://www.transportation.gov/administrations/office-policy/2015-value-travel-time-guidance*.

[47] *http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2008/m08-13.pdf*.

[48] 2016 General Schedule (GS) Locality Pay Tables; GS–11 Step 5 locality pay The REST OF UNITED STATES; *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2016/RUS_h.pdf* ; plus fringe benefits; *http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2008/m08-13.pdf*.

[49] SALARY TABLE NO. 2016–ES plus fringe benefits; *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2016/ES.pdf,* Agencies with a Certified SES Performance Appraisal System Maximum; *http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2008/m08-13.pdf*.

[50] SALARY TABLE NO. 2016–ES plus fringe benefits; *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2016/ES.pdf,* Agencies with a Certified SES Performance Appraisal System Maximum; *http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2008/m08-13.pdf*.

[51] 2016 General Schedule (GS) Locality Pay Tables; GS–11 Step 5 locality pay The REST OF UNITED STATES; *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2016/RUS_h.pdf*; plus fringe benefits; *http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2008/m08-13.pdf*.

[52] 2016 General Schedule (GS) Locality Pay Tables; GS–11 Step 5 locality pay The REST OF UNITED STATES; *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2016/RUS_h.pdf* ; plus fringe benefits; *http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2008/m08-13.pdf*.

and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

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

The FAA believes that this final rule would not have a significant impact on a substantial number of entities for the following reason: Pilots that choose to use this alternative requirement will receive a savings, however this final rule is voluntary hence there are no costs imposed on small entities.

If an agency determines that a rulemaking will not result in a significant economic impact on a substantial number of small entities, the head of the agency may so certify under section 605(b) of the RFA. Therefore, as provided in section 605(b), the head of the FAA certifies that this rulemaking will not result in a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and determined that it will only have a domestic impact and therefore will not create unnecessary obstacles to the foreign commerce of the United States.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $155.0 million in lieu of $100 million.

This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act, (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA will submit these information collection amendments to OMB for its review.

To implement the Act, the FAA is establishing one new information collection. This information collection includes the medical education course as well as the Individual Checklist for Medical Examination. Pursuant to the requirements of the Paperwork Reduction Act, the FAA published a 60-day notice seeking comment regarding this new information collection.

For those individuals who elect to use this rule the FAA considers that they no longer possess any airman medical certificate. Thus, the FAA is making a corresponding change to information collection 2120–0034, Application for Airman Medical Certificate, to reduce the burden associated with that information collection. The FAA published a 60-day notice seeking comment regarding the revision of this existing information collection.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed ICAO Standards and Recommended Practices (SARPs) applicable to private pilots.

The FAA has filed new differences and modified certain existing differences to reflect that certain U.S. private pilots no longer are required to hold a current FAA airman medical certificate. A filing is required for certain ICAO Annex 1 SARPs found in Chapters 1, 2, and 6.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 5–6.6f and involves no extraordinary circumstances.

XIV. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism. The agency has determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, will not have Federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

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

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, (77 FR 26413, May 4, 2012) promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

XVI. Additional Information

A. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the Internet by—

- Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);
- Visiting the FAA's Regulations and Policies Web site at *http://www.faa.gov/regulations_policies* or
- Accessing the Government Publishing Office's Web site at *http://www.fdsys.gov*.

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9677. Requestors must identify the docket or amendment number of this rulemaking.

All documents the FAA considered in developing this final rule, including economic analyses and technical reports, may be accessed from the Internet through the Federal eRulemaking Portal referenced above.

B. Small Business Regulatory Enforcement Fairness Act

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

List of Subjects

14 CFR part 61

Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements.

14 CFR part 68

Aircraft, Airmen, Health, Reporting and recordkeeping requirements.

14 CFR part 91

Aircraft, Airmen, Aviation safety.

The Amendment

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

PART 61—CERTIFICATION: PILOTS, FLIGHT INSTRUCTORS, AND GROUND INSTRUCTORS

■ 1. The authority citation for part 61 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701–44703, 44707, 44709–44711, 44729, 44903, 45102–45103, 45301–45302; Sec. 2307 Pub. L. 114–190, 130 Stat. 615 (49 U.S.C. 44703 note).

■ 2. In § 61.3, revise paragraphs (c)(2)(viii) and (x) through (xii), add paragraphs (c)(2)(xiii) and (xiv), and revise paragraph (l) introductory text to read as follows:

§ 61.3 Requirement for certificates, ratings, and authorizations.

* * * * *

(c) * * *

(2) * * *

(viii) Is exercising the privileges of a flight instructor certificate, provided the person is not acting as pilot in command or as a required pilot flight crewmember;

* * *

(x) Is operating an aircraft within a foreign country using a pilot license issued by that country and possesses evidence of current medical qualification for that license;

(xi) Is operating an aircraft with a U.S. pilot certificate, issued on the basis of a foreign pilot license, issued under § 61.75, and holds a medical certificate issued by the foreign country that issued the foreign pilot license, which is in that person's physical possession or readily accessible in the aircraft when exercising the privileges of that airman certificate;

(xii) Is a pilot of the U.S. Armed Forces, has an up-to-date U.S. military medical examination, and holds military pilot flight status;

(xiii) Is exercising the privileges of a student, recreational or private pilot certificate for operations conducted under the conditions and limitations set forth in § 61.113(i) and holds a U.S. driver's license; or

(xiv) Is exercising the privileges of a flight instructor certificate and acting as pilot in command for operations conducted under the conditions and limitations set forth in § 61.113(i) and holds a U.S. driver's license.

* * * * *

(l) *Inspection of certificate.* Each person who holds an airman certificate, medical certificate, documents establishing alternative medical qualification under part 68 of this chapter, authorization, or license required by this part must present it and their photo identification as described in paragraph (a)(2) of this section for inspection upon a request from:

* * * * *

■ 3. In § 61.23, revise paragraphs (a)(3), (c)(1)(iii) and (iv), add paragraphs (c)(1)(v) and (vi), revise paragraph (c)(2) introductory text, and add paragraph (c)(3) to read as follows:

§ 61.23 Medical certificates: Requirement and duration.

(a) * * *

(3) Must hold at least a third-class medical certificate—

(i) When exercising the privileges of a private pilot certificate, recreational pilot certificate, or student pilot certificate, except when operating under the conditions and limitations set forth in § 61.113(i);

(ii) When exercising the privileges of a flight instructor certificate and acting as the pilot in command or as a required flightcrew member, except when operating under the conditions and limitations set forth in § 61.113(i);

(iii) When taking a practical test in an aircraft for a recreational pilot, private pilot, commercial pilot, or airline transport pilot certificate, or for a flight instructor certificate, except when operating under the conditions and limitations set forth in § 61.113(i); or

(iv) When performing the duties as an Examiner in an aircraft when administering a practical test or proficiency check for an airman certificate, rating, or authorization.

* * * * *

(c) * * *

(1) * * *

(iii) Exercising the privileges of a flight instructor certificate with a sport pilot rating while acting as pilot in command or serving as a required flight crewmember of a light-sport aircraft other than a glider or balloon;

(iv) Serving as an Examiner and administering a practical test for the issuance of a sport pilot certificate in a light-sport aircraft other than a glider or balloon;

(v) Exercising the privileges of a student, recreational or private pilot certificate if the flight is conducted under the conditions and limitations set forth in § 61.113(i); or

(vi) Exercising the privileges of a flight instructor certificate and acting as the pilot in command or as a required flight crewmember if the flight is conducted under the conditions and limitations set forth in § 61.113(i).

(2) A person using a U.S. driver's license to meet the requirements of paragraph (c) while exercising sport pilot privileges must—

* * *

(3) A person using a U.S. driver's license to meet the requirements of paragraph (c) while operating under the conditions and limitations of § 61.113(i) must meet the following requirements—

(i) The person must—

(A) Comply with all medical requirements or restrictions associated with his or her U.S. driver's license;

(B) At any point after July 14, 2006, have held a medical certificate issued under part 67 of this chapter;

(C) Complete the medical education course set forth in § 68.3 of this chapter during the 24-calendar months before acting as pilot in command in an operation conducted under § 61.113(i) and retain a certification of course completion in accordance with § 68.3(b)(1) of this chapter;

(D) Receive a comprehensive medical examination from a State-licensed physician during the 48 months before acting as pilot in command of an operation conducted under § 61.113(i) and that medical examination is conducted in accordance with the requirements in part 68 of this chapter; and

(E) If the individual has been diagnosed with any medical condition that may impact the ability of the individual to fly, be under the care and treatment of a State-licensed physician when acting as pilot in command of an operation conducted under § 61.113(i).

(ii) The most recently issued medical certificate—

(A) May include an authorization for special issuance;

(B) May be expired; and

(C) Cannot have been suspended or revoked.

(iii) The most recently issued Authorization for a Special Issuance of a Medical Certificate cannot have been withdrawn; and

(iv) The most recent application for an airman medical certificate submitted to the FAA cannot have been completed and denied.

* * * * *

■ 4. In § 61.89, add paragraph (d) to read as follows:

§ 61.89 General Limitations.

* * * * *

(d) The holder of a student pilot certificate may act as pilot in command of an aircraft without holding a medical certificate issued under part 67 of this chapter provided the student pilot holds a valid U.S. driver's license, meets the requirements of § 61.23(c)(3), and the operation is conducted consistent with the requirements of paragraphs (a) and (b) of this section and the conditions of § 61.113(i). Where the requirements of paragraphs (a) and (b) of this section conflict with § 61.113(i), a student pilot must comply with paragraphs (a) and (b) of this section.

■ 5. In § 61.101, add paragraph (k) to read as follows:

§ 61.101 Recreational pilot privileges and limitations.

* * * * *

(k) A recreational pilot may act as pilot in command of an aircraft without holding a medical certificate issued under part 67 of this chapter provided the pilot holds a valid U.S. driver's license, meets the requirements of § 61.23(c)(3), and the operation is conducted consistent with this section and the conditions of § 61.113(i). Where the requirements of this section conflict with § 61.113(i), a recreational pilot must comply with this section.

■ 6. In § 61.113, add paragraph (i) to read as follows:

§ 61.113 Private pilot privileges and limitations: Pilot in command.

* * * * *

(i) A private pilot may act as pilot in command of an aircraft without holding a medical certificate issued under part 67 of this chapter provided the pilot holds a valid U.S. driver's license, meets the requirements of § 61.23(c)(3), and complies with this section and all of the following conditions and limitations:

(1) The aircraft is authorized to carry not more than 6 occupants, has a maximum takeoff weight of not more than 6,000 pounds, and is operated with no more than five passengers on board; and

(2) The flight, including each portion of the flight, is not carried out—

(i) At an altitude that is more than 18,000 feet above mean sea level;

(ii) Outside the United States unless authorized by the country in which the flight is conducted; or

(iii) At an indicated airspeed exceeding 250 knots; and

(3) The pilot has available in his or her logbook—

(i) The completed medical examination checklist required under § 68.7 of this chapter; and

(ii) The certificate of course completion required under § 61.23(c)(3).

■ 7. Add part 68 to subchapter D to read as follows:

PART 68—REQUIREMENTS FOR OPERATING CERTAIN SMALL AIRCRAFT WITHOUT A MEDICAL CERTIFICATE

Sec.

68.1 Applicability.
68.3 Medical education course requirements.
68.5 Comprehensive medical examination.
68.7 Comprehensive medical examination checklist.
68.9 Special Issuance process.
68.11 Authority to require additional information.

Authority: 49 U.S.C. 106(f), 44701–44703, sec. 2307 of Pub. L. 114–190, 130 Stat. 615 (49 U.S.C. 44703 note).

§ 68.1 Applicability.

This part prescribes the medical education and examination requirements for operating an aircraft under § 61.113(i) of this chapter without holding a medical certificate issued under part 67 of this chapter.

§ 68.3 Medical education course requirements.

(a) The medical education course required to act as pilot in command in an operation under § 61.113(i) of this chapter must—

(1) Educate pilots on conducting medical self-assessments;

(2) Advise pilots on identifying warning signs of potential serious medical conditions;

(3) Identify risk mitigation strategies for medical conditions;

(4) Increase awareness of the impacts of potentially impairing over-the-counter and prescription drug medications;

(5) Encourage regular medical examinations and consultations with primary care physicians;

(6) Inform pilots of the regulations pertaining to the prohibition on operations during medical deficiency and medically disqualifying conditions; and

(7) Provide the checklist developed by the FAA in accordance with § 68.7.

(b) Upon successful completion of the medical education course, the following items must be electronically provided to the individual seeking to act as pilot in command under the conditions and limitations of § 61.113(i) of this chapter and transmitted to the FAA—

(1) A certification of completion of the medical education course, which shall be retained in the individual's logbook and made available upon request, and shall contain the individual's name, address, and airman certificate number;

(2) A release authorizing single access to the National Driver Register through a designated State Department of Motor Vehicles to furnish to the FAA information pertaining to the individual's driving record;

(3) A certification by the individual that the individual is under the care and treatment of a physician if the individual has been diagnosed with any medical condition that may impact the ability of the individual to fly, as

required under § 61.23(c)(3) of this chapter;

(4) A form that includes—

(i) The name, address, telephone number, and airman certificate number of the individual;

(ii) The name, address, telephone number, and State medical license number of the physician performing the comprehensive medical examination;

(iii) The date of the comprehensive medical examination; and

(iv) A certification by the individual that the checklist described in § 68.7 was followed and signed by the physician during the medical examination required by this section; and

(5) A statement, which shall be signed by the individual certifying that the individual understands the existing prohibition on operations during medical deficiency by stating: ''I understand that I cannot act as pilot in command, or any other capacity as a required flight crew member, if I know or have reason to know of any medical condition that would make me unable to operate the aircraft in a safe manner.''.

§ 68.5 Comprehensive medical examination.

(a) Prior to the medical examination required by § 61.23(c)(3) of this chapter, an individual must—

(1) Complete the individual's section of the checklist described in § 68.7; and

(2) Provide the completed checklist to the State-licensed physician performing the medical examination.

(b) The physician must—

(1) Conduct the medical examination in accordance with the checklist set forth in § 68.7,

(2) Check each item specified during the examination; and

(3) Address, as medically appropriate, every medical condition listed and any medications the individual is taking.

§ 68.7 Comprehensive medical examination checklist.

The comprehensive medical examination required to conduct operations under § 61.113(i) must include a checklist containing the following:

(a) A section, for the individual to complete that contains—

(1) Boxes 3 through 13 and boxes 16 through 19 of the FAA Form 8500–8 (3–99); and

(2) A signature line for the individual to affirm that—

(i) The answers provided by the individual on that checklist, including the individual's answers regarding medical history, are true and complete;

(ii) The individual understands that he or she is prohibited under FAA regulations from acting as pilot in command, or any other capacity as a required flight crew member, if he or she knows or has reason to know of any medical deficiency or medically disqualifying condition that would make the individual unable to operate the aircraft in a safe manner; and

(iii) The individual is aware of the regulations pertaining to the prohibition on operations during medical deficiency and has no medically disqualifying conditions in accordance with applicable law;

(b) A section with instructions for the individual to provide the completed checklist to the State-licensed physician performing the comprehensive medical examination required under § 68.5; and

(c) A section, for the physician to complete, that instructs the physician—

(1) To perform a clinical examination of—

(i) Head, face, neck, and scalp;

(ii) Nose, sinuses, mouth, and throat;

(iii) Ears, general (internal and external canals), and eardrums (perforation);

(iv) Eyes (general), ophthalmoscopic, pupils (equality and reaction), and ocular motility (associated parallel movement, nystagmus);

(v) Lungs and chest (not including breast examination);

(vi) Heart (precordial activity, rhythm, sounds, and murmurs);

(vii) Vascular system (pulse, amplitude, and character, and arms, legs, and others);

(viii) Abdomen and viscera (including hernia);

(ix) Anus (not including digital examination);

(x) Skin;

(xi) G–U system (not including pelvic examination);

(xii) Upper and lower extremities (strength and range of motion);

(xiii) Spine and other musculoskeletal;

(xiv) Identifying body marks, scars, and tattoos (size and location);

(xv) Lymphatics;

(xvi) Neurologic (tendon reflexes, equilibrium, senses, cranial nerves, and coordination, etc.);

(xvii) Psychiatric (appearance, behavior, mood, communication, and memory);

(xviii) General systemic;

(xix) Hearing;

(xx) Vision (distant, near, and intermediate vision, field of vision, color vision, and ocular alignment);

(xxi) Blood pressure and pulse; and

(xxii) Anything else the physician, in his or her medical judgment, considers necessary;

(2) To exercise medical discretion to address, as medically appropriate, any medical conditions identified, and to exercise medical discretion in determining whether any medical tests are warranted as part of the comprehensive medical examination;

(3) To discuss all drugs the individual reports taking (prescription and nonprescription) and their potential to interfere with the safe operation of an aircraft or motor vehicle;

(4) To sign the checklist, stating: ''I certify that I discussed all items on this checklist with the individual during my examination, discussed any medications the individual is taking that could interfere with his or her ability to safely operate an aircraft or motor vehicle, and performed an examination that included all of the items on this checklist. I certify that I am not aware of any medical condition that, as presently treated, could interfere with the individual's ability to safely operate an aircraft.''; and

(5) To provide the date the comprehensive medical examination was completed, and the physician's full name, address, telephone number, and State medical license number.

§ 68.9 Special Issuance process.

(a) *General.* An individual who has met the qualifications to operate an aircraft under § 61.113(i) of this chapter and is seeking to serve as a pilot in command under that section must have completed the process for obtaining an Authorization for Special Issuance of a Medical Certificate for each of the following:

(1) A mental health disorder, limited to an established medical history or clinical diagnosis of—

(i) A personality disorder that is severe enough to have repeatedly manifested itself by overt acts;

(ii) A psychosis, defined as a case in which an individual—

(A) Has manifested delusions, hallucinations, grossly bizarre or disorganized behavior, or other commonly accepted symptoms of psychosis; or

(B) May reasonably be expected to manifest delusions, hallucinations, grossly bizarre or disorganized behavior, or other commonly accepted symptoms of psychosis;

(iii) A bipolar disorder; or

(iv) A substance dependence within the previous 2 years, as defined in § 67.307(a)(4) of this chapter.

(2) A neurological disorder, limited to an established medical history or clinical diagnosis of any of the following:

(i) Epilepsy;

(ii) Disturbance of consciousness without satisfactory medical explanation of the cause; or

(iii) A transient loss of control of nervous system functions without satisfactory medical explanation of the cause.

(3) A cardiovascular condition, limited to a one-time special issuance for each diagnosis of the following:

(i) Myocardial infarction;

(ii) Coronary heart disease that has required treatment;

(iii) Cardiac valve replacement; or

(iv) Heart replacement.

(b) *Special rule for cardiovascular conditions.* In the case of an individual with a cardiovascular condition, the process for obtaining an Authorization for Special Issuance of a Medical Certificate shall be satisfied with the successful completion of an appropriate clinical evaluation without a mandatory wait period.

(c) *Special rule for mental health conditions.* (1) In the case of an individual with a clinically diagnosed mental health condition, the ability to operate an aircraft under § 61.113(i) of this chapter shall not apply if—

(i) In the judgment of the individual's State-licensed medical specialist, the condition—

(A) Renders the individual unable to safely perform the duties or exercise the airman privileges required to operate an aircraft under § 61.113(i) of this chapter; or

(B) May reasonably be expected to make the individual unable to perform the duties or exercise the privileges required to operate an aircraft under § 61.113(i) of this chapter; or

(ii) The individual's driver's license is revoked by the issuing agency as a result of a clinically diagnosed mental health condition.

(2) Subject to paragraph (c)(1) of this section, an individual clinically diagnosed with a mental health condition shall certify every 2 years, in conjunction with the certification under § 68.3(b)(3), that the individual is under the care of a State-licensed medical specialist for that mental health condition.

(d) *Special rule for neurological conditions.* (1) In the case of an individual with a clinically diagnosed neurological condition, the ability to operate an aircraft under § 61.113(i) of this chapter shall not apply if—

(i) In the judgment of the individual's State-licensed medical specialist, the condition—

(A) Renders the individual unable to safely perform the duties or exercise the airman privileges required to operate an aircraft under § 61.113(i) of this chapter; or

(B) May reasonably be expected to make the individual unable to perform the duties or exercise the privileges required to operate an aircraft under § 61.113(i) of this chapter; or

(ii) The individual's driver's license is revoked by the issuing agency as a result of a clinically diagnosed neurological condition.

(2) Subject to paragraph (d)(1) of this section, an individual clinically diagnosed with a neurological condition shall certify every 2 years, in conjunction with the certification under § 68.3(b)(3), that the individual is under the care of a State-licensed medical specialist for that neurological condition.

§ 68.11 Authority to require additional information.

(a) If the Administrator receives credible or urgent information, including from the National Driver Register or the Administrator's Safety Hotline, that reflects on an individual's ability to safely operate an aircraft under § 61.113(i) of this chapter, the Administrator may require the individual to provide additional information or history so that the Administrator may determine whether the individual is safe to continue operating under that section.

(b) The Administrator may use credible or urgent information received under paragraph (a) to request an individual to provide additional information or to take actions under 49 U.S.C. 44709(b).

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 8. The authority citation for part 91 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 1155, 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, 47534, Pub. L. 114–190, 130 Stat. 615 (49 U.S.C. 44703 note); articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

■ 9. In § 91.319, add paragraph (j) to read as follows:

§ 91.319 Aircraft having experimental certificates: Operating limitations.

* * * * *

(j) No person may operate an aircraft that has an experimental certificate under § 61.113(i) of this chapter unless the aircraft is carrying not more than 6 occupants.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f) and Sec. 2307 of Public Law 114–190 on December 22, 2016.

Michael P. Huerta,

Administrator.

[FR Doc. 2016–31602 Filed 1–10–17; 11:15 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2016–8163; Airspace Docket No. 16–ANM–2]

Establishment of Class E Airspace, Thermopolis, WY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace extending upward from 700 feet above the surface at Hot Springs County Airport, Thermopolis, WY, to support the development of Instrument Flight Rules (IFR) operations under standard instrument approach and departure procedures at the airport, for the safety and management of aircraft within the National Airspace System.

DATES: Effective 0901 UTC, March 2, 2017. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11A, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: 202–267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html.*

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Tom Clark, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4511.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at Hot Spring County Airport, Thermopolis, WY.

History

On November 4, 2016, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to establish Class E airspace extending upward from 700 feet above the surface at Hot Springs County Airport, Thermopolis, WY. (81 FR 76886) Docket FAA–2016–8163. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11A, dated August 3, 2016, and effective September 15, 2016, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11A, Airspace Designations and Reporting Points, dated August 3, 2016, and effective September 15, 2016. FAA Order 7400.11A is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11A lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes Class E airspace extending upward from 700 feet above the surface within a 4.8-mile radius of the Hot Springs County Airport, Thermopolis, WY with segments extending to 7 miles southwest of the airport, and 5.5 miles northeast of the airport. This airspace is established to accommodate new Area Navigation (RNAV) Global Positioning System (GPS) standard instrument approach procedures developed for the airport.

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11A, Airspace Designations and Reporting Points, dated August 3, 2016, and effective September 15, 2016, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANM WY E5 Thermopolis, WY [New]

Hot Springs County Airport, WY
(Lat. 43°42′49″ N., long. 108°23′23″ W.)

That airspace extending upward from 700 feet above the surface within a 4.8-mile radius of Hot Spring County Airport, and within 4.8 miles each side of the airport 230° bearing extending from the 4.8 mile radius to 7 miles southwest of the airport, and within 1.8 miles each side of the airport 055° bearing extending from the 4.8-mile radius to 5.5 miles northeast of the airport.

Issued in Seattle, Washington, on January 4, 2017.

Richard Roberts,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2017–00288 Filed 1–10–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF STATE

22 CFR Parts 35, 103, 127 and 138

RIN 1400–AE09
Public Notice: 9828]

2017 Civil Monetary Penalties Inflationary Adjustment

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: This final rule is issued to adjust the civil monetary penalties (CMP) for regulatory provisions maintained and enforced by the Department of State. The revised CMP adjusts the amount of civil monetary penalties assessed by the Department of State based on the December 2016 guidance from the Office of Management and Budget. The new amounts will apply only to those penalties assessed on or after the effective date of this rule, regardless of the date on which the underlying facts or violations occurred.

DATES: This final rule is effective on January 11, 2017.

FOR FURTHER INFORMATION CONTACT: Alice Kottmyer, Attorney-Adviser, Office of Management, *kottmyeram@state.gov.* ATTN: Regulatory Change, CMP Adjustments, (202) 647–2318.

SUPPLEMENTARY INFORMATION: The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410 (the 1990 Act), as amended by the Debt Collection Improvement Act of

1996, Public Law 104–134 (the 1996 Act), required the head of each agency to adjust its CMPs for inflation no later than October 23, 1996 and required agencies to make adjustments at least once every four years thereafter. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Section 701 of Public Law 114–74 (the 2015 Act) further amended the 1990 Act by requiring agencies to adjust CMPs, if necessary, pursuant to a ''catch-up'' adjustment methodology prescribed by the 2015 Act, which mandated that the catch-up adjustment take effect no later than August 1, 2016. Additionally, the 2015 Act required agencies to make annual adjustments to their respective CMPs in accordance with guidance issued by the Office of Management and Budget (OMB).

Based on these statutes, the Department of State (the Department) published a final rule on June 8, 2016, to implement the ''catch-up'' provisions (''June 2016 final rule''). *See* 81 FR 36791.

On December 16, 2016, OMB notified agencies that the annual cost-of-living adjustment multiplier for 2017, based on the Consumer Price Index, is 1.01636. Additional information may be found in OMB Memorandum M–17–11, which can be found at *https://www.whitehouse.gov/sites/default/files/omb/memoranda/2017/m-17-11_0.pdf.* This final rule amends Department CMPs for fiscal year 2017.

Within the Department of State (Title 22, Code of Federal Regulations), this rule affects four areas:

(1) Part 35, which implements the Program Fraud Civil Remedies Act of 1986 (PFCRA), codified at 31 U.S.C. 3801–3812;

(2) Part 103, which implements the Chemical Weapons Convention Implementation Act of 1998 (CWC Act);

(3) Part 127, which implements the penalty provisions of sections 38(e), 39A(c), and 40(k) of the Arms Export Control Act (AECA) (22 U.S.C. 2778(e), 2779a(c), 2780(k)); and

(4) Part 138, which implements Section 319 of Public Law 101–121, codified at 31 U.S.C. 1352, and prohibits recipients of federal contracts, grants, and loans from using appropriated funds for lobbying the Executive or Legislative Branches of the federal government in connection with a specific contract.

Specific Changes to 22 CFR Made by This Rule

I. Part 35

The PFRCA, enacted in 1986, authorizes agencies, with approval from the Department of Justice, to pursue individuals or firms for false claims. According to the June 2016 final rule, the maximum liability under the PFRCA is $10,781, up to a maximum of $323,442. Applying the 2016 multiplier (1.01636) provided by OMB, the new maximum liabilities are as follows: $10,957, up to a maximum of $328,734.

II. Part 103

The CWC Act provided domestic implementation of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. The penalty provisions of the CWC Act are codified at 22 U.S.C. 6761. Based on the June 2016 final rule, a person violating 22 U.S.C. 6761(a)(1)(A), *Prohibited acts relating to inspections,* is subject to a civil penalty of an amount not to exceed $36,256 for each such violation. A person violating 22 U.S.C. 6761(a)(1)(B), *Recordkeeping violations,* is subject to a civil penalty in an amount not to exceed $7, 251 for each such violation.

Applying the 2016 multiplier (1.01636), the new maximum amounts are as follows: *Prohibited acts related to inspections,* $36,849; for *Recordkeeping violations,* $7,370.

III. Part 127

The Assistant Secretary of State for Political-Military Affairs is responsible for the imposition of CMPs under the International Traffic in Arms Regulations (ITAR), which is administered by the Directorate of Defense Trade Controls (DDTC).

(1) *AECA section 38(e):*

According to the June 2016 final rule, the new maximum penalty under 22 U.S.C. 2778(e), or Section 38(e) of the AECA, is $1,094,010 per violation. Applying the 2016 multiplier (1.01636), the new maximum penalty is $1,111,908.

(2) *AECA section 39A(c):*

According to the June 2016 final rule, the new maximum adjusted penalty for 22 U.S.C. 2779a(c), or Section 39A(c) of the AECA, is $795,445 per violation. Applying the 2016 multiplier (1.01636), the new maximum penalty is $808,458.

(3) *AECA section 40(k):*

According to the June 2016 final rule, the maximum penalty for 22 U.S.C. 2780(k), or Section 40(k) of the AECA, is $946,805 per violation. Applying the 2016 multiplier (1.01636), the new maximum penalty is $962,295.

IV. Part 138

Section 319 of Public Law 101–121, codified at 31 U.S.C. 1352, provides penalties for recipients of federal contracts, grants, and loans who use appropriated funds to lobby the Executive or Legislative Branches of the federal government in connection with a specific contract, grant, or loan. Any person who violates that prohibition is subject to a civil penalty. The statute also requires each person who requests or receives a federal contract, grant, cooperative agreement, loan, or a federal commitment to insure or guarantee a loan, to disclose any lobbying; there is a penalty for failure to disclose.

The June 2016 final rule raised the maximum penalties for both improper expenditures and failure to disclose, to not less than $18,936 and not more than $189,361. Applying the 2016 multiplier (1.01636), the new maximum penalty under 31 U.S.C. 1352 is: not less than $19,246, and not more than $192,459.

Effective Date of Penalties

The revised CMP amounts will go into effect on the date this rule is published. All violations for which CMPs are assessed on or after the effective date of this rule, regardless of whether the violation occurred before the effective date, will be assessed at the adjusted penalty level.

Future Adjustments and Reporting

The 2015 Act directed agencies to undertake an annual review of CMPs using a formula prescribed by the statute. Annual adjustments to CMPs are made in accordance with the guidance issued by OMB. As in this rulemaking, the Department of State will publish notification of annual inflation adjustments to CMPs in the **Federal Register** no later than January 15 of each year, with the adjusted amount taking effect immediately upon publication.

Regulatory Analysis and Notices

Administrative Procedure Act

The Department of State is publishing this rule using the ''good cause'' exception to the Administrative Procedure Act (5 U.S.C. 553(b)), as the Department has determined that public comment on this rulemaking would be impractical, unnecessary, or contrary to the public interest. This rulemaking is mandatory; it implements Public Law 114–74.

Regulatory Flexibility Act

Because this rulemaking is exempt from Section 553 of the Administrative Procedures Act, a Regulatory Flexibility Analysis is not required.

Unfunded Mandates Reform Act of 1995

This rule does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in

the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This amendment 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. Therefore, in accordance with Executive Order 13132, it is determined that this amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

Executive Orders 12866 and 13563

The Department believes that benefits of the rulemaking outweigh any costs, and there are no feasible alternatives to this rulemaking. It is the Department's position that this rulemaking is not an economically significant rule under the criteria of Executive Order 12866, and is consistent with the provisions of Executive Order 13563.

Executive Order 12988

The Department of State has reviewed the proposed amendment in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

This rulemaking does not impose or revise any information collections subject to 44 U.S.C. Chapter 35.

List of Subjects

22 CFR Part 35

Administrative practice and procedure, Claims, Fraud, Penalties.

22 CFR Part 103

Administrative practice and procedure, Chemicals, Classified information, Foreign relations, Freedom of information, International organization, Investigations, Penalties, Reporting and recordkeeping requirements.

22 CFR Part 127

Arms and munitions, Exports.

22 CFR Part 138

Government contracts, Grant programs, Loan programs, Lobbying, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth above, 22 CFR parts 35, 103, 127, and 138 are amended as follows:

PART 35—PROGRAM FRAUD CIVIL REMEDIES

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 22 U.S.C. 2651a; 31 U.S.C. 3801 *et seq.*; Pub. L. 114–74, 129 Stat. 584.

§ 35.3 [Amended]

■ 2. In § 35.3:
■ a. Remove ''$10,781'' and add in its place ''$10,957'', wherever it occurs.
■ b. In paragraph (f), remove ''$323,442'' and add in its place ''$328,734''.

PART 103—REGULATIONS FOR IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION AND THE CHEMICAL WEAPONS CONVENTION IMPLEMENTATION ACT OF 1998 ON THE TAKING OF SAMPLES AND ON ENFORCEMENT OF REQUIREMENTS CONCERNING RECORDKEEPING AND INSPECTIONS

■ 3. The authority citation for part 103 continues to read as follows:

Authority: 22 U.S.C. 2651a; 22 U.S.C. 6701 *et seq.*; Pub. L. 114–74, 129 Stat. 584.

§ 103.6 [Amended]

■ 4. Amend § 103.6 to remove ''$36,256'' and add in its place ''$36,849'' in paragraph (a)(1), and to remove ''$7,251'' and add in its place ''$7,370'' in paragraph (a)(2).

PART 127—VIOLATIONS AND PENALTIES

■ 5. The authority citation for part 127 continues to read as follows:

Authority: Sections 2, 38, and 42, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2791); 22 U.S.C. 401; 22 U.S.C. 2651a; 22 U.S.C. 2779a; 22 U.S.C. 2780; E.O. 13637, 78 FR 16129; Pub. L. 114–74, 129 Stat. 584.

§ 127.10 [Amended]

■ 6. Section 127.10 is amended as follows:
■ a. In paragraph (a)(1)(i), remove ''$1,094,010'' and add in its place ''$1,111,908'';
■ b. In paragraph (a)(1)(ii), remove ''$795,445'' and add in its place ''$808,458''; and
■ c. In paragraph (a)(1)(iii), remove ''$946,805'' and add in its place ''962,295.''

PART 138—RESTRICTIONS ON LOBBYING

■ 7. The authority citation for part 138 continues to read as follows:

Authority: 22 U.S.C. 2651a; 31 U.S.C. 1352; Pub. L. 114–74, 129 Stat. 584.

■ 8. Revise the heading of part 138 to read as set forth above.

§ 138.400 [Amended]

■ 9. Amend § 138.400 by removing ''$18,936'' and ''$189,361'' and adding in their place ''$19,246'' and ''$192,459'', respectively, wherever they occur.

Dated: January 4, 2017.

Alicia Frechette,

Executive Director, Office of the Legal Adviser & Bureau of Legislative Affairs, Department of State.

[FR Doc. 2017–00166 Filed 1–10–17; 8:45 am]

BILLING CODE 4710–08–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN 3046–AA94

Affirmative Action for Individuals With Disabilities in Federal Employment; Correction

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule; correction.

SUMMARY: The Equal Employment Opportunity Commission (EEOC or Commission) is correcting a final rule that appeared in the **Federal Register** of January 3, 2017 (82 FR 654). The document amended the regulations that require federal agencies to engage in affirmative action for individuals with disabilities, clarifying the obligations that the Rehabilitation Act of 1973 imposes on federal agencies, as employers, that are over and above the obligation not to discriminate on the basis of disability. The document published January 3 neglected to indicate its effective date. This

document corrects that omission. The applicability date remains January 3, 2018.

DATES: Effective March 6, 2017.

FOR FURTHER INFORMATION CONTACT: Christopher Kuczynski, Assistant Legal Counsel, (202) 663–4665, or Aaron Konopasky, Senior Attorney-Advisor, (202) 663–4127 (voice), or (202) 663–7026 (TTY), Office of Legal Counsel, U.S. Equal Employment Opportunity Commission. (These are not toll free numbers.) Requests for this document in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663–4191 (voice) or (202) 663–4494 (TTY). (These are not toll free numbers.)

SUPPLEMENTARY INFORMATION: In FR Doc. 2016–31397 appearing on page 654 in the **Federal Register** of Tuesday, January 3, 2017, the following correction is made:

1. On page 654, in the first column, in **DATES:**, ''*Effective date:* This final rule will be applicable on March 6, 2017.'' is corrected to read ''*Effective date:* This final rule will be effective March 6, 2017.''

Dated: January 5, 2017.

For the Commission.

Peggy R. Mastroianni,

Legal Counsel.

[FR Doc. 2017–00340 Filed 1–10–17; 8:45 am]

BILLING CODE 6570–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2014–0222; FRL–9956–55-Region 6]

Approval and Promulgation of Implementation Plans; Texas; Control of Air Pollution From Visible Emissions and Particulate Matter

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or Act), the Environmental Protection Agency (EPA) is approving revisions to the Texas State Implementation Plan (SIP) submitted by the State of Texas that pertain to particulate matter and outdoor burning regulations. The State submitted the SIP revisions in the years 1989, 2004, 2006 and 2014.

DATES: This rule is effective on February 10, 2017.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2014–0222. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Mr. Randy Pitre, 214–665–7299, *pitre.randy@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' means the EPA.

I. Background

The background for this action is discussed in detail in our proposal at 81 FR 74739 (October 27, 2016). In that document we proposed to approve five Texas SIP revisions that pertain to particulate matter and outdoor burning regulations. We did not receive comments regarding our proposal.

II. Final Action

We are approving the Texas SIP revisions dated from 1989, 2004, 2006 and 2014. Specifically, we are approving the August 21, 1989, and June 9, 2006, submittals that repealed Rule 105.2 of the Texas Administrative Code (TAC) (subsequently renumbered as 30 TAC Section 111.155 and repealed). We are also approving the July 18, 2006, submittal that revises 30 TAC Section 111.203. We are also approving the November 15, 2004, and July 18, 2006, submittals that revise 30 TAC Section 111.209. We are also approving the March 3, 2014, submittal that revises 30 TAC Section 111.211.

III. Incorporation by Reference

In this rule, we are finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are finalizing the incorporation by reference of the revisions to the Texas regulations as described in the Final Action section above. We have made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and/or in hard copy at the EPA Region 6 office.

IV. Statutory and Executive Order Reviews

Under the CAA, 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, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. 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 Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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 (Public Law 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 CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal

governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 13, 2017. 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 section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter, Reporting and recordkeeping requirements.

Dated: December 28, 2016.

Ron Curry,

Regional Administrator, Region 6.

■ 40 CFR part 52 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 SS—Texas

■ 2. In § 52.2270(c) the table titled ''EPA Approved Regulations in the Texas SIP'' is amended by removing the entry for ''Rule 105.2'' under Chapter 111, Subchapter A, Division 5 and revising the entries for sections 111.203, 111.209 and 111.211.

The amendments read as follows:

§ 52.2270 Identification of plan

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/ submittal date	EPA approval date	Explanation
*	*	*	*	*
Subchapter B—Outdoor Burning				
*	*	*	*	*
Section 111.203	Definitions	6/28/2006	1/11/2017, [Insert **Federal Register** citation].	
*	*	*	*	*
Section 111.209	Exception for Disposal Fires	6/28/2006	1/11/2017, [Insert **Federal Register** citation].	
Section 111.211	Exception for Prescribed Burn	1/15/2014	1/11/2017, [Insert **Federal Register** citation].	
*	*	*	*	*

* * * * *

[FR Doc. 2017–00087 Filed 1–10–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R06–OAR–2016–0275; FRL–9957–57-Region 6]

Determination of Nonattainment and Reclassification of the Houston-Galveston-Brazoria 2008 8-Hour Ozone Nonattainment Area; Texas; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Correcting amendment.

SUMMARY: EPA issued a final rule on December 14, 2016, (81 FR 90207), that determined that the Houston-Galveston-Brazoria, Texas nonattainment area (HGB area) failed to attain the 2008 8-hour ozone national ambient air quality standard (NAAQS) by the applicable attainment deadline of July 20, 2016, and thus was classified by operation of law as ''Moderate''. In that action, EPA also determined January 1, 2017 as the deadline by which Texas must submit to the EPA the State Implementation Plan (SIP) revisions that meet the Clean Air Act (CAA) statutory and regulatory requirements that apply to 2008 ozone NAAQS nonattainment areas reclassified as Moderate. The language in the December 14, 2016 **Federal Register** amended the table in 40 CFR 81.344 (Subpart C-Section 107 Attainment Status Designations) titled ''Texas—2008 8-Hour Ozone NAAQS (Primary and secondary)''. The amendatory language failed to update the table for the classification date for HGB nonattainment area to 12/14/2016. This document corrects the listed classification date in the December 14, 2016 final rule document.

DATES: This final rule correction is effective on January 11, 2017.

FOR FURTHER INFORMATION CONTACT: Ms. Nevine Salem, (214) 665–7222, *salem.nevine@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA issued a final rule on December 14, 2016, (81 FR 90207) (EPA–R06–OAR–2016–0275; FRL–9956–08-Region 6), that reclassified the HGB nonattainment area from Marginal to Moderate for the 2008 8-hour Ozone NAAQS standards. In that document, EPA incorrectly listed the classification date for the HGB ozone nonattainment area in § 81.344, the table titled ''Texas—2008 8-Hour Ozone NAAQS (Primary and secondary)'' to be 1/13/17. Instead the document should have the classification date in the table as 12/14/2016. This document corrects that mistake.

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control.

Dated: January 3, 2017.

Ron Curry,

Regional Administrator, Region 6.

40 CFR part 81 is corrected as follows:

PART 81–DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 1. The authority citation for part 81 continues to read as follows:

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

Subpart C—Section 107 Attainment Status Designations

■ 2. In § 81.344, the table titled ''Texas—2008 8-Hour Ozone NAAQS (Primary and secondary)'' is amended by revising the entry for ''Houston-Galveston-Brazoria, TX'' to read as follows:

§ 81.344 Texas.

* * * * *

TEXAS—2008 8-HOUR OZONE NAAQS (PRIMARY AND SECONDARY) [2]

Designated area	Designation		Classification	
	Date[1]	Type	Date[1]	Type
* * *	*	*	*	*
Houston-Galveston-Brazoria, TX: [2]		Nonattainment	12/14/2016	Moderate.
Brazoria County.				
Chambers County.				
Fort Bend County.				
Galveston County.				
Harris County.				
Liberty County.				
Montgomery County.				
Waller County.				
* * *	*	*	*	*

[1] This date is July 20, 2012, unless otherwise noted.
[2] Excludes Indian country located in each area, unless otherwise noted.

* * * * *

[FR Doc. 2017–00086 Filed 1–10–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

DEPARTMENT OF DEFENSE

40 CFR Part 1700

[EPA–HQ–OW–2013–0469; FRL–9957–85–OW]

RIN 2040–AD39

Uniform National Discharge Standards for Vessels of the Armed Forces—Phase II Batch One

AGENCY: Environmental Protection Agency and Department of Defense.

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) and the U.S. Department of Defense (DoD) are promulgating discharge performance standards for 11 discharges incidental to the normal operation of a vessel of the Armed Forces into the navigable waters of the United States, the territorial seas, and the contiguous zone. When implemented, the discharge performance standards will reduce the adverse environmental impacts associated with the vessel discharges, stimulate the development of improved vessel pollution control devices, and advance the development of environmentally sound vessels of the Armed Forces. The 11 discharges addressed by the final rule are the following: aqueous film-forming foam (AFFF), chain locker effluent, distillation and reverse osmosis brine, elevator pit effluent, gas turbine water wash, non-oily machinery wastewater, photographic laboratory drains, seawater cooling overboard discharge, seawater piping biofouling prevention, small boat engine wet exhaust, and welldeck discharges.

DATES: This final rule is effective on February 10, 2017.

ADDRESSES: The EPA has established a docket for this action under Docket No. EPA–HQ–OW–2013–0469. All documents in the docket are listed on the *http://regulations.gov* Web site. The complete public record for this rulemaking, including responses to comments received during the rulemaking, can be found under Docket No. EPA–HQ–OW–2013–0469.

FOR FURTHER INFORMATION CONTACT: Katherine B. Weiler, Marine Pollution Control Branch (4504T), U.S. EPA, 1200 Pennsylvania Avenue NW., Washington, DC 20460; (202) 566–1280; *weiler.katherine@epa.gov,* or Mike Pletke, Chief of Naval Operations (N45), 2000 Navy Pentagon (Rm 2D253), Washington, DC 20350–2000; (703) 695–5184; *mike.pletke@navy.mil.*

SUPPLEMENTARY INFORMATION:

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F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Coastal Zone Management Act
H. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
J. National Technology Transfer and Advancement Act
K. Endangered Species Act
L. Executive Order 13112: Invasive Species
M. Executive Order 13089: Coral Reef Protection
N. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
O. Congressional Review Act

I. General Information

A. Legal Authority for the Final Rule

The EPA and DoD promulgate this rule under the authority of Clean Water Act (CWA) section 312 (33 U.S.C. 1322). Section 325 of the National Defense Authorization Act of 1996 (''NDAA''), entitled ''Discharges from Vessels of the Armed Forces'' (Pub. L. 104–106, 110 Stat. 254), amended CWA section 312, to require the Administrator of the U.S. Environmental Protection Agency (Administrator) and the Secretary of Defense of the U.S. Department of Defense (Secretary) to develop uniform national standards to control certain discharges incidental to the normal operation of a vessel of the Armed Forces. The term Uniform National Discharge Standards, or UNDS, is used in this preamble to refer to the provisions in CWA section 312(a)(12) through (14) and (n) (33 U.S.C. 1322(a)(12) through (14) and (n)).

B. Purpose of the Final Rule

UNDS are intended to enhance the operational flexibility of vessels of the Armed Forces domestically and internationally, stimulate the development of innovative vessel pollution control technology, and advance the development of environmentally sound ships. Section 312(n)(3)(A) of the CWA requires the EPA and DoD to promulgate uniform national discharge standards for certain discharges incidental to the normal operation of a vessel of the Armed Forces (CWA section 312(a)(12)), unless the Secretary finds that compliance with UNDS would not be in the national security interests of the United States (CWA section 312(n)(1)).

This rule amends title 40 Code of Federal Regulations (CFR) part 1700 to establish discharge performance standards for 11 discharges incidental to the normal operation of a vessel of the Armed Forces from among the 25 discharges for which the EPA and DoD previously determined (64 FR 25126, May 10, 1999) that it is reasonable and practicable to require a marine pollution control device (MPCD). The 11 discharges addressed by this rule are the following: Aqueous film-forming foam; chain locker effluent; distillation and reverse osmosis brine; elevator pit effluent; gas turbine water wash; non-oily machinery wastewater; photographic laboratory drains; seawater cooling overboard discharge; seawater piping biofouling prevention; small boat engine wet exhaust; and welldeck discharges.

These discharge performance standards do not become enforceable until after promulgation of a final rule, as well as promulgation of regulations by DoD under CWA section 312(n)(5)(C) to govern the design, construction, installation, and use of a MPCD.

UNDS do not apply to the following discharges from vessels of the Armed Forces: Overboard discharges of rubbish, trash, garbage, or other such materials; sewage; air emissions resulting from the operation of a vessel propulsion system, motor-driven equipment, or incinerator; or discharges that require permitting under the National Pollutant Discharge Elimination System (NPDES) program, including operational discharges and other discharges that are not incidental to the normal operation of a vessel of the Armed Forces.

C. What vessels are regulated by the final rule?

The final rule applies to vessels of the Armed Forces. For the purposes of the rulemaking, the term ''vessel of the Armed Forces'' is defined at CWA section 312(a)(14). ''Vessel of the Armed Forces'' means any vessel owned or operated by the U.S. Department of Defense (*i.e.,* U.S. Navy, Military Sealift Command, U.S. Marine Corps, U.S. Army, and U.S. Air Force), other than a time- or voyage-chartered vessel, as well as any U.S. Coast Guard vessel designated by the Secretary of the Department in which the U.S. Coast Guard is operating. The preceding list is not intended to be exhaustive, but rather provides a guide for the reader regarding the vessels of the Armed Forces to be regulated by the final rule. The final rule does not apply to commercial vessels; private vessels; vessels owned or operated by state, local, or tribal governments; vessels under the jurisdiction of the U.S. Army Corps of Engineers; certain vessels under the jurisdiction of the U.S. Department of Transportation; vessels preserved as memorials and museums; vessels under construction; vessels in drydock; amphibious vehicles; and, as noted above, time- or voyage-chartered vessels. For answers to questions regarding the applicability of this action to a particular vessel, consult one of the contacts listed in the **FOR FURTHER INFORMATION CONTACT** section.

D. What is the geographic scope of the final rule?

This rule is applicable to discharges from a vessel of the Armed Forces operating in the navigable waters of the United States, territorial seas, and the contiguous zone (CWA section 1322(n)(8)(A)). The rule applies in both fresh and marine waters and can include bodies of water such as rivers, lakes, and oceans. Together, the preamble refers to these waters as ''waters subject to UNDS.''

Sections 502(7), 502(8), and 502(9) of the CWA define the term ''navigable waters,'' ''territorial seas,'' and ''contiguous zone,'' respectively. The term ''navigable waters'' means waters of the United States including the territorial seas, where the United States includes the states, the District of Columbia, the Commonwealth of Puerto

Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands. The term ''territorial seas'' means the belt of seas that generally extends three miles seaward from the line of ordinary low water along the portion of the coast in direct contact with the open sea and the line marking the seaward limit of inland waters. The term ''contiguous zone'' means the entire zone established or to be established by the United States under Article 24 of the *Convention of the Territorial Sea and the Contiguous Zone.* Generally, the contiguous zone extends seaward for the next nine miles (*i.e.,* from three to 12 miles from the U.S. coastline). The final rule is not applicable seaward of the contiguous zone.

E. Rulemaking Process

The UNDS rulemaking is a joint rulemaking between the EPA and DoD and is under development in three phases. The first two phases reflect joint rulemaking between the EPA and DoD; the third phase is a DoD-only rule.

Phase I

The EPA and DoD promulgated the Phase I regulations on May 10, 1999 (64 FR 25126), and these existing regulations are codified at 40 CFR part 1700. During Phase I, the EPA and DoD identified the discharges incidental to the normal operation of a vessel of the Armed Forces for which it is reasonable and practicable to require control with a MPCD to mitigate potential adverse impacts on the marine environment (CWA section 312(n)(2)), as well as those discharges for which it is not. Section 312(a)(13) of the CWA defines a MPCD as any equipment or management practice, for installation or use on a vessel of the Armed Forces, that is designed to receive, retain, treat, control, or discharge a discharge incidental to the normal operation of a vessel; and determined by the Administrator and the Secretary to be the most effective equipment or management practice to reduce the environmental impacts of the discharge consistent with the considerations set forth by UNDS.

During Phase I, the EPA and DoD identified the following 25 discharges as requiring control with a MPCD: Aqueous film-forming foam; catapult water brake tank and post-launch retraction exhaust; chain locker effluent; clean ballast; compensated fuel ballast; controllable pitch propeller hydraulic fluid; deck runoff; dirty ballast; distillation and reverse osmosis brine; elevator pit effluent; firemain systems; gas turbine water wash; graywater; hull coating leachate; motor gasoline and compensating discharge; non-oily machinery wastewater; photographic laboratory drains; seawater cooling overboard discharge; seawater piping biofouling prevention; small boat engine wet exhaust; sonar dome discharge; submarine bilgewater; surface vessel bilgewater/oil-water separator effluent; underwater ship husbandry; and welldeck discharges (40 CFR 1700.4).

During Phase I, the EPA and DoD identified the following 14 discharges as not requiring control with a MPCD: Boiler blowdown; catapult wet accumulator discharge; cathodic protection; freshwater layup; mine countermeasures equipment lubrication; portable damage control drain pump discharge; portable damage control drain pump wet exhaust; refrigeration/air conditioning condensate; rudder bearing lubrication; steam condensate; stern tube seals and underwater bearing lubrication; submarine acoustic countermeasures launcher discharge; submarine emergency diesel engine wet exhaust; and submarine outboard equipment grease and external hydraulics.

As of the effective date of the Phase I rule (June 9, 1999), neither states nor political subdivisions of states may adopt or enforce any state or local statutes or regulations with respect to the 14 discharges that were identified as not requiring control, except to establish no-discharge zones (CWA sections 312(n)(6)(A) and 312(n)(7)). However, section 312(n)(5)(D) of the CWA authorizes a Governor of any state to submit a petition to the EPA and DoD and requesting the re-evaluation of a prior determination that a MPCD is required for a particular discharge (40 CFR 1700.4) or that a MPCD is not required for a particular discharge (40 CFR 1700.5), if there is significant new information not considered previously, that could reasonably result in a change to the determination (CWA section 312(n)(5)(D) and 40 CFR 1700.11).

Phase II

Section 312(n)(3) of the CWA provides for Phase II and requires the EPA and DoD to develop federal discharge performance standards for each of the 25 discharges identified in Phase I as requiring control. In doing so, the EPA and DoD are required to consult with the Department in which the U.S. Coast Guard is operating, the Secretary of Commerce, interested states, the Secretary of State, and other interested federal agencies. In promulgating Phase II discharge performance standards, CWA section 312(n)(2)(B) directs the EPA and DoD to consider seven factors: The nature of the discharge; the environmental effects of the discharge; the practicability of using the MPCD; the effect that installation or use of the MPCD would have on the operation or the operational capability of the vessel; applicable U.S. law; applicable international standards; and the economic costs of installation and use of the MPCD. Section 312(n)(3)(C) of the CWA further provides that the EPA and DoD may establish discharge standards that (1) distinguish among classes, types, and sizes of vessels; (2) distinguish between new and existing vessels; and (3) provide for a waiver of applicability of standards as necessary or appropriate to a particular class, type, age, or size of vessel.

The EPA and DoD developed a process to establish the Phase II discharge performance standards in three batches (three separate rulemakings). The first batch of discharge performance standards was proposed on February 3, 2014 (79 FR 6117) and addressed 11 of the 25 discharges identified as requiring control (64 FR 25126). A notice of proposed rulemaking for the second batch of discharge performance standards was published on October 7, 2016 (81 FR 69753) and addressed 11 additional discharges identified as requiring control (64 FR 25126). The third batch of discharge performance standards that will address the remaining three discharges will be proposed in a separate rule.

In developing the Phase II discharge performance standards, the EPA and DoD reference the 2013 NPDES Vessel General Permit and the 2014 NPDES Small Vessel General Permit (hereinafter referred to collectively as the NPDES VGPs) as the baseline for each comparable discharge incidental to the normal operation of a vessel of the Armed Forces (78 FR 21938, April 12, 2013 and 79 FR 53702, September 10, 2014). The NPDES VGPs provide for CWA authorization of discharges incidental to the normal operation of non-military and non-recreational vessels extending to the outer reach of the three-mile territorial sea as defined in CWA section 502(8). The NPDES VGPs include effluent limits that are based on both the technology available to treat pollutants (*i.e.,* technology-based effluent limitations), and limits that would be protective of the designated uses of the receiving waters (*i.e.,* water quality-based effluent limits), including both non-numeric and numeric limitations. Additional information on NPDES permitting can

be found on-line at *http://www.epa.gov/npdes/.*

Using the NPDES VGPs as a baseline for developing the performance standards for discharges incidental to the normal operation of a vessel of the Armed Forces allowed the EPA and DoD to maximize the use of the EPA's scientific and technical work developed to support the NPDES VGPs. The NPDES VGPs technology-based and water quality-based effluent limitations were then adapted, as appropriate, for the relevant discharges from vessels of the Armed Forces.

Phase III

Phase III of UNDS requires DoD, in consultation with the EPA and the Secretary of the Department in which the U.S. Coast Guard is operating, within one year of finalization of the Phase II standards, to promulgate regulations governing the design, construction, installation, and use of MPCDs necessary to meet the discharge performance standards. DoD will implement the Phase III regulations under the authority of the Secretary as a DoD publication. The Phase III regulations will be publicly released and are expected to be made available on the Defense Technical Information Center Web site: *http://www.dtic.mil/whs/directives/.* Similar to Phase II, Phase III will be promulgated in three batches.

Following the effective date of regulations under Phase III, it will be unlawful for a vessel of the Armed Forces to operate within waters subject to UNDS if the vessel is not equipped with a MPCD that meets the Phase II standards (CWA section 312 (n)(7)). It also will be unlawful for a vessel of the Armed Forces to discharge a regulated UNDS discharge into an UNDS no-discharge zone (*i.e.,* waters where a prohibition on a discharge has been established) (CWA section 312(n)(8)). Any person in violation of this requirement shall be liable to a civil penalty of not more than $5,000 for each violation (CWA section 312(j)). The Secretary of the Department in which the U.S. Coast Guard is operating shall enforce these provisions and may utilize law enforcement officers, EPA personnel and facilities, other federal agencies, or the states to carry out these provisions. States may also enforce these provisions (CWA section 312(k) and (n)(9)).

In addition, as of the effective date of the Phase III regulations, neither a state nor political subdivision a of state may adopt or enforce any state or local statute or regulation with respect to discharges identified as requiring control, except to establish no-discharge zones (CWA section 312(n)(6)). CWA section 312(n)(7) provides for the establishment of no-discharge zones either (1) by state prohibition after application and a determination by the EPA, or (2) directly by EPA prohibition. The Phase I UNDS regulations established the criteria and procedures for establishing UNDS no-discharge zones (40 CFR 1700.9 and 40 CFR 1700.10).

If a state determines that the protection and enhancement of the quality of some or all of its waters require greater environmental protection, the state may prohibit one or more discharges incidental to the normal operation of a vessel of the Armed Forces, whether treated or not, into those waters (40 CFR 1700.9). A state prohibition does not apply until after the Administrator determines that (1) the protection and enhancement of the quality of the specified waters within the state require a prohibition of the discharge into the waters; (2) adequate facilities for the safe and sanitary removal of the discharge incidental to the normal operation of a vessel are reasonably available for the waters to which the prohibition would apply; and (3) the prohibition will not have the effect of discriminating against a vessel of the Armed Forces by reason of the ownership or operation by the federal government, or the military function, of the vessel (40 CFR 1700.9(b)(2)).

Alternatively, a state may request that the EPA prohibit, by regulation, the discharge of one or more discharges incidental to the normal operation of a vessel of the Armed Forces, whether treated or not, into specified waters within a state (40 CFR 1700.10). In this case, the EPA would make a determination that the protection and enhancement of the quality of the specified waters requires a prohibition of the discharge. As with the application of a state prohibition described above, the Administrator would need to determine that (1) the protection and enhancement of the quality of the specified waters within the state require a prohibition of the discharge into the waters; (2) adequate facilities for the safe and sanitary removal of the discharge incidental to the normal operation of a vessel are reasonably available for the waters to which the prohibition would apply; and (3) the prohibition will not have the effect of discriminating against a vessel of the Armed Forces by reason of the ownership or operation by the federal government, or the military function, of the vessel (40 CFR 1700.9(b)(2)). The EPA may not, however, disapprove a state application for this latter type of prohibition for the sole reason that there are not adequate facilities for the safe and sanitary removal of such discharges (CWA section 312(n)(7)(B)(ii) and 40 CFR 1700.10(b)).

The statute also requires the EPA and DoD to review the determinations and standards every five years and, if necessary, to revise them based on significant new information. Specifically, CWA section 312(n)(5)(A) and (B) contain provisions for reviewing and modifying both of the following determinations: (1) Whether control should be required for a particular discharge, and (2) the substantive standard of performance for a discharge for which control is required. A Governor also may petition the Administrator and the Secretary to review a UNDS determination or standard if there is significant new information, not considered previously, that could reasonably result in a change to the determination or standard (CWA section 312(n)(5)(D) and 40 CFR 1700.11).

F. Summary of Public Outreach and Consultation With Federal Agencies, States, Territories, and Tribes

During the development of the rule, the EPA and DoD consulted with other federal agencies, states, and tribes regarding the reduction of adverse environmental impacts associated with discharges from vessels of the Armed Forces; development of innovative vessel pollution control technology; and advancement of environmentally sound vessels of the Armed Forces. In addition, the EPA and DoD reviewed comments on the NPDES VGPs.

G. Supporting Documentation

This rule is supported by ''Technical Development Document (TDD) Phase I Uniform National Discharge Standards (UNDS) for Vessels of the Armed Forces,'' the UNDS Phase I rules, the ''Final 2013 Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (VGP),'' the ''Vessel General Permit (VGP) Fact Sheet,'' the ''Final Small Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels Less Than 79 Feet (sVGP),'' the ''Small Vessel General Permit (sVGP) Fact Sheet,'' the ''Economics and Benefits Analysis of the Final 2013 Vessel General Permit (VGP),'' the ''Economics and Benefits Analysis of the Final 2013 Small Vessel General Permit (sVGP),'' the ''February 2014 Uniform National Discharge Standards for Vessels of the Armed Forces—Phase II,'' the ''Report to

Congress: Study of Discharges Incidental to Normal Operation of Commercial Fishing Vessels and Other Non-Recreational Vessels Less than 79 Feet,'' the ''Environmentally Acceptable Lubricants,'' the ''Biological Evaluation for the Uniform National Discharge Standards (UNDS) Program Phase II Batch One,'' and the ''National Consistency Determination: Uniform National Discharge Standards (UNDS) Program for Phase II Batch One Discharges.'' These documents are available from the EPA Water Docket, Docket No. EPA–HQ–OW–2013–0469 (Email: *ow-docket@epa.gov;* Phone Number: (202) 566–2426; Mail: Water Docket, *Mail Code:* 2822–IT, 1200 Pennsylvania Avenue NW., Washington, DC 20460; or Online: *http://www.regulations.gov*). The NPDES VGPs background documents also are available online: *https://www.epa.gov/npdes/vessels.*

II. UNDS Performance Standards Development

During the development of the discharge performance standards, the EPA and DoD analyzed the information from the Phase I of UNDS, considered the relevant language in the NPDES VGPs effluent limitations, and took into the consideration the seven statutory factors listed in CWA section 312(n)(2)(B). These seven statutory factors are: The nature of the discharge; the environmental effects of the discharge; the practicability of using the MPCD; the effect that installation or use of the MPCD would have on the operation or operational capability of the vessel; applicable U.S. law; applicable international standards; and the economic costs of the installation and use of the MPCD. The EPA and DoD determined that the NPDES VGPs effluent limitations, which include technology-based and water quality-based effluent limitations, provide a sound basis to serve as a baseline for developing the discharge performance standards for the 11 discharges in this rule. The subsections below outline the EPA and DoD's approach to considering the seven statutory factors listed in CWA section 312(n)(2)(B).

A. Nature of the Discharge

During Phase I, the EPA and DoD gathered information on the discharges incidental to the normal operation of a vessel of the Armed Forces and developed nature of the discharge reports. The nature of the discharge reports discuss how the discharge is generated, volumes and frequencies of the generated discharge, where the discharge occurs, and the constituents present in the discharge. In addition, the EPA and DoD reviewed relevant discharge information in the supporting documentation of the NPDES VGPs. The EPA and DoD briefly describe the nature of each of the 11 discharges below; however, the complete nature of the discharge reports can be found in Appendix A of the Technical Development Document—EPA 821–R–99–001.

B. Environmental Effects

Discharges incidental to the normal operation of a vessel of the Armed Forces have the potential to negatively impact the aquatic environment. The discharges contain a wide variety of constituents that have the potential to negatively impact aquatic species and habitats. These discharges can cause thermal pollution and can contain aquatic nuisance species (ANS), nutrients, bacteria and pathogens (*e.g., E. coli* and fecal coliforms), oil and grease, metals, most conventional pollutants (*e.g.,* organic matter, bicarbonate, and suspended solids), and other toxic and non-conventional pollutants with toxic effects. While it is unlikely that these discharges would cause an acute or chronic exceedance of the EPA recommended water quality criteria across a large water body, these discharges have the potential to cause adverse environmental impacts on a more localized scale due to the end-of-pipe nature of the discharges. For each of the 11 discharges below, the EPA and DoD discuss the constituents of concern released into the environment and potential water quality impacts. The discharge performance standards will reduce the discharge of constituents of concern and mitigate the environmental risks to the receiving waters.

C. Cost, Practicability, and Operational Impacts

The universe of vessels of the Armed Forces affected by the rule encompasses more than 6,000 vessels distributed among the U.S. Navy, Military Sealift Command, U.S. Coast Guard, U.S. Army, U.S. Marine Corps, and U.S. Air Force. These vessels range in design and size from small boats with lengths of less than 20 feet for coastal operations, to aircraft carriers with lengths of over 1,000 feet for global operations. Approximately 80 percent of the vessels of the Armed Forces are less than 79 feet in length. Larger vessels (*i.e.,* vessels with length greater than or equal to 79 feet) comprise 20 percent of the vessels of the Armed Forces. The EPA and DoD considered vessel class, type, and size when developing the discharge standards, as not all vessels of the Armed Forces have the same discharges. For more information on the various vessel classes, characteristics, and missions, see Appendix A.

The EPA and DoD assessed the relative costs, practicability, and operational impacts of the rule by comparing current operating conditions and practices of vessels of the Armed Forces with the anticipated operating conditions and practices that will be required to meet the discharge performance standards. The EPA and DoD determined that the discharge performance standards applicable to operating conditions and practices for the 11 discharges will only result in a marginal increase in performance costs, practicability, and operational impacts.

D. Applicable U.S. and International Law

The EPA and DoD reviewed U.S. laws and international standards that would be relevant to discharges incidental to the normal operation of a vessel of the Armed Forces. A number of U.S. environmental laws include specific provisions for federal facilities and properties that may result in different environmental requirements for federal and non-federal entities. Similarly, many international treaties do not apply to vessels of the Armed Forces either because vessels of the Armed Forces are entitled to sovereign immunity under international law or because any particular treaty may apply different approaches to the adoption of appropriate environmental control measures consistent with the objects and purposes of such treaties. The EPA and DoD incorporated any relevant information in the development of the discharge standards after reviewing the requirements of the following treaties and domestic implementing legislation, as well as other relevant and potentially applicable U.S. environmental laws: International Convention for the Prevention of Pollution from Ships (also referred to as MARPOL); International Convention on the Control of Harmful Anti-Fouling Systems on Ships; Act to Prevent Pollution from Ships; CWA section 311, as amended by the Oil Pollution Control Act of 1990; CWA section 402 and the National Pollutant Discharge Elimination System Vessel General Permit and small Vessel General Permit; Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); Hazardous Materials Transportation Act; Title X of the Coast Guard Authorization Act of 2010; National Marine Sanctuaries Act; Antiquities Act of 1906; Resource Conservation and Recovery Act; Toxic

Substances Control Act; and the St. Lawrence Seaway Regulations.

E. Definitions

The EPA and DoD added UNDS definitions to 40 CFR part 1700. Specifically, this rule defines the terms: Bioaccumulative; biodegradable; environmentally acceptable lubricants; federally-protected waters; hazardous material; minimally-toxic; not bioaccumulative; person in charge; toxic materials; and waters subject to UNDS.

III. UNDS Performance Standards

This section describes the performance standards determined to be reasonable and practicable to mitigate the adverse impacts to the marine environment for the 11 discharges. In developing these standards, the EPA and DoD considered the information from Phase I of UNDS, the NPDES VGPs effluent limitations, and the seven statutory factors listed in CWA section 312(n)(2)(B). For more information on each discharge included in this rule, please see the Phase I Uniform National Discharge Standards for Vessels of the Armed Forces: Technical Development Document; EPA 821–R–99–001.

The 11 discharge performance standards described in each section below apply to vessels of the Armed Forces operating within waters subject to UNDS, except as otherwise expressly excluded in the ''exceptions'' in 40 CFR 1700.39. In addition, if two or more regulated discharge streams are combined prior to discharge, then the resulting discharge would need to meet the discharge performance standards applicable to each of the discharges that are being combined (40 CFR 1700.40). Furthermore, recordkeeping (40 CFR 1700.41) and non-compliance reporting (40 CFR 1700.42) apply generally to each discharge performance standard unless expressly provided in a particular discharge performance standard.

A. Aqueous Film-Forming Foam

The EPA and DoD prohibit the discharge of AFFF (*i.e.,* AFFF used during training, testing, or maintenance operations) for vessels that sail seaward of waters subject to UNDS at least once per month. For vessels that do not sail seaward of waters subject to UNDS at least once per month, discharges of fluorinated AFFF are prohibited and discharges of non-fluorinated or alternative foaming agent are prohibited in port or in or near federally-protected waters, and must occur as far from shore as possible.

B. Chain Locker Effluent

The EPA and DoD require that all anchor chains from surface vessels (submarines are not subject to this requirement) must be carefully and thoroughly washed down (*i.e.,* more than a cursory rinse) as they are being hauled out of the water to remove sediment and organisms. The EPA and DoD also require that all chain lockers must be cleaned periodically to eliminate accumulated sediments and any potential accompanying pollutants. The dates of all chain locker inspections must be recorded in the ship's log or other vessel recordkeeping documentation.

In addition, the EPA and DoD prohibit the rinsing or pumping out of chain lockers for vessels that sail seaward of waters subject to UNDS at least once per month. For vessels that do not sail seaward of waters subject to UNDS at least once per month, the rinsing or pumping out of chain lockers must occur as far from shore as possible and, if technically feasible, must not occur in federally-protected waters.

C. Distillation and Reverse Osmosis Brine

The EPA and DoD prohibit the discharge of the distillation and reverse osmosis brine and the discharge of reverse osmosis reject water if it comes in contact with machinery or industrial equipment (other than distillation or reverse osmosis machinery), toxic or hazardous materials, or wastes.

D. Elevator Pit Effluent

The EPA and DoD prohibit the direct discharge of elevator pit effluent. Notwithstanding the prohibition of direct discharges of elevator pit effluent, elevator pit effluent can be discharged when commingled with another discharge for the purposes of treatment prior to discharge; under no circumstances may oils, including oily mixtures, be discharged from that combined discharge in quantities that cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines, or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines, or contain an oil content above 15 ppm as measured by EPA Method 1664a or other appropriate method for determination of oil content as accepted by the International Maritime Organization (IMO) (*e.g.,* International Organization for Standardization (ISO) Method 9377) or U.S. Coast Guard, or are otherwise harmful to the public health or welfare of the United States.

E. Gas Turbine Water Wash

The EPA and DoD prohibit the direct discharge of gas turbine water wash. To the greatest extent practicable, gas turbine water wash must be collected separately and disposed of onshore in accordance with any applicable solid waste and hazardous substance management and disposal requirements. Notwithstanding the prohibition of direct discharges of gas turbine water wash overboard, if gas turbine water wash is commingled with any other discharge for the purposes of treatment prior to discharge, then under no circumstances may oils, including oily mixtures, be discharged from that combined discharge in quantities that cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines, or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines, or contain an oil content above 15 ppm as measured by EPA Method 1664a or other appropriate method for determination of oil content as accepted by the International Maritime Organization (IMO) (*e.g.,* ISO Method 9377) or U.S. Coast Guard, or are otherwise harmful to the public health or welfare of the United States.

F. Non-Oily Machinery Wastewater

The EPA and DoD require that discharges of non-oily machinery wastewater must not contain any additives that are toxic or bioaccumulative in nature. In addition, under no circumstances may oils, including oily mixtures be discharged in quantities that cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines, or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines, or contain an oil content above 15 ppm as measured by EPA Method 1664a or other appropriate method for determination of oil content as accepted by the International Maritime Organization (IMO) (*e.g.,* ISO Method 9377) or U.S. Coast Guard, or otherwise are harmful to the public health or welfare of the United States.

G. Photographic Laboratory Drains

The EPA and DoD prohibit the discharge of photographic laboratory drain effluent.

H. Seawater Cooling Overboard Discharge

The EPA and DoD require that non-contact engine cooling water, hydraulic system cooling water, refrigeration cooling water, and other seawater cooling overboard discharges be

minimized, to the greatest extent practicable, when the vessel is in port. In addition, the standard provides for the reduction in production and discharge of seawater cooling overboard by urging the use of shore power in port if: (1) Shore power is readily available; (2) shore-based power supply systems are capable of providing the needed electricity; and (3) the vessel is equipped to connect to shore-based power. Specifically, the EPA and DoD require that, for vessels that are less than 79 feet in length, fouling organisms must be removed from seawater piping on a regular basis and the discharge of such removed organisms is prohibited. For vessels that are greater than or equal to 79 feet in length, maintenance of all piping and seawater cooling systems must meet the requirements of 40 CFR 1700.32 (Seawater Piping Biofouling Prevention) and fouling organisms removed from seawater piping must not be discharged. Submarines have suction clearing procedures, which must be performed for vessel safety purposes; therefore, submarines are not required to meet these operational removal requirements.

I. Seawater Piping Biofouling Prevention

The EPA and DoD require a performance standard for seawater piping biofouling prevention that minimizes, to the greatest extent practicable, the amount of biofouling chemicals (*e.g.,* chlorine) used to keep fouling under control. Fouling organisms must be removed from seawater piping on a regular basis. Fouling organisms removed during a cleaning event are prohibited from being discharged. For all vessels, except submarines, the discharge of fouling organisms removed during cleanings is prohibited.

Lastly, this performance standard requires practices consistent with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136 *et seq.*) registration requirements for chemicals used to control biofouling of seawater piping, and prohibits the discharge of pesticides or chemicals banned for use in the United States.

J. Small Boat Engine Wet Exhaust

The EPA and DoD require that low sulfur or alternative fuels be used to the greatest extent practicable. In addition, the performance standard requires that, to the greatest extent practicable, four-stroke engines be used instead of two-stroke engines. Vessels using two-stroke engines are required to use environmentally acceptable lubricants (found in the definitions for this term at 40 CFR 1700.3) unless such use would be technologically infeasible. If technologically infeasible, the use and justification for the use of a non-environmentally acceptable lubricant must be recorded in the vessel recordkeeping documentation.

K. Welldeck Discharges

The EPA and DoD prohibit welldeck discharges containing graywater from smaller vessels. In addition, discharges containing washdown of gas turbine engines within nautical miles of the United States is prohibited and, to the greatest extent practicable, must be discharged seaward of waters subject to UNDS. Welldeck discharges from equipment and vehicle washdowns need to be free from garbage, and must not contain oil in quantities that cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines, or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines, or contain an oil content above 15 ppm as measured by EPA Method 1664a or other appropriate method for determination of oil content as accepted by the International Maritime Organization (IMO) (*e.g.,* ISO Method 9377) or U.S. Coast Guard, or otherwise are harmful to the public health or welfare of the United States.

IV. Additional Information in the Final Rule

This section provides an overview of the additional amendments for 40 CFR part 1700. These changes include an amendment to subsections referenced Effect (section 1700.2), a provision that authorizes certain discharges notwithstanding the performance standards in situations where vessel safety or lives are endangered (section 1700.39), a provision that requires combined discharge streams to meet the requirements applicable to all discharge streams that are combined (section 1700.40), a requirement for recordkeeping (section 1700.41), and a requirement to report instances of non-compliance with MPCD performance standards (section 1700.42).

1. Amendment to Subsections Referenced in Section 1700.2 Effect

The EPA and DoD amend the reference sections noted in the Effect Section 1700.2 (a) by amending ''Federal standards of performance for each required Marine Pollution Control Device are listed in section 1700.14'' to ''Federal standards of performance for each required Marine Pollution Control Device are listed in sections 1700.14 through 1700.38. Federal standards of performance apply to all vessels, whether existing or new, and regardless of vessel class, type, or size, unless otherwise expressly provided in sections 1700.14 through 1700.38.''

2. Reservation of Sections

As noted previously, the EPA and DoD are proposing the Phase II standards in three batches. For the purpose of proposing the remaining batches, this rule reserves the following sections for those future rulemaking actions:

Section 1700.17 Clean Ballast;
Section 1700.18 Compensated Fuel Ballast;
Section 1700.21 Dirty Ballast;

3. Section 1700.39 Exceptions

The EPA and DoD add an ''Exceptions'' subsection at section 1700.39, which provides a place to identify certain excluded discharges from the scope of UNDS, notwithstanding the performance standards, in situations where vessel safety or lives are endangered. The section also identifies requirements for maintaining records of all discharge exceptions.

4. Section 1700.40 Commingling of Discharges

The EPA and DoD add a ''Commingling of Discharges'' subsection at section 1700.40. By adding this subsection, the EPA and DoD stipulate that if two or more regulated discharge streams are combined into one, the resulting discharge stream must meet the requirements applicable to all discharge streams that are combined prior to discharge unless otherwise specified by the specific discharge standard.

5. Section 1700.41 Records

The EPA and DoD add a ''Records'' subsection at section 1700.41. By adding this subsection, the EPA and DoD include recordkeeping requirements that shall document all inspections, instances of non-compliance, and instances of an exception.

6. Section 1700.42 Non-Compliance Reports

The EPA and DoD add a ''Non-Compliance Reports'' subsection at section 1700.42. By adding this subsection, the EPA and DoD include reporting requirements for any non-compliance with performance standards prescribed for this Part.

V. Key Changes and Improvements Since the Proposed Rule

A. Public Comment

On February 3, 2014, the EPA and DoD published proposed discharge

performance standards for the 11 discharges in Batch One. The proposed rule established a public comment period of 60 days that closed on April 4, 2014. The public had the option of submitting comments by email, mail, hand delivery, or electronically via the Federal eRulemaking Portal (*www.regulations.gov*). The public comments are available for public viewing in the docket under Docket No. EPA–HQ–OW–2013–0469.

The EPA and DoD consider the public comment period vital to creating a rule that is effective at meeting regulatory standards and also is readily understandable and useful to the public. The EPA and DoD received one comment on the proposed rule regarding some of the terms and definitions used in the UNDS Phase II Batch One Proposed Rule. The comment noted that the definitions used in the UNDS proposed rule were slightly different than the definitions used in the NPDES VGP and could potentially cause confusion in production and sales of certain goods, such as lubricants, that are widely used on both commercial vessels and vessels of the Armed Forces. The EPA and DoD agreed with the comment and incorporated changes to the following definitions in Section 1700.3 of this final rule:

- *Aquatic Toxicity:* The EPA and DoD define and use the term ''minimally-toxic,'' found in the final 2013 VGP, rather than the ''non-toxic'' terminology used in the UNDS Phase II Batch One proposed rule.
- *Bioaccumulation:* The proposed UNDS rule defines ''bioaccumulative'' as determined by test methods; this is not consistent with the ''not bioaccumulative'' definition used in the 2013 VGP for lubricants. The 2013 VGP does not require bioaccumulation testing of biodegradable portions of lubricants as, by definition, they will not persist and accumulate in the environment. This final rule revises the term ''bioaccumulative'' to be consistent with the final 2013 VGP.
- *Biodegradability:* In the proposed rule, the EPA and DoD proposed testing the biodegradability of mixtures. However, to increase consistency with the terms and definitions found in the final 2013 VGP, the EPA and DoD use the definition of biodegradability established in the final 2013 VGP in place of the definition presented in the UNDS Phase II Batch One proposed rule. The VGP does not require testing the biodegradability of mixtures.

B. Endangered Species Act (ESA) Consultation

Pursuant to Section 7(a)(2) of the Endangered Species Act (ESA) the EPA and DoD consulted the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), collectively ''the Services.'' The Biological Evaluation developed by the EPA and DoD concluded that the issuance of the Batch One final rule for the Uniform National Discharge Standards for Vessels of the Armed Forces—Phase II is not likely to adversely affect listed or proposed species or adversely modify designated or proposed critical habitat.

C. Coastal Zone Management Act (CZMA) Consistency Determination

Pursuant to Section 307 of the CZMA, the EPA and DoD have determined that the performance standards are consistent to the maximum extent practicable with the enforceable policies of federally-approved coastal state and territory Coastal Management Plans (CMPs) for the coastal zones including state waters where discharges from vessels of the Armed Forces would be regulated by UNDS. Following proposal of the Uniform National Discharge Standards for Vessels of the Armed Forces—Phase II issued on February 3, 2014, the EPA and DoD provided 34 states and territories with the EPA and DoD's August 2016 ''National Consistency Determination: Uniform National Discharge Standards (UNDS) Program for Phase II Batch One Discharges.''

D. Development of Performance Standards in Batches

The EPA and DoD are modifying the batch process. In the proposed rule, the EPA and DoD indicated that Phase II—the establishment of discharge performance standards—would be completed in two batches. The EPA and DoD have since determined to develop the discharge performance standards in three batches to allow for more time to collect and incorporate additional information into the development of the discharge performance standards.

E. Revisions to Definitions and Standards

The EPA and DoD are modifying the definitions and standards to make them more clear and concise, in addition to changes made due to the public and federal comments. The non-substantive changes made to the definitions and standards are intended to clarify, simplify, and/or improve understanding and readability of the discharge performance standards. There are no technical changes to the definitions or standards.

VI. Related Acts of Congress and Executive Orders

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders*.

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 and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act

This action does not impose any new information collection burden, as the EPA and DoD have determined that Phase II of UNDS does not create any additional collection of information beyond that already mandated under the Phase I of UNDS. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR part 1700) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2040–0187. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

We certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action implements mandates specifically and explicitly set forth in CWA section 312 without the exercise of any policy discretion by the EPA.

E. Executive Order 13132: Federalism

The EPA and DoD concluded that the rule, once finalized in Phase III, will have federalism implications. Once the discharge performance standards are promulgated in Phase III by DoD, adoption and enforcement of new or existing state or local regulations for the discharges will be preempted.

Accordingly, the EPA and DoD provide the following federalism

summary impact statement. During Phase I of UNDS, the EPA and DoD conducted two rounds of consultation meetings (*i.e.,* outreach briefings) to allow states and local officials to have meaningful and timely input into the development of the rulemaking. Twenty-two states accepted the offer to be briefed on UNDS and discuss state concerns. The EPA and DoD provided clarification on the technical aspects of the UNDS process, including preliminary discharge determinations and analytical information supporting decisions to control or not control discharges. State representatives were provided with discharge summaries containing the description, analysis, and preliminary determination of each of the 39 discharges from vessels of the Armed Forces—25 of which were determined to require control.

During Phase II, the EPA and DoD consulted again with state representatives early in the process of developing the regulation to allow them to have meaningful and timely input into the development of the discharge standards. On March 14, 2013, the EPA held a Federalism consultation briefing in Washington, DC, which was attended by representatives from the National Governors Association, the National Conference of State Legislatures, the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the County Executives of America, the Environmental Council of States, the Association of Clean Water Administrators, two U.S. states and one U.S. territory, in order to obtain meaningful and timely input in the development of the proposed discharge standards. The EPA and DoD informed the state representatives that the two agencies planned to use the NPDES VGPs effluent limitations as a baseline for developing the discharge performance standards for the 25 discharges identified in Phase I as requiring control.

Pursuant to the terms of Executive Order 13132, as well as EPA policy for implementing it, a federalism summary impact statement is required to summarize not only the issues and concerns raised by state and local government commenters during the course of the rule's development, but also to describe how and the extent to which the agencies addressed those concerns. No formal, substantive comments were received from state and local government entities during the course of developing this action.

As required by section 8(a) of Executive Order 13132, the EPA included a certification from its Federalism Official stating that the EPA had met the Executive Order's requirements in a meaningful and timely manner. A copy of this certification is included in the public version of the official record for this final action.

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

This action does not have tribal implication as specified in Executive Order 13175. The UNDS rulemaking will not impact vessels operated by tribes because the rule only regulates discharges from vessels of the Armed Forces. However, tribes may be interested in this action because vessels of the Armed Forces, including U.S. Coast Guard vessels, may operate in or near tribal waters. The EPA hosted a National Teleconference on March 23, 2013, in order to obtain meaningful and timely input during the development of the discharge standards. The EPA and DoD informed the representatives that the two agencies planned to use the NPDES VGPs effluent limitations as a baseline for developing the discharge performance standards for the 25 discharges identified in Phase I as requiring control. During the Tribal consultation period, the EPA and DoD did not receive any substantive comments from the Indian Tribal Governments.

G. Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) and its implementing regulations (15 CFR part 930) require that any Federal agency activity or Federally licensed or permitted activity occurring within (or outside but affecting) the coastal zone of a state with an approved Coastal Management Plan (CMP) be consistent with the enforceable policies of that approved program to the maximum extent practicable. According to the August 2016 ''National Consistency Determination: Uniform National Discharge Standards (UNDS) Program for Phase II Batch One Discharges,'' the EPA and DoD have determined that the performance standards are consistent to the maximum extent practicable with the enforceable policies of the 34 federally-approved state and territory CMPs.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA and DoD do not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The 11 discharge standards are designed to control discharges incidental to the normal operation of a vessel of the Armed Forces that could adversely affect human health and the environment. The standards reduce the impacts to the receiving waters and any person using the receiving waters, regardless of age.

I. Executive Order 13211: Actions That Concern Regulations That Significantly Affect Energy Supply, Distribution, and Use

This action is not subject to Executive Order 13211, because is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

This action involves technical standards. The EPA and DoD propose to use ISO Method 9377—determination of hydrocarbon oil index. ISO Method 9377 is a voluntary consensus standard developed by an independent, non-governmental international organization.

K. Endangered Species Act

Section 7(a)(2) of the Endangered Species Act (ESA) requires each Federal agency, in consultation with and with the assistance of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), collectively ''the Services,'' to ensure that the actions they authorize, fund, or carry out are not likely to adversely affect the continued existence of any endangered or threatened species (referred to as ''listed species'') or result in the destruction or adverse modification of their designated critical habitats.

The Services have published regulations implementing ESA section 7 at 50 CFR part 402. The regulations provide that a federal agency (such as the EPA and DoD) must consult with FWS, NMFS, or both if the agency determines that an activity authorized, funded, or carried out by the agency may affect listed species or critical habitat. The kinds of effects that trigger the consultation obligation could include, among other things, beneficial, detrimental, direct and indirect effects. The EPA and DoD commenced discussion with the Services in November 2014. The consultation process included multiple steps: Briefings with the Services on the contents of the rulemaking, discussions

of the EPA and DoD's proposed outline and methodological approach, information exchanges and requests on current species lists, rulemaking schedule, and ultimately the submittal of a consultation package on October 11, 2016.

L. Executive Order 13112: Invasive Species

Executive Order 13112, entitled ''Invasive Species'' (64 FR 6183, February 8, 1999), requires each federal agency, whose actions may affect the status of invasive species, to identify such actions, and, subject to the availability of appropriations, use relevant programs and authorities to, among other things, prevent, detect, control, and monitor the introduction of invasive species. As defined by this Executive Order, ''invasive species'' means an alien species whose introduction causes, or is likely to cause, economic or environmental harm or harm to human health.

As part of the environmental effects analyses, the EPA and DoD considered the control of invasive species when developing the discharge performance standards for all 11 discharges (See Section II).

M. Executive Order 13089: Coral Reef Protection

Executive Order 13089, entitled ''Coral Reef Protection'' (63 FR 32701, June 16, 1998), requires all federal agencies to identify actions that may affect U.S. coral reef ecosystems; utilize their programs and authorities to protect the conditions of such ecosystems; and to the extent permitted by law, ensure that any actions they authorize, fund, or carry out will not degrade the conditions of such ecosystems. These discharge standards are designed to control or eliminate the discharges incidental to the normal operation of vessels of the Armed Forces, ultimately minimizing the potential for causing adverse impacts to the marine environment including coral reefs.

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

The EPA and DoD believe that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The discharge performance standards only apply to vessels of the Armed Forces and ultimately increase environmental protection.

O. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 1700

Environmental protection, Armed Forces, Vessels, Coastal zone, Reporting and recordkeeping requirements, Water pollution control.

Dated: December 8, 2016.

Gina McCarthy,

Administrator, Environmental Protection Agency.

Dated: December 22, 2016.

Steven R. Iselin,

Acting Assistant Secretary of the Navy, Energy, Installations, and Environment.

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

PART 1700—UNIFORM NATIONAL DISCHARGE STANDARDS FOR VESSELS OF THE ARMED FORCES

■ 1. The authority citation for 40 CFR part 1700 continues to read as follows:

Authority: 33 U.S.C. 1322, 1361.

Subpart A—Scope

■ 2. Amend § 1700.2 by revising paragraph (a) to read as follows:

§ 1700.2 Effect.

(a) This part identifies those discharges, other than sewage, incidental to the normal operation of vessels of the Armed Forces that require control within the navigable waters of the United States, including the territorial seas and the waters of the contiguous zone, and those discharges that do not require control. Discharges requiring control are identified in § 1700.4. Discharges not requiring control are identified in § 1700.5. Federal standards of performance for each required Marine Pollution Control Device are listed in §§ 1700.14 through 1700.38. Federal standards of performance apply to all vessels, whether existing or new, and regardless of vessel class, type, or size, unless otherwise expressly provided in §§ 1700.14 through 1700.38.

* * * * *

■ 3. Amend § 1700.3 by adding in alphabetical order definitions for ''Bioaccumulative'', ''Biodegradable'', ''Environmentally acceptable lubricants'', ''Federally-protected waters'', ''Hazardous material'', ''Minimally-toxic'', ''Not bioaccumulative'', ''Person in charge'', ''Toxic materials'', and ''Waters subject to UNDS'', to read as follows:

§ 1700.3 Definitions.

* * * * *

Bioaccumulative means the opposite of *not bioaccumulative.*

Biodegradable means the following for purposes of the standards:

(1) Regarding *environmentally acceptable lubricants* and greases, *biodegradable* means lubricant formulations that contain at least 90% (weight in weight concentration or w/w) or grease formulations that contain at least 75% (w/w) of a constituent substance or constituent substances (only stated substances present above 0.10% must be assessed) that each demonstrate either the removal of at least 70% of dissolved organic carbon, production of at least 60% of the theoretical carbon dioxide, or consumption of at least 60% of the theoretical oxygen demand within 28 days. Test methods include: Organization for Economic Co-operation and Development Test Guidelines 301 A–F, 306, and 310, ASTM 5864, ASTM D–7373, OCSPP Harmonized Guideline 835.3110, and International Organization for Standardization 14593:1999. For lubricant formulations, the 10% (w/w) of the formulation that need not meet the above biodegradability requirements, up to 5% (w/w) may be non-biodegradable, but not bioaccumulative, while the remaining 5–10% must be inherently biodegradable. For grease formulations, the 25% (w/w) of the formulation that need not meet the above biodegradability requirement, the constituent substances may be either inherently biodegradable or non-biodegradable, but may not be bioaccumulative. Test methods to demonstrate inherent biodegradability include: OECD Test Guidelines 302C (>70% biodegradation after 28 days) or OECD Test Guidelines 301 A–F (>20% but <60% biodegradation after 28 days).

(2) Regarding cleaning products, *biodegradable* means products that demonstrate either the removal of at least 70% of dissolved organic carbon, production of at least 60% of the theoretical carbon dioxide, or consumption of at least 60% of the theoretical oxygen demand within 28 days. Test methods include: Organization for Economic Cooperation and Development Test Guidelines 301 A–F, 306, and 310, and International

Organization for Standardization 14593:1999.

(3) Regarding biocidal substances, *biodegradable* means a compound or mixture that yields 60% of theoretical maximum carbon dioxide and demonstrate a removal of at least 70% of dissolved organic carbon within 28 days as described in EPA 712–C–98–075 (OPPTS 835.3100 Aerobic Aquatic Biodegradation).

Environmentally acceptable lubricants means lubricants that are *biodegradable, minimally-toxic,* and *not bioaccumulative* as defined in this subpart. The following labeling programs and organizations meet the definition of being *environmentally acceptable lubricants:* Blue Angel, European Ecolabel, Nordic Swan, the Swedish Standards SS 155434 and 155470, Safer Choice, and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) requirements.

* * * * *

Federally-protected waters means waters within 12 miles of the United States that are also part of any of the following:

(1) Marine sanctuaries designated under the National Marine Sanctuaries Act (16 U.S.C. 1431 *et seq.*) or Marine National Monuments designated under the Antiquities Act of 1906;

(2) A unit of the National Wildlife Refuge System, including Wetland Management Districts, Waterfowl Production Areas, National Game Preserves, Wildlife Management Areas, and National Fish and Wildlife Refuges;

(3) National Wilderness Areas; and

(4) Any component designated under the National Wild and Scenic Rivers System.

Hazardous material means any hazardous material as defined in 49 CFR 171.8.

* * * * *

Minimally-toxic means a substance must pass either OECD 201, 202, and 203 for acute toxicity testing, or OECD 210 and 211 for chronic toxicity testing. For purposes of the standards, equivalent toxicity data for marine species, including methods ISO/DIS 10253 for algae, ISO TC147/SC5/W62 for crustacean, and OSPAR 2005 for fish, may be substituted for OECD 201, 202, and 203. If a substance is evaluated for the formulation and main constituents, the LC50 of fluids must be at least 100 mg/L and the LC50 of greases, two-stroke oils, and all other total loss lubricants must be at least 1000 mg/L. If a substance is evaluated for each constituent substance, rather than the complete formulation and main compounds, then constituents comprising less than 20% of fluids can have an LC50 between 10–100 mg/L or a no-observed-effect concentration (NOEC) between 1–10 mg/L, constituents comprising less than 5% of fluids can have an LC50 between 1–10 mg/L or a NOEC between 0.1–1 mg/L, and constituents comprising less than 1% of fluids, can have an LC50 less than 1 mg/L or a NOEC between 0–0.1 mg/L.

* * * * *

Not bioaccumulative means any of the following: The partition coefficient in the marine environment is log Kow <3 or >7 using test methods OECD 117 and 107; molecular mass >800 Daltons; molecular diameter >1.5 nanometer; bioconcentration factor (BCF) or bioaccumulation factor (BAF) is <100 L/kg, using OECD 305, OCSPP 850.1710 or OCSPP 850.1730, or a field-measured BAF; or polymer with molecular weight (MW) fraction below 1,000 g/mol is <1%.

Person in charge (PIC) means the single individual named master of the vessel or placed in charge of the vessel, by the U.S. Department of Defense or by the Department in which the U.S. Coast Guard is operating, as appropriate, and who is responsible for the operation, manning, victualing, and supplying of the vessel of the Armed Forces. Examples of a PIC include, but are not limited to:

(1) A Commanding Officer, Officer in Charge, or senior commissioned officer on board the vessel;

(2) A civilian, military, or U.S. Coast Guard person assigned to a shore command or activity that has been designated as the PIC for one or more vessels, such as a group of boats or craft;

(3) A Tugmaster, Craftmaster, Coxswain, or other senior enlisted person onboard the vessel;

(4) A licensed civilian mariner onboard a Military Sealift Command vessel; or

(5) A contracted commercial person at a shore installation that is not part of the Armed Forces but as identified by the U.S. Department of Defense or the Department in which the U.S. Coast Guard is operating.

* * * * *

Toxic materials means any toxic pollutant identified in 40 CFR 401.15.

* * * * *

Waters subject to UNDS means the navigable waters of the United States, including the territorial seas and the waters of the contiguous zone, as these terms are defined in the Clean Water Act (33 U.S.C. 1362).

■ 4. Revise subpart D to read as follows:

Subpart D—Marine Pollution Control Device (MPCD) Performance Standards

Sec.

1700.14 Aqueous film-forming foam.
1700.15 [Reserved]
1700.16 Chain locker effluent.
1700.17–1700.21 [Reserved]
1700.22 Distillation and reverse osmosis brine.
1700.23 Elevator pit effluent.
1700.24 [Reserved]
1700.25 Gas turbine water wash.
1700.26–1700.28 [Reserved]
1700.29 Non-oily machinery wastewater.
1700.30 Photographic laboratory drains.
1700.31 Seawater cooling overboard discharge.
1700.32 Seawater piping biofouling prevention.
1700.33 Small boat engine wet exhaust.
1700.34–1700.37 [Reserved]
1700.38 Welldeck discharges.
1700.39 Exceptions.
1700.40 Commingling of discharges.
1700.41 Records.
1700.42 Non-compliance reports.

Subpart D—Marine Pollution Control Device (MPCD) Performance Standards

§ 1700.14 Aqueous film-forming foam.

(a) For the purposes of this section, regulated aqueous film-forming foam (AFFF) refers only to firefighting foam and seawater mixture discharged during training, testing, or maintenance operations.

(b) For all vessels that sail seaward of waters subject to UNDS at least once per month, the discharge of AFFF is prohibited.

(c) For all vessels that do not sail seaward of waters subject to UNDS at least once per month:

(1) The discharge of fluorinated AFFF is prohibited; and

(2) The discharges of non-fluorinated or alternative foaming agent are prohibited in port or in or near federally-protected waters, and must occur as far from shore as possible.

§ 1700.15 [Reserved]

§ 1700.16 Chain locker effluent.

(a) For all vessels, except submarines, the anchor chain must be carefully and thoroughly washed down (*i.e.,* more than a cursory rinse) as it is being hauled out of the water to remove sediment and organisms.

(b) For all vessels, the chain lockers must be cleaned periodically to eliminate accumulated sediments and any potential accompanying pollutants. The dates of all chain locker inspections must be recorded in the ship's log or other vessel recordkeeping documentation.

(c) For all vessels that sail seaward of waters subject to UNDS at least once per month, the rinsing or pumping out of chain lockers is prohibited.

(d) For all vessels that do not sail seaward of waters subject to UNDS at least once per month, the rinsing or pumping out of chain lockers must occur as far from shore as possible and, if technically feasible, the rinsing or pumping out of chain lockers must not occur in federally-protected waters.

§§ 1700.17–1700.21 [Reserved]

§ 1700.22 Distillation and reverse osmosis brine.

The discharge of brine from the distillation system and the discharge of reverse osmosis reject water are prohibited if they come in contact with machinery or industrial equipment (other than distillation or reverse osmosis machinery), toxic or hazardous materials, or wastes.

§ 1700.23 Elevator pit effluent.

(a) The direct discharge of elevator pit effluent is prohibited.

(b) Notwithstanding the prohibition of direct discharges of elevator pit effluent overboard, if the elevator pit effluent is commingled with any other discharge for the purposes of treatment prior to discharge, then under no circumstances may oils, including oily mixtures, be discharged from that combined discharge in quantities that:

(1) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines; or

(2) Cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines; or

(3) Contain an oil content above 15 ppm as measured by EPA Method 1664a or other appropriate method for determination of oil content as accepted by the International Maritime Organization (IMO) (*e.g.,* ISO Method 9377) or U.S. Coast Guard; or

(4) Otherwise are harmful to the public health or welfare of the United States.

§ 1700.24 [Reserved]

§ 1700.25 Gas turbine water wash.

(a) The direct discharge of gas turbine water wash is prohibited.

(b) To the greatest extent practicable, gas turbine water wash must be collected separately and disposed of onshore in accordance with any applicable solid waste and hazardous substance management and disposal requirements.

(c) Notwithstanding the prohibition of direct discharges of gas turbine water wash overboard, if the gas turbine water wash is commingled with any other discharge for the purposes of treatment prior to discharge then under no circumstances may oils, including oily mixtures be discharged from that combined discharge in quantities that:

(1) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines; or

(2) Cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines; or

(3) Contain an oil content above 15 ppm as measured by EPA Method 1664a or other appropriate method for determination of oil content as accepted by the International Maritime Organization (IMO) (*e.g.,* ISO Method 9377) or U.S. Coast Guard; or

(4) Otherwise are harmful to the public health or welfare of the United States.

§§ 1700.26–1700.28 [Reserved]

§ 1700.29 Non-oily machinery wastewater.

The discharge of non-oily machinery wastewater must not contain any additives that are toxic or bioaccumulative in nature, and under no circumstances may oils, including oily mixtures, be discharged in quantities that:

(a) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines; or

(b) Cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines; or

(c) Contain an oil content above 15 ppm as measured by EPA Method 1664a or other appropriate method for determination of oil content as accepted by the International Maritime Organization (IMO) (*e.g.,* ISO Method 9377) or U.S. Coast Guard; or

(d) Otherwise are harmful to the public health or welfare of the United States.

§ 1700.30 Photographic laboratory drains.

The discharge of photographic laboratory drains is prohibited.

§ 1700.31 Seawater cooling overboard discharge.

(a) For discharges from vessels that are less than 79 feet in length:

(1) To the greatest extent practicable, minimize non-contact engine cooling water, hydraulic system cooling water, refrigeration cooling water and other seawater cooling overboard discharges when the vessel is in port.

(2) To reduce the production and discharge of seawater cooling overboard discharge, the vessel should use shore based power when in port if:

(i) Shore power is readily available for the vessel from utilities or port authorities; and

(ii) Shore based power supply systems are capable of providing all needed electricity required for vessel operations; and

(iii) The vessel is equipped to connect to shore-based power and such systems are compatible with the available shore power.

(3) Fouling organisms must be removed from seawater piping on a regular basis. The discharge of fouling organisms removed during cleanings is prohibited.

(b) For discharges from vessels that are greater than or equal to 79 feet in length:

(1) To the greatest extent practicable, minimize non-contact engine cooling water, hydraulic system cooling water, refrigeration cooling water and other seawater cooling overboard discharges when the vessel is in port.

(2) To reduce the production and discharge of seawater cooling overboard discharge, the vessel should use shore based power when in port if:

(i) Shore power is readily available for the vessel from utilities or port authorities; and

(ii) Shore based power supply systems are capable of providing all needed electricity required for vessel operations; and

(iii) The vessel is equipped to connect to shore-based power and such systems are compatible with the available shore power.

(3) Maintenance of all piping and seawater cooling systems must meet the requirements of § 1700.32 (Seawater Piping Biofouling Prevention). For all vessels, except submarines, fouling organisms removed during maintenance must not be discharged.

§ 1700.32 Seawater piping biofouling prevention.

(a) Seawater piping biofouling chemicals subject to registration under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136 *et seq.*) must be used in accordance with the FIFRA label. Pesticides or chemicals banned for use in the United States must not be discharged.

(b) To the greatest extent practicable, only the minimum amount of biofouling chemicals must be used to keep fouling under control.

(c) Fouling organisms must be removed from seawater piping on a regular basis. For all vessels, except submarines, the discharge of fouling organisms removed during cleanings is prohibited.

§ 1700.33 Small boat engine wet exhaust.

(a) For the purposes of this section small boat engine wet exhaust discharges refers only to discharges from vessels that are less than 79 feet in length.

(b) Vessels generating small boat engine wet exhaust must be maintained

in good operating order, well-tuned, and functioning according to manufacturer specifications, in order to decrease pollutant concentrations and volumes in small boat engine wet exhaust.

(c) To the greatest extent practicable, low sulfur or alternative fuels must be used to reduce the concentration of pollutants in discharges from small boat engine wet exhaust.

(d) To the greatest extent practicable, use four-stroke engines instead of two-stroke engines for vessels generating small boat engine wet exhaust.

(e) Vessels using two-stroke engines must use environmentally acceptable lubricants unless use of such lubricants is technologically infeasible. If technologically infeasible, the use and justification for the use of a non-environmentally acceptable lubricant must be recorded in the vessel recordkeeping documentation.

§§ 1700.34–1700.37 [Reserved]

§ 1700.38 Welldeck discharges.

(a) Welldeck discharges that contain graywater from smaller vessels are prohibited.

(b) Welldeck discharges containing washdown from gas turbine engines are prohibited within three miles of the United States and to the greatest extent practicable must be discharged seaward of waters subject to UNDS.

(c) Welldeck discharges from equipment and vehicle washdowns must not contain garbage and must not contain oil in quantities that:

(1) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines; or

(2) Cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines; or

(3) Contain an oil content above 15 ppm as measured by EPA Method 1664a or other appropriate method for determination of oil content as accepted by the International Maritime Organization (IMO) (*e.g.,* ISO Method 9377) or U.S. Coast Guard; or

(4) Otherwise are harmful to the public health or welfare of the United States.

§ 1700.39 Exceptions.

(a) Notwithstanding each of the MPCD performance standards established in this Part, a vessel of the Armed Forces is authorized to discharge, into waters subject to UNDS, when the PIC or their designated representative determines that such discharge is necessary to prevent loss of life, personal injury, vessel endangerment, or severe damage to the vessel.

(b) A vessel of the Armed Forces must maintain the following records for all discharges under paragraph (a) of this section:

(1) Name and title of the PIC who determined the necessity of the discharge;

(2) Date, location, and estimated volume of the discharge;

(3) Explanation of the reason the discharge occurred; and

(4) Actions taken to avoid, minimize, or otherwise mitigate the discharge.

(c) All records prepared under paragraph (b) of this section must be maintained in accordance with § 1700.41.

§ 1700.40 Commingling of discharges.

If two or more regulated discharge streams are combined into one, the resulting discharge stream must meet the requirements applicable to all discharge streams that are combined prior to discharge.

§ 1700.41 Records.

(a) All records must be generated and maintained in the ship's logs (main, engineering, and/or damage control) or an UNDS Record Book and must include the following information:

(1) Vessel owner information (*e.g.,* U.S. Navy, U.S. Coast Guard);

(2) Vessel name and class; and

(3) Name of the PIC.

(b) The PIC must maintain complete records of the following information:

(1) Any inspection or recordkeeping requirement as specified in §§ 1700.14 through 1700.38;

(2) Any instance of an exception and the associated recordkeeping requirements as specified in § 1700.39; and

(3) Any instance of non-compliance with any of the performance standards as specified in §§ 1700.14 through 1700.38. The information recorded must include the following:

(i) Description of any non-compliance and its cause;

(ii) Date of non-compliance;

(iii) Period of non-compliance (time and duration);

(iv) Location of the vessel during non-compliance;

(v) Corrective action taken;

(vi) Steps taken or planned to reduce, eliminate, and prevent non-compliance in the future; and

(vii) If the non-compliance has not been corrected, an estimate of the time the non-compliance is expected to continue.

(c) All records prepared under this section must be maintained for a period of five years from the date they are created. The information in this paragraph will be available to the EPA, states, or the U.S. Coast Guard upon request. Any information made available upon request must be appropriately classified, as applicable, and handled in accordance with applicable legal requirements regarding national security.

§ 1700.42 Non-compliance reports.

The PIC must report any non-compliance, including the information as required under § 1700.41, to the Armed Service's designated office in writing and/or electronically within five days of the time the PIC becomes aware of the circumstances.

[FR Doc. 2017–00153 Filed 1–10–17; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 98

[Docket No. 2016–22986]

RIN 0970–AC67

Child Care and Development Fund (CCDF) Program; Correction

AGENCY: Office of Child Care (OCC), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Correcting amendment.

SUMMARY: The Department of Health and Human Services published a final rule in the **Federal Register** on September 30, 2016 that revised regulations for the Child Care and Development Fund (CCDF) program. The final rule inadvertently included incorrect numbering of two paragraphs. This document corrects the numbering of those two paragraphs.

DATES: Effective on January 11, 2017.

FOR FURTHER INFORMATION CONTACT: Andrew Williams, Office of Child Care, at 202–401–4795 (not a toll-free call). Deaf and hearing impaired individuals may call the Federal Dual Party Relay Services at 1–800–877–8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION: The Department of Health and Human Services published a final rule in the **Federal Register** on September 30, 2016 (81 FR 67438) that revised regulations for the Child Care and Development Fund (CCDF) program based on the Child Care and Development Block Grant Act of 2014. The final rule inadvertently included incorrect numbering of two paragraphs in 45 CFR 98.83(d)(1) regarding requirements for tribal CCDF programs. This document corrects the final regulations by revising this section.

List of Subjects in 45 CFR Part 98

Child care, Grant programs—social programs.

Accordingly, 45 CFR part 98 is corrected by making the following correcting amendments:

PART 98—CHILD CARE AND DEVELOPMENT FUND

■ 1. The authority citation for part 98 continues to read as follows:

Authority: 42 U.S.C. 618, 9858.

■ 2. Revise paragraph (d)(1) of § 98.83 to read as follows:

§ 98.83 Requirements for tribal programs.

* * * * *

(d)(1) Tribal Lead Agencies shall not be subject to:

(i) The requirement to produce a consumer education Web site at § 98.33(a). Tribal Lead Agencies still must collect and disseminate the provider-specific consumer education information described at § 98.33(a) through (d), but may do so using methods other than a Web site;

(ii) The requirement to have licensing applicable to child care services at § 98.40;

(iii) The requirement for a training and professional development framework at § 98.44(a);

(iv) The market rate survey or alternative methodology described at § 98.45(b)(2) and the related requirements at § 98.45(c), (d), (e), and (f);

(v) The requirement that Lead Agencies shall give priority for services to children of families with very low family income at § 98.46(a)(1);

(vi) The requirement that Lead Agencies shall prioritize increasing access to high-quality child care in areas with significant concentrations of poverty and unemployment at § 98.46(b);

(vii) The requirements about Mandatory and Matching Funds at § 98.50(e);

(viii) The requirement to complete the quality progress report at § 98.53(f);

(ix) The requirement that Lead Agencies shall expend no more than five percent from each year's allotment on administrative costs at § 98.54(a); and

(x) The Matching Fund requirements at §§ 98.55 and 98.63.

* * * * *

Dated: January 3, 2017.

Madhura C. Valverde,

Executive Secretary to the Department, Department of Health and Human Services.

[FR Doc. 2017–00093 Filed 1–10–17; 8:45 am]

BILLING CODE 4150–28–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R3–ES–2015–0112; 4500030113]

RIN 1018–BB66

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Rusty Patched Bumble Bee

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered species status under the Endangered Species Act of 1973 (Act), as amended, for the rusty patched bumble bee (*Bombus affinis*), a species that occurs in the eastern and Midwestern United States and Ontario, Canada. The effect of this regulation will be to add this species to the List of Endangered and Threatened Wildlife.

DATES: This rule becomes effective February 10, 2017.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* and on the Midwest Region Web site at *http://www.fws.gov/midwest/Endangered/.* Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov.* Comments, materials, and documentation that we considered in this rulemaking will be available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Twin Cities Ecological Services Field Office, 4101 American Blvd. E., Bloomington, MN 55425; telephone 952–252–0092, extension 210.

FOR FURTHER INFORMATION CONTACT: Peter Fasbender, Field Supervisor, U.S. Fish and Wildlife Service, Twin Cities Ecological Services Field Office, 4101 American Blvd. E., Bloomington, MN 55425, by telephone 952–252–0092, extension 210. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act, a species may warrant protection through listing if it is endangered or threatened throughout all or a significant portion of its range. Listing a species as an endangered or threatened species can only be completed by issuing a rule. This rule will finalize the listing of the rusty patched bumble bee (*Bombus affinis*) as an endangered species.

The basis for our action. Under the Endangered Species Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence. While the exact cause of the species' decline is uncertain, the primary causes attributed to the decline include habitat loss and degradation, pathogens, pesticides, and small population dynamics.

Peer review and public comment. We sought comments on the species status assessment (SSA) from independent specialists to ensure that our analysis was based on scientifically sound data, assumptions, and analyses. We also invited these peer reviewers to comment on our listing proposal. We also considered all comments and information received during the public comment period.

An SSA team prepared an SSA for the rusty patched bumble bee. The SSA team was composed of U.S. Fish and Wildlife Service biologists, in consultation with other species experts. The SSA represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the rusty patched bumble bee. The SSA underwent independent peer review by 15 scientists with expertise in bumble bee biology, habitat management, and stressors (factors negatively affecting the species). We incorporated peer review suggestions into the SSA. The SSA and other materials relating to this final rule can be found on the Midwest Region Web site at *http://www.fws.gov/midwest/Endangered/* or on *http://www.regulations.gov.*

Previous Federal Action

Please refer to the proposed listing rule for the rusty patched bumble bee (81 FR 65324; September 22, 2016) for a detailed description of previous Federal actions concerning this species.

Background

A thorough review of the taxonomy, life history, and ecology of the rusty patched bumble bee (*Bombus affinis*) is presented in the species status assessment report (Szymanski *et al.* 2016, Chapter 2; available at *http://www.fws.gov/midwest/Endangered/* and at *http://www.regulations.gov* under Docket No. FWS–R3–ES–2015–0112). All bumble bees, including the rusty patched, belong to the genus *Bombus* (within the family Apidae) (Williams *et al.* 2008, p. 53).

The rusty patched bumble bee is a eusocial (highly social) organism forming colonies consisting of a single queen, female workers, and males. Colony sizes of the rusty patched bumble bee are considered large compared to other bumble bees, and healthy colonies may consist of up to 1,000 individual workers in a season (Macfarlane *et al.* 1994, pp. 3–4). Queens and workers differ slightly in size and coloration; queens are larger than workers (Plath 1922, p. 192, Mitchell 1962, p. 518). All rusty patched bumble bees have entirely black heads, but only workers and males have a rusty reddish patch centrally located on the abdomen.

The rusty patched bumble bee's annual cycle begins in early spring with colony initiation by solitary queens and progresses with the production of workers throughout the summer and ending with the production of reproductive individuals (males and potential queens) in mid- to late summer and early fall (Macfarlane *et al.* 1994, p. 4; Colla and Dumesh 2010, p. 45; Plath 1922, p. 192). The males and new queens (gynes, or reproductive females) disperse to mate, and the original founding queen, males, and workers die. The new queens go into diapause (a form of hibernation) over winter. The following spring, the queen, or foundress, searches for suitable nest sites and collects nectar and pollen from flowers to support the production of her eggs, which are fertilized by sperm she has stored since mating the previous fall. She is solely responsible for establishing the colony. As the workers hatch and the colony grows, they assume the responsibility of food collection, colony defense, and care of the young, while the foundress remains within the nest and continues to lay eggs. During later stages of colony development, in mid-July or August to September, the new queens and males hatch from eggs.

The rusty patched bumble bee has been observed and collected in a variety of habitats, including prairies, woodlands, marshes, agricultural landscapes, and residential parks and gardens (Colla and Packer 2008, p. 1381; Colla and Dumesh 2010, p. 46; USFWS rusty patched bumble bee unpublished geodatabase 2016). The species requires areas that support sufficient food (nectar and pollen from diverse and abundant flowers), undisturbed nesting sites in proximity to floral resources, and overwintering sites for hibernating queens (Goulson *et al.* 2015, p. 2; Potts *et al.* 2010, p. 349). Rusty patched bumble bees live in temperate climates, and are not likely to survive prolonged periods of high temperatures (over 35 °Celsius (C) (95 °F (F)) (Goulson 2016, pers. comm.).

Bumble bees are generalist foragers, meaning they gather pollen and nectar from a wide variety of flowering plants (Xerces 2013, pp. 27–28). The rusty patched bumble bee is one of the first bumble bees to emerge early in the spring and the last to go into hibernation, so to meet its nutritional needs, the species requires a constant and diverse supply of blooming flowers.

Rusty patched bumble bee nests are typically in abandoned rodent nests or other similar cavities (Plath 1922, pp. 190–191; Macfarlane *et al.* 1994, p. 4). Little is known about the overwintering habitats of rusty patched bumble bee foundress queens, but other species of *Bombus* typically form a chamber in soft soil, a few centimeters deep, and sometimes use compost or mole hills to overwinter (Goulson 2010, p. 11).

Prior to the mid- to late 1990s, the rusty patched bumble bee was widely distributed across areas of 31 States/Provinces: Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Ontario, Pennsylvania, Quebec, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. Since 2000, the rusty patched bumble bee has been reported from 14 States/Provinces: Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Ontario, Ohio, Pennsylvania, Tennessee, Virginia, and Wisconsin (figure 1).

Summary of Biological Status and Threats

The Act directs us to determine whether any species is an endangered species or a threatened species because of any factors affecting its continued existence. We completed a comprehensive assessment of the biological status of the rusty patched bumble bee, and prepared a report of the assessment, which provides a thorough account of the species' overall viability. We define viability as the ability of the species to persist over the long term and, conversely, to avoid extinction. In this section, we summarize the conclusions of that assessment, which can be accessed at Docket No. FWS–R3–ES–2015–0112 on *http://www.regulations.gov* and at *http://www.fws.gov/midwest/Endangered/.* The reader is directed to the Rusty Patched Bumble Bee (*Bombus affinis)* Species Status Assessment (SSA; Szymanski *et al.* 2016) for a detailed discussion of our evaluation of the biological status of the rusty patched bumble bee and the influences that may affect its continued existence.

To assess rusty patched bumble bee viability, we used the three conservation biology principles of resiliency, representation, and redundancy (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years); representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes); and redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, hurricanes). In general, the more redundant, representative, and resilient a species is, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

We evaluated the change in resiliency, representation, and redundancy from the past until the present, and projected the anticipated future states of these conditions. To forecast the biological condition into the future, we devised plausible future scenarios by eliciting expert information on the primary stressors anticipated in the future to the rusty patched bumble bee: Pathogens, pesticides, habitat loss and degradation, effects of climate change, and small population dynamics. To assess resiliency, we evaluated the trend in rusty patched bumble bee occurrences (populations) over time. To forecast future abundance, we used a population model to project the number of populations expected to persist based on plausible future risk scenarios. To

assess representation (as an indicator of adaptive capacity) of the rusty patched bumble bee, we evaluated the spatial extent of occurrences over time. That is, we tallied the number of counties, States, and ecoregions occupied by the species historically, currently, and projected into the future. Ecoregions are areas delineated to capture the variation (representation) in the species. We relied on unique climate conditions to delineate variations, and thus, used the Bailey Ecoregions (Bailey 1983, Bailey *et al.* 1994) and the equivalent Canadian Ecoregions (Ecological Stratification Working Group, 1996) in our analyses. To assess redundancy, we calculated the risk of ecoregion-wide extirpations given the past frequency of catastrophic drought events in each of the ecoregions.

Our analyses indicate that the resiliency, representation, and redundancy of the rusty patched bumble bee have all declined since the late 1990s and are projected to continue to decline over the next several decades. Historically, the species was abundant and widespread, with hundreds of populations across an expansive range, and was the fourth-ranked *Bombus* species in our relative abundance analysis. This information has also been reported by others.

Since the late 1990s, rusty patched bumble bee abundance and distribution has declined significantly. Historically, the rusty patched bumble bee has been documented from 926 populations; since 1999, the species has been observed at 103 populations, which represents an 88 percent decline from the number of populations documented prior to 2000). We assumed any population with at least one record (one individual rusty patched bumble bee seen) since 1999 is current, and thus, the overall health and status of these 103 current populations is uncertain. Indeed, many populations have not been reconfirmed since the early 2000s and may no longer persist. For example, no rusty patched bumble bees were observed at 41 (40 percent) of the current sites since 2010 and at 75 (73 percent) of the 103 sites since 2015. Furthermore, many of the current populations are documented by only a few individuals; 95 percent of the populations are documented by 5 or fewer individuals; the maximum number found at any site was 30. The number of individuals constituting a healthy colony is typically several hundred, and a healthy population typically contains tens to hundreds of colonies (Macfarlane *et al.* 1994, pp. 3–4).

Along with the loss of populations, a marked decrease in the range and distribution has occurred in recent times. As noted above, the rusty patched bumble bee was broadly distributed historically across the Eastern United States, upper Midwest, and southern Quebec and Ontario, an area comprising 15 ecoregions, 31 States/Provinces, and 394 U.S. counties and 38 county-equivalents in Canada. Since 2000, the species' distribution has declined across its range, with current records from 6 ecoregions, 14 States or Provinces, and 55 counties (figure 1); this represents an 87-percent loss of spatial extent (expressed as a loss of counties with the species) within the historical range. The losses in both the number of populations and spatial extent render the rusty patched bumble bee vulnerable to extinction even without further external stressors (*e.g.,* habitat loss, insecticide exposure) acting upon the species.

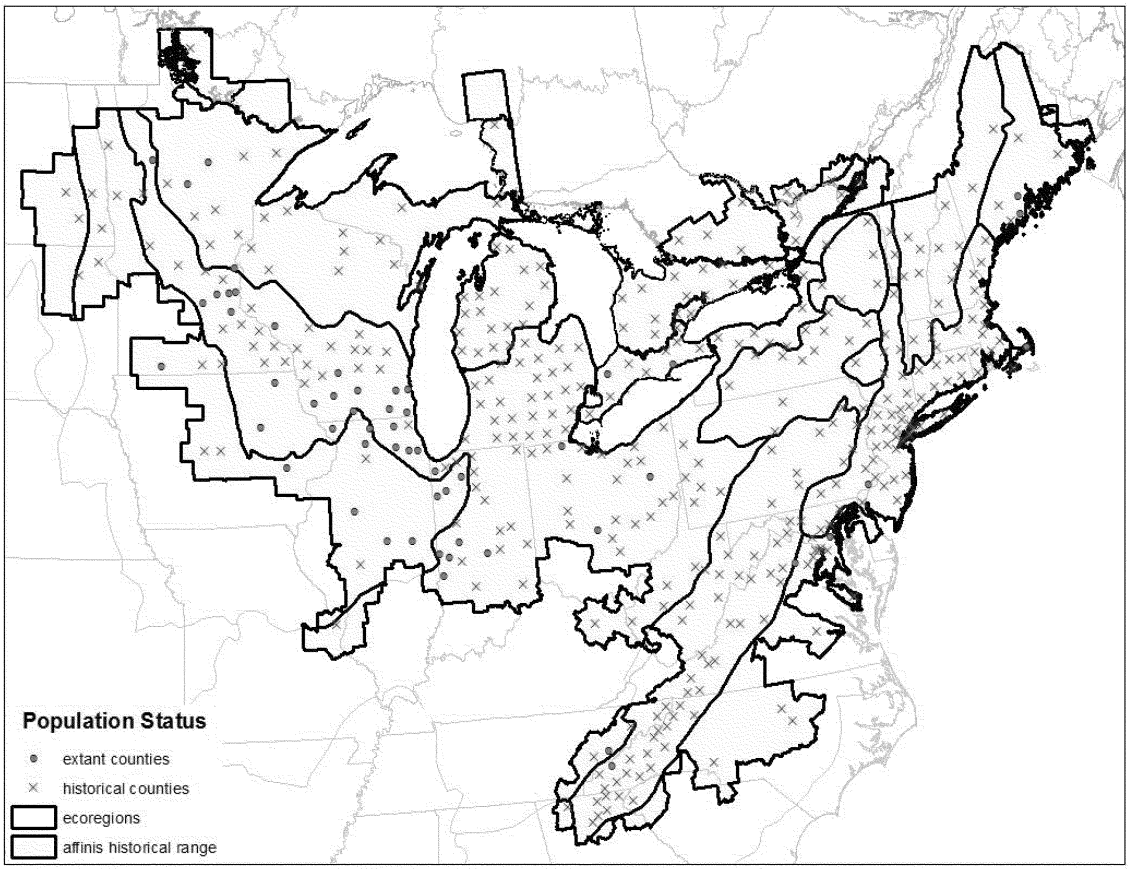

Figure 1. Rusty patched bumble bee range map showing the current distribution. Dots represent counties with a rusty patched bumble bee occurrence since 2000. The Xs represent counties with historical occurrences only (*i.e.*, no occurrences since 2000). (See Szymanski *et al.* (2016, p. 12) for an explanation of current and historical time periods.)

Many of the existing populations, however, continue to face the effects of past and ongoing stressors, including pathogens, pesticides, habitat loss and degradation, small population dynamics, and effects of climate change. A brief summary of these primary stressors is presented below; for a full description of these stressors, refer to chapter 5 of the SSA report.

Pathogens—The precipitous decline of several bumble bee species (including the rusty patched) from the mid-1990s to the present was contemporaneous with the collapse in populations of commercially bred western bumble bees (*B. occidentalis*), raised primarily to pollinate greenhouse tomato and sweet pepper crops, beginning in the late 1980s (for example, Szabo *et al.* 2012, pp. 232–233). This collapse was attributed to the microsporidium (fungus) *Nosema bombi.* Around the same time, several North American wild bumble bee species also began to decline rapidly (Szabo *et al.* 2012, p. 232). The temporal congruence and speed of these declines led to the suggestion that they were caused by transmission or ''spillover'' of *N. bombi* from the commercial colonies to wild populations through shared foraging resources. Patterns of losses observed, however, cannot be completely explained by exposure to *N. bombi.* Several experts have surmised that *N. bombi* may not be the culpable (or only culpable) pathogen in the precipitous decline of certain wild bumble bees in North America (for example, Goulson 2016, pers. comm.; Strange and Tripodi 2016, pers. comm.), and the evidence for chronic pathogen spillover from commercial bumble bees as a main cause of decline remains debatable (see various arguments in Colla *et al.* 2006, entire; Szabo *et al.* 2012, entire; Manley *et al.* 2015, entire).

In addition to fungi such as *N. bombi,* other viruses, bacteria, and parasites are being investigated for their effects on bumble bees in North America, such as deformed wing virus, acute bee paralysis virus, and parasites such as *Crithidia bombi* and *Apicystis bombi* (for example, Szabo *et al.* 2012, p. 237; Manley *et al.* 2015, p. 2; Tripodi 2016, pers. comm.; Goulson *et al.* 2015, p. 3). Little is known about these diseases in bumble bees, and no studies specific to the rusty patched bumble bee have been conducted. Refer to Szymanski *et al.* (2016, pp. 40–43) for a brief summary of those that have the greatest potential to affect the rusty patched bumble bee.

Pesticides—A variety of pesticides are widely used in agricultural, urban, and even natural environments, and native bumble bees are simultaneously exposed to multiple pesticides, including insecticides, fungicides, and herbicides. The pesticides with greatest effects on bumble bees are insecticides and herbicides: Insecticides are specifically designed to directly kill insects, including bumble bees, and herbicides reduce available floral resources, thus indirectly affecting bumble bees. Although the overall toxicity of pesticides to rusty patched or other bumble bees is unknown, pesticides have been documented to have both lethal and sublethal effects (for example, reduced or no male

production, reduced or no egg hatch, and reduced queen production and longevity) on bumble bees (for example, Gill *et al.* 2012, p. 107; Mommaerts *et al.* 2006, pp. 3–4; Fauser-Misslin *et al.* 2014, pp. 453–454).

Neonicotinoids are a class of insecticides used to target pests of agricultural crops, forests (for example, emerald ash borer), turf, gardens, and pets and have been strongly implicated as the cause of the decline of bees in general (European Food Safety Authority 2015, p. 4211; Pisa *et al.* 2015, p. 69; Goulson 2013, pp. 7–8), and specifically for rusty patched bumble bees, due to the contemporaneous introduction of neonicotinoid use and the precipitous decline of the species (Colla and Packer 2008, p. 10). The neonicotinoid imidacloprid became widely used in the United States starting in the early 1990s, and clothianidin and thiamethoxam entered the commercial market beginning in the early 2000s (Douglas and Tooker 2015, pp. 5091–5092). The use of neonicotinoids rapidly increased as seed-applied products were introduced in field crops, marking a shift toward large-scale, preemptive insecticide use. If current trends continue, Douglas and Tooker (2015, p. 5093) predict that neonicotinoid use will increase further, through application to more soybeans and other crop species.

Most studies examining the effect of neonicotinoids on bees have been conducted using the European honey bee (*Apis mellifera*) (Lundin *et al.* 2015, p. 7). Bumble bees, however, may be more vulnerable to pesticide exposure for several reasons: (1) They are more susceptible to pesticides applied early in the year, because for 1 month the entire bumble bee population depends on the success of the queens to forage and establish new colonies; (2) bumble bees forage earlier in the morning and later in the evening than honey bees, and thus are susceptible to pesticides applied in the early morning or evening to avoid effects to honey bees; (3) most bumble bees have smaller colonies than honey bees; thus, a single bumble bee worker is more important to the survival of the colony (Thompson and Hunt 1999, p. 155); (4) bumble bees nest underground, and thus are also exposed to pesticide residues in the soil (Arena and Sgolastra 2014, p. 333); and (5) bumble bee larvae consume large amounts of unprocessed pollen (as opposed to honey), and therefore are much more exposed to pesticide residues in the pollen (Arena and Sgolastra 2014, p. 333).

Habitat loss and degradation—The rusty patched bumble bee historically occupied native grasslands of the Northeast and upper Midwest; however, much of this landscape has now been lost or is fragmented. Estimates of native grassland losses since European settlement of North America are as high as 99.9 percent (Samson and Knofp 1994, p. 418). Habitat loss is commonly cited as a long-term contributor to bee declines through the 20th century, and may continue to contribute to current declines, at least for some species (Goulson *et al.* 2015, p. 2; Goulson *et al.* 2008; Potts *et al.* 2010, p. 348; Brown and Paxton 2009, pp. 411–412). However, the rusty patched bumble bee may not be as severely affected by habitat loss compared to habitat specialists, such as native prairie endemics, because it is not dependent on specific plant species, but can use a variety of floral resources. Still, loss or degradation of habitat has been shown to reduce both bee diversity and abundance (Potts *et al.* 2010, pp. 348–349). Large monocultures do not support the plant diversity needed to provide food resources throughout the rusty patched bumble bees' long foraging season, and small, isolated patches of habitat may not be sufficient to support healthy bee populations (Hatfield and LeBuhn 2007, pp. 154–156; Öckinger and Smith 2007, pp. 55–56).

Although habitat loss has established negative effects on bumble bees (Goulson *et al.* 2008; Williams and Osborne 2009, pp. 371–373), many researchers believe it is unlikely to be a main driver of the recent, widespread North American bee declines (Szabo *et al.* 2012; p. 236; Colla and Packer 2008, p. 1388; Cameron *et al.* 2011b, p. 665). However, the past effects of habitat loss and degradation may continue to have impacts on bumble bees that are stressed by other factors. If there is less food available or if the bumble bees must expend more energy and time to find food, they are less healthy overall, and thus less resilient to other stressors (for example, nutritional stress may decrease the ability to survive parasite infection (Brown *et al.* 2000, pp. 425–426) or cope with pesticides (Goulson *et al.* 2015, p. 5)). Furthermore, bumble bees may be more vulnerable to extinction than other animals because their colonies have long cycles, where reproductive individuals are primarily produced near the end of those cycles. Thus, even slight changes in resource availability could have significant cumulative effects on colony development and productivity (Colla and Packer 2008, p. 1380).

Small population dynamics—The social organization of bees has a large effect on their population biology and genetics (Pamilo and Crozier 1997, entire; Chapman and Bourke 2001, entire; Zayed 2009, entire). The rusty patched bumble bee is a eusocial bee species (cooperative brood care, overlapping generations within a colony of adults, and a division of labor into reproductive and nonreproductive groups), and a population is made up of colonies rather than individuals. Consequently, the effective population size (number of individuals in a population who contribute offspring to the next generation) is much smaller than the census population size (number of individuals in a population). Genetic effects of small population sizes depend on the effective population size (rather than the actual size), and for the rusty patched bumble bee the effective population sizes are inherently small due to the species' eusocial structure, haplodiploidy reproduction, and the associated ''diploid male vortex.''

Like many insect species, the rusty patched bumble bee has haplodiploidy sex differentiation, in which haploid (having one set of chromosomes) males are produced from unfertilized eggs and diploid (containing two complete sets of chromosomes) females from fertilized eggs (Zayed 2009, p. 239). When females mate with related males (as is more likely to happen in small populations), however, half of the females' progeny will develop into diploid males instead of females. Having fewer females decreases the health of the colony, as males do not contribute food resources to the colony (Ellis *et al.* 2006, p. 4376). Additionally, diploid males are mostly unviable or, if viable and mate, produce unviable eggs or sterile daughters (Zayed 2009, p. 239 and references within), so those males that are produced are unable to contribute to next year's cohort. (See Szymanski *et al.* 2016, pp. 17–18 for a more detailed explanation of this life-history characteristic). This reproductive strategy (haplodiploidy) makes the rusty patched bumble bee particularly vulnerable to the effects of a small population size, as the species can experience a phenomenon called a ''diploid male vortex,'' where the proportion of nonviable males increases as abundance declines, thereby further reducing population size. Given this, due to the small sizes of the current populations, some populations may not persist and others are likely already quasi-extirpated (the level at which a population will go extinct, although it is not yet at zero individuals) (Szymanski *et al.* 2016, p. 66).

Effects of climate change—Global climate change is broadly accepted as

one of the most significant risks to biodiversity worldwide; however, specific impacts of climate change on pollinators are not well understood. The changes in climate likely to have the greatest effects on bumble bees include: Increased drought, increased flooding, increased storm events, increased temperature and precipitations, early snow melt, late frost, and increased variability in temperatures and precipitation. These climate changes may lead to decreased resource availability (due to mismatches in temporal and spatial co-occurrences, such as availability of floral resources early in the flight period), decreased availability of nesting habitat (due to changes in rodent populations or increased flooding or storms), increased stress from overheating (due to higher temperatures), and increased pressures from pathogens and nonnative species, (Goulson *et al.* 2015, p. 4; Goulson 2016, pers. comm.; Kerr *et al.* 2015, pp. 178–179; Potts *et al.* 2010, p. 351; Cameron *et al.* 2011a, pp. 35–37; Williams and Osborne 2009, p. 371).

Synergistic effects—It is likely that several of the above summarized risk factors are acting synergistically or additively on the species, and the combination of multiple stressors is likely more harmful than a single stressor acting alone. Although the ultimate source of the decline is debated, the acute and widespread decline of rusty patched bumble bees is undisputable.

Beneficial factors—We are aware of only a few specific measures for bumble bee conservation at any of the current rusty patched bumble bee locations in the United States. In Canada, the species was listed as endangered on Schedule 1 of the Species at Risk Act in 2012, and a recovery strategy has been proposed (Environment and Climate Change Canada 2016, entire). However, we are aware of only nine current occurrences (three populations) in Canada. The rusty patched bumble bee is listed as State endangered in Vermont and Special Concern in Connecticut, Michigan, and Wisconsin. Of these 4 States, Wisconsin is the only State with current records (18 populations). Existing regulatory mechanisms that address threats to the species vary across the species' range; one such mechanism is the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), under which the U.S. Environmental Protection Agency (EPA) determines the ecological risk of all registered pesticides. Also, one way the Service works to ensure pesticides are used with the least amount of hazards to human and environmental health is through its pesticide consultations with the EPA. Since 2013, the Service and EPA, together with the National Marine Fisheries Service (NOAA-Fisheries), have been working collaboratively on the Act's section 7 consultation process. The agencies are currently working together to complete consultations on nine pesticides (carbaryl, chlorpyrifos, diazinon, malathion, methomyl, atrazine, simazine, propazine, and glyphosate), with biological opinions to be completed in December 2017, 2018, and 2022 for those chemicals.

A few organizations have or may soon start monitoring programs, such as Bumble Bee Watch (*www.bumblebeewatch.org*), a collaborative citizen science effort to track North American bumble bees, and the Xerces Society. Also, the International Union of Concerned Scientists Conservation Breeding Specialist Group has developed general conservation guidelines for bumble bees (Hatfield *et al.* 2014b, pp. 11–16; Cameron *et al.* 2011a, entire). There is an increased awareness on pollinators in general, and thus efforts to conserve pollinators may have a fortuitous effect on the rusty patched bumble bee. An example of such efforts is the Ohio Pollinator Habitat Initiative, which is working to improve and create pollinator habitat and raise awareness of the importance of pollinators in Ohio (*http://www.ophi.info/* (accessed December 14, 2016)). Actions such as planting appropriate flowers may contribute to pollinator conservation; however, there is a need to develop regionally appropriate, bumble bee-specific recommendations based on evidence of use (Goulson 2015, p. 6).

In summary, the magnitude of population losses and range contraction to date has greatly reduced the rusty patched bumble bee's ability to adapt to changing environmental conditions and to guard against further losses of adaptive diversity and potential extinction due to catastrophic events. In reality, the few populations persisting and the limited distribution of these populations have substantially reduced the ability of the rusty patched bumble bee to withstand environmental variation, catastrophic events, and changes in physical and biological conditions. Coupled with the increased risk of extirpation due to the interaction of reduced population size and its haplodiploidy reproductive strategy, the rusty patched bumble bee may lack the resiliency required to sustain populations into the future, even without further exposure to stressors.

Summary of Changes From the Proposed Rule

In preparing this final rule, we reviewed and fully considered comments from the public and peer reviewers on the proposed rule. This final rule incorporates minor changes to our proposed listing based on the comments we received, as discussed below in Summary of Comments and Recommendations, and newly available occurrence data. These data allowed us to refine occurrence information, thus, the final numerical results are slightly different from those in the proposed rule.

We have reevaluated the viability of the rusty patched bumble bee in the SSA given this new information, and found that the probability of the species' persistence has not changed from the proposed rule. Specifically, in four of the ecoregions, the probability of extirpation exceeds 90 percent within 10 years, and extirpation in the remaining ecoregions is greater than 90 percent by year 30. The new information we received in response to the proposed rule did not change our determination that the rusty patched bumble bee is an endangered species, nor was it significant enough to warrant reopening the public comment period.

Summary of Comments and Recommendations

In the proposed rule published on September 22, 2016 (81 FR 65324), we requested that all interested parties submit written comments on the proposal by November 21, 2016. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. A newspaper notice inviting general public comment was published in USA Today on October 6, 2016. We did not receive any requests for a public hearing.

We reviewed all comments received in response to the proposed rule for substantive issues and new information. Over 70 commenters provided substantive information. Those commenters included members of the general public, local governments, nongovernmental organizations, State agencies, species experts, agricultural organizations, and industry. We did not receive comments from Federal agencies or Tribes.

We also received more than 100 individual comments supporting the proposed rule to list rusty patched bumble bee, and thousands (more than 90,000) of supportive comments submitted in form-letter format by

members of Environment America, Environmental Action, Friends of the Earth, League of Conservation Voters, Sierra Club, and the Natural Resources Defense Council. Although comments simply expressing support or opposition to the proposed action do not affect the final determination, we appreciate knowing of the public's opinion regarding our action.

All substantive information provided during the comment period has either been incorporated directly into this final determination or addressed below. The new occurrence data we received was incorporated into our SSA analysis.

Peer Reviewer Comments

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited review of the SSA report from 25 knowledgeable individuals with scientific expertise that included familiarity with the rusty patched bumble bee and its habitat, biological needs, and threats. We received responses from 15 of the peer reviewers.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the rusty patched bumble bee. The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the assessment. Peer reviewer comments are addressed in an appendix to the SSA, as appropriate; therefore, our proposal and this final rule were developed in consideration of peer reviewer comments.

Comments From States

(1) Comment: One State transportation agency recommended the Service review literature on bumble bee mortality from vehicle collisions prior to listing, particularly in regard to areas where suitable habitat and highway rights-of-way intersect. The commenting agency was concerned about undue constraints being placed on transportation agencies that may be responsible for implementing wildlife-friendly road crossings.

Our Response: To date, we have not found evidence that suggests vehicle collision is a threat to the rusty patched bumble bee. Through the recovery process, we will be conducting population-specific assessments to identify the stressors acting upon the populations. If vehicle collisions are found to be a problem for a specific population, the Service will work with the applicable county, State, or Federal agency to strategize on measures that could be used to reduce the mortality.

(2) Comment: A few State transportation and agriculture agencies and other commenters indicated that we should conduct additional population surveys prior to listing, because they believed additional populations would likely be found.

Our Response: The listing decision must be made using the best scientific and commercial data available at that time. In this case, we have access to rangewide, rusty patched bumble bee specific survey data from the late 1990s through 2016. Since we published the proposed listing rule, additional survey data have become available to us from large-scale bumble bee surveys in the States of Maine, Michigan, and Minnesota, as well as several smaller scale searches for the species, including citizen science surveys. These surveys were generally focused on prairies and grasslands with good-quality habitat for the species and, therefore, a good potential of hosting the species. However, as in the majority of previous surveys, the rusty patched bumble bee was not detected at most sites.

In 2016, no rusty patched bumble bees were found at the 50 sites surveyed in Michigan, and the species was detected at 15 of the approximately 120 locations surveyed in Minnesota. Maine initiated a statewide 5-year bumble bee atlas program in 2015 to better understand the status of the State's bumble bees through citizen science. The rusty patched bumble bee was not among approximately 4,500 submitted vouchers and photos from Maine in 2015, nor was it detected in the 2016 survey effort. Given the amount of sampling within the range of the rusty patched bumble bee, we find that the likelihood of discovering a significant number of new populations is low. Further, given the condition of the persisting populations and the stressors that those populations face, adding a small number of new populations does not change our endangered determination, since the additional populations likely face similar stressors.

(3) Comment: One State agency expressed an interest in converting more rights-of-way into pollinator habitat to benefit the rusty patched bumble bee and other species, but is concerned that, as these areas become suitable habitat for a listed species, projects in these locations may require section 7 consultations. The agency further stated that consultation concerns could be alleviated via a rule issued under the authority of section 4(d) of the Act, if evidence supports the species being listed as threatened, or by other methods such as assurances from the Service, Safe Harbor Agreements, or programmatic consultations. A few industry groups also requested that the Service develop a species-specific section 4(d) rule, if threatened status is warranted. Such a rule, they state, would help protect the species and allow ongoing conservation efforts. One commenter suggested that a threatened listing, as opposed to endangered, would be a more appropriate classification for this species.

Our Response: We appreciate the agency's interest in enhancing pollinator habitat. These plantings can offer foraging and breeding habitats for pollinators and may connect previously separated habitats and aid in species recovery. Although an increased workload for section 7 consultations may be associated with listing, section 4 of the Act requires the Service to determine whether any species is an endangered or threatened species because of any of the section 4(a)(1) factors. The Service will work with the consulting agency as expeditiously as possible to complete the section 7 consultation processes in a timely manner. Once a species is listed, we offer private or other non-Federal property owners voluntary Safe Harbor Agreements that can contribute to the recovery of species, Habitat Conservation Plans that facilitate private activities (*e.g.,* grazing) while minimizing effects to species, funding through the Partners for Fish and Wildlife Program to help promote conservation actions, and grants to the States under section 6 of the Act.

We have determined that, based on the best scientific and commercial data available at the time of listing, the rusty patched bumble bee warrants listing as an endangered species. A complete discussion is provided in the Determination section of the preamble to this rule. Section 4(d) of the Act allows for development of rules for species listed as threatened. As this species is being listed as an endangered species, a section 4(d) rule cannot be promulgated.

(4) Comment: Several commenters stated that, because the rusty patched bumble bee has such a large historical range, overly burdensome regulations could be placed on a large geographic area. Specifically, one State transportation agency commented that, based on the available status information, the State would support listing with rules that would encourage conservation plan elements that allow State transportation agencies to plan highway roadside management without a large section 7 consultation burden. The agency further commented that it is willing to maintain roadsides that

provide environmental benefits, as long as safety of the traveling public is not compromised and resources are available. Also, the agency wanted to ensure that the Service is aware of potential conflicts with other federally mandated practices related to roadside vegetation management.

Our Response: For federally listed species, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency enters into consultation with the Service regarding the degree of impact and measures available to avoid or minimize adverse effects. We look forward to working with the States and other agencies and organizations in developing ways to conserve the rusty patched bumble bee while streamlining consultation requirements. We may also issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified in title 50 of the Code of Federal Regulations at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

(5) Comment: One State agency was concerned that, although habitat loss and pesticide use may be less likely to be the causes of the decline than pathogens and the effects of climate change, habitat and pesticide use will be the only two factors addressed in the species' recovery plan. If the Service focuses on only those two threats, the commenter stated that recovery will be less efficient, and the listing will impact landowners and farmers to a greater degree than other members of the regulated community. The commenter believes that the Service should consider approaches to pollinators that address all of the relevant factors to truly protect and preserve the rusty patched bumble bee.

Our Response: Landowners deserve great credit for their land stewardship, and we want to continue to encourage those management practices that support bumble bees and other insect pollinators. The Service also strives to find ways to meet people's needs while protecting imperiled species. The Service is committed to working with private landowners, public land managers, conservation agencies, nongovernmental organizations, and the scientific community to conserve the rusty patched bumble bee. Determining why populations persist in some areas and not others will be a key question during recovery planning for this species. All primary stressors will be considered during recovery planning and implementation. More information about stressors acting on each remaining population will help inform effective and efficient recovery planning and recovery actions.

(6) Comment: One State transportation agency recommended that the Service more clearly define the phrase ''where the rusty patched bumble bee is known to occur'' in the discussion of activities that could result in take if performed in areas currently occupied by the species. The agency requested that the Service clarify what is considered as occupied habitat (historical range, current range, or specific known locations). The agency recommended limiting the definition of occupied habitat to current collection records, and limiting requirements for survey work to areas within and directly adjacent to currently known locations.

Our Response: The Service maintains a list of counties that are within the current range of the species on publicly accessible Web sites. We suggest that project proponents contact their State's U.S. Fish and Wildlife Service Ecological Services Field Office for specific information for their locality. The species is likely to be present only in areas with suitable habitat. Suitable habitats are described in the Background section of the preamble to this final listing rule. The phrase ''known to occur'' was inserted to clarify that the rusty patched bumble bee would have to be exposed to actions for those actions to cause take and that the bees would be exposed only if they occur in the area that would be affected by a particular action. That is, we want to avoid the interpretation that the general use of pesticides, for example, could be prohibited per the listing of the rusty patched bumble bee. However, the species will be protected under the Act in any area where it is found to occur.

(7) Comment: The Ohio Department of Transportation (DOT) recommended allowing specialists to start applying for collector's permits before the species is listed so that permitted surveyors are available as needed once the listing process is complete.

Our Response: The Service can include proposed species on section 10(a)(1)(a) permits and encourages the submission of permit applications as soon as possible.

(8) Comment: The Ohio DOT provided information about past conservation projects in Ohio that may benefit the rusty patched bumble bee, even though they were not specifically designed to conserve the species. Examples of existing conservation efforts that have been completed by the agency include protection of mitigation areas that are under conservation easement, development of procedures to limit moving certain rights-of-way, partnerships with the Ohio Pollinator Habitat Initiative, and pilot testing of pollinator plots within rights-of-way.

Our Response: We appreciate Ohio's interest and contribution to conservation and look forward to continuing a cooperative relationship with Ohio and other States as we proceed with recovery planning and implementation for the rusty patched bumble bee. Despite these beneficial measures, however, the status of the species remains dire.

(9) Comment: The Pennsylvania Department of Agriculture noted that one of the threats to the rusty patched bumble bee identified in the proposal is the spread of pathogens from commercial honey and bumble bees. The commenter stated that the Pennsylvania Department of Agriculture does not have the authority or the mandate to regulate or inspect bumble bee colonies that are reared for agricultural purposes. The commenter expressed concern over this lack of oversight if the spread of pathogens from captive to wild bees is going to be better understood and addressed.

Our Response: We appreciate this information and will consider it during the recovery planning process.

(10) Comment: Several State agencies and other commenters provided information regarding ongoing or planned pollinator conservation actions and plans that the Service should consider. One State agency commented that its government is in the process of developing a Pollinator Protection Plan intended to improve and protect the health of pollinators, while also protecting crops, property, and human health. The plan is a nonregulatory guidance document that provides voluntary measures for apiarists and pesticide applicators. Two other State agencies provided information regarding planned future conservation actions, specifically in the States of Ohio and North Dakota. These activities include seeking funding for population surveys, monitoring, and research, and developing pollinator strategy plans. Other commenters cited, for example, that the White House has developed several documents outlining measures

to protect honey bees and other pollinators and that a number of other groups and companies are involved in voluntary efforts to support pollinator health. The commenters note that these efforts will contribute to conservation of the rusty patched bumble bee.

Our Response: We appreciate the pollinator conservation efforts our State partners and others are currently implementing and planning for the future. We look forward to working cooperatively on pollinator, and specifically rusty patched bumble bee, conservation. Despite these beneficial measures, however, the status of the species remains dire.

(11) Comment: Several State agencies and other organizations expressed their support for bumble bee and general pollinator conservation. The commenters conveyed their commitment and willingness to continue or initiate cooperative participation in habitat management and other conservation efforts. Some commenters mentioned beneficial actions they are able to fulfill, such as the following: (1) Creating and maintaining flowering plant habitat and overwintering sites by revegetating project areas with appropriate native seed mixes, (2) timing vegetation-related maintenance activities to minimize impacts to the rusty patched bumble bee and other pollinators, and (3) restricting pesticide and herbicide use at appropriate times of the year.

Our Response: The Service appreciates the commenters' support and interest in rusty patched bumble bee and other pollinator conservation efforts. We agree that the actions as described will contribute to the conservation of the rusty patched bumble bee and other pollinator species. We welcome the involvement of these agencies and organizations as stakeholders in recovery planning for the species. We will work with stakeholders through recovery planning to identify areas that would aid in recovery of this species and to determine the appropriate actions to take. The Service understands the importance of stakeholder participation and support in the recovery of the rusty patched bumble bee and will continue to work with all stakeholders to this end.

(12) Comment: One State agriculture agency questioned the relative role of habitat loss versus other stressors as the true cause of population declines. Specifically, the commenter indicated the Service contradicts the statement that the rusty patched bumble bee may find suitable habitat in agricultural cropping systems by then noting that the flowering period for most crops is too short to sustain their population.

Our Response: Our assessment determined that there is uncertainty about the relative role of the cause(s) of the population declines and range contraction since 1990. Based on the available information, we cannot narrow the primary driver down to a single cause, nor do we have reason to assume that bumble bee losses were due to uniform impacts across the range. Although listing the rusty patched bumble bee is based on population trends showing a severe decline over the past 2.5 decades with no evident prospect of a natural reversal, the individual and combined effects of the multiple possible causes of this decline cannot be ascertained based on available information. Further research into past and ongoing stressors on the species will be an essential component of any future conservation strategy for this species. Rusty patched bumble bees have been observed in agricultural landscapes, although such observances are declining with the decrease in diversity of floral resources in such areas.

(13) Comment: Two North Dakota State agencies commented that the range where the rusty patched bumble bee would be listed should not include North Dakota, nor should critical habitat be designated in the State, because the species has not been found there since 2000.

Our Response: The species receives the protections of the Act wherever found; thus, if the species does occur in North Dakota, it would be protected there. We will consider a range of recovery actions following listing, and will work with local and State partners to determine and implement actions in locations that will benefit the species.

(14) Comment: A few State natural resource agencies, several species experts, and numerous other public commenters concluded that endangered species protections would benefit the recovery of the rusty patched bumble bee and provided additional suggestions for future conservation actions. Some examples of suggested actions include: Creating new pollinator habitat; enhancing existing habitat, limiting, reducing, or eliminating pesticide use and exposure (in part through work with the EPA, U.S. Department of Agriculture, and other agencies); limiting novel disease exposure by regulating commercial bumble bee colony movement; incentivizing habitat improvement activities; increasing or enacting penalties for failure to comply with restrictions and regulations; requiring municipalities to set aside a proportion of undisturbed areas for pollinator use; protecting habitat; initiating captive-rearing programs; conducting additional population surveys; limiting mowing and herbicide spraying; addressing legal barriers (*e.g.,* local weed ordinances) to planting and maintaining habitat with flowering plants; and conducting public outreach and education.

Our Response: There are potentially many pathways to achieving rusty patched bumble bee conservation, including many of the actions suggested by commenters. The most prudent course for recovering the rusty patched bumble bee will be developed in the ensuing years, with input from species experts, appropriate agency personnel, and the public.

Public Comments

(15) Comment: Several commenters questioned the validity of the data sets we used or the analytical methods of those data. Those commenters stated that the Service's assessment relied on incomplete or nontarget survey data and that the analysis had significant data gaps and uncertainties. Thus, those commenters questioned the species' decline as depicted in the SSA. Other commenters validated the Service's use of the best available science and a robust dataset. For example, one of the commenters (a scientist with bumble bee expertise) stated that the analyses and data are reliable and the SSA employs similar techniques as other status assessment tools (*e.g.,* NatureServe rank calculator or IUCN ranking process). They also stated that the SSA analyses are consistent with internationally accepted quantitative methods for assessing extinction risk (Mace *et al.* 2008; IUCN 2012). Several species experts and State natural resource agencies commented that there is strong evidence suggesting that the species has experienced a severe decline and warrants protection.

Our Response: Our analysis of the species' status and the determination to list it as an endangered species is based on the best available information. We thoroughly searched the published literature and sought out unpublished information from bumble bee and other subject matter experts in the United States, Canada, England, and Germany, as well as information from all States within the historical range of the rusty patched bumble bee. The datasets on which we relied span more than 100 years and contain more than 94,000 bumble bee records from within the rusty patched bumble bee's range. Each record has been verified. Furthermore, although surveys were not targeted for

any specific bumble bee, the rusty patched bumble bee was consistently and routinely observed prior to the late 1990s; since then, however, the observations have dropped off precipitously. In response to the decline, a concerted effort was put forth by several experts in the early 2000s to search for rusty patched bumble bees. Despite this increase in effort specifically targeting the rusty patched bumble bee, observations of the rusty patched bumble bee continued to drop. Further, to account for the lack of standardization in the annual survey interval, we grouped records into 10-year blocks to assess populations over time. Finally, although we agree that there are gaps in our knowledge of rusty patched bumble bee ecology, this information is not germane to determining whether the species warrants protection under the Act. These unknowns are important to devising a conservation strategy, and we will be working with partners to resolve many of these information gaps as we proceed with recovery.

(16) Comment: Several industry groups commented that there is no evidence in the SSA report, proposed rule, or elsewhere in the administrative record that the Service requested all available data from each of the States within the historical range of the rusty patched bumble bee or from the cooperative extensions of the USDA Natural Resources Conservation Service.

Our Response: In December of 2015, we requested data and reports from all of the 31 States within the known historical range of the species. We also invited them to attend a followup webinar regarding the SSA process and reminded them of the information request. Furthermore, we requested a review of the draft SSA report from numerous species experts and State natural resources agency staff (*e.g.,* Department of Natural Resources or equivalent) within the range of the rusty patched bumble bee. During that review, we received responses from 15 species experts (as peer reviewers), and 6 State agencies provided us with additional data and information. We also used verified location data available from Bumble Bee Watch (*www.bumblebeewatch.org*), a collaborative project to gather baseline data about the distribution and abundance of North America's bumble bees. Thus, we requested available data from all State agencies, multiple species experts, and other organizations throughout the historical range of the species. Additionally, we requested comments and information from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, and any other interested party during the public comment period on the proposed rule. We considered all information that we received throughout the process in this final listing determination.

(17) Comment: A few commenters stated that the Service did not utilize the best available science and should revise the SSA and the proposed rule to ensure that it is based on the best available science. Further, two commenters requested that the proposed listing be withdrawn until a more complete and thorough evaluation is completed.

Our Response: In accordance with section 4 of the Act, we are required to make listing determinations on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards under the Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines (*www.fws.gov/informationquality/*), provide criteria and guidance and establish procedures to ensure that our decisions are based on the best scientific data available. They require us, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to make listing determinations.

Primary or original information sources are those that are closest to the subject being studied, as opposed to those that cite, comment on, or build upon primary sources. The Act and our regulations do not require us to use only peer-reviewed literature, but instead they require us to use the ''best scientific and commercial data available'' in listing determinations. We have relied on published articles, unpublished research, habitat modeling reports, digital data publicly available on the Internet, and the expertise of subject biologists to make our determination for the rusty patched bumble bee. Although many information sources were used, we acknowledge that data gaps for the species still exist; however, our analyses made the data gaps explicit and we utilized expert opinion to help bridge the data gaps.

Furthermore, in accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited peer review from knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. Additionally, we requested comments or information from other concerned governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties concerning the proposed rule. Comments and information we received helped inform this final rule.

(18) Comment: A few industry organizations commented that the existing administrative record does not support the proposed listing decision. One commenter further stated that, for the Service to find that a species is ''endangered'' or ''in danger of extinction throughout all or a significant portion of its range,'' it needs to show that the species is ''currently on the brink of extinction in the wild.'' They stated that, while the proposed rule suggests that the Service likely believes that the rusty patched bumble bee fits into the third and/or fourth category in the December 22, 2010, memo to the polar bear listing determination file, ''Supplemental Explanation for the Legal Basis of the Department's May 15, 2008, Determination of Threatened Status for the Polar Bear,'' signed by then Acting Director Dan Ashe (hereafter referred to as Polar Bear Memo), the administrative record shows that it fits into neither.

Our Response: The Service used the SSA framework to assess the biological status of the rusty patched bumble bee and describe the species' overall viability. See the Summary of Biological Status and Threats section of this rule for our analysis. As required by section 4(a)(1) of the Act, the Service determined whether the rusty patched bumble bee is an endangered or threatened species based on the five listing factors. The Service did not substitute the assessment of the species' overall viability for the standards and definitions in the Act, but used the SSA report to relate the species' biological status and threats to the five listing factors and definitions of ''endangered'' and ''threatened'' in the Act. A complete discussion of how the Service has applied these terms to the rusty patched bumble bee is provided in the Determination section of this final rule.

In assessing the status of the rusty patched bumble bee, we applied the general understanding of ''in danger of extinction'' discussed in the Polar Bear Memo. The Polar Bear Memo provides further guidance on the statutory difference between a threatened species and an endangered species and clarifies that if a species is in danger of

extinction now, it is an endangered species. In contrast, if it is likely to become in danger of extinction in the foreseeable future, it is a threatened species. As detailed in the Determination section of this final rule, we conclude, based on our analysis of the best scientific and commercial information, that the rusty patched bumble bee is currently in danger of extinction throughout all or a significant portion of its range, and thus meets the Act's definition of an endangered species.

(19) Comment: One species expert commented that he has collected thousands of bumble bee specimens in the range of this species since 1999, but has not observed new rusty patched bumble bee populations in those targeted searches. One entomological organization noted that several of their members who have taken up the study of native pollinators within the last 5 years have never seen a rusty patched bumble bee in the wild. Additionally, two species experts (who also were peer reviewers of the SSA) and two private citizens, who have discussed the decline of this species with numerous other species experts, commented that there is strong evidence the species has disappeared from most of its former range; without legal protection, the scientific consensus is that this species is heading for imminent extinction. Another species expert stated that the rusty patched bumble bee was common throughout the upper Midwest in the early 1990s. The expert started systematic surveys at sites with relatively recent records (1990s) in 2007 but did not find any rusty patched bumble bees until 2010.

Our Response: We appreciate the commenters' confirmation of the data we have, which show a significant decline in rusty patched bumble bee occurrences.

(20) Comment: Several commenters asserted that the proposal fails to account for assumptions in the SSA report or the uncertainties underlying the projections, or that the proposal is premised on uncertainty rather than data. Some of those commenters stated that, although the SSA provides a list of 12 key assumptions made in the analysis, the Service did not acknowledge those assumptions in the proposed listing rule and does not evaluate how those assumptions could affect the conclusions. The commenters further added that limitations and uncertainties are prevalent throughout the SSA report and proposed listing rule, but are not acknowledged or accounted for in either.

Our Response: As stated in the SSA report, our analyses are predicated on multiple assumptions, which could lead to over- and underestimates of viability. In total, however, we find that our predictions overestimated viability of the species. Specifically, we conclude that 9 of the 12 key assumptions overestimated viability. It was unclear to us whether the remaining three assumptions were underestimated or overestimated. Therefore, even without these assumptions, we would have likely underestimated the future extinction risk of the rusty patched bumble bee. Peer reviewers also indicated that our analyses underestimated extinction risk. Although not explicitly stated in the rule, this potential underestimation of the extinction risk to the species would only strengthen our endangered determination.

(21) Comment: Industry groups commented on the Service's approach to modeling and analyses. One group commented the Service should revise the modeling and analysis to account for ongoing public and private efforts to conserve pollinators. The group further encouraged the Service to include additional model scenarios in the SSA addressing changes in habitat while including different disease risk scenarios.

Our Response: We evaluated both positive and negative influences acting upon the species currently and potentially into the future. We developed three scenarios that represent the most likely future scenario, a reasonable worse-case future scenario, and a better-case future scenario. These future scenarios were based on how the primary stressors might act on the populations into the future; all scenarios assumed the current conservation efforts would continue into the future. We could have devised additional future scenarios accounting for different disease and conservation efforts, but the scenarios developed represent a reasonable range of possible outcomes. As all three scenarios yielded similar population trajectories, we did not see a need to model additional scenarios.

(22) Comment: Several other industry groups commented on the inherent limitations and uncertainties associated with conservation biology and projections of species viability. The commenters referenced multiple sources in the publication, Endangered Species Act: Law, Policy, and Perspectives (Baur and Irvin, 2010) and explained that limitations and uncertainties are prevalent throughout the SSA Report and proposed listing, but are not acknowledged or accounted for in either.

Our Response: The Service recognizes inherent limitations and uncertainties in the field of conservation science. We considered the best scientific and commercial data available regarding the rusty patched bumble bee to evaluate its potential status under the Act (see our response to comment 15). In addition, the Service uses the SSA analytical framework to address uncertainties, and the report states multiple assumptions (see our response to comment 20). Modelers, species experts, and endangered species biologists work cooperatively to best match modelling goals and information needs. Further, our Policy on Information Standards under the Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines (*www.fws.gov/informationquality/*) provide criteria and guidance, and establish procedures to ensure that our decisions are based on the best scientific data available.

(23) Comment: Multiple commenters provided additional expert-verified rusty patched bumble bee observations that were not included in our original SSA analyses. In particular, commenters provided rusty patched bumble bee locations that were either verified by experts or submitted to the Bumble Bee Watch database after we conducted our analyses.

Our Response: We have incorporated the information into the Background section of the preamble to this final listing rule. After our original analysis was complete, a small number of additional expert-verified rusty patched bumble bee records were discovered on citizen science Web sites and/or were provided to us by species experts. Of the records provided to us during the comment period, we were not aware of eight additional rusty patched bumble bee records that were located in Wisconsin. All additional rusty patched bumble bee records were incorporated into our database and we re-ran the extinction risk analyses in the SSA; this information is considered in this final rule. The additional records received since our original analyses do not change our overall determination.

(24) Comment: Two commenters provided survey or museum data. In particular, these commenters provided some clarifications about the species in Maine and Virginia and stated that most museum records for this species are

available from the Global Biodiversity Information Facility (GBIF) Web site.

Our Response: We have incorporated the commenters' clarifications into the Background section of the preamble to this final listing rule. We were already aware of the Maine, Virginia, and GBIF records and utilized those data in our SSA analyses.

(25) Comment: A few commenters claimed that there have been recent rusty patched bumble bee observations in Monroe County in West Virginia. They further stated that there may be suitable habitat for the species in Monroe, Summers, and Greenbrier counties in West Virginia.

Our Response: We followed up on this claim and determined that these observations have not been verified by experts. We have asked for further proof of the observations, such as a specimen or clear photographs, such that the species could be positively identified by experts, but have not received the requested information. We have taken note that there may be suitable habitat in additional locations.

(26) Comment: One group commented that the SSA does not support the claim that the rusty patched bumble bee is suffering from significant habitat loss and degradation. Specifically, the group asserted that the Service cannot reconcile the long-term habitat loss with the assertion that the declines in the rusty patched bumble bee populations began in the late 1990s or that the species is a habitat generalist, which would minimize habitat impacts.

Our Response: Although empirical data are currently unavailable regarding the level of habitat loss and degradation affecting the rusty patched bumble bee, we do know that habitat impacts have caused decline of other *Bombus* species (*e.g.,* Goulson *et al.* 2015, p. 2; Goulson and Darvill 2008, pp. 193–194; Brown and Paxton 2009, pp. 411–412). This, in conjunction with the declines in distribution and relative abundance since the 1990s lead us to infer that habitat changes are, at the least, a contributing factor to the current precarious status of this species. Recognizing the uncertainty regarding the effects of habitat loss, we consulted with bumble bee experts with regard to the likely contribution of habitat impacts to the decline of this species. Although their conclusions varied, none of these experts stated that habitat loss and/or degradation played no role in the decline.

We agree that habitat impacts are not likely the sole cause of the rusty patched bumble bee declines; rather, as explained, we find there are a multitude of stressors acting on the species. We acknowledge, however, that habitat losses may have become more of a factor as the colonies have been compromised by other, seemingly new, exposures to specific insecticides and pathogens.

(27) Comment: One commenter stated that habitat loss and degradation as a factor of the rusty patched bumble bee decline is based on the assumption that the abundance of wildflowers has declined due to agricultural intensification, urban development, and increased fragmentation of natural landscapes, but it is not clear that persisting populations of the rusty patched bumble bee are associated with a particular habitat type, such as native prairie, that has undergone a precipitous decline. The commenter asserted that floral abundance has probably not declined greatly in the nonagricultural and relatively undeveloped Appalachian region where the rusty patched bumble bee has likely disappeared.

Our Response: We agree that habitat loss alone cannot explain the disappearance of the rusty patched bumble bee in regions where apparently suitable habitat conditions, including abundant wildflower resources, remain. It follows that multiple stressors, with habitat impacts being only one, have had different relative effects in different parts of the range. We hasten to add, however, that these are inferences based on the conjunction of increased use of pesticides, possible impacts from the pathogen *N. bombi,* and ongoing habitat changes with the drastic decline of the rusty patched bumble bee from the 1990s to present. More investigation needs to be done into the habitat requirements of this species to design effective and focused habitat conservation strategies.

(28) Comment: One group emphasized the importance of woodland habitats that provide early spring ephemeral flowers, which are important food sources for foundress rusty patched bumble bee queens during the time they are establishing colonies. As stated by the commenter, these woodland habitats are subject to a variety of threats including invasive plant and insect species, development, and overgrazing from the overpopulation of white-tailed deer.

Our Response: We agree that early spring floral resources are vital for colony establishment. Conservation strategies for meeting the essential habitat requirements for the rusty patched bumble bee will necessarily include local and microhabitat conditions that address its needs throughout its life cycle and at the population level.

(29) Comment: Several commenters expressed that the information the Service provided on pathogens and their role in the decline of the rusty patched bumble bee is well-supported by available literature and current research findings, whereas another commenter stated that the proposed rule does not cite any evidence that pathogens are affecting the species. That commenter indicated that the proposal states that experts have surmised that *N. bombi* may not be the culpable pathogen causing declines in the species.

Our Response: We acknowledged the uncertainty regarding the role of pathogens in the decline of the rusty patched bumble bee in the SSA report and the proposed rule. Our current understanding of this stressor on the species is largely extrapolated from studies and observations of pathogenic effects on other bumble bee species, as the rusty patched bumble bee is too depleted to provide needed sample sizes. Nonetheless, as several commenters noted and as pathogen experts have determined, there is considerable evidence of pathogens adversely affecting bumble bees. Although, for the most part, bumble bee species carry a large pathogen load with which they have co-evolved, the congruence between the decline of the rusty patched bumble bee and the collapse of the commercially bred western bumble bee (*B. occidentalis*), attributed by some researchers to the microsporidium *Nosema bombi,* led researchers to suspect that this pathogen was at least one agent of the decline. The experts we consulted during the course of the assessment agreed that transmission of one or more pathogens, whether *N. bombi* or not, is very likely to be at least a contributory, if not the primary, cause of the decline of the rusty patched bumble bee. Indeed, one eminent expert pointed out that the rapid and widespread decline of the species may be plausibly explained only by an epizootic event, even if the particular pathogen remains, to date, unknown.

(30) Comment: A commenter stated that the proposal asserts that a variety of pesticides are impacting the rusty patched bumble bee but provides no direct evidence. They further commented that specific data showing that neonicotinoids have affected the rusty patched bumble bee specifically are not cited, because, they assert, no studies have been performed to examine the asserted impacts of neonicotinoid use on the rusty patched bumble bees. The commenter stated that, absent such data, alleged impacts from pesticides do

not support the proposed listing decision.

Our Response: We acknowledge that although other bumble bee species have been studied, we are not aware of any direct studies of the effects of pesticides on the rusty patched bumble bee. As with most species that have exhibited severe declines, potentially lethal studies (*e.g.,* toxicity studies) on the species are no longer feasible, because not enough specimens are available for a scientifically meaningful study. We infer, however, that studies of the effects of pesticides on other bumble bee species will likely reflect their effects on the rusty patched bumble bee, because these species have similar life-history traits (*e.g.,* generalist foragers collecting pollen from the same food sources). We used studies that documented impacts to other bumble bees as surrogates to estimate the impacts of various stressors on the rusty patched bumble bee. The pesticide discussions in the SSA focused on research that studied the effects of various chemicals on bumble bees (*Bombus spp.*), noting that much research has also been conducted on the European honey bees (*Apis mellifera*). Bumble bees may, in fact, be more vulnerable to pesticide exposure than European honey bees.

(31) Comment: Several commenters suggested that the Service use the U.S. Geological Survey (USGS) National Pesticide Synthesis data to illustrate trends such as the increasing application of neonicotinoids over time within the rusty patched bumble bee's range.

Our Response: We used USGS National Pesticide Synthesis data to help understand the annual regional trends of three neonicotinoids (imidacloprid, clothianidin, and thiamethoxam) within the historical range of the rusty patched bumble bee. We understand the limitations of the data: specifically, only county-level estimates were provided in the USGS dataset and extrapolation methods were used to estimate pesticide use for some counties. Therefore, we used these graphs simply to discern possible temporal correlations between bumble bee (and some species of butterfly) declines and neonicotinoid use. We acknowledged that the exact causes of the decline remain uncertain. In the SSA, we noted that we could have also evaluated the trends in use of numerous other chemicals, but focused only on the three commonly used neonicotinoids, as they represent a class of chemicals that have been implicated in the decline of bees. We will continue to review and evaluate the use of various chemicals and impacts on the rusty patched bumble bee during recovery planning.

(32) Comment: Two commenters provided recent research papers on risks to bees posed by pesticides that were not included in our analyses, including new studies on the effects of pesticides to bumble bees and other bees, research on the effects fungicides have on bees, studies about pesticide contamination of pollinator habitat, as well as correlational studies attempting to understand the effects of pesticides on pollinators at a timescale relevant to population-level processes.

Our Response: We appreciate the new information. Studies demonstrating lethal and sublethal effects of pesticides to bees and studies correlating pesticide use trends to pollinator population declines provide further evidence that pesticides likely contributed to the decline of the rusty patched bumble bee. We will continue to review the effects of pesticides during recovery planning and may use an adaptive management approach to recovery to refine actions related to pesticides.

(33) Comment: A commenter, citing Watts and Williamson (2015), stated that the persistent organochlorines, like Endosulfan and the highly toxic organophosphates, have been replaced by the neonicotinoids in several countries, trading one set of problems for another. The commenter noted that replacement of one suite of harmful chemicals with another perpetuates an endless cycle of replacing one chemical with another.

Our Response: We mention the potential risk of organophosphates to honey bees in our SSA and will consider reviewing the effects of organochlorines to bumble bees in greater detail during recovery planning for this species.

(34) Comment: One commenter requested that the Service review the pesticides used in mosquito control to see if they have resulted in bee declines, and, if so, ban their use.

Our Response: The issue of banning use of specific chemicals is outside the scope of this rulemaking. During the recovery planning process, we will work closely with contaminant specialists within and outside the government to investigate chemicals that may be causing population-level harm to the rusty patched bumble bee.

(35) Comment: Several commenters asserted that the analysis of the relationship between neonicotinoids and rusty patched bumble bee population declines relies on the assumption that the introduction of neonicotinoids coincided with a steep decline in rusty patched bumble bee populations. They suggest that the decline in rusty patched bumble bee populations preceded the widespread use of neonicotinoids in its range, and that the bees are persisting in places with widespread neonicotinoid use on corn and soybeans. The decline of the rusty patched bumble bee, the commenters conclude, began before the advent of the neonicotinoids, with the sharpest decline of the bee beginning in the 1990s and coinciding with the use of imidacloprid beginning in 1995, which had minimal use compared to imidacloprid usage beginning in 2000. Given the uncertainty about the relevance of the timing of neonicotinoids' introduction to rusty patched bumble bee population decline, the commenters question its emphasis in the SSA.

Our Response: The EPA approved the registration of imidacloprid in 1994, and it became widely used in the United States starting in the mid-1990s; clothianidin and thiamethoxam entered the market beginning in the early 2000s. According to the USGS National Synthesis database, beginning in 1995, imidacloprid was used in nearly every State with historical records of the rusty patched bumble bee, and use increased and spread in the following years. Although it is difficult to pinpoint exactly when the species' decline began, the data show that the precipitous declines of the rusty patched bumble bee manifested around 1995 and continued into the early 2000s. This time period coincides with increased neonicotinoid use.

It is difficult to determine how much of the species' decline is due to a single factor, including neonicotinoids, as there are a myriad of other stressors (*e.g.,* pathogens, parasitoids, and diseases) acting upon the species, and all likely interacting synergistically. However, lethal and sublethal effects to bees have been documented for this class of chemicals, so it is reasonable to think that they likely are contributing to the decline. Furthermore, the additive and synergistic effects of exposure to multiple pesticides at multiple times may exacerbate the toxicity of exposure to any single pesticide, and thus, additional pesticides in combination with others may pose risks to bees as well.

(36) Comment: Several commenters stated that, by focusing on pesticides as a risk factor in the SSA, the Service appears to have ignored the advice of the experts they surveyed, who concluded that 31 percent of the rusty patched bumble bee decline was likely due to pathogens and 23 percent of the decline was likely due to habitat loss.

Other stressors included pesticides (15 percent), climate change (15 percent), and small population dynamics (15 percent). Yet, in the SSA synopsis, pesticides are listed second among the top three stressors causing the decline of the species.

Our Response: The list of potential causative factors in the SSA synthesis was not ordered by relative importance; rather, it was listed alphabetically. According to expert input and literature review, we find that habitat loss and degradation, pathogens, pesticides, and small population dynamics are the primary contributing factors to the declines of the rusty patched bumble bee. Although the relative contribution of pesticides, pathogens, loss of habitat, small population size, and climate changes is not known, the prevailing data indicate that multiple threats are acting, most likely synergistically and additively, on the species. This combination of multiple threats is likely more harmful than a single threat acting alone.

(37) Comment: One commenter noted that the SSA does not cite field studies that found no adverse effects when bees are placed near treated crops and allowed to forage naturally. The commenter provided citations for four field studies with bumble bee colonies placed in or near bee-attractive crops grown from seeds treated with neonicotinoids, and which reported no adverse effects. They further stated that several published studies have reported adverse effects on developing bumble bee colonies that were exposed in confined settings to artificial diets spiked with various levels of neonicotinoids. The commenter also stated that the SSA does not mention that test levels or exposure scenarios in most of these studies have been criticized as unrealistically high.

Our Response: We reviewed over 100 published reports and papers regarding the effects of pesticides to bees, focusing primarily on bumble bee studies. Most of the laboratory studies that we reviewed reported at least one sublethal and/or lethal effect to bees, as did some of the field studies. We acknowledge that many studies that we reviewed were not conducted in the field, and we acknowledge that there are studies that did not find adverse effects. The totality of data, however, suggests some insecticides kill bumble bees and others cause sublethal effects. Further, researchers often also note the limitations of laboratory studies. For example, many lab studies that we reviewed were conducted over relatively short-term exposure durations (*e.g.,* 4 to 28 days), which may not reflect realistic longer term exposures in the field. Additionally, although bees likely experience exposure to multiple chemicals in the field, most studies did not address the risk posed from the additive and synergistic effects of multiple exposures to multiple pesticides. Exposure to multiple pesticides over multiple time periods may exacerbate the toxicity of exposure to any single pesticide.

(38) Comment: Two commenters were concerned that the pesticide discussion fails to consider all of the information and expertise available from the government and private sources. For example, these commenters state that there is no reference to any of the EPA pesticide evaluation methods for bees, risk assessments for pesticide products, or discussions with scientists and risk managers in EPA's Office of Pesticide Programs, whose input should be essential in any science-based discussion of pesticide risks to pollinators. According to the commenters, this can lead to an emphasis on pesticides as a causal agent that may not be warranted. The commenters noted that the EPA is currently reviewing the risk of neonicotinoids to pollinators, and has released draft pollinator risk assessments for some of the compounds.

Our Response: The Service considered several documents that were not cited in the SSA. Although not cited in the SSA document, for example, the Service reviewed EPA's ''Preliminary pollinator assessment to support the registration review of imidacloprid'' (January 2016); this assessment evaluated the risk of imidacloprid to managed honey bees at both the individual and colony levels and concluded that imidacloprid can pose risks to honey bee health. Notably, the assessment did not evaluate risks to other bee or bumble bee species, nor did it evaluate the risk when imidacloprid is mixed with other chemicals, which is a more realistic field condition. We also reviewed the summary of EPA and Health Canada's ''Re-evaluation of Imidacloprid—Preliminary Pollinator Assessment'' (dated January 18, 2016 and available online at *http://www.hc-sc.gc.ca/cps-spc/pest/part/consultations/_rev2016-05/rev2016-05-eng.php*); this assessment indicated that the results of the available Tier II colony-level feeding studies with non-*Apis* bees (non-honey bee) suggested that bumble bees may be more sensitive to imidacloprid exposure than honey bees, and that measured pollen and nectar residues were often above the lowest dose where colony effects were detected in bumble bee feeding studies, suggesting a potential for risk to bumble bees. Lastly, we reviewed ''Joint PMRA/USEPA Re-evaluation Update for the Pollinator Risk Assessment of the Neonicotinoid Insecticides''(January 6, 2016), which provided a timeline of anticipated milestones for EPA's pollinator assessments—only the imidacloprid assessment was anticipated to be in preliminary form before the Service needed to complete its proposed determination. Thus, although not cited in the SSA, we reviewed the pertinent literature that was available to us.

(39) Comment: Several commenters stated that the Service should analyze the potential effects of herbicides separately from insecticides and fungicides in the stressor analyses. As ''pesticides'' is used as a general term to describe insecticides, fungicides, and herbicides, the commenters note that the SSA analysis and supporting scientific studies are specific to the effects of neonicotinoids, a distinct class of insecticides. They assert that the Service did not provide enough discussion or justification for including herbicides, or pesticides in general, as a primary stressor for the rusty patched bumble bee.

Our Response: While the SSA evaluated neonicotinoids as potential stressors to the rusty patched bumble bee, we also acknowledged that numerous other chemicals have documented lethal and sublethal effects to bumble bees. Our discussion of herbicides in the SSA primarily focused on the use of herbicides in agricultural, urban, and natural landscapes and the likely consequential loss in flowering plants and, therefore, food availability for the rusty patched bumble bee.

(40) Comment: One group requested that the Service provide definitive and functional guidance addressing herbicide use specifically, as distinct from pesticide or insecticide use.

Our Response: Functional guidance addressing herbicide use methods goes beyond the scope of this final listing document and is more appropriate for recovery planning. We will consider developing management protocols for herbicide use during recovery planning for this species. In the interim, there are guidelines available from Xerces Society and other organizations engaged in pollinator conservation and management.

(41) Comment: Some industry groups asserted that the information on possible effects of climate change is too speculative to use in the analysis, as the potential effects identified in the assessment have not yet occurred, and the potential impact on the rusty

patched bumble bee specifically remains unstudied and unknown. One commenter also expressed that, because the proposal does not project when such effects might occur, there is a ''temporal disconnect that precludes relevance to any determination that the rusty patched bumble bee currently is 'on the brink of extinction.' '' The commenters requested that the Service provide additional information on the species' climate change vulnerability assessment and relevant data to support the conclusion that climate change is one of the factors contributing to the proposed endangered status.

Our Response: Although we developed a potential future scenario in the SSA that included impacts from climate change, all the future scenarios contribute to our understanding of the risk to the species, and thus the decision to list the rusty patched bumble bee as an endangered species. The widespread, precipitous decline that has occurred to date has rendered the rusty patched bumble bee in danger of extinction. During the recovery planning process, however, we will investigate more closely the vulnerability of rusty patched bumble bee to the effects of climate change and the implications of this vulnerability.

(42) Comment: One commenter claimed that the Service's assertion that the small population size of the rusty patched bumble bee and the species' reproduction strategy make the species more susceptible to impacts from other factors is faulty, because that position assumes that the species' population size and range have dramatically decreased. The commenter contended that the proposal does not demonstrate such a decline with reliable data.

Our Response: Based on the best available data, we have determined that the rusty patched bumble bee has declined precipitously with remaining known populations documented by only a few individual bees. As explained in the SSA, a healthy population consists of multiple viable colonies, which are composed of hundreds of worker bumble bees. It is unknown what exact small population size would trigger a diploid extinction vortex phenomenon, but given the data, it is reasonable to conclude that the remaining populations are below sustainable levels, and, if they have not yet reached vortex levels, they will soon if declines are not arrested.

(43) Comment: Several commenters mentioned additional stressors or threats the Service did not evaluate in the assessment, including the role of natural predators, the role that managed pollinators play in spreading and amplifying diseases to bumble bees and the pathogenic effects those diseases can have on bumble bees, vehicle collisions, and invasive plant and animal species.

Our Response: Our analysis in the SSA focused on what we determined to be the primary stressors negatively affecting the rusty patched bumble bee: pathogens, pesticides, the effects of small population size, habitat loss and degradation, and the effects of climate change. Although we recognize there may be other factors negatively affecting the species, these factors are not likely as influential as those mentioned. We will, however, consider the role of additional stressors in our recovery planning efforts and the effects of such stressors on specific populations, as appropriate.

(44) Comment: One organization expressed concerns about how the Service defined the range of individual populations of the rusty patched bumble bee. Specifically, the Service assigns a 10-kilometer (km) range for colonies in the habitat needs discussion, but the comment notes that an individual rusty patched bumble bee range is less than 1 km (0.62 miles).

Our Response: We used a 10-km × 10-km area to delineate populations, not colonies. All records found within a 10-km × 10-km area were considered to be a single population, which is composed of multiple colonies. An individual bumble bee generally occupies an area less than 1 square km, but the populations, which are composed of multiple individual bees in multiple colonies, span across a larger range.

(45) Comment: One organization expressed concern that the Service did not incorporate growing season hardiness zones into the range estimates, especially since the species is active early and late in the growing season. They provide the example that there may be portions of a county with a shorter floral growing season than other parts of the same county.

Our Response: The range of the rusty patched bumble bee represents the broad-scale occurrence of the species and was derived by plotting all records of occurrence; that is, where individual bumble bees were recorded. The suitability of any given site is influenced by a myriad of factors, including providing sufficient quantity of floral resources for the entire active season. Whether a particular spot on the landscape provides this requirement was not assessed in the SSA; however, this assessment is not needed to determine the broad range of the species.

(46) Comment: A few commenters stated that rusty patched bumble bee populations appear to be persisting in the Midwest or areas of high agriculture, where pesticide use is prevalent.

Our Response: Rusty patched bumble bee populations still exist in the Midwest. Although we have not completed a thorough site-specific analysis, and although there are some survey biases to consider, we noticed that many of the remaining populations are within urban areas where they may not be exposed to the same level of pesticides as in the rural, agricultural areas. The extent of rusty patched bumble bee persistence in agricultural areas and the corollary impact of pesticides on the species will be investigated further during recovery planning.

(47) Comment: A few industry commenters stated that there are ongoing studies by USDA—Agricultural Research Service and others that will aid in addressing knowledge gaps and assist the Service in making an informed decision and complying with the Act's mandate to use the best available science. Many of these studies conclude in 2017.

Our Response: While we are pleased to hear of additional studies that may soon become available and assist us and our partners with a recovery plan for the species, we are required to make our listing determinations based on the best scientific and commercial data available at the time of our rulemaking. We searched the published and gray literature, and solicited peer review of our evaluation of the available data. These studies are not available for the rulemaking, but results will certainly be used in future recovery planning efforts.

(48) Comment: A few commenters noted that the EPA has a statutory role to determine the ecological risk of all registered pesticides under FIFRA. They referenced the EPA's comprehensive, regulatory process for registering pesticides.

Our Response: We recognize the work that EPA does to protect pollinators and acknowledge the statutory role that EPA has under FIFRA. The EPA uses honey bees in its pesticide risk assessments (EPA 2014, pp. 2 and 6); however, our SSA details why we conclude that bumble bees are likely more susceptible than are honey bees to pesticides. In fact, the EPA ''acknowledges the uncertainty regarding the extent to which honey bees may be a reasonable surrogate for native insect pollinators'' (EPA 2015, p. 2). However, we have added an acknowledgment of FIFRA as a regulatory mechanism in the final rule.

(49) Comment: One commenter stated that, ''considering the wide-ranging and

extensive impact to farmers attempting to use pesticides vital to sustaining crop production,'' inconsistent recommendations from the Service and EPA could create an ''impossible situation'' for the agricultural community if they follow label restrictions according to one federal standard, but are then in potential violation of another federal standard for that same action.

Our Response: In this final rule, we provide some actions prohibited by section 9 of the Act and specifically use the phrase ''where the species is known to occur.'' We use this phrase to clarify that there is a geographical context to potential avenues of illegal take; that is, we want to avoid the interpretation that the general use of pesticides, for example, could be prohibited per the listing of the rusty patched bumble bee. More specifically, the rusty patched bumble bee would have to be exposed to particular actions for those actions to cause take, and the bee could only be exposed if it occurs in the project area. The Service can provide technical assistance to help determine whether the rusty patched bumble bee may be present in a specific area. If noxious weed control is needed where the rusty patched bumble bee is likely to be present, for example, the Service will work with landowners or land managers to identify techniques that avoid take or allow for it to occur legally.

(50) Comment: One utility company expressed concerns that, if the rusty patched bumble bee is listed, the requirements of two regulatory agencies will be in conflict; the North American Electric Reliability Corporation requires a utility to clear vegetation that interferes with transmission and distribution lines, and the Service would prevent a utility from doing so to protect a listed species and its habitat. The commenter suggests that, because of this potential conflict between two legal requirements, the Service should work with electric cooperatives to identify a means by which they are able to meet both obligations.

Our Response: Listing the rusty patched bumble bee as an endangered species does not prevent utilities or any other entity from complying with other laws. If such compliance will incidentally lead to take of rusty patched bumble bees, the project proponent is required to obtain the appropriate permit or exemption before implementing the action. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

(51) Comment: One commenter noted that the major crops grown within the range of the rusty patched bumble bee that receive neonicotinoid treatment are corn and soybeans, and that use of neonicotinoids on these crops is mainly as a seed treatment, which limits potential exposure to bees.

Our Response: The Service is aware that many seed treatments are widely used for corn and soybean crops. The EPA's risk assessment process for evaluating soil applications and seed treatments is similar to its assessments for foliar applications, ''except that risk from contact exposure is not evaluated'' (EPA 2014 p. 10). The EPA states, ''For soil application, it is generally assumed that exposure of honey bees from direct contact with the pesticide is minimal, given the nature of the application to bare soil, although exceptions may occur if applications are made with bee-attractive weeds present.'' However, they noted that ''Contact exposure of non-*Apis* bees (solitary and ground-nesting bees) may be significant with soil applications, although the extent of this potential exposure is uncertain. It is also noted that for seed treatments, exposure of bees to pesticides has been documented via drift of abraded seed coat dust when planting under certain conditions; however, there are multiple factors determining the extent to which dust-off occurs'' (EPA 2014, p. 10). Because rusty patched bumble bee is a ground-nesting species and fertilized queens overwinter in the soil, they could be susceptible to additional exposure pathways that honey bees are not (*e.g.,* neonicotinoids in the soil that have not yet been taken up by plants and thus cause an additional dermal exposure pathway). Therefore, it is reasonable to conclude that rusty patched bumble bees may be more exposed to insecticides used as seed treatments (because the chemical can move through the soils (*e.g.,* Goulson 2013, pp. 979–980)) than are honey bees, which nest above ground.

(52) Comment: One commenter stated that, under section 4(b) of the Act, the Service is required to take ''into account those [conservation] efforts, if any, being made by any State'' before making a listing decision. Moreover, the Service's Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) requires the Service to consider conservation efforts, including conservation efforts that have not yet been implemented or demonstrated their effectiveness, so long as the Service is certain that the conservation effort will be implemented and, once implemented, will be effective. The commenters contended that failure to comply with PECE is grounds for vacating a final listing rule. Other commenters stated that the proposed rule does not sufficiently address the significant public and private efforts currently under way to address pollinator issues that will benefit the rusty patched bumble bee.

Our Response: In the Summary of Biological Status and Threats section of this final rule, we include consideration of conservation efforts by States and other beneficial factors that may be affecting the rusty patched bumble bee. The Service's PECE policy applies to formalized conservation efforts (*i.e.,* conservation efforts identified in a conservation agreement, conservation plan, management plan, or similar document) that have not yet been implemented or those that have been implemented but have not yet demonstrated whether they are effective at the time of listing. We acknowledge that increased awareness of and conservation measures for pollinators in general may have fortuitous beneficial effects on rusty patched bumble bee. We are not aware of any formalized conservation efforts for any of the specific rusty patched bumble bee locations.

(53) Comment: One commenter supports creating environments where the rusty patched bumble bee can rebound while avoiding a regulatory framework that impedes responsible agricultural practices. They further noted that doing so would require cooperating agencies to receive adequate long-term Federal funding to promote habitat restoration or enhancements.

Our Response: The listing determination must be made solely on the biological status of the species. That said, the Service generally considers regulatory restrictions alone to be both insufficient and less preferred as a primary means of achieving the conservation of listed species. We seek to work collaboratively with other agencies and organizations (public and private), and with individual private landowners on proactive conservation efforts.

(54) Comment: One commenter, supporting the action to list the rusty patched bumble bee, urged the Service to work cooperatively with Canada on conservation efforts for this species.

Our Response: We appreciate the interest in bumble bee conservation and look forward to continuing our coordination with Canada as we begin recovery planning and implementation for the rusty patched bumble bee.

(55) Comment: One commenter stated that accurate identification of the rusty patched bumble bee in the field may be difficult, even for a trained specialist. Voucher specimens of sterile female workers or males may be essential to understand and study pollinator populations. As such, the possibility of accidental take of a listed insect should be considered and permitted. Another commenter stated that unauthorized handling or collecting of the species is not enforceable because, as the species is difficult to identify, the specimen would require handling when conducting surveys to verify that a prohibited violation had taken place.

Our Response: Under section 10 of the Act, the Service may permit limited take of listed species for scientific purposes or to enhance the propagation or survival of the species. The Service will consider incidental take for otherwise legal activities in our permitting (*e.g.,* section 10 recovery permits) processes. Because the objectives of surveys may vary across the range of these species, we recommend contacting the Service's Ecological Services Field Office in your State to discuss the appropriate survey protocol to use for particular projects, habitat types, and geographic areas. To facilitate effective cooperation among agencies, organizations, and individuals interested in the distribution of the rusty patched bumble bee, the Service will consider maintaining a list of individuals who meet certain qualifications for conducting reliable identification for the target species.

(56) Comment: A commenter remarked that there are several other apparently declining species of bumble bee including yellow-banded bumble bee (*B. terricola*) and American bumble bee (*B. pennsylvanicus*) that need evaluation and monitoring.

Our Response: As part of its ongoing efforts to improve the effectiveness and implementation of the Act and provide the best possible conservation for our nation's imperiled wildlife, the Service has developed a National Listing Workplan (Workplan) for addressing listing and critical habitat decisions over the next 7 years. The yellow-banded bumble bee (*B. terricola*), for example, is in the Workplan schedule for evaluation under the Act.

(57) Comment: Several commenters asserted that the Act has failed to recover or delist 98 percent of all listed species, and that those that have been removed were due to extinction or data error. Therefore, they contend, listing the rusty patched bumble bee as an endangered species will have no positive impact on its recovery. The commenters feel that listing the rusty patched bumble bee as endangered may negatively impact current pollinator conservation efforts being undertaken across the country.

Our Response: The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. Protection under the Act has prevented the extinction of more than 98 percent of listed species. Once a species is listed as either endangered or threatened, the Act provides protections from unauthorized take and many tools and opportunities for funding to advance the conservation of such listed species. Further, receiving protections under the Act facilitates conservation planning and the development of conservation partnerships. The Act has been and continues to be extremely effective in preventing the extinction of species. The statement that the commenter made that ''the Act has failed to recover or delist 98 percent of all listed species, and that those that have been removed were due to extinction or data error'' is erroneous—there are notable exceptions to this statement where species have been removed due to successful recovery, such as the bald eagle and peregrine falcon.

The listing of a species does not obstruct the development of conservation agreements or partnerships to conserve the species. Once a species is listed as either endangered or threatened, the Act provides many tools to advance the conservation of listed species. Conservation of listed species in many parts of the United States depends on working partnerships with a wide variety of entities, including the voluntary cooperation of non-Federal landowners. Building partnerships and promoting cooperation of landowners are essential to understanding the status of species on non-Federal lands, and may be necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

(58) Comment: Several commenters stated that the Service should recognize current national attention on pollinators, and that these ongoing conservation efforts should allow a warranted but precluded listing because the wide array of conservation actions for other pollinators may lead to recovery of the rusty patched bumble bee.

Our Response: In making our determination as to whether the rusty patched bumble bee meets the Act's definition of an endangered or threatened species, we considered the current conservation measures available to the species (see Summary of Biological Status and Threats—*Beneficial factors*). The increased effort to conserve pollinators may have an incidental positive impact on the rusty patched bumble bee. However, we are not aware of specific conservation measures for bumble bees at any of the current rusty patched bumble bee locations in the United States. Although general pollinator conservation efforts can provide some benefits to the rusty patched bumble bee, bumble bees like this species have unique life-history characteristics and biological requirements that are not addressed by these general efforts. Because the rusty patched bumble bee has experienced such severe population declines throughout its range, there is a need to develop and implement regionally appropriate, bumble bee-specific recommendations to aid in recovery of the species.

(59) Comment: Numerous commenters expressed concern about the decline of pollinators and the need to prevent extinction of the rusty patched bumble bee to protect biodiversity and address pollinator declines. These commenters cited the value of bumble bees as important pollinators of wildflowers (and other wild plants) and as the chief pollinator of many economically important crops. Another commenter stated that, although they agreed that the rusty patched bumble bee is an important pollinator, there are still numerous other species, wind, and other methods that act as pollinators.

Our Response: Although these comments do not directly address information pertaining to the listing determination of the rusty patched bumble bee, we want to acknowledge their validity and importance. In the United States and globally, native bees are responsible for most pollination of plants that require insect pollination to produce fruits, seeds, and nuts. As such, they not only pollinate economically important crops, but provide the foundation of functioning ecosystems; pollination is required for plant reproduction, and plants are the base of the food chain. The plight of the rusty patched bumble bee is not an isolated occurrence, but a symptom of widespread decline of many insect pollinators. Measures to identify and address threats and prevent the extinction of the rusty patched bumble bee will help conserve other native pollinators. It is important to recognize that the rusty patched bumble bee occurs in very few locations. Measures to identify and address threats to pollinators is needed beyond the current

occurrences of the rusty patched bumble bee—they are needed throughout the United States. It is true that there are other forms of pollination as mentioned (*e.g.,* wind, other insect species, birds, and mammals). However, the Act requires us to determine whether listing is warranted based on whether a species meets the definitions of an endangered or threatened species because of any of the section 4(a)(1) factors, not on the basis of whether it fulfills a unique ecosystem function.

(60) Comment: Several commenters noted how the rusty patched bumble bee would benefit from listing under the Act. Those commenters noted such benefits as the following: (1) Protecting remaining populations from site-specific threats, (2) the bees' habitat will benefit from critical habitat designation, (3) developing a recovery plan, (4) Federal agencies will need to address threats to the species, (5) increased research into the causes of decline, (6) increased economic benefits to U.S. farmers who benefit from the ecosystem service of crop pollination by wild bees.

Our Response: As these commenters stated, there are many potential benefits to a species in being listed under the Act. For additional information, please refer to the Available Conservation Measures section of the preamble to this final rule.

(61) Comment: Several commenters requested that the Service act quickly in providing protection to the rusty patched bumble bee and asked if there is a way to expedite the listing process. Some of those commenters expressed concern that the Service might have not acted fast enough in protecting the rusty patched bumble bee, and that the ability to prevent the species' extinction may already be diminished. Other commenters, particularly those representing industry, requested that the Service extend the final listing decision deadline by 6 months or withdraw the proposed rule to provide additional time needed to evaluate the rusty patched bumble bee appropriately; consider new information and data provided in comments; collect and evaluate additional data; and consider results of ongoing studies that are anticipated to be completed in 2017.

Our Response: Given the precipitous decline and the few populations that remain, we are hopeful that, by affording the species protection now and working expeditiously with all partners, the rusty patched bumble bee will be saved from extinction. See our response to comment 15 for information about our use of the best available science.

We do not find substantial disagreement regarding the sufficiency or accuracy of the available scientific data relevant to this determination. Therefore, we are not extending the period for making a final determination for the purposes of soliciting additional data. However, we agree that results from ongoing studies would further our understanding and help us with recovery planning and implementation. We will consider further research needs in our recovery planning efforts.

(62) Comment: Several commenters agreed that critical habitat is not determinable at this time, contending that there is insufficient scientific understanding of the rusty patched bumble bee's biology, current occurrences and threats to allow the Service to identify the requisite physical and biological features necessary to designate critical habitat. Some commenters expressed concern that designating critical habitat may impact agriculture or other industries. Others commented that, if critical habitat is ultimately designated, only occupied habitat should be included. A comment from bumble bee experts provided information on physical and biological features and habitat types (including information on forage; nesting sites; overwintering sites; habitats that are protected from pesticides and disease) to consider when designating critical habitat.

Our Response: We will consider this information when we designate critical habitat for this species.

(63) Comment: Several commenters stated that the Service should acknowledge the benefits to the rusty patched bumble bee and other pollinators from habitat management.

Response: We agree that compatible habitat management is beneficial for rusty patched bumble bee conservation. Indeed, we will be working with conservation partners to implement good management practices for bumble bees as we work towards preventing the extinction, and working toward recovery, of this species.

(64) Comment: Some utility groups commented that specific activities should be excluded from activities that may result in ''take.'' The activities specifically requested to be excluded as ''take'' were the use of herbicides to maintain electronic transmission rights-of-way when applied in accordance with label requirements and seasonal recommendations, and utility infrastructure construction or rights-of-way maintenance practices. The commenters provided reasons why such activities would not lead to ''take.'' The commenters also sought acknowledgement that herbicide use to maintain utility rights-of-way is likely to benefit, rather than harm, pollinator insect species, including the rusty patched bumble bee.

Our Response: It is the policy of the Service to identify, to the extent known at the time a species is listed, specific activities that are unlikely to result in violation of section 9 of the Act. To the extent possible, we also strive to identify the activities that are likely to result in violation. Activities that may lead to take, even those having a net benefit, cannot be authorized without a section 10 permit or section 7 exemption. For certain activities, the Service will assist the public in determining whether they would constitute a prohibited act under section 9 of the Act.

We acknowledge that proper herbicide use can reduce invasive or unwanted plant species from rusty patched bumble bee habitat, but label restrictions alone may not be protective of the rusty patched bumble bee. For example, one common herbicide label allows a mixture with imidacloprid, which has documented sublethal and lethal effects to bees. It is unclear which populations could be affected by these activities, what the effects might be, and how the effects might be minimized. The Service can provide technical assistance to help determine whether the rusty patched bumble bee may be present in a project area. If noxious weed control is needed where the rusty patched bumble bee is likely to be present, for example, the Service will work with landowners or land managers to identify techniques that avoid take. As we work to conserve the rusty patched bumble bee, we will provide landowners and land managers with information to assist with understanding what activities are likely to cause take of the species and what actions may be implemented to conserve the species.

(65) Comment: A few commenters requested that the Service clarify what constitutes ''unauthorized use'' of biological control agents in the following statement, ''The unauthorized release of biological control agents that attack any life stage of the rusty patched bumble bee, including the unauthorized use of herbicides, pesticides, or other chemicals in habitats in which the rusty patched bumble bee is known to occur is listed in the proposed rule as an activity that may result in a violation of section 9 of the Act.'' Specifically, they request clarification as to whether this includes using or releasing registered pesticides in a manner consistent with its EPA-approved labeling instructions.

Our Response: We use the word ''unauthorized'' here to mean those activities that have not been permitted or exempted from the section 9 prohibitions due to their appropriate and full consideration under section 10 or section 7 of the Act.

(66) Comment: Several commenters noted that pathogens discussed in the proposal are also commonly found in honey bees and commercial bumble bees, and thus honey bees and commercial bumble bees could be seen as an unauthorized release of nonnative species under section 9 of the Act. The commenters expressed concern that restricted use of commercial bees would harm that industry.

Our Response: Our response to comment 65 clarifies the term ''unauthorized'' as used in this final listing rule. We recognize that honey bee and bumble bee species naturally carry high pathogen loads and that under normal circumstances this characteristic will not affect their fitness. In the case of any pathogen that is found to adversely affect listed species, we need to investigate the source of the pathogen and undertake actions to ameliorate its negative effects. If commercial bumble bees, or wild bees, are found to transmit pathogens that cause take of rusty patched bumble bees, the Service will work with the industry to identify and implement conservation measures that will support the survival or recovery of the species while being practicable from the industry's perspective. We emphasize, however, that under the Act, our concern is the continued existence of this endangered species.

(67) Comment: The unauthorized discharge of chemicals or fill material into any wetlands in which the rusty patched bumble bee is known to occur is listed in the proposed rule as an activity that may result in a violation of section 9 of the Act. A few commenters mentioned that they assume the reference to ''fill material'' in this phrase is a reference to the term as used in the Clean Water Act (CWA), which broadly includes soil, plants, and other biological material. They stated that, given this broad scope, it is unclear how ''fill material'' poses a risk to the rusty patched bumble bee.

Our Response: The commenter is correct that the reference to ''fill material'' is a reference to the term as used in the CWA. The unauthorized discharge of fill material in wetland areas utilized by the rusty patched bumble bee may result in habitat loss or destruction, for example through the loss of floral resources, which could lead to death or harm of rusty patched bumble bees.

(68) Comment: Several commenters expressed concerns that listing the rusty patched bumble bee may affect private property rights and restrict land use. For example, one commenter was concerned that listing would inhibit the use of Federal crop insurance, because recipients must allow government access to private land for bumble bee habitat restoration efforts. Others suggested that landowners who enhance their lands could become susceptible to restrictions or lawsuits from private special interest groups.

Our Response: Programs are available to private landowners for managing habitat for listed species, and permits can be obtained to protect private landowners from the take prohibition when such taking is incidental to, and not the purpose of, carrying out an otherwise lawful activity. In addition, presence of a listed species does not authorize government access to private lands. Private landowners may contact the U.S. Fish and Wildlife Ecological Services Field Office in their State to obtain information about these programs and permits.

(69) Comment: One commenter contends that consultations on actions affecting critical habitat cause delay and extra expenses to proposed projects. The commenter believes there is also a risk that landowners may unintentionally violate the regulations.

Our Response: The Service has determined that critical habitat is not determinable at this time. Section 7 of the Act requires Federal agencies to use their legal authorities to promote the conservation purposes of the Act and to consult with the Service to ensure that effects of actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species. This added requirement may result in a delay in the project, but we will work as expeditiously as possible to complete the required section 7 consultation process in a timely manner. Furthermore, coordination with the Service early in the project development can help expedite the project and minimize the likelihood of delays.

(70) Comment: Several commenters expressed concern that listing this species may hinder research and conservation efforts for the rusty patched bumble bee rather than protect it and may hamper conservation of other native pollinators overall.

Our Response: Research that is conducted for the purpose of recovering a species is an activity that can be authorized under section 10 of the Act, normally referred to as a recovery permit, or can be conducted by certain State conservation agencies by virtue of their authority under section 6 of the Act. We will continue to support research important for recovery of the rusty patched bumble bee. Similarly, management efforts that support the species but may result in some level of take can be authorized through use of incidental take statements or permits. It is not the intent of the Service to hamper conservation of other natural resources through its efforts to recover listed species, and we strive to prevent undue impediments.

(71) Comment: One commenter expressed concern that listing the rusty patched bumble bee could restrict vital uses of pesticides that promote public health and safety, protect our nation's infrastructure, and create healthy homes and greenspaces.

Our Response: Although we are required to base listing determinations solely on the best available scientific and commercial data, we will continue to work with organizations and agencies in reviewing the effects of specific pesticides on bumble bees during recovery planning and in section 7 consultations for this species. In so doing, we will work closely with involved parties to craft effective recovery strategies that benefit the species without incurring unnecessary restrictions or risking public health and safety.

Determination

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the rusty patched bumble bee. Habitat loss and degradation from residential and commercial development and agricultural conversion occurred rangewide and resulted in fragmentation and isolation of the species from

formerly contiguous native habitat. Habitat loss and degradation have resulted in the loss of the diverse floral resources needed throughout the rusty patched bumble bee's long feeding season, as well as loss of appropriate nesting and overwintering sites. Although much of the habitat conversion occurred in the past, the dramatic reduction and fragmentation of habitat have persistent and ongoing effects on the viability of populations; furthermore, conversion of native habitats to agriculture (*i.e.,* monocultures) or other uses is still occurring today (Factor A).

The species' range (as measured by the number of counties occupied) has been reduced by 87 percent, and its current distribution is limited to just one to a few populations in each of 12 States and Ontario, with an 88-percent decrease in the number of populations known historically. Of the 103 known current populations, 96 percent have been documented by 5 or fewer individual bees; only 1 population has had more than 30 individuals observed in any given year. Drought frequency and increased duration of high temperatures are likely to increase due to climate change, further restricting floral resources, reducing foraging times, and fragmenting or eliminating populations (Factor E). Fungi such as *N. bombi,* parasites such as *Crithidia bombi* and *Apicystis bombi,* deformed wing virus, acute bee paralysis, and bacteria are all suspected causes of decline for the rusty patched bumble bee (Factor C).

Pesticide use, including the use of many insecticides that have known lethal and sublethal effects to bumble bees, is occurring at increasing levels rangewide (Factor E). Similarly, herbicide use occurs rangewide and can reduce available floral resources (Factor A). Additionally, the rusty patched bumble bee is not able to naturally recolonize unoccupied areas that are not connected by suitable dispersal habitat (Factors A and E).

The rusty patched bumble bee's reproductive strategy makes it particularly vulnerable to the effects of small population size. The species can experience a ''diploid male vortex,'' where the number of nonviable males increases as abundance declines, thereby further reducing population size (Factor E). There is virtually no redundancy of populations within each occupied ecoregion, further increasing the risk of loss of representation of existing genetic lineages and, ultimately, extinction.

These threats have already resulted in the extirpation of the rusty patched bumble bee throughout an estimated 87 percent of its range, and these threats are likely to continue or increase in severity. Although the relative contributions of pesticides, pathogens, loss of floral resources, and other threats to the species' past and continued decline are not known, the prevailing data indicate that threats are acting synergistically and additively and that the combination of multiple threats is likely more harmful than a single threat acting alone. Regardless of the sources of the decline, the last 16 years of population data are not indicative of healthy colonies or healthy populations. Thus, the species is vulnerable to extinction even without further external stressors acting upon the populations.

Existing regulatory mechanisms vary across the species' range. The rusty patched bumble bee is listed as State endangered in Vermont (which prohibits taking, possessing, or transporting) and as special concern (no legal protection) in Connecticut, Michigan, and Wisconsin, and is protected under Canada's Species at Risk Act. Although these and other regulatory mechanisms exist, they do not currently ameliorate threats to the rusty patched bumble bee, as evidenced by the species' rapid, ongoing decline.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' We find that the rusty patched bumble bee is presently in danger of extinction throughout its entire range. Relative to its historical (pre-2000s) condition, the abundance of rusty patched bumble bees has declined precipitously over a short period of time.

Further adding to the species' imperilment, its reproductive strategy (haplodiploidy) renders it particularly sensitive to loss of genetic diversity, which is further exacerbated by decreasing population size (for example, diploid male vortex). The persisting colonies are few in number and continue to be affected by high-severity stressors, including pathogens, pesticides, habitat loss and degradation, effects of climate change, and small population dynamics, throughout all of the species' range. These stressors are acting synergistically and additively on the species, and the combination of multiple stressors is more harmful than a single stressor acting alone. Due to the above factors, the species does not have the adaptive capacity in its current state to withstand physical and biological changes in the environment presently or into the future, and optimistic modeling suggests that all but one of the ecoregions are predicted to be extirpated within 5 years (Szymanski *et al.* 2016, Table 7.3).

In conclusion, the species' spatial extent has been considerably reduced and the remaining populations are under threat from a variety of factors acting in combination to significantly reduce the overall viability of the species. The risk of extinction is currently high because the number of remaining populations is small, most of those populations are extremely small in size (all but 2 have 10 or fewer individuals), and the species' range is severely reduced. Therefore, on the basis of the best available scientific and commercial information, we are listing the rusty patched bumble bee as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act. We find that a threatened species status is not appropriate for the rusty patched bumble bee because (1) given its current condition, the species presently lacks the ability to withstand physical and biological changes in the environment; (2) based on the prediction that all but one ecoregion will be extinct within 5 years, the species presently has a high probability of extinction; and (3) even if the current stressors were to be reduced or eliminated, the species would still be at high risk of extinction based on small population size effects alone.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Because we have determined that the rusty patched bumble bee is endangered throughout all of its range, no portion of its range can be ''significant'' for purposes of the definitions of ''endangered species'' and ''threatened species.'' See the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37577; July 1, 2014).

Critical Habitat

Section 4(a)(3) of the Act, as amended, and implementing regulations in 50 CFR 424.12, require that, to the maximum extent prudent and determinable, we designate critical habitat at the time the species is determined to be an endangered or threatened species. Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are

found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as: An area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (for example, migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use, and the use of, all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Critical habitat designation does not allow the government or public to access private lands, nor does it require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult under section 7(a)(2) of the Act, but even if consultation leads to a finding that the action would likely cause destruction or adverse modification of critical habitat, the resulting obligation of the Federal action agency and the landowner is not to restore or recover the species, but rather to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) that are essential to the conservation of the species and (2) that may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features, we focus on the specific features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed if we determine that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. For example, they require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when any of the following situations exist: (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (ii) such designation of critical habitat would not be beneficial to the species. The regulations also provide that, in determining whether a designation of critical habitat would not be beneficial to the species, the factors that the Services may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of ''critical habitat'' (50 CFR 424.12(a)(1)(ii)).

We do not know of any imminent threat of take attributed to collection or vandalism for the rusty patched bumble bee. The available information does not indicate that identification and mapping of critical habitat is likely to initiate any threat of collection or vandalism for the bee. Therefore, in the absence of finding that the designation of critical habitat would increase threats to the species, if there are benefits to the species from a critical habitat designation, a finding that designation is prudent is warranted.

The potential benefits of designation may include: (1) Triggering consultation under section 7 of the Act, in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is unoccupied; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the protected species. Because designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, designation of critical habitat may be prudent for the rusty patched bumble bee.

Our regulations (50 CFR 424.12(a)(2)) further state that critical habitat is not determinable when one or both of the following situations exists: (1) Information sufficient to perform required analysis of the impacts of the designation is lacking; or (2) the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

Delineation of critical habitat requires identification of the physical or biological features, within the geographical area occupied by the species, essential to the species' conservation. In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include but are not limited to space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance. Information regarding the rusty patched bumble bee life-history needs is complex, and complete data are lacking for most of them. For example, little is known about the overwintering habitats of foundress queens; however, information is currently being collected that may provide important knowledge on this topic. Consequently, a careful assessment of the biological information is still ongoing, and we are still in the process of acquiring the information needed to perform that assessment. The information sufficient to perform a required analysis of the impacts of the designation is lacking, and therefore, we find designation of critical habitat to be not determinable at this time.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to address the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a draft and final recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for downlisting or delisting, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. When completed, the draft recovery plan and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Twin Cities Ecological Service Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (for example, restoration of native vegetation), research, captive-propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands. Following publication of this final listing rule, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin are eligible for Federal funds to implement management actions that promote the protection or recovery of the rusty patched bumble bee. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require consultation as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands, for example, lands administered by the National Park Service, U.S. Fish and Wildlife Service, and U.S. Forest Service.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply

to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized handling or collecting of the species;

(2) The unauthorized release of biological control agents that attack any life stage of the rusty patched bumble bee, including the unauthorized use of herbicides, pesticides, or other chemicals in habitats in which the rusty patched bumble bee is known to occur;

(3) Unauthorized release of nonnative species or native species that carry pathogens, diseases, or fungi that are known or suspected to adversely affect rusty patched bumble bee where the species is known to occur;

(4) Unauthorized modification, removal, or destruction of the habitat (including vegetation and soils) in which the rusty patched bumble bee is known to occur; and

(5) Unauthorized discharge of chemicals or fill material into any wetlands in which the rusty patched bumble bee is known to occur.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Twin Cities Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Twin Cities Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the Twin Cities Ecological Services Field Office and the Region 3 Regional Office.

List of Subjects in 50 CFR part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

■ 2. In § 17.11(h), add an entry for ''Bumble bee, rusty patched'' to the List of Endangered and Threatened Wildlife in alphabetical order under INSECTS to read follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	* * *
INSECTS				
*	*	*	*	* * *
Bumble bee, rusty patched	*Bombus affinis* ..	Wherever found	E	82 FR [insert **Federal Register** page where the document begins], 1/11/2017.
*	*	*	*	* * *

* * * * *

Dated: December 27, 2016.

Teresa R. Christopher,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2017–00195 Filed 1–10–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 161227999–6999–01]

RIN 0648–BG49

Atlantic Highly Migratory Species; Technical Amendment to Regulations

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

ACTION: Final rule; technical amendments.

SUMMARY: NMFS is hereby making technical amendments to the regulations for Atlantic highly migratory species. Currently, certain cross-references meant to be in the regulations are either missing or incorrect. This final action will make the cross-references in the regulations accurate. The action also simplifies regulatory text by removing unnecessary language. The rule is administrative in nature and does not make any change with substantive effect to the regulations governing Atlantic highly migratory species (HMS) fisheries.

DATES: This final rule is effective on January 11, 2017.

ADDRESSES: Copies of other documents relevant to this rule are available from the HMS Management Division Web site at *http://www.nmfs.noaa.gov/sfa/hms/* or upon request from the Atlantic HMS Management Division at 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Larry Redd or Karyl Brewster-Geisz by phone at 301–427–8503.

SUPPLEMENTARY INFORMATION: Atlantic HMS are managed under the dual authority of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.,* (Magnuson-Stevens Act) and the Atlantic Tunas Convention Act, 16 U.S.C. 971 *et seq.,* (ATCA). The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary of Commerce to the NOAA Assistant Administrator for Fisheries (AA). On May 28, 1999, NMFS published in the **Federal Register** (64 FR 29090) regulations implementing the Fishery Management Plan (FMP) for Atlantic Tunas, Swordfish, and Sharks (1999 FMP). On October 2, 2006, NMFS published in the **Federal Register** (71 FR 58058) regulations implementing the 2006 Consolidated HMS FMP, which details the management measures for Atlantic HMS fisheries. The implementing regulations for Atlantic HMS are at 50 CFR part 635.

Background

The regulations in 50 CFR 635.71 contain specific prohibitions, and those prohibitions contain or should contain regulatory cross-references specific to the regulatory requirements in other sections of 50 CFR part 635. The regulatory text in § 635.71 ensures that person(s) under United States jurisdiction are in compliance with the Federal rules promulgated under the Atlantic Tunas Convention Act and the Magnuson-Stevens Fishery Conservation and Management Act when fishing for Atlantic HMS. This technical amendment corrects the cross-references in the HMS regulations. It also simplifies regulatory text at § 635.71(b)(23) by removing unnecessary language.

Corrections

The regulations at § 635.71(a)(9), (b)(21), (e)(9), and (e)(10) are missing a clarifying cross-reference. This final action adds a cross reference to those regulations.

Additionally, the regulations at § 635.71(a)(17), (a)(18), (a)(37), (a)(54), (a)(56), (a)(59), (b)(36), (b)(37), (b)(39), (b)(40), and (e)(17) contain one or more incorrect cross-references. This final action corrects those cross-references. Additionally, § 635.71(b)(23) has an incorrect cross reference, which this action corrects. This action would remove language referencing that incidental to recreational fishing for other species would be retained in accordance with § 635.23(b) and (c), and simplifies the regulatory text to more broadly refer to the provisions of § 635.23.

Classification

The Assistant Administrator for Fisheries has determined that this final rule is necessary for the conservation and management of U.S. fisheries and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act, the 2006 Consolidated Atlantic HMS FMP and its amendments, and ATCA.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment are unnecessary and contrary to the public interest. This final rule makes only corrective, non-substantive changes to add missing, or correct, cross-references to HMS regulations or, in one instance, to remove confusing, unnecessary language, and is solely administrative in nature. Therefore, public comment would serve no purpose and is unnecessary. Furthermore, it is in the public interest to correct or insert the cross-references as quickly as possible to more clearly articulate the regulatory requirements to the public. Any delay in implementation would result in the continuation of incorrect cross-references in the regulations at 50 CFR 635. It is in the best interest of both the public and law enforcement to effectively enforce the new changes on publication to ensure person(s) are justifiably operating within U.S. law. Thus, there is also good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date.

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

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, and a proposed rule is not being published, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* are inapplicable.

NMFS has determined that fishing activities conducted pursuant to this rule will not affect endangered and/or threatened species or critical habitat listed under the Endangered Species Act, or marine mammals protected by the Marine Mammal Protection Act, because the action will not result in any change or increase in fishing activity, and is solely administrative in nature.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: January 5, 2017.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 635 is amended as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

■ 2. In § 635.71, revise paragraphs (a)(9), (a)(17), (a)(18), (a)(37), (a)(54), (a)(56), (a)(59), (b)(21), (b)(23), (b)(36), (b)(37), (b)(38), (b)(39), (b)(40), (e)(9), (e)(10), and (e)(17) to read as follows:

§ 635.71 Prohibitions.

* * * * *

(a) * * *

(9) Fail to report the catching of any Atlantic HMS to which a conventional tag has been affixed under a tag and release program as specified in § 635.26(a).

* * * * *

(17) Fish for Atlantic tunas or swordfish with a gillnet or possess Atlantic tunas or swordfish on board a vessel with a gillnet on board, as specified in § 635.19(a), (b), and (e).

(18) Fail to retrieve fishing gear and move after an interaction with a protected species, as specified in § 635.21(b)(3).

* * * * *

(37) Fail to report to NMFS, at the number designated by NMFS, the incidental capture of listed whales with shark gillnet gear as required by § 635.21(g)(1).

* * * * *

(54) Possess, use, or deploy, in the Gulf of Mexico, any circle hook, other than as described at § 635.21(c). Vessels in the Gulf of Mexico, with pelagic gear onboard, are prohibited from possessing, using, or deploying circle hooks that are constructed of round wire stock which is larger than 3.65 mm in diameter (See: § 635.21(c)(5)(iii)(B)(*2*)(*i*)).

* * * * *

(56) Have been issued a valid HMS Commercial Caribbean Small Boat permit and to purchase, barter for, or trade for HMS harvested by other vessels with the intent to sell, as specified in § 635.4(o)(5).

* * * * *

(59) Fish for, retain, possess, or land any HMS from a vessel with a pelagic longline on board when the Atlantic Tunas Longline category fishery is closed, as specified in § 635.28(a)(3), (b)(7), (c)(3), and (d).

* * * * *

(b) * * *

(21) Transfer a tuna as specified in § 635.29(a), except as may be authorized for the transfer of Atlantic BFT between purse seine vessels, as specified in § 635.29(c).

* * * * *

(23) Fish for, catch, possess, or retain a bluefin tuna, except as specified under § 635.23.

* * * * *

(36) Possess J-hooks onboard a vessel that has pelagic longline gear onboard, and that has been issued, or is required to have, a limited access swordfish, shark, or Atlantic Tunas Longline category permit for use in the Atlantic Ocean, including the Caribbean Sea and the Gulf of Mexico, except when green-stick gear is onboard, as specified at § 635.21(c)(2)(vii)(A) and (c)(5)(iii)(B)(*3*).

(37) Use or deploy J-hooks with pelagic longline gear from a vessel that has been issued, or is required to have, a limited access swordfish, shark, or tuna longline category permit for use in the Atlantic Ocean, including the Caribbean Sea and Gulf of Mexico, as specified in § 635.21(c)(5)(iii)(B).

(38) As specified in § 635.21(c)(5)(iii)(B)(*3*), possess more than 20 J-hooks onboard a vessel that has been issued, or is required to have, a limited access swordfish, shark, or tuna Longline category permit for use in the Atlantic Ocean, including the Caribbean Sea and Gulf of Mexico, when possessing onboard both pelagic longline gear and green-stick gear as defined in § 635.2.

(39) Use or deploy more than 10 hooks at one time on any individual green-stick gear, as specified in § 635.21(j), (c)(2)(vii)(A), or (c)(5)(iii)(B)(*3*).

(40) Possess, use, or deploy J-hooks smaller than 1.5 inch (38.1 mm), when measured in a straight line over the longest distance from the eye to any part of the hook, when fishing with or possessing green-stick gear onboard a vessel that has been issued, or is required to have, a limited access swordfish, shark, or tuna longline category permit for use in the Atlantic Ocean, including the Caribbean Sea and Gulf of Mexico, as specified at § 635.21(c)(5)(iii)(B)(*3*) or (c)(2)(vii)(A).

* * * * *

(e) * * *

(9) Fish for swordfish from the South Atlantic swordfish stock using gear other than pelagic longline, as specified at § 635.19(e)(1) and § 635.27(c)(1)(ii).

(10) Fish for, catch, possess, retain, or land an Atlantic swordfish using, or captured on, ''buoy gear'' as defined at § 635.2, unless, as specified in § 635.19(e)(3), the vessel owner has been issued a swordfish directed limited access permit or a swordfish handgear limited access permit in accordance with § 635.4(f) or a valid HMS Commercial Caribbean Small Boat permit in accordance with § 635.4(o).

* * * * *

(17) Failure to construct, deploy, or retrieve buoy gear as specified at § 635.21(h).

* * * * *

[FR Doc. 2017–00325 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 82, No. 7
Wednesday, January 11, 2017

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

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 204 and 216

[CIS No. 2595–16; DHS Docket No. USCIS–2016–0008]

RIN 1615–AC11

EB–5 Immigrant Investor Regional Center Program

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security (DHS) is considering making regulatory changes to the EB–5 Immigrant Investor Regional Center Program. Based on decades of experience operating the program, DHS has determined that program changes are needed to better reflect business realities for regional centers and EB–5 immigrant investors, to increase predictability and transparency in the adjudication process for stakeholders, to improve operational efficiency for the agency, and to enhance program integrity. This Advance Notice of Proposed Rulemaking (ANPRM) is organized to include requests for comment immediately following discussions of the relevant issues.

DATES: Written comments must be received on or before April 11, 2017.

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS–2016–0008, by any one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* You may send comments directly to U.S. Citizenship and Immigration Services (USCIS) by mail to Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave. NW., Washington, DC 20529. To ensure proper handling, please reference DHS Docket No. USCIS–2016–0008 in your correspondence. This mailing address may be used for paper or CD–ROM submissions.
- *Hand Delivery/Courier:* You may submit comments directly to USCIS through hand delivery to Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave. NW., Washington, DC 20529; Telephone 202–272–8377. To ensure proper handling, please reference DHS Docket No. USCIS–2016–2008 in your correspondence.

FOR FURTHER INFORMATION CONTACT: Lori MacKenzie, Division Chief, Operations Policy and Performance, Immigrant Investor Program Office, U.S. Citizenship and Immigration Services, Department of Homeland Security, 131 M St. NE., 3rd Floor, Washington, DC 20529; Telephone 202–357–9214.

SUPPLEMENTARY INFORMATION:

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List of Acronyms and Abbreviations Used

ANPRM Advance Notice of Proposed Rulemaking
DHS Department of Homeland Security
JCE Job-Creating Entity
LPR Lawful Permanent Resident
NCE New Commercial Enterprise
NOID Notice of Intent To Deny
NPRM Notice of Proposed Rulemaking
RFE Request for Evidence
USCIS United States Citizenship and Immigration Services

I. Public Participation

This ANPRM provides an opportunity for DHS to hear and consider the views of the public on potential changes to improve and modify the EB–5 Regional Center Program. DHS invites comments, data, and information from all interested parties, including regional centers, investors, advocacy groups, nongovernmental organizations, community-based organizations, and legal representatives who specialize in immigration law, as well as corporate and securities law. DHS welcomes comments on any and all aspects of this ANPRM. Your comments can help shape the outcome of this possible rulemaking.

DHS is issuing this ANPRM to seek comment from all interested stakeholders on several topics, including: (1) The process for initially designating entities as regional centers, (2) a potential requirement for regional centers to utilize an exemplar filing process, (3) ''continued participation'' requirements for maintaining regional center designation, and (4) the process for terminating regional center designation. While DHS has gathered some information related to these topics, DHS is seeking additional information that can help the Department make operational and security updates to the Regional Center Program while minimizing the impact of such changes on regional center operations and EB–5 investors.

When submitting comments, please indicate the specific section of this document to which each comment applies, indicate the specific question number to which each comment applies, and provide reasons for each suggestion or recommendation. Feedback that simply states that a stakeholder strongly prefers a particular outcome, unaccompanied by careful reasoning and actionable data, is much less useful to DHS.

DHS is particularly interested in data that would inform a quantitative and qualitative assessment of the costs and benefits of the potential changes described in this ANPRM. DHS is also interested in comments from the public that provide more information how to identify the small entity status of EB–5 stakeholder entities, such as regional centers and new commercial enterprises. DHS specifically requests information on revenue or employment data sources on regional centers and new commercial enterprises.

Instructions: All submissions for this advance notice of proposed rulemaking must include the DHS Docket No. USCIS–2016–0008. Please note that DHS has published a notice of proposed rulemaking entitled ''EB–5 Immigrant Investor Program Modernization,'' DHS Docket No. USCIS–2016–0006, separate

from this ANPRM. The NPRM and ANPRM include distinct proposals, so please ensure that you submit your comments to the correct docket.

Comments must be submitted in English, or an English translation must be provided. Written comments may be submitted electronically or by mail, as explained previously in the **ADDRESSES** section of this ANPRM. To avoid duplication, please use only one of these methods to submit written 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 public comment 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.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and enter this ANPRM's docket number in the search bar.

II. Background

A. The EB–5 Program

As part of the Immigration Act of 1990, Public Law 101–649, 104 Stat. 4978, Congress established the EB–5 immigrant visa classification to incentivize employment creation in the United States. Under the EB–5 program, lawful permanent resident (LPR) status is available to foreign nationals who invest at least $1 million in a new commercial enterprise (NCE) that will create at least 10 full-time jobs in the United States. *See* INA section 203(b)(5), 8 U.S.C. 1153(b)(5). A foreign national may invest $500,000 if the investment is in a ''targeted employment area,'' defined to include certain rural areas and areas of high unemployment. *Id.* The INA allots 9,940 immigrant visas each fiscal year for foreign nationals seeking to enter the United States under the EB–5 classification. *See* INA section 201(d), 8 U.S.C. 1151(d); INA section 203(b)(5), 8 U.S.C. 1153(b)(5). Not less than 3,000 of these visas must be reserved for foreign nationals investing in targeted employment areas. *See* INA section 203(b)(5)(B), 8 U.S.C. 1153(b)(5)(B).

B. The Regional Center Program

Enacted in 1992, section 610 of the Departments of Commerce, Justice, State, and State, and Related Agencies Appropriations Act, 1993, Public Law 102–395, 106 Stat. 1828, established a pilot program that requires the allocation of a limited number of EB–5 immigrant visas to individuals who invest in new commercial enterprises through DHS-designated regional centers.[1] DHS regulations define a regional center as an economic unit, public or private, that promotes economic growth, regional productivity, job creation, and increased domestic capital investment. *See* 8 CFR 204.6(e). While all EB–5 petitioners go through the same petition process, those petitioners participating in the Regional Center Program may meet statutory job creation requirements based on economic projections of either direct or indirect job creation, rather than only on jobs directly created by the new commercial enterprise. *See* 8 CFR 204.6(m)(3). In addition, Congress authorized the Secretary to give priority to EB–5 petitions filed through the Regional Center Program. *See* section 601(d) of Public Law 102–395, 106 Stat. 1828, as amended by Public Law 112–176, Sec. 1, 126 Stat. 1326 (Sept. 28, 2012).

Requests for regional center designation must be filed with USCIS on the Application for Regional Center Under the Immigrant Investor Program (Form I–924). *See* 8 CFR 204.6(m)(3)–(4). Once designated, regional centers must provide USCIS with updated information to demonstrate continued eligibility for the designation by submitting an Annual Certification of Regional Center (Form I–924A) on an annual basis or as otherwise requested by USCIS. *See* 8 CFR 204.6(m)(6)(i)(B). USCIS may seek to terminate a regional center's participation in the program if the regional center no longer qualifies for the designation, the regional center fails to submit the required information or pay the associated fee, or USCIS determines that the regional center is no longer promoting economic growth. *See* 8 CFR 204.6(m)(6)(i). As of November 1, 2016, there were 864 designated regional centers.[2]

The former Immigration and Naturalization Service last promulgated comprehensive regulations implementing the EB–5 Regional Center Program in 1993. 58 FR 44606. Although Congress has revised the program multiple times since, *see* Public Law 106–396, 114 Stat. 1637; Public Law 107–273, 116 Stat. 1758 (2002 statutory amendments), the regulations have not been updated to conform to the statutory changes. Neither have the regulations been amended to make improvements to the program based on the Department's experience implementing the program for the last 25 years.

III. Requests for Information

DHS is considering changes to the Regional Center Program regarding the requirements for initial designation and continued participation, a potential requirement for regional centers to utilize an exemplar process, and the grounds for terminating regional center designation.

A. Process for Initial Designation and Exemplar Approval

DHS is considering ways to improve the process associated with the initial designation of regional centers and the approval of ''exemplar'' projects. Currently, an entity applying for initial designation as a regional center may choose whether to present a hypothetical project, an actual project, or an exemplar project with their Application For Regional Center Under the Immigrant Investor Program (Form I–924 application). A request for review of a hypothetical project should be supported by general proposals and general predictions showing that the proposed regional center will more likely than not promote economic growth and job creation. Organizational and transactional supporting documents are not required for a hypothetical project. Previous determinations based on hypothetical projects will not receive deference in the adjudication of subsequent filings.

If the entity includes an actual or exemplar project proposal with its Form I–924 application, USCIS determines, as part of the Form I–924 adjudication, whether USCIS will accord deference to its approval of that project when USCIS later reviews investor petitions associated with the same regional center

[1] Current law requires that DHS annually set aside 3,000 EB–5 immigrant visas for regional center investors. Section 116 of Public Law 105–119, 111 Stat. 2440 (Nov. 26, 1997). If this full annual allocation is not used, remaining visas may be allocated to foreign nationals who do not invest in regional centers.

[2] USCIS, Immigrant Investor Regional Centers, *https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers.*

and based on the same project. A request for review of an actual project requires a comprehensive and credible business plan that, among other things, provides a description of the business and verifiable detail on how jobs will be created. Organizational and transactional supporting documents for the new commercial enterprise are not required for an actual project. Deference generally will be accorded to prior approval of the business plan and economic analysis in subsequent filings related to an approved actual project.

A request for review of an exemplar project is comprised of a sample Form I–526 petition filed with a proposed actual project containing copies of the new commercial enterprise's organizational and transactional documents. USCIS currently reviews exemplars to determine if they are in compliance with established EB–5 eligibility requirements. If the exemplar project is approved, the determination generally is accorded deference in subsequent related Form I–526 and Form I–829 filings.[3]

DHS believes that the existing process presents two problems. First, the adjudication of initial applications for regional center designation become much more complex when entities seeking such designation ''bundle'' their initial applications with actual or exemplar projects. Under the current process, regional centers often include a host of documents related to actual or exemplar projects with their Form I–924 applications, including project proposals and related organization and transactional documents, such as private placement memoranda, subscription agreements, operating and partnership agreements, and other information. USCIS must review all such documents submitted with Form I–924 applications, even though the information contained in such documents is frequently unrelated to adjudication of the regional center designation (*i.e.,* determining whether to designate the applying entities as regional centers).

Second, by allowing regional centers to choose whether to submit an exemplar project at all, USCIS effectively lets those entities determine the level of workload for the agency related to each EB–5 project. When a regional center submits an exemplar proposal, USCIS must only assess the project once at an initial stage. Any issues related to project approval are considered and resolved at this initial stage, thus making individual immigrant investor petitions submitted pursuant to that project simpler to adjudicate. In contrast, when a regional center does not use the exemplar process, USCIS is presented with the project proposal multiple times, including with each individual immigrant investor petition submitted pursuant to that project. At this stage, issues related to project approval often require USCIS to issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) to each individual petitioner who is investing in that project. This presents a significant burden on the agency and each individual petitioner, and significantly delays the adjudication of their petitions.

To address these issues, DHS is seeking comment on whether it should bifurcate the Form I–924 application process into two steps, as follows: DHS would first require submission of a more general application for initial designation, and then, subsequent to designation, would require submission of a more specific application for approval of an exemplar project. DHS is considering a different form and fee for each of the two steps. DHS believes these changes would significantly reduce the issuance of RFEs and NOIDs and improve processing times for both applications for regional center designation and immigrant investor petitions. Individual immigrant investors would also bear a lower paperwork burden and would benefit from improved predictability in adjudications. DHS describes each potential change in turn below.

1. General Application for Initial Designation

As noted above, DHS seeks comment on its proposal to require entities seeking regional center designation to submit a more general application for such designation (*i.e.,* without including documentation related to actual or exemplar projects). DHS expects that the information required to be submitted in such an application would generally conform to the requirements contained in the regional center statute, as amended. Under this process, an applicant for regional center designation would only need to include a general proposal based on general predictions concerning the kinds of commercial enterprises that will receive capital from immigrant investors, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive effects such capital investments will have on economic growth. Further information about investments and regional center projects would generally not be required or reviewed as part of this initial filing. After USCIS designates the entity as a regional center, the regional center would be able to request review of investment offering documents and project documents, including the types of documents that typically accompany an ''exemplar'' project filing under current practice.

DHS believes this change would provide several benefits to stakeholders and USCIS. First, DHS believes the change would reduce confusion by simplifying the application for regional center designation and providing increased guidance on the limited types of information expected by the agency for adjudicating such applications. Second, the change would likely improve adjudication times related to such applications, as USCIS adjudicators would no longer need to review documentation that is unrelated to determining whether the applicant has satisfied the basic requirements for initial designation. Third, the change should reduce the frustration currently experienced by entities that meet the evidentiary requirements for initial designation but fail to meet the evidentiary requirements necessary to meet applicable deference guidelines for their projects and investment offerings. DHS understands that the inability of entities to file other requests when seeking initial designation as a regional center could effectively delay the ability of entities to receive decisions on those requests. DHS, however, believes these impacts may be outweighed by the clarity provided to stakeholders and the operational efficiencies gained by the proposal.

2. Mandatory Exemplar Process

As noted above, DHS also seeks comment on its proposal to implement an exemplar filing requirement for all designated regional centers. DHS is considering (1) requiring regional centers to file exemplar project requests, both to support individual EB–5 immigrant petitions and to maintain regional center designation and (2) requiring the approval of such a request before any investor may submit his or her EB–5 immigrant petition associated with a project covered by such request. As envisioned by DHS, USCIS would use the approved exemplar as evidence when adjudicating individual immigrant petitions related to the exemplar project.

[3] Deference may also be accorded to the approval of a regional center investor's Form I–526 or Form I–829 petition in the adjudication of related Form I–526 and Form I–829 petitions based upon an investment in the same investment project with the same project documents. Investors may submit evidence of association with an exemplar project before or while the regional center's exemplar is pending with USCIS, or after the exemplar is approved.

Under the exemplar filing requirement, regional centers would be required to submit all documentation necessary to establish that investments in the project would satisfy the eligibility criteria related to investment and job creation, in addition to evidence demonstrating the regional center's continued compliance with Regional Center Program rules. Currently, exemplars typically include a comprehensive business plan, economic impact analysis, offering documents and organizational documents. Because DHS wants to ensure investments sponsored by the regional center are fully compliant with program requirements to maintain regional center designation, DHS is considering requiring that additional documentation be provided with exemplar filings, including (1) any documents related to the investment offering that have been filed with the U.S. Securities and Exchange Commission; and (2) any investment and offering documents that the regional center intends to provide to investors, as well as any agreements between the investor and the regional center.

DHS also seeks comment on the appropriate validity period for the approval of an exemplar project to ensure the regional center is actively promoting economic growth. DHS is considering limiting each exemplar's validity period to a specific period of time, *e.g.,* 2 to 3 years after the exemplar's approval or latest amendment or associated immigrant investor petition. DHS has determined that regional center projects that for 2 to 3 years have not been amended and have not obtained EB–5 investments are generally not active. DHS is seeking public comments on potential exemplar approval validity periods, including the amount of time needed for regional centers to recruit investors, the amount of time needed for investors to file EB–5 immigrant petitions, and the amount of time needed for projects to satisfy job creation requirements.

Finally, DHS seeks public comment on possible modifications to the existing policy governing the impact of a ''material change'' on an approved exemplar. Current policy requires DHS to deny petitions where, after the petition has been filed, there are significant changes to the exemplar project, including significant changes to the job-creating entity or entities receiving associated EB–5 investment. Under this policy, DHS has also denied petitions, on a case-by-case basis, where in the time between approval of the exemplar and adjudication of the petition, there were significant changes to project timelines and changes to job creation methodologies.[4] Regional centers and other stakeholders may feel that modifications to this policy may be necessary or wise if DHS were to implement a mandatory exemplar process. Public comment on this issue would help DHS determine whether and how to revise USCIS's current approach to addressing material changes in the EB–5 context to account for a potential mandatory exemplar process.

DHS is considering these process changes as a means of addressing the increasing processing times associated with EB–5 immigrant petitions. DHS believes that by addressing potential issues with EB–5 projects in the exemplar process, the Department would significantly streamline the adjudication process for immigrant petitions filed by associated investors, including by significantly reducing the need to issue RFEs and NOIDs to those investors. Individual immigrant investors would also bear a lower paperwork burden and would benefit from improved predictability in adjudications. Moreover, an exemplar requirement may also lead to substantial government cost savings by reducing the paperwork, staffing, and physical space required to process EB–5 immigrant petitions. DHS understands that a mandatory exemplar process could negatively impact regional centers and investors by delaying investor filings and, as a practical matter given the prevailing structure of many regional center investment offerings, by delaying funding to regional center projects. DHS believes, however, that the operational efficiencies, reduced processing times, increased stakeholder predictability, and reduced paperwork burden resulting from the exemplar process described above would provide sufficient benefits to overcome these impacts.

3. Specific Questions for Public Input

DHS welcomes public comment on all aspects of the potential changes described above, but would particularly benefit from commenters addressing one or more of the following questions:

1. How can USCIS improve the initial designation process?

2. How would requiring an entity to obtain initial designation as a regional center prior to, and separate from, filing for approval of an exemplar project impact entities seeking regional center designation and investors seeking to associate with designated regional centers?

3. Would a bifurcated initial application process achieve the benefits discussed above—*i.e.,* reduced overall paperwork burdens and improved processing times? Please provide specific data on how such changes would affect time or other burdens in initial documentation preparation.

4. What additional costs or benefits, if any, would occur as a result of adopting the suggested approach?

5. Would adopting the suggested approach impact small entities? If so, how? Please provide data to support your response. Please identify any alternative policy proposals or other recommendations that would accomplish some or all of the goals identified above, while mitigating impacts on small entities.

6. Would it benefit potential immigrant investors to know whether or not an entity has been designated as a regional center, if the initial designation decision notice is solely for designation and does not include any decisions on exemplar projects?

7. Would a streamlined exemplar filing process impact any regional center or investor costs?

8. Should exemplar approval be required prior to a regional center-associated investor submitting an EB–5 immigrant petition? Please support the response by providing information regarding the costs and benefits of alternatives (*e.g.,* by permitting concurrent filing with EB–5 immigrant petitions).

9. What additional costs and benefits would regional centers or investors incur as a result of a required exemplar approval prior to submitting EB–5 immigrant petitions?

10. What documentation should be required to accompany an exemplar application?

11. In what circumstances should a regional center be required to file to amend a previously approved exemplar?

12. For what duration should an exemplar approval be valid, and why?

13. Under what circumstances should USCIS seek to terminate a previously approved exemplar?

14. What effect, if any, should termination or expiration of an approved exemplar have on an investor whose immigrant visa petition has not yet been adjudicated?

15. What concerns, if any, would be raised by the elimination of the ''actual'' project deference process, wherein regional centers seek approval of the business plan and economic impact analysis associated with an investment offering, but not the investment offering documents?

[4] *See* USCIS Policy Manual, 6 USCIS–PM G (Nov. 30, 2016).

16. Would some projects be deterred by a requirement to have an approved exemplar? DHS is particularly interested in how the exemplar requirement may affect the number of projects that obtain EB–5 investment and associated parties. Additionally, DHS seeks input on how an exemplar requirement might affect costs related to project timelines, business plan fees, and regional center administrative fees.

17. Would an exemplar requirement impact the financial structure of regional center investments? For example, would such a requirement decrease or increase the EB–5 capital portion of a project's total finance? Would it impact the overall financing costs and rates of return for investors, regional centers, and developers?

18. How could USCIS define the term ''material change'' to account for the exemplar process, consistent with applicable regulations and case law, including regulations requiring petitioners to be eligible for the requested benefit at the time of filing and to remain eligible until the benefit is granted? [5] Please discuss how a new material change definition would impact pending EB–5 immigrant petitions.

B. Safeguards for Monitoring and Oversight

DHS has found that current regulations would benefit from additional safeguards to ensure that all regional centers (1) use immigrant investor funds to promote economic growth, and (2) protect against the misuse of such funds. DHS is therefore considering incorporating additional regulatory requirements for initial designation as a regional center. For instance, DHS could require assurances that the regional center commit to an appropriate level of internal monitoring and oversight of investment offerings and business activities associated with the regional center or under its sponsorship. This would include investment offerings and business activities of any associated new commercial enterprises (NCEs) or job-creating entities (JCEs). DHS is seeking to help ensure that the stakeholder granted a regional center designation will perform appropriate oversight and monitoring with respect to capital investments, job creation, and business activities under its auspices such that the pooled capital investments at its NCEs and JCEs will promote economic growth.

DHS seeks data and information on potential methods for ensuring an appropriate level of monitoring and oversight, including through regional center attestations, the submission of detailed information about the regional center's oversight efforts of its NCEs and JCEs, and other compliance and enforcement mechanisms. DHS understands that these and similar measures may be burdensome to stakeholders, but believes that such requirements could improve the regional center program by providing regional centers with the tools to ensure that associated NCEs and JCEs comply with program requirements. This would ensure only regional centers with effective oversight could operate within the program. DHS believes that this would enhance the program's integrity and ultimately benefit both regional centers and investors by providing greater trust in the entities operating within the program.

DHS welcomes public comment on the issues described above, but would particularly benefit from commenters addressing one or more of the following questions:

1. What would be the most effective and efficient way to add monitoring and oversight requirements? Should such requirements be incorporated into the initial designation stage, the exemplar stage, or throughout the period of the regional center's designation?

2. What forms of monitoring and oversight of NCEs, JCEs, and investor funds are regional centers currently utilizing as part of their best practices?

3. Do other entities associated with regional centers engage in monitoring and oversight?

4. What benefits, if any, would additional monitoring and oversight offer to regional centers and to immigrant investors?

5. What types of documentation would be appropriate for regional centers to submit to establish that they will have an adequate monitoring and oversight process in place upon designation?

6. What measures, if any, have regional centers put in place to identify conflicts of interest by regional center participants? What requirements for identification and disclosure of conflicts of interest would be appropriate in the regional center context?

7. What investment and other economic impacts could be expected from the establishment of new monitoring and oversight requirements?

8. What data and information should USCIS consider affirmatively disclosing to increase transparency in the EB–5 program?

9. What additional costs would stakeholders incur in setting up and maintaining a monitoring and oversight process?

10. Would an additional filing fee or additional costs to regional centers in preparing documentation for separate filings be too burdensome to support or justify the suggested initial filing framework?

11. Would any of the potential changes described above either deter or incentivize participation in the program, or directly affect the viability of certain types of investment projects? If so, how could USCIS best measure the likely effects?

12. Would any of the potential changes described above impact small entities? If so, how? Please provide data to support your response. Please identify any alternative policy proposals or other recommendations that would accomplish some or all of the goals identified above, while mitigating impacts on small entities.

C. Continued Participation

DHS is considering ways to clarify the requirements for regional centers to maintain their designation. Under the current regulatory framework, regional centers must provide USCIS with updated information to demonstrate they are continuing to meet program requirements—*i.e.,* promoting economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area. Such information must be submitted to USCIS on an annual basis or as otherwise requested by USCIS, generally by filing the Annual Certification of Regional Center (Form I–924A). *See* 8 CFR 204.6(m)(6). USCIS will issue a notice of intent to terminate the participation of a regional center in the EB–5 program if a regional center fails to submit the required information or upon a determination that the regional center no longer meets program requirements. *Id.*

The requirement that regional centers continue to serve the purpose of promoting economic growth is subject to varying interpretations, and regional centers have expressed uncertainty regarding the requirements for continued participation. In addition, DHS has found that a number of regional centers have maintained their designation without actually engaging in work related to the EB–5 program, which has led to growing concerns of potential fraud.

DHS is therefore considering certain changes to the regulations governing

[5] *See* 8 CFR 103.2(b)(1), 8 CFR 205.2; *see also Matter of Izummi,* 22 I&N Dec. 169 (Assoc. Comm'r 1998), *Matter of Tawfik,* 20 I&N Dec. 166 (BIA 1990), *Matter of Arias,* 19 I&N Dec. 568 (BIA 1988), *Matter of Estime,* 19 I&N Dec. 450 (BIA 1987).

continued regional center designations, including changes that would require existing and newly designated regional centers to demonstrate that they continue to meet applicable statutory and regulatory requirements. Specifically, DHS is considering the following requirements for continued participation:

- Requiring evidence of active participation in the regional center program. Such evidence could include having an approved and currently valid exemplar; having pending exemplar applications that were filed within a specific time frame; or the existence of pending Form I–526 or I–829 petitions that are associated with the regional center and that were filed within a specific time frame.
- Requiring periodic demonstrations that the regional center has active monitoring and oversight activities as described in the previous section.
- Requiring prompt notification to DHS of significant changes to the regional center through the timely filing of amendments to the regional center designation. The effect of such a requirement would turn on how DHS interprets the term ''significant'' in this context. For instance, DHS currently considers the following change to the regional center to be significant: [6]
- Changes to the regional center's name;
- Changes to the regional center's ownership;
- Changes to the regional center's organizational structure;
- Changes to the regional center's administration that affect its oversight and reporting responsibilities;
- Changes to add or remove regional center principals; and/or
- Changes to the geographic scope of the regional center.

DHS is considering whether or not other changes may be deemed significant, such as material changes to an approved exemplar filing.

DHS welcomes public comment on all aspects of the potential changes described above, but would particularly benefit from commenters addressing one or more of the following questions:

1. How would regional centers or immigrant investors benefit, if at all, from an explicit requirement that the regional center actively participate in the Regional Center Program?

2. What activities demonstrate active participation in the Regional Center Program? What evidence should regional centers be required to provide to demonstrate active participation?

3. If DHS conditions a finding of active participation on evidence that the regional center is associated with an approved and valid exemplar, a pending exemplar application, or a pending Form I–526 or I–829 petition associated with the regional center, how long should the regional center be able to retain its designation in the absence of such approved or pending exemplar or pending petition? Why is such a timeframe appropriate?

4. How would a continual monitoring and oversight requirement impact currently designated regional centers?

5. How would a monitoring and oversight requirement impact small entities? Please provide data to support your response. Please identify any alternative policy proposals or other recommendations that would accomplish some or all of the goals identified above, while mitigating impacts on small entities.

6. In what circumstances should a regional center be required to amend a regional center designation during an out-of-cycle filing?

7. What additional changes to the regional center amendment process would assist stakeholders in complying with the process?

8. Should DHS reconsider the current filing structure for notifying USCIS of the suggested changes—*i.e.,* filing an amended Form I–924 petition with a fee? If so, what would be appropriate alternatives, and why?

D. Termination

Currently, USCIS can issue a Notice of Intent to Terminate and subsequently terminate a regional center designation if the regional center fails to submit required information annually, or if USCIS determines that the regional center no longer serves the purpose of promoting economic growth. *See* 8 CFR 204.6(m)(6). DHS is considering providing additional regulatory guidance to help stakeholders better understand the actions that can lead to termination of a regional center designation. Providing more detail about the types of activity (or inactivity) that may result in termination of the regional center would help regional centers better understand their obligations. This guidance would assist USCIS in more efficiently terminating non-compliant regional centers and ultimately help strengthen program integrity by providing a consistent framework for adjudication of these decisions. Finally, this guidance would help ensure that regional centers are legitimately pooling capital investment and promoting economic growth consistent with the purpose of the Regional Center Program.

Some of the activities that DHS is considering explicitly listing as activities that would result in termination of the regional center include:

- Failure to meet the continued participation requirements;
- Obtaining designation by fraud or misrepresentation;
- Using unlawfully sourced funds to run regional center operations; or
- Misusing investor funds, including, but not limited to, use in any unlawful activity (*e.g.,* Ponzi schemes).

DHS is seeking stakeholder input on actions that would cause USCIS to initiate termination actions against a regional center. DHS welcomes public comment on all aspects of the termination considerations, but would particularly benefit from commenters addressing one or more of the following questions:

1. What should DHS do to more effectively regulate the regional centers participating in this program?

2. Should the failure to maintain approved exemplar filings result in termination?

3. What activities should be considered a failure to promote economic growth and result in termination of the regional center?

4. What impact, positive or negative, would changes to clarify the termination grounds and process have on regional centers and/or investors? What impact would the changes have on small entities? Please provide data to support your response. Please identify any alternative policy proposals or other recommendations that would accomplish some or all of the goals identified above, while mitigating impacts on small entities.

5. What other factors impacting the regional center and/or investors should DHS consider when terminating a regional center?

Jeh Charles Johnson,

Secretary.

[FR Doc. 2017–00441 Filed 1–10–17; 8:45 am]

BILLING CODE 9111–97–P

[6] *See* 81 FR 73292; Form I–924 is available at *http://www.uscis.gov/I-924.*

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9568; Directorate Identifier 2016–NM–150–AD]

RIN 2120–AA64

Airworthiness Directives; 328 Support Services GmbH (Type Certificate Previously Held by AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain 328 Support Services GmbH Model 328–100 airplanes and 328 Support Services GmbH Model 328–300 airplanes. This proposed AD was prompted by reports of broken bonding wires of certain fuel line clamps. This proposed AD would require a one-time inspection of certain fuel line clamps for discrepancies, and replacement of any discrepant clamps. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 27, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this NPRM, contact 328 Support Services GmbH, Global Support Center, P.O. Box 1252, D–82231 Wessling, Federal Republic of Germany; telephone +49 8153 88111 6666; fax +49 8153 88111 6565; email *gsc.op@328support.de;* Internet *http://www.328support.de.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9568; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1175; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9568; Directorate Identifier 2016–NM–150–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2016–0169, dated August 17, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain 328 Support Services GmbH Model 328–100 and Model 328–300 airplanes. The MCAI states:

> Occurrences of broken bonding wires of the fuel line clamps have been reported on Dornier 328–100 and Dornier 328–300 aeroplanes equipped with fuel line clamps Part Number (P/N) 14C02–10A, or P/N 14C02–12A, or P/N 14C02–16A. The affected fuel line clamps have been installed in accordance with the instructions of SB–328–28–490 or SB–328J–28–241 to reduce occurrences of fuel line chafing.
>
> The results of the investigation did not identify design deficiency or production failure of the fuel line clamps. It is assumed that the chafing and breaking of the bonding wires are caused either by excessive vibration, misalignment, excessive installation tolerances or mistakes on installation or a combination * * * thereof.
>
> This condition, if not detected and corrected, could lead to the loss of bonding function and, in combination with a lightning strike, create a source of ignition in a fuel tank, possibly resulting in a fire or explosion and consequent loss of the aeroplane.
>
> To address this unsafe condition, 328 Support Services issued Alert Service Bulletin ASB–328–28–041 for Dornier 328–100 aeroplanes and ASB–328J–28–018 for Dornier 328–300 aeroplanes respectively (hereafter referred to collectively as 'the applicable ASB' in this [EASA] AD) providing inspection instructions.
>
> For the reason stated above, this [EASA] AD requires a one-time inspection of the fuel line clamps [for discrepancies including damaged, worn, or missing bonding wires, and chafing or incorrect alignment of jet pumps, connection parts, and fuel lines] and, depending on findings, replacement. This [EASA] AD also requires the reporting of all inspection results to the design approval holder.
>
> This [EASA] AD is considered an interim action and further [EASA] AD action may follow.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9568.

Related Service Information Under 1 CFR Part 51

328 Support Services GmbH issued Alert Service Bulletin ASB–328J–28–018, Revision 1, dated October 13, 2016; and Alert Service Bulletin ASB–328–28–041, Revision 1, dated October 13, 2016. The service information describes a one-time inspection of the fuel line clamps, and replacement of any clamps with worn or missing bonding wires. These documents are distinct since they apply to different airplane models.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of

Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of these same type designs.

Costs of Compliance

We estimate that this proposed AD affects 35 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	8 work-hours × $85 per hour = $680	$0	$680	$23,800
Reporting	1 work-hour × $85 per hour = $85	0	85	2,975

We estimate the following costs to do any necessary replacements that would be required based on the results of the proposed inspection. We have no way of determining the number of airplanes that might need these replacements.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement of discrepant clamps on Model 328–100 airplanes.	Up to 1 work-hour × $85 per hour = $85	Up to $560	Up to $645.
Replacement of discrepant clamps on Model 328–300 airplanes.	Up to 1 work-hour × $85 per hour = $85	Up to $588	Up to $673.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this proposed AD is 2120–0056. The paperwork cost associated with this proposed AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this proposed AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW., Washington, DC 20591, ATTN: Information Collection Clearance Officer, AES–200.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

328 Support Services GmbH (Type Certificate Previously Held by AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH): Docket No. FAA–2016–9568; Directorate Identifier 2016–NM–150–AD.

(a) Comments Due Date

We must receive comments by February 27, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to 328 Support Services GmbH (Type Certificate Previously Held by AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH) airplanes, certificated in any category, identified in paragraphs (c)(1) and (c)(2) of this AD.

(1) Model 328–100 airplanes, on which Dornier 328 Service Bulletin SB–328–28–490, has been incorporated.

(2) Model 328–300 airplanes, on which Dornier 328J Service Bulletin SB–328J–28–241, has been incorporated.

(d) Subject

Air Transport Association (ATA) of America Code 28, Fuel.

(e) Reason

This AD was prompted by reports of broken bonding wires of certain fuel line clamps. We are issuing this AD to prevent the loss of bonding function, which, in combination with a lightning strike, could create a source of ignition in a fuel tank, possibly resulting in a fire or explosion and consequent loss of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Inspection

Within 6 months after the effective date of this AD, do a one-time general visual inspection for discrepancies, as identified in, and in accordance with, the Accomplishment Instructions of the service information specified in paragraph (g)(1) or (g)(2) of this AD, as applicable.

(1) 328 Support Services GmbH Alert Service Bulletin ASB–328–28–041, Revision 1, dated October 13, 2016 (Model 328–100 airplanes).

(2) 328 Support Services GmbH Alert Service Bulletin ASB–328J–28–018, Revision 1, dated October 13, 2016 (Model 328–300 airplanes).

(h) Replacement of Parts

If any discrepancy is found during the inspection required by paragraph (g) of this AD, before further flight, replace the affected clamp in accordance with the Accomplishment Instructions of the service information specified in paragraph (g)(1) or (g)(2) of this AD, as applicable.

(i) Reporting

At the applicable time specified in paragraph (i)(1) or (i)(2) of this AD, report the inspection results, positive or negative, to 328 Support Services, GmbH, Global Support Center, P.O. Box 1252, D–82231 Wessling, Federal Republic of Germany; fax +49 8153 88111 6565; email *gsc.op@328support.de.* The report must include findings on fuel line clamps, aircraft serial number, total flight hours, and total landings.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(j) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraph (j)(1) or (j)(2) of this AD.

(1) 328 Support Services GmbH Alert Service Bulletin ASB–328–28–041, dated June 14, 2016.

(2) 328 Support Services GmbH Alert Service Bulletin ASB–328J–28–018, dated June 3, 2016.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1175; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or 328 Support Services GmbH's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(l) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2016–0169, dated August 17, 2016, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9568.

(2) For service information identified in this AD, contact 328 Support Services GmbH, Global Support Center, P.O. Box 1252, D–82231 Wessling, Federal Republic of Germany; telephone +49 8153 88111 6666; fax +49 8153 88111 6565; email *gsc.op@328support.de;* Internet *http://www.328support.de.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 27, 2016.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–31965 Filed 1–10–17; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Information Security Oversight Office

32 CFR Part 2004

[FDMS No. NARA–16–0006; Agency No. NARA–2017–017]

RIN 3095–AB79

National Industrial Security Program

AGENCY: Information Security Oversight Office, National Archives and Records Administration (NARA).

ACTION: Proposed rule.

SUMMARY: The Information Security Oversight Office (ISOO) of the National Archives and Records Administration (NARA), proposes to revise the National Industrial Security Program (NISP) Directive. The NISP safeguards classified information the Federal Government or foreign governments release to contractors, licensees, grantees, and certificate holders. This proposed revision adds provisions incorporating executive branch insider threat policy and minimum standards, identifies the Office of the Director of National Intelligence (ODNI) and the Department of Homeland Security (DHS) as new cognizant security agencies (CSAs), and adds responsibilities for all CSAs and non-CSA departments and agencies (to reflect oversight functions that are already detailed for private sector entities in the National Industrial Security Program Operating Manual (NISPOM)). The proposed revisions also make other administrative changes to be consistent with recent revisions to the NISPOM and with updated regulatory language and style.

DATES: Submit comments by February 10, 2017.

ADDRESSES: You may submit comments, identified by RIN 3095–AB79, by any of the following methods:

▪ *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

▪ *Email: Regulation_comments@nara.gov.* Include RIN 3095–AB79 in the subject line of the message.

▪ *Mail (for paper, disk, or CD–ROM submissions. Include RIN 3095–AB79 on the submission):* Regulations Comments Desk (External Policy Program, Strategy and Performance Division (SP)); Suite 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740–6001.

▪ *Hand delivery or courier:* Deliver comments to the front desk at the address above.

Instructions: You must include on all submissions the Regulatory Information Number (RIN) for this rulemaking (RIN 3095–AB79) and NARA's name. We may publish any comments we receive without changes, including any personal information you provide.

FOR FURTHER INFORMATION CONTACT: For information about this regulation and the regulatory process, contact Kimberly Keravuori, External Policy Program Manager, by email at *regulation_comments@nara.gov,* or by telephone at 301.837.3151. For information about the NISP and the requirements in this regulation, contact William A. Cira, Acting Director, ISOO, by telephone at 202–357–5323.

SUPPLEMENTARY INFORMATION: We have coordinated and vetted the proposed revisions through the CSAs listed in Executive Order (E.O.) 12829, National Industrial Security Program (January 6, 1993 (58 FR 3479)), as amended by E.O. 12885 (December 14, 1993 (58 FR 65863): Department of Defense, Department of Energy, Nuclear Regulatory Commission, Office of the Director of National Intelligence, and Department of Homeland Security. We have also coordinated this with the other executive branch agencies that are members of the National Industrial Security Program Policy Advisory Committee (NISPPAC) or that release classified information to contractors, licensees, grantees, or certificate holders, and with the industry members of the NISPPAC. The proposed revisions do not change requirements for industry (which are contained in the NISPOM), but instead clarify agency responsibilities.

Background

The NISP is the Federal Government's single, integrated industrial security program. E.O. 12829 (amended in 1993) established the NISP to safeguard classified information in industry and preserve the nation's economic and technological interests. The President issued E.O. 13691, Promoting Private Sector Cybersecurity Information Sharing (February 13, 2015 (80 FR 9347)), and E.O. 13708, Continuance or Reestablishment of Certain Federal Advisory Committees (September 30, 2015 (80 FR 60271)), which further amended E.O. 12829.

E.O. 12829, sec. 102(b), delegated oversight of the NISP to the Director of NARA's Information Security Oversight Office (ISOO). As part of ISOO's responsibilities under E.O. 12829, it is authorized to issue such directives as necessary to implement the E.O., which are binding on agencies. In 2006, ISOO issued, and periodically updates, this regulation, which functions as one of those directives.

This regulation establishes uniform standards throughout the Program, and helps agencies implement requirements in E.O. 12829, as amended (collectively referred to as ''E.O. 12829''). This revision also establishes agency responsibilities for implementing the insider threat provisions of E.O. 13587, Structural Reforms to Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information (October 7, 2011 (76 FR 63811)) within the NISP. However, the regulation does not stand alone; users should refer concurrently to the underlying executive orders for guidance.

Nothing in this regulation supersedes the authority of the Secretary of Energy or the Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011, *et seq.*); the authority of the Director of National Intelligence (or any intelligence community element) under the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108–458), the National Security Act of 1947 (50 U.S.C. 401, *et seq.*), as amended, and E.O. 12333 (December 4, 1981), as amended by E.O. 13355, Strengthened Management of the Intelligence Community (August 27, 2004) and E.O. 13470, Further Amendments to Executive Order 12333 (July 30, 2008); or the authority of the Secretary of Homeland Security, as the Executive Agent for the Classified National Security Information Program established under E.O. 13549, Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities (August 18, 2010), or by E.O. 13284, Amendment of Executive Orders, and Other Actions, in Connection with the Establishment of the Department of Homeland Security, (January 23, 2003).

Revision Process and Proposed Changes

This proposed rule reflects a national level policy framework that should not change existing practices and procedures for any of the affected agencies or for entities in any significant way. A working group comprised of NISP CSA representatives, ISOO staff, the Department of Defense's (DoD) Defense Security Service (DSS), and the Central Intelligence Agency, drafted this proposed rule.

We initiated the proposed revisions in 2013 to incorporate new insider threat program requirements as a result of E.O. 13587, Structural Reforms to Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information, October 2011, and the associated National Insider Threat Policy and Minimum Standards from the White House in November 2012. The national insider threat policy directs that the Government apply insider threat provisions to private sector entities that access classified information, which the executive branch accomplishes through the National Industrial Security Program Operating Manual (NISPOM), issued by the NISP Executive Agent, DoD. The NISPOM also provides private sector entities that access classified information with other NISP requirements and procedures. On the other side of the equation, this NISP regulation gives policy direction and establishes responsibilities for the agencies that release classified information *to* private sector entities to ensure that the agencies provide consistent oversight of entity programs. We are therefore proposing revisions to the regulation to add the insider threat requirements that pertain to NISP oversight by agencies; similar provisions have been added to the NISPOM for private sector entities to follow. The NISP CSAs, ISOO, and the National Insider Threat Task Force (NITTF) collaborated on the proposed insider threat provisions that are incorporated.

During review of the regulation, the working group determined that, although the NISPOM provides requirements and procedures for entities, this regulation did not include many of the coinciding oversight requirements for agencies. We therefore expanded the revision to include adding aspects of NISP implementation for which the agencies have a responsibility that weren't already spelled out in the regulation. These proposed changes include adding responsibility provisions

for CSAs and Government contracting activities (GCAs), standards by which they make entity and employee eligibility determinations for access to classified information, standards for assessing foreign ownership, control, or influence and for mitigating or negating it, and identifying CSA and non-CSA agency responsibilities for security classification and for authorizing entity information systems to process classified information. While CSAs and other agencies have been carrying out these responsibilities since the establishment of the NISP under E.O. 12829, and they have been spelled out in the NISPOM, they were not previously included in this regulation. We are including them to ensure agencies consistently apply the NISP requirements for all entities that have access to classified information and thereby aid in reducing processing burdens on entities. This affords agencies the opportunity to ensure that they are complying with existing NISP requirements, to include verifying that all current contracts or agreements with contractors, licensees, or grantees include appropriate security requirements. E.O. 12829 was amended by E.O. 13691, Promoting Private Sector Cybersecurity Information Sharing, in February 2015. The amendment established the DHS as a CSA, not limited to the classified critical infrastructure protection program (CCIPP). As part of its CSA responsibilities, DHS will perform oversight of critical sector entities participating in the CCIPP. We also incorporated DHS responsibilities as a CSA and the provisions of the CCIPP into this revision.

We have also made some proposed revisions to more clearly set out items that were already in the regulation. One such proposed change is the approach to reciprocity. Because of the separate and unique authorities of the CSAs, one CSA might not, in some cases, reciprocally accept entity eligibility determinations made by another CSA. However, the proposed revision stipulates that CSAs will not require entities to go through duplicate steps for eligibility determinations. This should help reduce and streamline eligibility determinations for entities receiving classified information from more than one agency.

We are also proposing some new, more general terminology (like ''entity eligibility determination,'' which describes a process all CSAs do, instead of ''facility security clearance (FCL),'' which is an agency-specific term for a favorable determination resulting from that process). Our goal is to create a common framework that all CSAs can effectively use because it sets out requirements in terms that encompass CSA processes for varying types of classified information under the NISP. These terminology changes do not preclude the CSAs from using their traditional terminology in agency policies that implement this rule or in the NISPOM.

The NISPOM currently includes a limited facility security clearance as an option for agencies to consider when foreign ownership, control, or influence (FOCI) of an entity cannot be mitigated or negated. We have added the limited eligibility determination option to this regulation, but have also expanded it to include limited eligibility for entities that are not under FOCI, but for which an agency considers it appropriate to limit access to a specific and narrow purpose.

In addition, we have made some drafting changes to make the regulation more readable.

Regulatory Analysis

The Office of Management and Budget (OMB) has reviewed this proposed regulation.

Review Under Executive Orders 12866 and 13563

Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (September 30, 1993), and Executive Order 13563, Improving Regulation and Regulation Review, 76 FR 23821 (January 18, 2011), direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This proposed rule is ''significant'' under Executive Order 12866, sec. 3(f), but is not a major rule as defined in 5 U.S.C. Chapter 8, Congressional Review of Agency Rulemaking. The Office of Management and Budget (OMB) has reviewed this proposed regulation.

Review Under the Regulatory Flexibility Act (5 U.S.C. 601, et seq.)

This review requires an agency to prepare an initial regulatory flexibility analysis and publish it when the agency publishes the proposed rule. This requirement does not apply if the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 603). As required by the Regulatory Flexibility Act, we certify that this proposed rulemaking will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies. This regulation does not establish requirements for entities; those requirements are established in the NISPOM. This rule sets out coinciding requirements for agencies. However, agencies implementing this regulation will do so through contracts with businesses (as well as other agreements with entities) and thus it indirectly affects those entities. Agencies have been applying the requirements and procedures contained in the NISPOM (and, to a lesser extent, contained in this regulation) to entities for 20 years, with the exception of insider threat provisions added to the NISPOM in 2016, and the proposed additions to this regulation do not substantially alter those requirements. Most of the provisions being added to this regulation have applied to entities through the NISPOM; we are simply incorporating the agency responsibilities for those requirements into the regulation.

Other revisions to this regulation are primarily administrative, except the new insider threat requirements. The insider threat requirements make minor additions to training, oversight, information system security, and similar functions already being conducted by entities, and thus will not have a significant economic impact on a substantial number of small business entities.

Review Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed rule contains information collection activities that are subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. We refer to the following OMB-approved DoD information collection in §§ 2004.34(b), 2004.34(c)(1) of this regulation: OMB control No. 0704–0194, SF 328, Certificate Pertaining to Foreign Interests, approved through September 30, 2019. DoD published the information collection notice in the **Federal Register** in May 2015 (80 FR 27938, May 15, 2015) for public comment, and the notice of OMB review in the **Federal Register** in July 2016 (81 FR 47790, July 22, 2016), providing a second opportunity for public comment.

Review Under Executive Order 13132, Federalism, 64 FR 43255 (August 4, 1999)

Review under Executive Order 13132 requires that agencies review regulations for federalism effects on the

institutional interest of states and local governments, and, if the effects are sufficiently substantial, prepare a Federal assessment to assist senior policy makers. This proposed rule will not have any direct effects on State and local governments within the meaning of the Executive Order. Therefore, this rule does not include a federalism assessment.

List of Subjects in 32 CFR Part 2004

Classified information, National Industrial Security Program.

For the reasons stated in the preamble, the National Archives and Records Administration proposes to revise 32 CFR part 2004 to read as follows:

PART 2004—NATIONAL INDUSTRIAL SECURITY PROGRAM (NISP)

Subpart A—Implementation and Oversight

2004.1 Purpose and scope.
2004.4 Definitions that apply to this part.
2004.10 Responsibilities of the Director, Information Security Oversight Office (ISOO).
2004.11 CSA and agency implementing regulations, internal rules, or guidelines.
2004.12 ISOO reviews of agency NISP implementation.

Subpart B—Administration

2004.20 National Industrial Security Program Executive Agent (EA) and Operating Manual (NISPOM).
2004.22 Agency responsibilities.
2004.24 Insider threat program.
2004.26 Reviews of entity NISP implementation.
2004.28 Cost reports.

Subpart C—Operations

2004.30 Security classification requirements and guidance.
2004.32 Determining entity eligibility for access to classified information.
2004.34 Foreign ownership, control, or influence (FOCI).
2004.36 Determining entity employee eligibility for access to classified information.
2004.38 Safeguarding and marking.
2004.40 Information system security.
2004.42 International programs security. [Reserved]

Appendix A to Part 2004—Acronym Table

Authority: Section 102(b)(1) of E.O. 12829 (January 6, 1993), as amended by E.O. 12885 (December 14, 1993), E.O. 13691 (February 12, 2015), and section 4 of E.O. 13708 (September 30, 2015).

Subpart A—Implementation and Oversight

§ 2004.1 Purpose and scope.

(a) This part sets out the National Industrial Security Program (''NISP'' or ''the Program'') governing the protection of executive-branch agency classified information released to Federal contractors, licensees, grantees, and certificate holders. It establishes uniform standards throughout the Program, and helps agencies implement requirements in E.O. 12829, National Industrial Security Program, as amended by E.O. 12558 and E.O.13691 (collectively referred to as ''E.O. 12829''), E.O. 13691, Promoting Private Sector Cybersecurity Information Sharing, and E.O. 13587, Structural Reforms to Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information. It applies to any executive branch agency that releases classified information to current, prospective, or former Federal contractors, licensees, grantees, or certificate holders. However, this part does not stand alone; users should refer concurrently to the underlying executive orders for guidance. ISOO maintains policy oversight over the NISP as established by E.O.12829.

(b) This part also does not apply to release of classified information pursuant to criminal proceedings. The Classified Information Procedures Act (CIPA) (18 U.S.C. Appendix 3) governs release of classified information in criminal proceedings.

(c) Nothing in this part supersedes the authority of the Secretary of Energy or the Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011, *et seq.*) (collectively referred to as ''the Atomic Energy Act''); the authority of the Director of National Intelligence (or any intelligence community element) under the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108–458), the National Security Act of 1947 as amended (50 U.S.C. 401, *et seq.*), and E.O. 12333 (December 4, 1981), as amended by E.O. 13355, Strengthened Management of the Intelligence Community (August 27, 2004) and E.O. 13470, Further Amendments to Executive Order 12333 (July 30, 2008) (collectively referred to as ''E.O. 12333''); or the authority of the Secretary of Homeland Security, as the Executive Agent for the Classified National Security Information Program established under E.O. 13549, Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities (August 18, 2010), or as established by E.O. 13284, Amendment of Executive Orders, and Other Actions, in Connection with the Establishment of the Department of Homeland Security (January 23, 2003).

§ 2004.4 Definitions that apply to this part.

(a) *Access* is the ability or opportunity to gain knowledge of classified information.

(b) *Agency(ies)* are any ''Executive agency'' as defined in 5 U.S.C. 105; any ''Military department'' as defined in 5 U.S.C. 102; and any other entity within the executive branch that releases classified information to private sector entities. This includes component agencies under another agency or under a cross-agency oversight office (such as ODNI with CIA), which are also agencies for purposes of this part.

(c) *Classified Critical Infrastructure Protection Program (CCIPP)* is the DHS program established by E.O. 13691, ''Promoting Private Sector Cybersecurity Information Sharing.'' The Government uses this program to share classified threat information with employees of private sector entities that own or operate critical infrastructure. Critical infrastructure refers to systems and assets, whether physical or virtual, so vital to the United States that incapacitating or destroying such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination thereof. These entities include banks and power plants, among others. The sectors of critical infrastructure are listed in Presidential Policy Directive 21, *Critical Infrastructure Security and Resilience* (February 12, 2013).

(d) *Classified Critical Infrastructure Protection Program (CCIPP) security point of contact (security POC)* is an official whom a CCIPP entity designates to maintain eligibility information about the entity and its cleared employees, and to report that information to DHS. The CCIPP security POC must be eligible for access to classified information.

(e) *Classified information* is information the Government designates as requiring protection against unauthorized disclosure in the interest of national security, pursuant to E.O. 13526, Classified National Security Information, or any predecessor order, and the Atomic Energy Act of 1954, as amended. Classified information includes national security information (NSI), restricted data (RD), and formerly restricted data (FRD), regardless of its physical form or characteristics (including tangible items other than documents).

(f) *Cognizance* is the area over which a CSA has operational oversight. Normally, a statute or executive order establishes a CSA's cognizance over certain types of information, programs, or non-CSA agencies, although CSAs

may also have cognizance through an agreement with another CSA or non-CSA agency or an entity. A CSA may have cognizance over a particular type(s) of classified information based on specific authorities (such as those listed in 2004.1(d)), and a CSA may have cognizance over certain agencies or cross-agency programs (such as DoD's cognizance over non-CSA agencies as the EA for NISP, or ODNI's oversight (if applicable) of all intelligence community elements within the executive branch). Entities fall under a CSA's cognizance when they enter or compete to enter contracts or agreements to access classified information under the CSA's cognizance, including when they enter or compete to enter such contracts or agreements with a non-CSA agency or another entity under the CSA's cognizance.

(g) *Cognizant security agencies (CSAs)* are the agencies E.O. 12829, sec. 202, designates as having NISP implementation and security responsibilities for their own agencies (including component agencies) and any entities and non-CSA agencies under their cognizance. The CSAs are: Department of Defense (DoD); Department of Energy (DOE); Nuclear Regulatory Commission (NRC); Office of the Director of National Intelligence (ODNI); and Department of Homeland Security (DHS).

(h) *Cognizant security office (CSO)* is an organizational unit to which the head of a CSA delegates authority to administer industrial security services on behalf of the CSA.

(i) *Contracts or agreements* are any type of arrangement between an agency and an entity or an agency and another agency. They include, but are not limited to, contracts, sub-contracts, licenses, certificates, memoranda of understanding, inter-agency service agreements, other types of documents or arrangements setting out responsibilities, requirements, or terms agreed upon by the parties, programs, projects, and other legitimate U.S. or foreign government requirements. FOCI mitigation or negation measures, such as Voting Trust Agreements, that have the word ''agreement'' in their title are not included in the term ''agreements'' within this part.

(j) *Controlling agency* is an agency that owns or controls certain types of proscribed information and thus has authority over access to or release of the proscribed information. For communications security information (COMSEC), the controlling agency is NSA; for restricted data (RD), the controlling agency is DOE; and for sensitive compartmented information (SCI), the controlling agency is ODNI. For Top Secret and SAP information, the controlling agency is always the same agency as the GCA.

(k) *Entity* is a generic and comprehensive term which may include sole proprietorships, partnerships, corporations, limited liability companies, societies, associations, institutions, contractors, licensees, grantees, certificate holders, and other organizations usually established and operating to carry out a commercial, industrial, educational, or other legitimate business, enterprise, or undertaking, or parts of these organizations. It may reference an entire organization, a prime contractor, parent organization, a branch or division, another type of sub-element, a sub-contractor, subsidiary, or other subordinate or connected entity (referred to as ''sub-entities'' when necessary to distinguish such entities from prime or parent entities), a specific location or facility, or the headquarters/official business location of the organization, depending upon the organization's business structure, the access needs involved, and the responsible CSA's procedures. The term ''entity'' as used in this part refers to the particular entity to which an agency might release, or is releasing, classified information, whether that entity is a parent or subordinate organization.

(l) *Entity eligibility determination* is an assessment by the CSA as to whether an entity is eligible for access to classified information of a certain level (and all lower levels). Eligibility determinations may be broad or limited to specific contracts, sponsoring agencies, or circumstances. A favorable determination results in eligibility to access classified information under the cognizance of the responsible CSA to the level approved. When the entity would be accessing categories of information such as RD or SCI for which the CSA for that information has set additional requirements, CSAs must also assess whether the entity is eligible for access to that category. Some CSAs refer to their favorable determinations as facility security clearances (FCL). A favorable entity eligibility determination does not convey authority to store classified information.

(m) *Foreign interest* is any foreign government, agency of a foreign government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered, or incorporated under the laws of any country other than the United States or its territories; and any person who is not a United States citizen or national.

(n) *Government contracting activity (GCA)* is an agency component or subcomponent to which the agency head delegates broad authority regarding acquisition functions. A foreign government may also be a GCA.

(o) *Industrial security services* are those activities performed by a CSA to verify that an entity is protecting classified information. They include, but are not limited to, conducting oversight reviews, making eligibility determinations, and providing agency and entity guidance and training.

(p) *Insider(s)* are entity employees who are eligible to access classified information and may be authorized access to any U.S. Government or entity resource (such as personnel, facilities, information, equipment, networks, or systems).

(q) *Insider threat* is the likelihood, risk, or potential that an insider will use his or her authorized access, wittingly or unwittingly, to do harm to the national security of the United States. Insider threats may include harm to entity or program information to the extent that the information impacts the entity's or agency's obligations to protect classified information.

(r) *Insider threat response action(s)* are actions (such as investigations) an agency takes to ascertain whether an insider threat exists, and actions the agency takes to mitigate the threat. Agencies may conduct insider threat response actions through their counterintelligence (CI), security, law enforcement, or inspector general organizations, depending on the statutory authority and internal policies that govern the agency.

(s) *Insider threat program senior official (SO)* is the official an agency head or entity designates with responsibility to manage, account for, and oversee the agency's or entity's insider threat program, pursuant to the National Insider Threat Policy and Minimum Standards. An agency may have more than one insider threat program SO.

(t) *Key managers and officials (KMO)* are the senior management official (or authorized executive official under CCIPP), the entity's security officer (or security POC under CCIPP), the insider threat program senior official, and other entity employees whom the responsible CSA identifies as having authority, direct or indirect, to influence or decide matters affecting the entity's management or operations, its classified contracts, or national security interests. They may include individuals who hold majority ownership interest in the entity

(in the form of stock or other ownership interests).

(u) *Proscribed information* is information that is classified as top secret (TS) information; communications security (COMSEC) information (excluding controlled cryptographic items when un-keyed or utilized with unclassified keys); restricted data (RD); special access program information (SAP); or sensitive compartmented information (SCI).

(v) *Security officer* is a U.S. citizen employee the entity designates to supervise and direct security measures implementing NISPOM (or equivalent; such as DOE Orders) requirements. Some CSAs refer to this position as a facility security officer (FSO). The security officer must complete security training specified by the responsible CSA, and must have and maintain an employee eligibility determination level that is at least the same level as the entity's eligibility determination level.

(w) *Senior agency official for NISP (SAO for NISP)* is the official an agency head designates to direct and administer the agency's National Industrial Security Program.

(x) *Senior management official (SMO)* is the person in charge of an entity. Under the CCIPP, this is the authorized executive official with authority to sign the security agreement with DHS.

(y) *Sub-entity* is an entity's branch or division, another type of sub-element, a sub-contractor, subsidiary, or other subordinate or connected entity. Sub-entities fall under the definition of ''entity,'' but this part refers to them as sub-entities when necessary to distinguish such entities from prime contractor or parent entities. See definition of ''entity'' at § 2004.4(k) for more context.

§ 2004.10 Responsibilities of the Director, Information Security Oversight Office (ISOO).

The Director, ISOO:

(a) Implements E.O. 12829, including ensuring that:

(1) The NISP operates as a single, integrated program across the executive branch of the Federal Government (*i.e.,* such that agencies that release classified information to entities adhere to NISP principles);

(2) A responsible CSA oversees each entity's NISP implementation in accordance with § 2004.22;

(3) All agencies that contract for classified work include the Security Requirements clause, 48 CFR 52.204–2, from the Federal Acquisition Regulation (FAR), or an equivalent clause, in contracts that require access to classified information;

(4) Those agencies for which the Department of Defense (DoD) serves as the CSA or provides industrial security services have agreements with DoD defining the Secretary of Defense's responsibilities on behalf of their agency;

(5) Each CSA issues directions to entities under their cognizance that are consistent with the NISPOM insider threat guidance;

(6) CSAs share with each other, as lawful and appropriate, relevant information about entity employees that indicates an insider threat; and

(7) CSAs conduct ongoing analysis and adjudication of adverse or relevant information about entity employees that indicates an insider threat.

(b) Raises an issue to the National Security Council (NSC) for resolution if the EA's NISPOM coordination process cannot reach a consensus on NISPOM security standards (see § 2004.20(d)).

§ 2004.11 CSA and agency implementing regulations, internal rules, or guidelines.

(a) Each CSA implements NISP practices in part through policies and guidelines that are consistent with this part, so that agencies for which it serves as the CSA are aware of appropriate security standards, engage in consistent practices with entities, and so that practices effectively protect classified information those entities receive (including foreign government information that the U.S. Government must protect in the interest of national security).

(b) Each CSA must also routinely review and update its NISP policies and guidelines and promptly issue revisions when needed (including when a change in national policy necessitates a change in agency NISP policies and guidelines).

(c) Non-CSA agencies may choose to augment CSA NISP policies or guidelines as long as the agency policies or guidelines are consistent with the CSA's policies or guidelines and this part.

§ 2004.12 ISOO review of agency NISP implementation.

(a) ISOO fulfills its oversight role based, in part, on information received from NISP Policy Advisory Committee (NISPPAC) members, from on-site reviews that ISOO conducts under the authority of E.O. 12829, and from any submitted complaints and suggestions. ISOO reports findings to the responsible CSA or agency.

(b) ISOO reviews agency policies and guidelines to ensure consistency with NISP policies and procedures. ISOO may conduct reviews during routine oversight visits, when a problem or potential problem comes to ISOO's attention, or after a change in national policy that impacts agency policies and guidelines. ISOO provides the responsible agency with findings from these reviews.

Subpart B—Administration

§ 2004.20 National Industrial Security Program Executive Agent and Operating Manual (NISPOM).

(a) The executive agent (EA) for NISP is the Secretary of Defense. The EA:

(1) Provides industrial security services for agencies that are not CSAs but that release classified information to entities. The EA provides industrial security services only through an agreement with the agency. Non-CSA agencies must enter an agreement with the EA and comply with EA industrial security service processes before releasing classified information to an entity;

(2) Provides services for other CSAs by agreement; and

(3) Issues and maintains the National Industrial Security Program Operating Manual (NISPOM) in consultation with all affected agencies and with the concurrence of the other CSAs.

(b) The NISPOM sets out the procedures and standards that entities must follow during all phases of the contracting process to safeguard any classified information an agency releases to an entity. The NISPOM requirements may apply to the entity directly (*i.e.,* through FAR clauses or other contract clauses referring entities to the NISPOM) or through equivalent contract clauses or requirements documents that are consistent with NISPOM requirements.

(c) The EA, in consultation with all affected agencies and with the concurrence of the other CSAs, develops the requirements, restrictions, and safeguards contained in the NISPOM. The EA uses security standards applicable to agencies as the basis for developing NISPOM entity standards to the extent practicable and reasonable.

(d) The EA also facilitates the NISPOM coordination process, which addresses issues raised by entities, agencies, ISOO, or the NISPPAC, including requests to create or change NISPOM security standards.

§ 2004.22 Agency responsibilities.

(a) *Agency categories and general areas of responsibility.* (1) Federal agencies fall into two categories for the purpose of NISP responsibilities:

(i) *CSAs.* CSAs are responsible for carrying out NISP implementation within their agency, for providing NISP

industrial security services on behalf of non-CSA agencies by agreement when authorized, and for overseeing NISP compliance by entities that access classified information under the CSA's cognizance. When the CSA has oversight responsibilities for a particular non-CSA agency or for an entity, the CSA also functions as the responsible CSA;

(ii) *Non-CSA agencies.* Non-CSA agencies are responsible for entering agreements with a designated CSA for industrial security services, and are responsible for carrying out NISP implementation within their agency consistently with the agreement, the CSA's guidelines and procedures, and this part;

(2) *Agencies that are components of another agency.* Component agencies do not have itemized responsibilities under this part and do not independently need to enter agreements with a CSA, but they follow, and may have responsibilities under, implementing guidelines and procedures established by their CSA or non-CSA agency, or both.

(b) *Responsible CSA role.* (1) The responsible CSA is the CSA (or its delegated CSO) that provides NISP industrial security services on behalf of an agency, determines an entity's eligibility for access, and monitors and inspects an entity's NISP implementation.

(2) In general, the goal is to have one responsible CSA for each agency and for each entity, to minimize the burdens that can result from complying with differing CSA procedures and requirements.

(i) With regard to agencies, NISP accomplishes this goal by a combination of designated CSAs and agreements between agencies and CSAs.

(ii) With regard to entities, CSAs strive to reduce the number of responsible CSAs for a given entity as much as possible. To this end, when more than one CSA releases classified information to a given entity, those CSAs agree on which is the responsible CSA. However, due to certain unique agency authorities, there may be circumstances in which a given entity is under the oversight of more than one responsible CSA.

(3) *Responsible CSA for agencies.* (i) In general, each CSA serves as the responsible CSA for classified information that it (or any of its component agencies) releases to entities, unless it enters an agreement otherwise with another CSA.

(ii) DoD serves as the responsible CSA for DHS with the exception of the CCIPP, based on an agreement between the two CSAs.

(iii) DoD serves as the responsible CSA on behalf of all non-CSA agencies, except CSA components, based on E.O. 12829 and its role as NISP EA.

(iv) ODNI serves as the responsible CSA for CIA.

(4) *Responsible CSA for entities.* When determining the responsible CSA for a given entity, the involved CSAs consider, at a minimum: Retained authorities, the information's classification level, number of classified contracts, location, number of Government customers, volume of classified activity, safeguarding requirements, responsibility for entity employee eligibility determinations, and any special requirements.

(5) Responsible CSAs may delegate oversight responsibility to a cognizant security office (CSO) through CSA policy or by written delegation. The CSA must inform entities under its cognizance if it delegates responsibilities. For purposes of this rule, the term CSA also refers to the CSO.

(c) *CSA responsibilities.* (1) The CSA may perform GCA responsibilities as its own GCA.

(2) As CSA, the CSA performs or delegates the following responsibilities:

(i) Designates a CSA senior agency official (SAO) for NISP;

(ii) Identifies the insider threat senior official (SO) to the Director, ISOO;

(iii) Shares insider threat information with other CSAs, as lawful and appropriate, including information that indicates an insider threat about entity employees eligible to access classified information;

(iv) Acts upon and shares—with security management, GCAs, insider threat program employees, and Government program and CI officials—any relevant entity-reported information about security or CI concerns, as appropriate;

(v) Submits reports to ISOO as required by this part; and

(vi) Develops, coordinates, and provides concurrence on changes to the NISPOM when requested by the EA.

(3) As a responsible CSA, the CSA also performs or delegates the following responsibilities:

(i) Determines whether an entity is eligible for access to classified information (see § 2004.32);

(ii) Allocates funds, ensures appropriate investigations are conducted, and determines entity employee eligibility for access to classified information (see § 2004.36);

(iii) Reviews and approves entity safeguarding measures, including making safeguarding capability determinations (see § 2004.38);

(iv) Conducts periodic security reviews of entity operations (see § 2004.26) to determine that entities: Effectively protect classified information provided to them; and follow NISPOM (or equivalent) requirements;

(v) Provides and regularly updates guidance, training, training materials, and briefings to entities on:

(A) Entity implementation of NISPOM (or equivalent) requirements, including: Responsibility for protecting classified information, requesting NISPOM interpretations, establishing training programs, and submitting required reports;

(B) Initial security briefings and other briefings required for special categories of information;

(C) Authorization measures for information systems processing classified information (except DHS) (see § 2004.40);

(D) Security training for security officers (or CCIPP POCs) and other employees whose official duties include performing NISP-related functions;

(E) Insider threat programs in accordance with the National Insider Threat Policy and Minimum Standards; and

(F) Other guidance and training as appropriate;

(vi) Establishes a mechanism for entities to submit requests for waivers to NISPOM (or equivalent) provisions;

(vii) Reviews, continuously analyzes, and adjudicates, as appropriate, reports from entities regarding events that:

(A) Impact the status of the entity's eligibility for access to classisfied information;

(B) Impact an employee's eligibility for access;

(C) May indicate an employee poses an insider threat;

(D) Affect proper safeguarding of classified information; or

(E) Indicate that classified information has been lost or compromised.

(viii) Verifies that reports offered in confidence and so marked by an entity may be withheld from public disclosure under applicable exemptions of the Freedom of Information Act (5 U.S.C. 552).

(ix) Requests any additional information needed from an entity about involved employees to determine continued eligibility for access to classified information when the entity reports loss, possible compromise, or unauthorized disclosure of classified information; and

(x) Posts hotline information on its Web site for entity access, or otherwise

disseminates contact numbers to the entities for which the CSA is responsible.

(d) *Non-CSA agency head responsibilities.* The head of a non-CSA agency that is not a CSA component and that releases classified information to entities, performs the following responsibilities:

(1) Designates an SAO for the NISP;

(2) Identifies the SO for insider threat to ISOO to facilitate information sharing;

(3) Enters into an agreement with the EA (except agencies that are components of another agency or a cross-agency oversight office) to act as the responsible CSA on the agency's behalf (see paragraph (a)(1)(ii) of this section);

(4) Performs, or delegates in writing to a GCA, the following responsibilities:

(i) Provides appropriate education and training to agency personnel who implement the NISP;

(ii) Includes FAR security requirements clause 52.204–2, or equivalent (such as the DEAR clause 952.204–2), and a contract security classification specification into contracts and solicitations that require access to classified information (see § 2004.30); and

(iii) Reports to the appropriate CSA adverse information and insider threat activity pertaining to entity employees having access to classified information.

§ 2004.24 Insider threat program.

(a) Responsible CSAs oversee and analyze entity activity to ensure entities implement an insider threat program in accordance with the National Insider Threat Policy and Minimum Standards (via requirements in the NISPOM or its equivalent) and guidance from the CSA, to include:

(1) Verifying that entities appoint SOs for insider threat;

(2) Requiring entities to monitor, report, and review insider threat program activities and response actions in accordance with the provisions set forth in the NISPOM (or equivalent);

(3) Providing entities with access to data relevant to insider threat program activities and applicable reporting requirements and procedures;

(4) Providing entities with a designated means to report insider threat-related activity; and

(5) Advising entities on appropriate insider threat training for authorized entity employees.

(b) CSAs share with other CSAs any insider threat information reported to them by entities, as lawful and appropriate.

§ 2004.26 Reviews of entity NISP implementation.

(a) The responsible CSA conducts recurring oversight reviews of entities' NISP security programs to verify that the entity is protecting classified information and is implementing the provisions of the NISPOM (or equivalent). The CSA determines the scope and frequency of reviews. The CSA generally notifies entities when a review will take place, but may also conduct unannounced reviews at its discretion.

(b) CSAs make every effort to avoid unnecessarily intruding into entity employee personal effects during the reviews.

(c) A CSA may, on entity premises, physically examine the interior spaces of containers not authorized to store classified information in the presence of the entity's representative.

(d) As part of a security review, the CSA:

(1) Verifies that the entity limits entity employees with access to classified information to the minimum number necessary to perform on classified contracts.

(2) Validates that the entity has not provided its employees unauthorized access to classified information;

(3) Reviews the entity's self-inspection program and evaluates and records the entity's remedial actions; and

(4) Verifies that the GCA approved any public release of information pertaining to a classified contract.

(e) As a result of findings during the security review, the CSA may, as appropriate, notify:

(1) GCAs if there are unfavorable results from the review; and

(2) A prime entity if the CSA discovers unsatisfactory security conditions pertaining to a sub-entity.

(f) The CSA maintains a record of reviews it conducts and the results. Based on review results, the responsible CSA determines whether an entity's eligibility for access to classified information may continue. See § 2004.32(g).

§ 2004.28 Cost reports.

(a) Agencies must annually report to the Director, ISOO, on their NISP implementation costs for the previous year.

(b) CSAs must annually collect information on NISP implementation costs incurred by entities under their cognizance and submit a report to the Director, ISOO.

Subpart C—Operations

§ 2004.30 Security classification requirements and guidance.

(a) *Contract or agreement and solicition requirements.* (1) The GCA must incorporate FAR clause 52.204–2, Security Requirements (or equivalent set of security requirements), into contracts or agreements and solicitations requiring access to classified information.

(2) The GCA must also include a contract security classification specification (or equivalent guidance) with each contract or agreement and solicitation that requires access to classified information. The contract security classification specification (or equivalent guidance) must identify the specific elements of classified information involved in each phase of the contract or agreement life-cycle, such as:

(i) Level of classification;

(ii) Where the entity will access or store the classified information, and any requirements or limitations on transmitting classified information outside the entity;

(iii) Any special accesses;

(iv) Any classification guides or other guidance the entity needs to perform during that phase of the contract or agreement;

(v) Any authorization to disclose information about the classified contract or agreement; and

(vi) GCA personnel responsible for interpreting and applying the contract security specifications (or equivalent guidance).

(3) The GCA revises the contract security classification specification (or equivalent guidance) throughout the contract or agreement life-cycle as security requirements change.

(b) *Guidance.* Classification guidance is the exclusive responsibility of the GCA. The GCA prepares classification guidance in accordance with 32 CFR 2001.15, and provides appropriate security classification and declassification guidance to entities.

(c) *Requests for clarification and classification challenges.* (1) The GCA responds to entity requests for clarification and classification challenges.

(2) The responsible CSA assists entities to obtain appropriate classification guidance from the GCA, and to obtain a classification challenge response from the GCA.

(d) *Instructions upon contract or agreement termination.* (1) The GCA provides instructions to the entity for returning or disposing of classified information upon contract or agreement

termination or when an entity no longer has a legitimate need to retain or possess classified information.

(2) The GCA also determines whether the entity may retain classified information for particular purposes after the contract or agreement terminates, and if so, provides written authorization to the entity along with any instructions or limitations (such as which information, for how long, etc).

§ 2004.32 Determining entity eligibility for access to classified information.

(a) *Eligibility determinations.* (1) The responsible CSA determines whether an entity is eligible for access to classified information. An entity may not have access to classified information until the responsible CSA determines that it meets all the requirements in this section. In general, the entity must be eligible to access classified information at the appropriate level before the CSA may consider any of the entity's subsidiaries, sub-contractors, or other sub-entities for eligibility. However, when the subsidiary will perform all classified work, the CSA may instead exclude the parent entity from access to classified information rather than determining its eligibility. In either case, the CSA must consider all information relevant to assessing whether the entity's access poses an unacceptable risk to national security interests.

(2) A favorable access eligibility determination is not the same as a safeguarding capability determination. Entities may access classified information with a favorable eligibility determination, but may possess classified information only if the CSA determines both access eligibility and safeguarding capability, based on the GCA's requirement in the contract security classification specification (or equivalent).

(3) If an entity has an existing eligibility determination, a CSA will not duplicate eligibility determination processes performed by another CSA. If a CSA cannot acknowledge an entity eligibility determination to another CSA, that entity may be subject to duplicate processing.

(4) Each CSA maintains a record of its entities' eligibility determinations (or critical infrastructure entity eligibility status under the CCIPP, for DHS) and responds to inquiries from GCAs or entities, as appropriate and to the extent authorized by law, regarding the eligibility status of entities under their cognizance.

(b) *Process.* (1) The responsible CSA provides guidance to entities on the eligibility determination process and on how to maintain eligibility throughout the period of the agreement or as long as an entity continues to need access to classified information in connection with a legitimate U.S. or foreign government requirement.

(2) The CSA coordinates with appropriate authorities to determine whether an entity meets the eligibility criteria in paragraph (e) of this section. This includes coordinating with appropriate U.S. Government regulatory authorities to determine entity compliance with laws and regulations.

(3) An entity cannot apply for its own eligibility determination. A GCA or an eligible entity must sponsor the entity to the responsible CSA for an eligibility determination. The GCA or eligible entity may sponsor an entity at any point during the contracting or agreement life-cycle at which the entity must have access to classified information to participate (including the solicitation or competition phase). An entity with limited eligibility granted under paragraph (f) of this section may sponsor a sub-entity for a limited eligibility determination for the same contract, agreement, or circumstance so long as the sponsoring entity is not under FOCI (see § 2004.34(i)).

(4) The GCA must include enough lead time in each phase of the acquisition or agreement cycle to accomplish all required security actions. Required security actions include any eligibility determination necessary for an entity to participate in that phase of the cycle. The GCA may award a contract or agreement before the CSA completes the entity eligibility determination. However, in such cases, the entity may not begin performance on portions of the contract or agreement that require access to classified information until the CSA makes a favorable entity eligibility determination.

(5) When a CSA is unable to make an eligibility determination in sufficient time to qualify an entity to participate in the particular procurement action or phase that gave rise to the GCA request (this includes both solicitation and performance phases), the GCA may request that the CSA continue the determination process to qualify the entity for future classified work, provided that the processing delay was not due to the entity's lack of cooperation.

(c) *Coverage.* (1) A favorable eligibility determination allows an entity to access classified information at the determined eligibility level, or lower.

(2) The CSA must ensure that all entities needing access to classified information as part of a legitimate U.S. or foreign government requirement have or receive a favorable eligibility determination before accessing classified information. This includes both prime or parent entities and sub-entities, even in cases in which an entity intends to have the classified work performed only by sub-entities. A prime or parent entity must have a favorable eligibility determination at the same classification level or higher than its sub-entity(ies), unless the CSA determined that the parent entity could be effectively excluded from access (see paragraph (a)(1) of this section).

(3) If a parent and sub-entity need to share classified information with each other, the CSA must validate that both the parent and the sub-entity have favorable eligibility determinations at the level required for the classified information prior to sharing the information.

(d) *DHS Classified Critical Infrastructure Protection Program (CCIPP).* DHS shares classified cybersecurity information with certain employees of entities under the Classified Critical Infrastructure Protection Program (CCIPP). The CCIPP applies only to entities that do not need to store classified information, have no other contracts or agreements already requiring access to classified information, and are not already determined eligible for access to classified information. DHS establishes and implements procedures consistent with the NISP to determine CCIPP entity eligibility for access to classified information.

(e) *Eligibility criteria.* An entity must meet the following requirements to be eligible to access classified information:

(1) It must need to access classified information as part of a legitimate U.S. Government or foreign government requirement, and access must be consistent with U.S. national security interests as determined by the CSA;

(2) It must be organized and existing under the laws of any of the 50 States, the District of Columbia, or an organized U.S. territory (Guam, Commonwealth of the Northern Mariana Island, Commonwealth of Puerto Rico, and the U.S. Virgin Islands); or an American Indian or Alaska native tribe formally acknowledged by the Assistant Secretary—Indian Affairs, of the U.S. Department of the Interior;

(3) It must be located in the United States or its territorial areas;

(4) It must have a record of compliance with pertinent laws, regulations, and contracts (or other relevant agreements).

(5) Its KMOs must each have and maintain eligibility for access to

classified information that is at least the same level as the entity eligibility level;

(6) It and all of its KMOs must not be excluded by a Federal agency, contract review board, or other authorized official from participating in Federal contracts or agreements;

(7) It must meet all requirements the CSA or the authorizing law, regulation, or Government-wide policy establishes for access to the type of classified information or program involved; and

(8) If the CSA determines the entity is under foreign ownership, control, or influence (FOCI), the responsible CSA must:

(i) Agree that sufficient security measures are in place to mitigate or negate risk to national security interests due to the FOCI (see § 2004.34);

(ii) Determine that it is appropriate to grant eligibility for a single, narrowly defined purpose (see § 2004.34(i)); or

(iii) Determine that the entity is not eligible to access classified information.

(9) DoD and DOE cannot award a contract involving access to proscribed information to an entity effectively owned or controlled by a foreign government unless the Secretary of the agency first issues a waiver (see 10 U.S.C. 2536). A waiver is not required if the CSA determines the entity is eligible and it agrees to establish a voting trust agreement (VTA) or proxy agreement (PA) (see § 2004.34(f)) because both VTAs and PAs effectively negate foreign government control.

(f) *Limited entity eligibility determination.* CSAs may choose to allow GCAs to request limited entity eligibility determinations (this is not the same as limited entity eligibility in situations involving FOCI when the FOCI is not mitigated or negated; for more information on limited entity eligibility in such FOCI cases, see § 2004.34(i)). If a CSA permits GCAs to request a limited entity eligibility determination, it must set out parameters within its implementing policies that are consistent with the requirements below:

(1) The GCA, or an entity with limited eligibility, must first request a limited entity eligibility determination from the CSA for the relevant entity and provide justification for limiting eligibility in that case;

(2) Limited entity eligibility is specific to the requesting GCA's classified information, and to a single, narrowly defined contract, agreement, or circumstance;

(3) The entity must otherwise meet the requirements for entity eligibility set out in this part;

(4) The CSA documents the requirements of each limited entity eligibility determination it makes, including the scope of, and any limitations on, access to classified information;

(5) The CSA verifies limited entity eligibility determinations only to the requesting GCA or entity. In the case of multiple limited entity eligibility determinations for a single entity, the CSA verifies each one separately only to its requestor; and

(6) CSAs administratively terminate the limited entity eligibility when there is no longer a need for access to the classified information for which the CSA approved the limited entity eligibility.

(g) *Terminating or revoking eligibility.* (1) The responsible CSA terminates the entity's eligible status when the entity no longer has a need for access to classified information.

(2) The responsible CSA revokes the entity's eligible status if the entity is unable or unwilling to protect classified information.

(3) The CSA coordinates with the GCA(s) to take interim measures, as necessary, toward either termination or revocation.

§ 2004.34 Foreign ownership, control, or influence (FOCI).

(a) *FOCI determination.* A U.S. entity is under foreign ownership, control, or influence (FOCI) when:

(1) A foreign interest has the power to direct or decide matters affecting the entity's management or operations in a manner that could:

(i) Result in unauthorized access to classified information; or

(ii) Adversely affect performance of a classified contract or agreement; and

(2) The foreign interest exercises that power:

(i) Directly or indirectly;

(ii) Through ownership of the U.S. entity's securities, by contractual arrangements, or other similar means;

(iii) By the ability to control or influence the election or appointment of one or more members to the entity's governing board (*e.g.* board of directors, board of managers, board of trustees) or its equivalent; or

(iv) Prospectively (*i.e.,* is not currently exercising the power, but could).

(b) *CSA guidance.* The CSA establishes guidance for entities on filling out and submitting a Standard Form (SF) 328, Certificate Pertaining to Foreign Interests (OMB Control No. 0704–0194), and on reporting changes in circumstances that might result in a determination that the entity is under FOCI or is no longer under FOCI. The CSA also advises entities on the Government appeal channels for disputing CSA FOCI determinations.

(c) *FOCI factors.* To determine whether an entity is under FOCI, the CSA analyzes available information to determine the existence, nature, and source of FOCI. The CSA:

(1) Considers information the entity or its parent provides on the SF 328 (OMB Control No. 0704–0194), and any other relevant information; and

(2) Considers in the aggregate the following factors about the entity:

(i) Record of espionage against U.S. targets, either economic or Government;

(ii) Record of enforcement actions against the entity for transferring technology without authorization;

(iii) Record of compliance with pertinent U.S. laws, regulations, and contracts or agreements;

(iv) Type and sensitivity of the information the entity would access;

(v) Source, nature, and extent of FOCI, including whether foreign interests hold a majority or minority position in the entity, taking into consideration the immediate, intermediate, and ultimate parent entities;

(vi) Nature of any relevant bilateral and multilateral security and information exchange agreements;

(vii) Ownership or control, in whole or in part, by a foreign government; and

(viii) Any other factor that indicates or demonstrates foreign interest capability to control or influence the entity's operations or management.

(d) *Entity access while under FOCI.* (1) If the CSA is determining whether an entity is eligible to access classified information and finds that the entity is under FOCI, the CSA must consider the entity ineligible for access to classified information. The CSA and the entity may then attempt to negotiate FOCI mitigation or negation measures sufficient to permit a favorable eligibility determination.

(2) The CSA may not determine that the entity is eligible to access classified information until the entity has put into place appropriate security measures to negate or mitigate FOCI or is otherwise no longer under FOCI. If the degree of FOCI is such that no mitigation or negation efforts will be sufficient, or access to classified information would be inconsistent with national security interests, then the CSA will determine the entity ineligible for access to classified information.

(3) If an entity comes under FOCI, the CSA may allow the existing eligibility status to continue while the CSA and the entity negotiate acceptable FOCI mitigation or negation measures, as long as there is no indication that classified information is at risk. If the entity does not actively negotiate mitigation or negation measures in good faith, or

there are no appropriate measures that will remove the possibility of unauthorized access or adverse effect on the entity's performance of contracts or agreements involving classified information, the CSA will take steps, in coordination with the GCA, to terminate eligibility.

(e) *FOCI and entities under the CCIPP.* DHS may sponsor, as part of the CCIPP, a U.S. entity that is under FOCI, under the following circumstances:

(1) The Secretary of DHS proposes appropriate FOCI risk mitigation or negation measures (see paragraph (f) of this section) to the other CSAs and ensures the anticipated release of classified information:

(i) Is authorized for release to the country involved;

(ii) Does not include information classified under the Atomic Energy Act; and

(iii) Does not impede or interfere with the entity's ability to manage and comply with regulatory requirements imposed by other Federal agencies, such as the State Department's International Traffic in Arms Regulation.

(2) If the CSAs agree the mitigation or negation measures are sufficient, DHS may proceed to enter a CCIPP information sharing agreement with the entity. If one or more CSAs disagree, the Secretary of DHS may seek a decision from the Assistant to the President for National Security Affairs before entering a CCIPP information sharing agreement with the entity.

(f) *Mitigation or negation measures to address FOCI.* (1) The CSA-approved mitigation or negation measures must assure that the entity can offset FOCI by effectively denying unauthorized people or entities access to classified information and preventing the foreign interest from adversely impacting the entity's performance on classified contracts or agreements.

(2) Any mitigation or negation measures the CSA approves for an entity must not impede or interfere with the entity's ability to manage and comply with regulatory requirements imposed by other Federal agencies (such as Department of State's International Traffic in Arms Regulation).

(3) If the CSA approves a FOCI mitigation or negation measure for an entity, it may agree that the measure, or particular portions of it, may apply to all of the present and future sub-entities within the entity's organization.

(4) Mitigation or negation options are different for ownership versus control or influence; ownership necessitates a stronger mitigation or negation measure.

(5) Methods to mitigate foreign control or influence (unrelated to ownership) may include:

(i) Assigning specific oversight duties and responsibilities to independent board members;

(ii) Formulating special executive-level security committees to consider and oversee matters that affect entity performance on classified contracts or agreements;

(iii) Modifying or terminating loan agreements, contracts, agreements, and other understandings with foreign interests;

(iv) Diversifying or reducing foreign-source income;

(v) Demonstrating financial viability independent of foreign interests;

(vi) Eliminating or resolving problem debt;

(vii) Separating, physically or organizationally, the entity component performing on classified contracts or agreements;

(viii) Adopting special board resolutions; and

(ix) Other actions that effectively negate or mitigate foreign control or influence.

(6) Methods to mitigate or negate foreign ownership include:

(i) Board resolutions. The CSA and the entity may agree to a board resolution when a foreign interest does not own voting interests sufficient to elect, or is otherwise not entitled to representation on, the entity's governing board. The resolution must identify the foreign shareholders and their representatives (if any), note the extent of foreign ownership, certify that the foreign shareholders and their representatives will not require, will not have, and can be effectively excluded from, access to all classified information, and certify that the entity will not permit the foreign shareholders and their representatives to occupy positions that might enable them to influence the entity's policies and practices, affecting its performance on classified contracts or agreements.

(ii) Security control agreements (SCAs). The CSA and the entity may agree to use an SCA when a foreign interest does not effectively own or control an entity (*i.e.,* the entity is under U.S. control), but the foreign interest is entitled to representation on the entity's governing board. At least one cleared U.S. citizen must serve as an outside director on the entity's governing board.

(iii) Special security agreements (SSAs). The CSA and the entity may agree to use an SSA when a foreign interest effectively owns or controls an entity. The SSA preserves the foreign owner's right to be represented on the entity's board or governing body with a direct voice in the entity's business management, while denying the foreign owner majority representation and unauthorized access to classified information. When a GCA requires an entity to have access to proscribed information, and the CSA proposes or approves an SSA as the mitigation measure, the GCA must also make a national interest determination (NID) before the CSA can determine an entity's eligibility for access. See paragraph (h) of this section for more information on NIDs.

(iv) Voting trust agreements (VTAs) or proxy agreements (PAs). The CSA and the entity may agree to use one of these measures when a foreign interest effectively owns or controls an entity. The VTA and PA are substantially identical arrangements that vest the voting rights of the foreign-owned stock in cleared U.S. citizens approved by the CSA. Under the VTA, the foreign owner transfers legal title in the entity to the trustees approved by the CSA. Under the PA, the foreign owner conveys their voting rights to proxy holders approved by the CSA. The entity must be organized, structured, and financed to be capable of operating as a viable business entity independently from the foreign owner. Both VTAs and PAs can effectively negate foreign ownership and control; therefore, neither imposes any restrictions on the entity's eligibility to have access to classified information or to compete for classified contracts or agreements, including those involving proscribed information. Both VTAs and PAs can also effectively negate foreign government control.

(v) Combinations of the above measures or other similar measures that effectively mitigate or negate the risks involved with foreign ownership.

(g) *Standards for FOCI mitigation or negation measures.* The CSA must include the following requirements as part of any FOCI mitigation or negation measures, to ensure that entities implement necessary security and governing controls:

(1) Annual certification and annual compliance reports by the entity's governing board and the KMOs;

(2) The U.S. Government remedies in case the entity is not adequately protecting classified information or not adhering to the provisions of the mitigation or negation measure;

(3) Supplements to FOCI mitigation or negation measures as the CSA deems necessary. In addition to the standard FOCI mitigation or negation measure's requirements, the CSA may require more procedures via a supplement, based upon the circumstances of an

entity's operations. The CSA may place these requirements in supplements to the FOCI mitigation or negation measure to allow flexibility as circumstances change without having to renegotiate the entire measure. When making use of supplements, the CSA does not consider the FOCI mitigation measure final until it approves the required supplements (*e.g.,* technology control plan, electronic communication plan); and

(4) For agreements to mitigate or negate ownership (PAs, VTAs, SSAs, and SCAs), the following additional requirements apply:

(i) FOCI oversight. The CSA verifies that the entity establishes an oversight body consisting of trustees, proxy holders or outside directors, as applicable, and those officers or directors whom the CSA determines are eligible for access to classified information (see § 2004.36). The entity's security officer is the principal advisor to the oversight body and attends their meetings. The oversight body:

(A) Maintains policies and procedures to safeguard classified information in the entity's possession with no adverse impact on classified contract or agreement performance; and

(B) Verifies the entity is complying with the FOCI mitigation or negation measure and related documents, contract security requirements or equivalent, and the NISP;

(ii) Qualifications of trustees, proxy holders, and outside directors. The CSA determines eligibility for access to classified information for trustees, proxy holders, and outside directors at the classification level of the entity's eligibility determination. Trustees, proxy holders, and outside directors must meet the following criteria:

(A) Be resident U.S. citizens who can exercise management prerogatives relating to their position in a way that ensures that the foreign owner can be effectively insulated from the entity or effectively separated from the entity's classified work; and

(B) Be completely disinterested individuals with no prior involvement with the entity, the entities with which it is affiliated, or the foreign owner;

(C) No other circumstances that may affect an individual's ability to serve effectively; such as, the number of boards on which the individual serves, the length of time serving on any other boards.

(iii) Annual meeting. The CSA meets at least annually with the oversight body to review the purpose and effectiveness of the FOCI mitigation or negation agreement; establish a common understanding of the operating requirements and their implementation; and provide guidance on matters related to FOCI mitigation and industrial security. These meetings include a CSA review of:

(A) Compliance with the approved FOCI mitigation or negation measure;

(B) Problems regarding practical implementation of the mitigation or negation measure; and

(C) Security controls, practices, or procedures and whether they warrant adjustment; and

(iv) Annual certification. The CSA reviews the entity's annual report; addresses, and resolves issues identified in the report; and documents the results of this review and any follow-up actions.

(h) *National Interest Determination (NID).* (1) *Requirement for a NID.* When a GCA requires an entity to have access to proscribed information, and the CSA proposes or approves an SSA as the FOCI mitigation measure, the GCA must determine (with controlling agency concurrence when appropriate) whether releasing the proscribed information to the entity under an SSA is consistent with the national security interests of the United States. This determination is called a national interest determination (NID). A favorable NID confirms that an entity's access to the proscribed information is consistent with such interests and allows the CSA to make a positive entity eligibility determination in such cases if the entity meets the other eligibility requirements. If the NID is not favorable, an entity may not have access to the proscribed information.

(i) The CSA requests a NID from the GCA for new contracts or agreements at any phase that requires access to proscribed information; and existing contracts or agreements (or any relevant sub-contracts or sub-agreements) when the GCA adds a requirement for access to proscribed information or adds a new sub-entity that operates under an SSA and requires access to proscribed information. The GCA may initiate a NID prior to receiving the request from the CSA, when appropriate.

(ii) While CSAs normally request NIDs on a case-by-case contract- or agreement-specific basis, the CSA, GCA, and applicable controlling agency may decide to make a NID on another basis, using criteria the CSA establishes. In such cases, the GCA provides the CSA with a written statement that the NID covers a specific contract or program and all follow-on contracts associated that program, and lists all contracts or agreements covered by the NID in cases in which the GCA can identify them.

(iii) When an entity has a favorable NID for a given contract or agreement, the CSA does not have to request a new NID for the same entity when the access requirements for proscribed information and terms remain unchanged for:

(A) Renewal of the contract or agreement;

(B) New task orders issued under the contract or agreement;

(C) A new contract or agreement that contains the same provisions as the previous (this usually applies when the contract or agreement is for a program or project); or

(D) Renewal of the SSA.

(2) *Process.* (i) The CSA requests the NID from the GCA and provides the GCA with pertinent information, such as: The FOCI assessment; a copy of the SSA; and any other relevant information that might help the GCA make its determination.

(ii) If another agency (or agencies) controls any category of the proscribed information involved, the GCA or CSA also coordinates with the controlling agency(ies) to request their concurrence on the GCA's NID. In cases involving one or more controlling agencies, a favorable NID is not final until the relevant controlling agencies concur with the determination in writing for the proscribed information under their control. The GCA or CSA provides the relevant controlling agency(ies) with: A statement that ''Access to the proscribed information by the entity is consistent with the national security interests of the United States''; the FOCI assessment; a copy of the SSA; a contract security classification specification (or equivalent); justification for access and a description of the proscribed information involved; and any other relevant information that might help the controlling agency consider the request.

(iii) In cases in which the GCA has authority over all the categories of proscribed information involved, the CSA may make an entity eligibility determination or upgrade an existing eligibility level to top secret only after the GCA notifies the CSA in writing of a favorable NID, except as described in paragraph (h)(3)(iii)(A) of this section.

(iv) In cases in which the GCA requests concurrence from one or more controlling agencies, it does not notify the CSA of its NID until the controlling agency concurs. In cases in which the CSA requests concurrence from the controlling agency, the CSA may not act upon a favorable GCA NID until it also receives written concurrence from the controlling agency(ies). In both cases, the CSA may not make an eligibility determination until all the relevant controlling agencies concur in writing on a favorable NID and the GCA notifies the CSA in writing of its final NID,

except as described in paragraph (h)(3)(iii)(B) of this section.

(3) *Timing.* (i) When the GCA has authority over all of the categories of proscribed information involved, the GCA provides a final, written NID to the CSA, with a copy to the entity, within 30 days after the GCA receives the NID request.

(ii) If a controlling agency controls any of the involved categories of proscribed information, the GCA provides a final, written NID to the CSA, with a copy to the entity, within 60 days after the GCA receives the NID request.

(A) In such cases, the GCA notifies the relevant controlling agency(ies) of its NID in writing within 30 days after it receives the NID request, and each controlling agency concurs or non-concurs in writing to the GCA or CSA within the next 30 days unless there are extenuating circumstances.

(B) In cases in which there are extenuating circumstances, the controlling agency responds to the GCA or CSA within 30 days to explain the extenuating circumstances, request additional information as needed, and coordinate a plan and timeline for completion.

(iii) If the GCA cannot make the NID within the 30- or 60-day timeframes in paragraphs (h)(3)(i) and (h)(3)(ii) of this section, the GCA must notify the CSA in writing and explain the extenuating circumstances causing the delay. The GCA must provide written updates to the CSA, or its designee, every 30 days until it makes the determination. In turn, the CSA provides the entity with updates every 30 days.

(A) When the GCA has authority over all the categories of the proscribed information involved, if the GCA does not provide the CSA with a NID within 30 days, the CSA does not have to delay any longer to make the entity eligibility determination or upgrade it to top secret and implement an SSA to wait for the NID, as long as the GCA does not indicate that the NID might be negative. However, the entity must not have access to proscribed information under a new contract until the GCA makes a favorable NID.

(B) In some cases in which one or more controlling agencies have authority over any category of the proscribed information involved, the GCA or CSA might receive concurrence on a favorable NID from some of the controlling agencies within 60 days, but not others. In such cases, the CSA may proceed with an eligibility determination or upgrade it to top secret eligibility and implement an SSA, but only for those categories of proscribed information for which a controlling agency has concurred. The entity must not have access to any category of proscribed information for which a controlling agency that has not yet concurred.

(iv) Unless cancelled sooner by the GCA that made the NID, a NID remains in effect for the duration of the contract or agreement. When a NID is not contract- or agreement-specific, the CSA, the GCA, and any applicable controlling agency determine how long the NID remains in effect based on the criteria used to make the NID.

(i) *Limited eligibility determinations (for entities under FOCI without mitigation or negation).* (1) In exceptional circumstances when an entity is under FOCI, the CSA may decide that limited eligibility for access to classified information is appropriate when the entity is unable or unwilling to implement FOCI mitigation or negation measures (this is not the same as limited eligibility in other circumstances; for more information on limited eligibility in other cases, see § 2004.32(f)).

(2) The GCA first decides whether to request a limited eligibility determination for the entity and must articulate a compelling need for it that is in accordance with U.S. national security interests. The GCA must verify that access to classified information is essential to contract or agreement performance, and accept the risk inherent in not mitigating or negating the FOCI.

(3) The CSA may grant a limited eligibility determination if the GCA requests and the entity meets all other eligibility criteria in § 2004.32(e).

(4) A foreign government may sponsor a U.S. sub-entity of a foreign entity for limited eligibility when the foreign government desires to award a contract or agreement to the U.S. sub-entity that involves access to classified information for which the foreign government is the original classification authority (*i.e.,* foreign government information), and there is no other need for the U.S. sub-entity to have access to classified information.

(5) Limited eligibility determinations are specific to the classified information of the requesting GCA or foreign government, and specific to a single, narrowly defined contract, agreement, or circumstance of that GCA or foreign government.

(6) The access limitations of a favorable limited eligibility determination apply to all of the entity's employees, regardless of citizenship.

(7) A limited eligibility determination is not an option for entities that require access to proscribed information when a foreign government has ownership or control over the entity. See § 2004.32(e)(9).

(8) The CSA administratively terminates the entity's limited eligibility when there is no longer a need for access to the classified information for which the CSA made the favorable limited eligibility determination. Terminating one limited eligibility status does not impact other ones the entity may have.

§ 2004.36 Determining entity employee eligibility for access to classified information.

(a) *Making employee eligibility determinations.* (1) The responsible CSA:

(i) Determines whether entity employees meet the criteria established in the Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by White House memorandum, December 29, 2005, and in accordance with applicable executive branch procedures. Entity employees must have a legitimate requirement (*i.e.,* need to know) for access to classified information in the performance of assigned duties and eligibility must be clearly consistent with the interest of the national security.

(ii) Notifies entities of its determinations of employee eligibility for access to classified information.

(iii) Terminates eligibility status when there is no longer a need for access to classified information by entity employees.

(2) The responsible CSA maintains:

(i) SF 312s, Classified Information Nondisclosure Agreements, or other approved nondisclosure agreements, executed by entity employees, as prescribed by ODNI in accordance with 32 CFR 2001.80 and E.O. 13526; and

(ii) Records of its entity employee eligibility determinations, suspensions, and revocations.

(3) CSAs ensure that entities limit the number of employees with access to classified information to the minimum number necessary to work on classified contracts or agreements.

(4) The CSA determines the need for event-driven reinvestigations for entity employees.

(5) CSAs use the Federal Investigative Standards (FIS) issued jointly by the Suitability and Security Executive Agents.

(6) The CSA provides guidance to entities on:

(i) Requesting employee eligibility determinations, to include guidance for submitting fingerprints; and

(ii) Granting employee access to classified information when the

employee has had a break in access or a break in employment.

(7) If the CSA receives adverse information about an eligible entity employee, the CSA should consider and possibly investigate to determine whether the employee's eligibility to access classified information remains clearly consistent with the interests of national security. If the CSA determines that an entity employee's continued eligibility is not in the interest of national security, the CSA implements procedures leading to suspension and ultimate revocation of the employee's eligible status, and notifies the entity.

(b) *Consultants.* A consultant is an individual under contract or agreement to provide professional or technical assistance to an entity in a capacity requiring access to classified information. A consultant is considered an entity employee for security purposes. The CSA makes eligibility determinations for entity consultants in the same way it does for entity employees.

(c) *Reciprocity.* The responsible CSA determines if an entity employee was previously investigated or determined eligible by another CSA. CSAs reciprocally accept existing employee eligibility determinations in accordance with applicable and current national level personnel security policy, and do not duplicate employee eligibility investigations conducted by another CSA.

(d) *Limited access authorization (LAA).* (1) CSAs may make LAA determinations for non-U.S. citizen entity employees in rare circumstances, when:

(i) A non-U.S. citizen employee possesses unique or unusual skill or expertise that the agency urgently needs to support a specific U.S. Government contract or agreement; and

(ii) A U.S. citizen with those skills is not available.

(2) A CSA may grant LAAs up to the secret classified level.

(3) CSAs may not use LAAs for access to:

(i) Top secret (TS) information;

(ii) RD or FRD information;

(iii) Information that a Government-designated disclosure authority has not determined releasable to the country of which the individual is a citizen;

(iv) COMSEC information;

(v) Intelligence information, to include SCI;

(vi) NATO information, except as follows: Foreign nationals of a NATO member nation may be authorized access to NATO information subject to the terms of the contract, if the responsible CSA obtains a NATO security clearance certificate from the individual's country of citizenship. NATO access is limited to performance on a specific NATO contract;

(vii) Information for which the U.S. Government has prohibited foreign disclosure in whole or in part; or

(viii) Information provided to the U.S. Government by another government that is classified or provided in confidence.

(4) The responsible CSA provides specific procedures to entities for requesting LAAs. The GCA must concur on an entity's LAA request before the CSA may grant it.

§ 2004.38 Safeguarding and marking.

(a) *Safeguarding approval.* (1) The CSA determines whether an entity's safeguarding capability meets requirements established in 32 CFR 2001, and other applicable national level policy (*e.g.,* Atomic Energy Act for RD). If the CSA makes a favorable determination, the entity may store classified information at that level or below. If the determination is not favorable, the CSA must ensure that the entity does not possess classified information or does not possess information at a level higher than the approved safeguarding level.

(2) The CSA maintains records of its safeguarding capability determinations and, upon request from GCAs or entities, and as appropriate and to the extent authorized by law, verifies that it has made a favorable safeguarding determination for a given entity and at what level.

(b) *Marking.* The GCA provides guidance to entities that meets requirements in 32 CFR 2001.22, 2001.23, 2001.24, and 2001.25, Derivative classification, Classification marking in the electronic environment, Additional requirements, and Declassification markings; ISOO's marking guide, *Marking Classified National Security Information;* and other applicable national level policy (*e.g.,* Atomic Energy Act for RD) for marking classified information and material.

§ 2004.40 Information system security.

(a) The responsible CSA must authorize an entity information system before the entity can use it to process classified information. The CSA must use the most complete, accurate, and trustworthy information to make a timely, credible, and risk-based decision whether to authorize an entity's system.

(b) The responsible CSA issues to entities guidance that establishes protection measures for entity information systems that process classified information. The responsible CSA must base the guidance on standards applicable to Federal systems, which must include the Federal Information Security Modernization Act of 2014 (FISMA), Public Law 113–283, and may include National Institute of Standards and Technology (NIST) publications, Committee on National Security Systems (CNSS) publications, and Federal information processing standards (FIPS).

§ 2004.42 International programs security. [Reserved]

Appendix A to Part 2004—Acronym Table

For details on many of these terms, see the definitions at § 2004.4.

CCIPP—Classified Critical Infrastructure Protection Program
CCIPP POC—Entity point of contact under the CCIPP program
CIA—Central Intelligence Agency
CSA—Cognizant security agency
CNSS—Committee on National Security Systems
COMSEC—Communications security
CSO—Cognizant security office
DHS—Department of Homeland Security
DoD—Department of Defense
DOE—Department of Energy
EA—Executive agent (the NISP executive agent is DoD)
E.O.—Executive Order
FAR—Federal Aquisition Regulation
FOCI—Foreign ownership, control, or influence
GCA—Government contracting activity
Insider threat SO—insider threat senior official (for an agency or for an entity)
ISOO—Information Security Oversight Office of the National Archives and Records Administration (NARA)
KMO—Key managers and officials (of an entity)
LAA—Limited access authorization
NID—National interest determination
NISPOM—National Industrial Security Program Operating Manual
NRC—Nuclear Regulatory Commission
NSA—National Security Agency
ODNI—Office of the Director of National Intelligence
PA—Proxy agreement
RD—Restricted data
SF—Standard Form
SAO—Senior agency official for NISP
SAP—Special access program
SCA—Security control agreement
SCI—Sensitive compartmented information
SSA—Special security agreement
TS—Top secret (classification level)
VT—Voting trust

Dated: January 3, 2017.

David S. Ferriero,

Archivist of the United States.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2016–0238; FRL–9957–87–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Control of Nitrogen Oxide Emissions from Coal-Fired Electric Generating Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) revision submitted by the State of Maryland. This SIP submittal consists of a regulation for inclusion in the Maryland SIP which regulates nitrogen oxides (NO_X) emissions from seven coal-fired electric generating units (EGU) in the State. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before February 10, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2016–0238 at *http://www.regulations.gov,* or via email to *pino.maria@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

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

SUPPLEMENTARY INFORMATION: On November 20, 2015, the State of Maryland, through the Maryland Department of the Environment (MDE), submitted a revision to its SIP seeking to include regulation COMAR 26.11.38.01—.05—Control of NO_X Emissions from Coal-Fired Electric Generating Units, in the Maryland SIP. On September 8, 2016, MDE provided a letter to EPA to clarify that this regulation was submitted as a SIP strengthening measure, and not as a submission to address reasonably available control technology (RACT) for coal-fired EGUs.[1]

I. Background

On March 12, 2008, EPA strengthened the national ambient air quality standards (NAAQS) for ground level ozone, setting both the primary and secondary standards to a level of 0.075 parts per million (ppm) or 75 parts per billion (ppb) averaged over an 8-hour period (2008 ozone NAAQS). On May 21, 2012 (77 FR 30088), EPA designated areas that were not attaining the 2008 ozone NAAQS as nonattainment, including the following three areas or portions of areas in Maryland: Cecil County (part of the Philadelphia-Wilmington-Atlantic City Nonattainment Area); Calvert, Charles, Frederick, Montgomery, and Prince Georges Counties (part of the Washington, DC-MD-VA Nonattainment Area); and Anne Arundel, Baltimore, Carroll, Harford, and Howard Counties and the City of Baltimore (the Baltimore Nonattainment Area). The Philadelphia-Wilmington-Atlantic City Area and Washington, DC-MD-VA Area were classified as marginal nonattainment areas, and the Baltimore Area was classified as a moderate nonattainment area for the 2008 ozone NAAQS.

II. Summary of SIP Revision and EPA Analysis

On November 20, 2015, MDE submitted a regulation as a SIP revision for EPA approval and incorporation into the Maryland SIP. The revision consists of Maryland regulation COMAR 26.11.38—Control of NO_X Emissions from Coal-Fired Electric Generating Units. The regulation, effective in August 2015, establishes NO_X emission standards and additional monitoring and reporting requirements for coal-fired EGUs.

COMAR 26.11.38 defines the affected units for the regulation as Brandon Shores Units 1 and 2, C.P. Crane Units 1 and 2, Chalk Point Units 1 and 2, Dickerson Units 1, 2, and 3, H.A. Wagner Units 2 and 3, Morgantown Units 1 and 2, and Warrior Run. The regulation requires an affected EGU to minimize NO_X emissions by operating and optimizing the use of all installed pollution controls and combustion controls during all times that the unit is in operation while burning coal. For demonstrating compliance with this requirement, the owner or operator is required to submit a plan to MDE and EPA for approval that summarizes the data to be collected to show that each affected EGU is operating its installed controls.

The regulation establishes a system-wide emissions rate of 0.15 pounds per million British thermal units (lbs/mmBtu) on a 30-day rolling average for coal-burning EGUs during the ozone season.[2] System-wide emissions are an aggregation of NO_X emissions from all coal-fired EGUs owned, operated, or controlled by the same company. Continuous emissions monitoring (CEM) systems already installed on these units as a requirement of previous federal and state programs, will be used to track system-wide emissions and to determine compliance with the 30-day rolling average emissions limit. *See* COMAR 26.11.38.05. The 0.15 lb/mmBtu emission rate does not apply to C.P. Crane and AES Warrior Run, as they are not a part of a system.

To demonstrate compliance with the requirement to optimize controls, MDE established 24-hour block emissions levels for each coal-burning EGU based on historical emissions data. *Id.* During the ozone season, EGU owners are required to provide a daily report for any unit that exceeds its 24-hour emissions level. The report requires specific operating data and an explanation of any exceedances of the 24-hour level. A detailed discussion of the requirements of regulation COMAR 26.11.38 may be found in the EPA technical support document (TSD) prepared in support of this proposed rulemaking, which is available in the

[1] Subsequent to MDE's submission of this SIP revision to EPA, the State finalized several changes to COMAR 26.11.38 that were effective on December 10, 2015. This subsequent MDE action modified sections .01, recodified sections .04 and .05 to sections .05 and .06, respectively, and added new sections .04 and .07. These changes to COMAR 26.11.38 have not yet been submitted to EPA for incorporation in the Maryland SIP. EPA is proposing approval of sections .01 through .05 of COMAR 26.11.38 as submitted by MDE on November 20, 2015, which had a state effective date of August 31, 2015.

[2] The limit does not apply to an EGU located at a facility that is solely owned, operated, or controlled. AES Warrior Run is subject to a limit of 0.10 lb/mmBtu and Charles P. Crane is subject to the 24-hour block average rates which trigger reporting requirements.

docket for this rulemaking action and online at *www.regulations.gov.*

The 14 affected units at the seven plants that are subject to COMAR 26.11.38 have all installed controls as a result of programs requiring NO_X reductions by previous regulatory requirements such as the NO_X SIP Call (65 FR 57356, October 27, 1998), the Clean Air Interstate Rule (CAIR) (70 FR 25162, May 12, 2005), the Cross State Air Pollution Rule (CSAPR) (76 FR 48208, August 8, 2011), and Maryland's Healthy Air Act (HAA). All of the affected units have either selective catalytic reduction (SCR), selective non-catalytic reduction (SNCR), or selective alternative catalytic reduction (SACR).

EPA finds that the submittal strengthens the Maryland SIP. COMAR 26.11.38 imposes NO_X emissions limits on units subject to the regulation which are expected to lower NO_X emissions within the State. The NO_X emissions limits plus the operation and optimization of the existing NO_X controls whenever the units are in operation will help Maryland's attainment and maintenance of the 2008 ozone NAAQS. EPA's detailed analysis of the Maryland submittal can be found in the TSD developed in support of this proposed rulemaking action, and can be found in the docket for this rulemaking action and at *www.regulations.gov.*

III. Proposed Action

EPA is proposing to approve the November 20, 2015 Maryland SIP submittal which seeks to include regulation COMAR 26.11.38, Control of Nitrogen Oxides Emissions from Coal-Fired Electric Generating Units, in the Maryland SIP as a SIP strengthening measure in accordance with CAA section 110. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Incorporation by Reference

In this proposed rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference Maryland regulation COMAR 26.11.28—Control of Nitrogen Oxides Emissions from Coal-Fired Electric Generating Units. EPA has made, and will continue to make, these materials generally available through *http://www.regulations.gov* and/or at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA 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 CAA. 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 proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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 CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this action proposing to approve Maryland's regulation to control NO_X emissions from coal-fired electric generating units 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.

List of Subjects in 40 CFR Part 52

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

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

Dated: December 16, 2016.

Shawn M. Garvin,

Regional Administrator, Region III.

[FR Doc. 2017–00309 Filed 1–10–17; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R04–OAR–2012–0773; FRL–9957–92–Region 4]

Air Plan Approval and Air Quality Designation; KY; Redesignation of the Kentucky Portion of the Louisville 1997 Annual $PM_{2.5}$ Nonattainment Area to Attainment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On March 5, 2012, the Commonwealth of Kentucky, through the Kentucky Energy and Environment Cabinet, Division for Air Quality (DAQ), submitted a request for the Environmental Protection Agency (EPA) to redesignate the portion of Kentucky that is within the bi-state Louisville, KY–IN fine particulate matter ($PM_{2.5}$) nonattainment area (hereafter referred to as the ''bi-state Louisville Area'' or ''Area'') to attainment for the 1997 Annual $PM_{2.5}$ national ambient air quality standards (NAAQS) and to approve a state implementation plan (SIP) revision containing a maintenance plan for the Area. EPA is proposing to approve the Commonwealth's plan for maintaining the 1997 Annual $PM_{2.5}$ NAAQS in the Area, including the motor vehicle emission budgets (MVEBs) for nitrogen oxide (NO_X) and $PM_{2.5}$ for the years 2015 and 2025 for the bi-state Louisville Area, and incorporate it into the SIP, and to redesignate the Kentucky portion of the Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. EPA is also notifying the public of the status of EPA's adequacy determination for the MVEBs for the bi-state Louisville Area.

DATES: Comments must be received on or before February 10, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0773 at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Madolyn Sanchez of the Air Regulatory Management Section, in the Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Madolyn Sanchez may be reached by phone at (404) 562–9644, or via electronic mail at *sanchez.madolyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. What are the actions EPA is proposing to take?

EPA is proposing to take the following two separate but related actions: (1) To approve Kentucky's plan for maintaining the 1997 Annual $PM_{2.5}$ NAAQS (maintenance plan), including the associated MVEBs for the bi-state Louisville Area, and incorporate it into the Kentucky SIP, and (2) to redesignate the Kentucky portion of the bi-state Louisville Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. EPA is also notifying the public of the status of EPA's adequacy determination for the MVEBs for the bi-state Louisville Area. The bi-state Louisville Area consists of Bullitt and Jefferson Counties in Kentucky as well as Clark and Floyd Counties and a portion of Jefferson County (Madison Township) in Indiana.[1] These proposed actions are summarized below and described in greater detail throughout this notice of proposed rulemaking.

EPA is proposing to approve Kentucky's maintenance plan for its portion of the bi-state Louisville Area as meeting the requirements of section 175A (such approval being one of the Clean Air Act (CAA or Act) criteria for redesignation to attainment status). The maintenance plan is designed to help keep the bi-state Louisville Area in attainment for the 1997 Annual $PM_{2.5}$ NAAQS through 2025. As explained in section V below, EPA is also proposing to determine that attainment can be maintained through 2027. The maintenance plan includes 2015 and 2025 MVEBs for NOx and direct $PM_{2.5}$ for the bi-state Louisville Area. EPA is proposing to approve these MVEBs and incorporate them into the Kentucky SIP.

EPA also proposes to determine that the Kentucky portion of the bi-state Louisville Area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. Accordingly, in this action, EPA is proposing to approve a request to change the legal designation of Bullitt and Jefferson Counties within the Kentucky portion of the bi-state Louisville Area, as found at 40 CFR part 81, from nonattainment to attainment for the 1997 Annual $PM_{2.5}$ NAAQS.

EPA is also notifying the public of the status of EPA's adequacy process for the 2015 and 2025 MVEBs for NO_X and $PM_{2.5}$ for the bi-state Louisville Area. The Adequacy comment period for the MVEBs for the bi-state Louisville Area began on January 24, 2012, with EPA's posting of the availability on EPA's Adequacy Web site (*http://www.epa.gov/otaq/stateresources/transconf/currsips.htm*). The Adequacy comment period for these MVEBs closed on February 23, 2012. No comments, adverse or otherwise, were received through the Adequacy process. Please see section VIII of this notice of proposed rulemaking for further explanation of this process and for more details on the MVEBs.

In summary, this proposed rulemaking is in response to Kentucky's March 5, 2012, redesignation request and associated SIP submission that addresses the specific issues summarized above and the necessary elements for redesignation described in section 107(d)(3)(E) of the CAA for the redesignation of the Kentucky portion of the bi-state Louisville Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS.

II. What is the background for EPA's proposed actions?

Fine particle pollution can be emitted directly or formed secondarily in the atmosphere.[2] The main precursors of secondary $PM_{2.5}$ are sulfur dioxide (SO_2), NO_X, ammonia, and volatile organic compounds (VOCs). *See* 72 FR 20586, 20589 (April 25, 2007). Sulfates are a type of secondary particle formed from SO_2 emissions from power plants and industrial facilities. Nitrates, another common type of secondary particle, are formed from NO_X emissions from power plants, automobiles, and other combustion sources.

On July 18, 1997, EPA promulgated the first air quality standards for $PM_{2.5}$. EPA promulgated an annual standard at a level of 15.0 micrograms per cubic meter (μg/m³), based on a 3-year average of annual mean $PM_{2.5}$ concentrations. In the same rulemaking, EPA promulgated a 24-hour standard of 65 μg/m³, based

[1] In a separate submittal, EPA received the redesignation request and maintenance plan for the Indiana portion of this Area. On September 9, 2016, EPA took final action to determine that the entire bi-state Louisville Area has attained the 1997 $PM_{2.5}$ standard and to approve Indiana's redesignation request and maintenance plan. *See* 81 FR 62390.

[2] Fine particulate matter ($PM_{2.5}$) refers to airborne particles less than or equal to 2.5 micrometers in diameter. Although treated as a single pollutant, fine particles come from many different sources and are composed of many different compounds. In the bi-state Louisville Area, one of the largest components of $PM_{2.5}$ is sulfate, which is formed through various chemical reactions from the precursor SO_2. The other major component of $PM_{2.5}$ is organic carbon, which originates predominantly from biogenic emission sources. Nitrate, which is formed from the precursor NO_X, is also a component of $PM_{2.5}$. Crustal materials from windblown dust and elemental carbon from combustion sources are less significant contributors to total $PM_{2.5}$. VOCs, also precursors for PM, are emitted from a variety of sources, including motor vehicles, chemical plants, refineries, factories, consumer and commercial products, and other industrial sources. VOCs are also emitted by natural sources such as vegetation.

on a 3-year average of the 98th percentile of 24-hour concentrations. On October 17, 2006 (71 FR 61144), EPA retained the annual average NAAQS at 15.0 μg/m^3 but revised the 24-hour NAAQS to 35 μg/m^3, based again on the 3-year average of the 98th percentile of 24-hour concentrations.[3] Under EPA regulations at 40 CFR part 50, the primary and secondary 1997 Annual $PM_{2.5}$ NAAQS are attained when the annual arithmetic mean concentration, as determined in accordance with 40 CFR part 50, Appendix N, is less than or equal to 15.0 μg/m^3 at all relevant monitoring sites in the subject area averaged over a 3-year period.

On January 5, 2005, at 70 FR 944, and supplemented on April 14, 2005, at 70 FR 19844, EPA designated the bi-state Louisville Area as nonattainment for the Annual 1997 $PM_{2.5}$ NAAQS. On November 13, 2009, at 74 FR 58688, EPA promulgated designations for the 24-hour $PM_{2.5}$ standard established in 2006, designating the bi-state Louisville Area as attainment for that NAAQS. That action clarified that the bi-state Louisville Area was classified unclassifiable/attainment for the 24-hour NAAQS promulgated in 1997. EPA did not promulgate designations for the 2006 Annual $PM_{2.5}$ NAAQS since that NAAQS was essentially identical to the 1997 Annual $PM_{2.5}$ NAAQS. Therefore, the bi-state Louisville Area is designated nonattainment for the 1997 Annual $PM_{2.5}$ NAAQS, and this proposed action only addresses this designation.

All 1997 $PM_{2.5}$ NAAQS areas were designated under subpart 1 of title I, part D, of the CAA. Subpart 1 contains the general requirements for nonattainment areas for any pollutant governed by a NAAQS and is less prescriptive than the other subparts of title I, part D. On April 25, 2007 (72 FR 20586), EPA promulgated its Clean Air Fine Particle Implementation Rule, codified at 40 CFR part 51, subpart Z, in which the Agency provided guidance for state and tribal plans to implement the 1997 $PM_{2.5}$ NAAQS. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded the Clean Air Fine Particle Implementation Rule and the final rule entitled ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)'' (73 FR 28321, May 16, 2008) (collectively, ''1997 $PM_{2.5}$ Implementation Rules'') to EPA on January 4, 2013, in *Natural Resources Defense Council* v. *EPA,* 706 F.3d 428 (D.C. Cir. 2013). The court found that EPA erred in implementing the 1997 $PM_{2.5}$ NAAQS pursuant to the general implementation provisions of subpart 1 of part D of title I of the CAA, rather than the particulate matter-specific provisions of subpart 4 of part D of title I. The effect of the court's ruling on this proposed redesignation action is discussed in detail in section VI of this notice.

On July 29, 2016, EPA issued a rule entitled, ''Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements'' ($PM_{2.5}$ SIP Requirements Rule) that clarifies how states should meet the statutory SIP requirements that apply to areas designated nonattainment for any $PM_{2.5}$ NAAQS under subparts 1 and 4. *See* 81 FR 58010 (August 24, 2016). It does so by establishing regulatory requirements and providing guidance that is applicable to areas that are currently designated nonattainment for existing $PM_{2.5}$ NAAQS and areas that are designated nonattainment for any $PM_{2.5}$ NAAQS in the future. In addition, the rule responds to the D.C. Circuit's remand of the 1997 $PM_{2.5}$ Implementation Rules. As a result, the requirements of the rule also govern future actions associated with states' ongoing implementation efforts for the 1997 and 2006 $PM_{2.5}$ NAAQS. The rule also revokes the 1997 primary Annual NAAQS for areas designated as attainment for that standard because EPA revised the primary annual standard in 2012.

III. What are the criteria for redesignation?

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA allows for redesignation provided the following criteria are met: (1) The Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for the area under section 110(k); (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable federal air pollutant control regulations, and other permanent and enforceable reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A; and (5) the state containing such area has met all requirements applicable to the area under section 110 and part D of title I of the CAA.

On April 16, 1992, EPA provided guidance on redesignation in the General Preamble for the Implementation of title I of the CAA Amendments of 1990 (57 FR 13498), and the Agency supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in the following documents:

1. ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (hereinafter referred to as the ''Calcagni Memorandum'');
2. ''State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (CAA) Deadlines,'' Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992; and
3. ''Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment,'' Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994.

IV. Why is EPA proposing these actions?

On March 5, 2012, Kentucky requested that EPA redesignate the Kentucky portion of the bi-state Louisville Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS.[4] EPA's evaluation indicates that the Kentucky portion of the bi-state Louisville Area meets the requirements for redesignation set forth in section 107(d)(3)(E), including the maintenance plan requirements under section 175A of the CAA. As a result of these proposed findings, EPA is proposing to take the two related actions summarized in section I of this notice.

V. What is EPA's analysis of the request?

As stated above, in accordance with the CAA, EPA proposes to approve the 1997 Annual $PM_{2.5}$ NAAQS maintenance plan, including the associated MVEBs, for the Kentucky portion of the bi-state Louisville Area and incorporate it into the Kentucky

[3] In response to legal challenges of the annual standard promulgated in 2006, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded that NAAQS to EPA for further consideration. *See American Farm Bureau Federation and National Pork Producers Council, et al.* v. *EPA,* 559 F.3d 512 (D.C. Cir. 2009). However, given that the 1997 and 2006 Annual NAAQS are essentially identical, attainment of the 1997 Annual NAAQS would also indicate attainment of the remanded 2006 Annual NAAQS.

[4] For the reasons discussed in footnote 5, below, EPA's proposed action on Kentucky's redesignation request was delayed due to a technical systems audit on the $PM_{2.5}$ laboratory in Kentucky that invalidated certain Jefferson County monitoring data collected in 2012 and 2013.

SIP, and redesignate the Kentucky portion of the bi-state Louisville Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. The five redesignation criteria provided under CAA section 107(d)(3)(E) are discussed in greater detail for the Area in the following paragraphs of this section.

Criteria (1)—The Bi-State Louisville Area Has Attained the 1997 Annual $PM_{2.5}$ NAAQS

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the area has attained the applicable NAAQS (CAA section 107(d)(3)(E)(i)). For $PM_{2.5}$, an area may be considered to be attaining the 1997 Annual $PM_{2.5}$ NAAQS if it meets the standards, as determined in accordance with 40 CFR 50.13 and Appendix N of part 50, based on three complete, consecutive calendar years of quality-assured air quality monitoring data. To attain the 1997 Annual $PM_{2.5}$ NAAQS, the 3-year average of the annual arithmetic mean concentration, as determined in accordance with 40 CFR part 50, Appendix N, must be less than or equal to 15.0 μg/m³ at all relevant monitoring sites in the subject area over a 3-year period. The relevant data must be collected and quality-assured in accordance with 40 CFR part 58 and recorded in the EPA Air Quality System (AQS) database. The monitors generally should have remained at the same location for the duration of the monitoring period required for demonstrating attainment.

On September 9, 2016, EPA determined that the bi-state Louisville Area has attained the 1997 Annual $PM_{2.5}$ NAAQS based on 2013–2015 data.[5] *See* 81 FR 62390. In that action, EPA reviewed valid $PM_{2.5}$ monitoring data from the bi-state Louisville Area for the 1997 Annual $PM_{2.5}$ NAAQS from 2013–2015 and determined that the design value for the Area is less than the standard of 15.0 μg/m³ for that time period. The $PM_{2.5}$ design values for monitors with complete data are summarized in Table 1, below.[6]

TABLE 1—1997 ANNUAL $PM_{2.5}$ DESIGN VALUES FOR MONITORS WITH COMPLETE DATA IN THE BI-STATE LOUISVILLE AREA FOR 2013–2015

County	Monitoring site	2013–2015 Design value (μg/m³)
Clark County, IN	180190006	11.4
	180190008	9.3
Floyd County, IN	180431004	10.0
Jefferson County, KY	211110043	11.3
	211110051	11.7
	211110067	10.5

As shown in Table 1 above, the bi-state Louisville Area has a 2013–2015 design value of 11.7 μg/m³, which is below the 1997 Annual $PM_{2.5}$ NAAQS. For this proposed action, EPA has reviewed 2016 preliminary monitoring data for the Area and proposes to find that the preliminary data does not indicate a violation of the NAAQS.[7] EPA will not take final action to approve the redesignation if the 3-year design value exceeds the NAAQS prior to EPA finalizing the redesignation. As discussed in more detail below, Kentucky has committed to continue monitoring in the Kentucky portion of the Area in accordance with 40 CFR part 58.

Criteria (2)—Kentucky Has a Fully Approved SIP Under Section 110(k) for the Kentucky Portion of the Bi-State Louisville Area and Criteria (5)—Kentucky Has Met All Applicable Requirements Under Section 110 and Part D of the CAA

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the state has met all applicable requirements under section 110 and part D of title I of the CAA (CAA section 107(d)(3)(E)(v)) and that the state has a fully approved SIP under section 110(k) for the area (CAA section 107(d)(3)(E)(ii)). EPA proposes to find that the Commonwealth has met all applicable SIP requirements for the Kentucky portion of the Area under section 110 of the CAA (general SIP requirements) for purposes of redesignation. Additionally, EPA proposes to find that the Kentucky SIP satisfies the criterion that it meets applicable SIP requirements for purposes of redesignation under part D of title I of the CAA in accordance with section 107(d)(3)(E)(v). Further, EPA proposes to determine that the SIP is fully approved with respect to all requirements applicable for purposes of redesignation in accordance with section 107(d)(3)(E)(ii). In making these determinations, EPA ascertained which requirements are applicable to the Area and, if applicable, that they are fully approved under section 110(k). SIPs must be fully approved only with respect to requirements that were applicable prior to submittal of the complete redesignation request.

a. The Kentucky Portion of the Bi-State Louisville Area Has Met All Applicable Requirements Under Section 110 and Part D of the CAA

General SIP requirements. General SIP elements and requirements are delineated in section 110(a)(2) of title I, part A of the CAA. These requirements include, but are not limited to, the following: submittal of a SIP that has been adopted by the state after reasonable public notice and hearing;

[5] EPA made this determination in association with the redesignation of the Indiana portion of the Area. EPA initially proposed to redesignate that portion of the Area to attainment based on monitoring data from 2009–2011 and preliminary data from 2012. However, in August 2013, EPA issued results of a technical systems audit on the $PM_{2.5}$ laboratory in Kentucky that invalidated the Jefferson County monitoring data for all of 2012, and a small portion of the monitoring data from 2013 (a portion of the first quarter). Because there was not enough data to support an attainment determination for the Area, EPA could not proceed with the redesignation of the bi-state Louisville Area. Kentucky began collecting valid data in early 2013 (the end of the first quarter) after the monitoring audit issues had been addressed, resulting in a valid design value for the area using 2013–2015 data.

[6] See 81 FR 62390 for additional information regarding the evaluation of 2013–2015 data for the Area.

[7] This preliminary data is available at EPA's air data Web site: *http://aqsdr1.epa.gov/aqsweb/aqstmp/airdata/download_files.html#Daily.*

provisions for establishment and operation of appropriate procedures needed to monitor ambient air quality; implementation of a source permit program; provisions for the implementation of part C requirements (Prevention of Significant Deterioration (PSD)) and provisions for the implementation of part D requirements (NSR permit programs); provisions for air pollution modeling; and provisions for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision, EPA has required certain states to establish programs to address the interstate transport of air pollutants. The section 110(a)(2)(D) requirements for a state are not linked with a particular nonattainment area's designation and classification in that state. EPA believes that the requirements linked with a particular nonattainment area's designation and classifications are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, EPA does not believe that the CAA's interstate transport requirements should be construed to be applicable requirements for purposes of redesignation.

In addition, EPA believes that other section 110 elements that are neither connected with nonattainment plan submissions nor linked with an area's attainment status are not applicable requirements for purposes of redesignation. The area will still be subject to these requirements after the area is redesignated. The section 110 and part D requirements which are linked with a particular area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. This approach is consistent with EPA's existing policy on applicability (*i.e.,* for redesignations) of conformity and oxygenated fuels requirements, as well as with section 184 ozone transport requirements. *See* Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996), (62 FR 24826, May 7, 1997); Cleveland-Akron-Loraine, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking at (60 FR 62748, December 7, 1995). *See also* the discussion on this issue in the Cincinnati, Ohio, redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania, redesignation (66 FR 50399, October 19, 2001).

EPA has reviewed Kentucky's SIP and has preliminarily concluded that it meets the general SIP requirements under section 110(a)(2) of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of Kentucky's SIP addressing CAA section 110(a)(2) requirements including provisions addressing the 1997 Annual $PM_{2.5}$ NAAQS. *See* 77 FR 60307 (October 3, 2012) and 79 FR 26143 (May 7, 2014). These requirements are, however, statewide requirements that are not linked to the $PM_{2.5}$ nonattainment status of the Area. Therefore, EPA believes these SIP elements are not applicable for purposes of this redesignation.

Title I, part D, subpart 1 applicable SIP requirements. EPA proposes to determine that the Kentucky SIP meets the applicable SIP requirements for the Kentucky portion of the Area for purposes of redesignation under part D of the CAA. Subpart 1 of part D, comprised of sections 172–179B of the CAA, sets forth the basic nonattainment requirements applicable to all nonattainment areas. All areas that were designated nonattainment for the 1997 Annual $PM_{2.5}$ NAAQS were designated under subpart 1 of the CAA. For purposes of evaluating this redesignation request, the applicable part D, subpart 1 SIP requirements are contained in sections 172(c)(1)–(9) and in section 176. A thorough discussion of the requirements contained in sections 172 and 176 can be found in the General Preamble for Implementation of title I. *See* 57 FR 13498 (April 16, 1992). Section VI of this proposed rulemaking notice discusses the relationship between this proposed redesignation action and subpart 4 of part D.

Subpart 1, section 172 Requirements. Under section 172, states with nonattainment areas must submit plans providing for timely attainment and meeting a variety of other requirements. EPA's longstanding interpretation of the nonattainment planning requirements of section 172 is that once an area is attaining the NAAQS, those requirements are not ''applicable'' for purposes of CAA section 107(d)(3)(E)(ii) and therefore need not be approved into the SIP before EPA can redesignate the area. In the 1992 General Preamble for Implementation of Title I, EPA set forth its interpretation of applicable requirements for purposes of evaluating redesignation requests when an area is attaining a standard. *See* 57 FR 13498, 13564 (April 16, 1992). EPA noted that the requirements for reasonable further progress (RFP) and other measures designed to provide for attainment do not apply in evaluating redesignation requests because those nonattainment planning requirements ''have no meaning'' for an area that has already attained the standard. *Id.* This interpretation was also set forth in the Calcagni Memorandum. EPA's understanding of section 172 also forms the basis of its Clean Data Policy, which suspends a state's obligation to submit most of the attainment planning requirements that would otherwise apply, including an attainment demonstration and planning SIPs to provide for RFP, reasonably available control measures (RACM), and contingency measures under section 172(c)(9).

On March 9, 2011, EPA determined that the bi-state Louisville Area had attained the 1997 annual $PM_{2.5}$ NAAQS based upon ambient air monitoring data for the 2007–2009 period, which showed that the area had monitored attainment of the annual $PM_{2.5}$ NAAQS. As a result of this determination and in accordance with EPA's Clean Data Policy, the requirements for the area to submit an attainment demonstration and associated RACM, a RFP plan, contingency measures, and other planning SIP revision related to attainment of the standards are suspended for so long as the area continues to attain the 1997 annual $PM_{2.5}$ NAAQS.[8] Therefore, Kentucky withdrew the aforementioned $PM_{2.5}$ attainment demonstration SIP revision except for the portion addressing emissions inventory requirements under section 172(c)(3). However, as discussed below, the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) recently issued an opinion in *Sierra Club* v. *EPA,* 793 F.3d 656 (6th Cir. 2015), that is inconsistent with EPA's longstanding interpretation regarding section 107(d)(3)(E)(ii) and requires that subpart 1 RACM be approved into the SIP before EPA can redesignate an area subject to section 172(c)(1).

Section 172(c)(1) requires the plans for all nonattainment areas to provide

[8] At the time of EPA's March 9, 2011 action, EPA's Clean Data Policy for $PM_{2.5}$ was codified at 40 CFR 51.1004(c). This regulation was promulgated as part of the 1997 $PM_{2.5}$ NAAQS implementation rule that was subsequently challenged and remanded in *NRDC* v. *EPA,* 706 F.3d 428 (D.C. Cir. 2013), as discussed in Section VI of this notice. However, the Clean Data Policy portion of the implementation rule was not at issue in that case. In the $PM_{2.5}$ SIP Requirements Rule, EPA updated the Clean Data Policy for the $PM_{2.5}$ NAAQS and moved it to 40 CFR 51.1015.

for the implementation of RACM as expeditiously as practicable and to provide for attainment of the NAAQS. EPA interprets this requirement to impose a duty on all nonattainment areas to consider all available control measures and to adopt and implement such measures as are reasonably available for implementation in each area as components of the area's attainment demonstration.

On July 14, 2015, the Sixth Circuit vacated EPA's redesignation of the Indiana and Ohio portions of the Cincinnati nonattainment area for the 1997 $PM_{2.5}$ NAAQS because EPA had not approved RACM for that area into the Indiana and Ohio SIPs pursuant to CAA section 172(c)(1). *Sierra Club* v. *EPA,* 793 F.3d 656. The Court concluded that ''a State seeking redesignation 'shall provide for the implementation' of RACM/RACT [reasonably available control technology], even if those measures are not strictly necessary to demonstrate attainment with the $PM_{2.5}$ NAAQS. If the State has not done so, EPA cannot 'fully approve' the area's SIP, and redesignation to attainment status is improper.'' *Sierra Club,* 793 F.3d at 670. EPA is bound by the Sixth Circuit's decision within the Court's jurisdiction.[9]

On August 9, 2016, Kentucky submitted a SIP revision containing a RACM determination for the Kentucky portion of the Louisville Area, in accordance with CAA 172(c)(1) and the Sixth Circuit decision in *Sierra Club,* for incorporation into the Kentucky SIP in support of the Commonwealth's redesignation request. Although EPA continues to believe that subpart 1 RACM is not an applicable requirement under section 107(d)(3)(E) for an area that has already attained the 1997 Annual $PM_{2.5}$ NAAQS, on October 21, 2016, EPA proposed to approve Kentucky's SIP revision to incorporate the subpart 1 RACM determination for the Kentucky portion of the Area into the SIP.[10] *See* 81 FR 72755. EPA did not receive any adverse comments on the proposal, and on December 15, 2016, the EPA Region 4 Regional Administrator took final action to approve Kentucky's subpart 1 RACM determination SIP submission. Publication in the **Federal Register** is pending.

Because attainment has been reached in the Area, the section 172(c)(2) requirement that nonattainment plans contain provisions promoting reasonable further progress toward attainment is not relevant for purposes of redesignation. In addition, because the Area has attained the standard and is no longer subject to a RFP requirement, the requirement to submit the section 172(c)(9) contingency measures is not applicable for purposes of redesignation. Section 172(c)(6) requires the SIP to contain control measures necessary to provide for attainment of the NAAQS. Because attainment has been reached, no additional measures are needed to provide for attainment.

Section 172(c)(3) requires submission and approval of a comprehensive, accurate, and current inventory of actual emissions. On August 2, 2012 (77 FR 45956), EPA approved Kentucky's 2002 base-year emissions inventory for the bi-state Louisville Area.

Section 172(c)(4) requires the identification and quantification of allowable emissions for major new and modified stationary sources to be allowed in an area, and section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA has determined that, since PSD requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' The Commonwealth has demonstrated that the Kentucky portion of the bi-state Louisville Area will be able to maintain the NAAQS without part D NSR in effect, and therefore Kentucky need not have fully approved part D NSR programs prior to approval of the redesignation request. Kentucky's PSD program will become effective in the Kentucky portion of the bi-state Louisville Area upon redesignation to attainment.

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above, EPA believes that the Kentucky SIP meets the requirements of section 110(a)(2) applicable for purposes of redesignation.

176 Conformity Requirements. Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that federally-supported or funded projects conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs and projects that are developed, funded or approved under title 23 of the United States Code (U.S.C.) and the Federal Transit Act (transportation conformity) as well as to all other federally-supported or funded projects (general conformity). State transportation conformity SIP revisions must be consistent with federal conformity regulations relating to consultation, enforcement and enforceability that EPA promulgated pursuant to its authority under the CAA.

EPA believes that it is reasonable to interpret the conformity SIP requirements[11] as not applying for purposes of evaluating the redesignation request under section 107(d) because state conformity rules are still required after redesignation and federal conformity rules apply where state rules have not been approved. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001) (upholding this interpretation); *See* 60 FR 62748 (December 7, 1995). Nonetheless, Kentucky has an approved conformity SIP for the bi-state Louisville Area. *See* 75 FR 20780 (April 21, 2010).

For these reasons, EPA proposes to find that Kentucky has satisfied all applicable requirements for purposes of redesignation of the Area under section 110 and part D of the CAA.

b. The Kentucky Portion of the Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

EPA has fully approved the applicable Kentucky SIP for the Kentucky portion of the bi-state Louisville Area for the 1997 Annual $PM_{2.5}$ nonattainment area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. EPA may rely on prior SIP approvals in approving a redesignation request (*see* Calcagni

[9] Kentucky, Michigan, Ohio, and Tennessee are located within the Sixth Circuit's jurisdiction.

[10] The EPA Region 4 Regional Administrator signed a memorandum on July 20, 2015, seeking concurrence from the Director of EPA's Air Quality Policy Division (AQPD) in the Office of Air Quality Planning and Standards to act inconsistent with EPA's interpretation of CAA sections 107(d)(3)(E) and 172(c)(1) when taking action on pending and future redesignation requests in Kentucky and Tennessee because the Region is bound by the Sixth Circuit's decision in *Sierra Club* v. *EPA.* The AQPD Director issued her concurrence on July 22, 2015. This memorandum is not required to satisfy EPA's regional consistency regulations. *See* 40 CFR 56.5(b)(1); 81 FR 51102 (August 3, 2016).

[11] CAA section 176(c)(4)(E) requires states to submit revisions to their SIPs to reflect certain Federal criteria and procedures for determining transportation conformity. Transportation conformity SIPs are different from the MVEBs that are established in control strategy SIPs and maintenance plans.

Memorandum at p. 3; *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984 (6th Cir. 1998); *Wall,* 265 F.3d 426) plus any additional measures it may approve in conjunction with a redesignation action. *See* 68 FR 25426 (May 12, 2003) and citations therein. Following passage of the CAA of 1970, Kentucky has adopted and submitted, and EPA has fully approved at various times, provisions addressing the various SIP elements applicable for the 1997 Annual $PM_{2.5}$ NAAQS in the Kentucky portion of the bi-state Louisville Area (*e.g.,* 77 FR 60307, October 3, 2012).

As indicated above, EPA believes that the section 110 elements not connected with nonattainment plan submissions and not linked to an area's nonattainment status are not applicable requirements for purposes of redesignation.

Criteria (3)—The Air Quality Improvement in the Bi-State Louisville Area Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the air quality improvement in the area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP and applicable federal air pollution control regulations and other permanent and enforceable reductions (CAA section 107(d)(3)(E)(iii)). EPA has preliminarily determined that Kentucky has demonstrated that the observed air quality improvement in the Kentucky portion of the bi-state Louisville Area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP and federal measures.

Federal measures enacted in recent years have resulted in permanent emission reductions in particulate matter and its precursors. The federal measures that have been implemented include:

Tier 2 vehicle standards and low-sulfur gasoline. Implementation of the Tier 2 vehicle standards began in 2004, and as newer, cleaner cars enter the national fleet, these standards continue to significantly reduce NO_X emissions. The standards require all classes of passenger vehicles in any manufacturer's fleet to meet an average standard of 0.07 grams of NO_X per mile. In addition, starting in January of 2006, the Tier 2 rule reduced the allowable sulfur content of gasoline to 30 parts per million (ppm). Most gasoline sold prior to this had a sulfur content of approximately 300 ppm. EPA expects that these standards will reduce NO_X emissions from vehicles by approximately 74 percent by 2030, translating to nearly 3 million tons annually by 2030.

Heavy-duty gasoline and diesel highway vehicle standards & ultra low-sulfur diesel rule. On October 6, 2000 (65 FR 59896), EPA promulgated a rule to reduce NO_X and VOC emissions from heavy-duty gasoline and diesel highway vehicles that began to take effect in 2004. On January 18, 2001 (66 FR 5002), EPA promulgated a second phase of standards and testing procedures which began in 2007 to reduce particulate matter from heavy-duty highway engines and reduced the maximum highway diesel fuel sulfur content from 500 ppm to 15 ppm. The total program should achieve a 90 percent reduction in PM emissions and a 95 percent reduction in NO_X emissions for new engines using low-sulfur diesel, compared to existing engines using higher-content sulfur diesel. EPA expects that this rule will reduce NO_X emissions by 2.6 million tons by 2030 when the heavy-duty vehicle fleet is completely replaced with newer heavy-duty vehicles that comply with these emission standards.

Non-road, large spark-ignition engines and recreational engines standards. The non-road spark-ignition and recreational engine standards, effective in July 2003, regulate NO_X, hydrocarbons, and carbon monoxide from groups of previously unregulated non-road engines. These engine standards apply to large spark-ignition engines (*e.g.,* forklifts and airport ground service equipment), recreational vehicles (*e.g.,* off-highway motorcycles and all-terrain-vehicles), and recreational marine diesel engines sold in the United States and imported after the effective date of these standards. When all of the non-road spark-ignition and recreational engine standards are fully implemented, an overall 72 percent reduction in hydrocarbons, 80 percent reduction in NO_X, and 56 percent reduction in carbon monoxide emissions are expected by 2020. These controls help reduce ambient concentrations of $PM_{2.5}$.

Large non-road diesel engine standards. This rule, which applies to diesel engines used in industries such as construction, agriculture, and mining, was promulgated in 2004 and fully phased in by 2014. This rule reduced allowable non-road diesel fuel sulfur levels from approximately 3,000 ppm to 500 ppm in 2007 and further reduced those levels to 15 ppm starting in 2010 (a 99 percent reduction). This rule also achieved significant reductions of up to 90 percent for NO_X and particulate matter emissions nationwide.

NO_X SIP Call. On October 27, 1998 (63 FR 57356), EPA issued the NO_X SIP Call requiring the District of Columbia and 22 states to reduce emissions of NO_X, a precursor to ozone and $PM_{2.5}$ pollution, and providing a mechanism (the NO_X Budget Trading Program) that states could use to achieve those reductions. Affected states were required to comply with Phase I of the SIP Call beginning in 2004 and Phase II beginning in 2007. By the end of 2008, ozone season NO_X emissions from sources subject to the NO_X SIP Call dropped by 62 percent from 2000 emissions levels. All NO_X SIP Call states, including Kentucky, have SIPs that currently satisfy their obligations under the NO_X SIP Call, and EPA will continue to enforce the requirements of the NO_X SIP Call.

Reciprocating internal combustion engine National Emissions Standards for Hazardous Air Pollutants (NESHAP). In 2010, EPA issued rules regulating emissions of air toxics from existing compression ignition (CI) and spark ignition (SI) stationary reciprocating internal combustion engines (RICE) that meet specific site rating, age, and size criteria. With these RICE standards fully implemented in 2013, EPA estimates that the CI RICE standards reduce $PM_{2.5}$ emissions from the covered CI engines by approximately 2,800 tons per year (tpy) and VOC emissions by approximately 27,000 tpy and that the SI RICE standards reduce NO_X emissions from the covered SI engines by approximately 96,000 tpy.

Category 3 marine diesel engine standards. Promulgated in 2010, this rule establishes more stringent exhaust emission standards for new large marine diesel engines with per cylinder displacement at or above 30 liters (commonly referred to as Category 3 compression-ignition marine engines) as part of a coordinated strategy to address emissions from all ships that effect U.S. air quality. Near-term standards for newly built engines applied beginning in 2011, and long-term standards requiring an 80 percent reduction in NO_X emissions will begin in 2016.

Boiler NESHAP. The NESHAP for industrial, commercial, and institutional boilers is projected to reduce VOC emissions. This NESHAP applies to boiler and process heaters located at major sources of hazardous air pollutants that burn natural gas, fuel oil, coal, biomass, refinery gas, or other gas

and had a compliance deadline of January 31, 2016.

Utility Mercury Air Toxics Standards (MATS) and New Source Performance Standards (NSPS). The MATS for coal and oil-fired electric generation units (EGUs) and the NSPS for fossil-fuel-fired electric utility steam generating units were published on February 16, 2012 (77 FR 9304). The purpose is to reduce mercury and other toxic air pollutant emissions from coal and oil-fired EGUs, 25 megawatts or more, that generate electricity for sale and distribution through the national electric grid to the public. The NSPS has revised emission standards for NO_X, SO_2, and particulate matter (PM) that apply to new coal and oil-fired power plants. The MATS compliance date for existing sources was April 16, 2015.

CAIR and CSAPR. In its redesignation request and maintenance plan, the Commonwealth identified the Clean Air Interstate Rule (CAIR) as a permanent and enforceable measure that contributed to attainment in the bi-state Louisville Area. CAIR created regional cap-and-trade programs to reduce SO_2 and NO_X emissions in 27 eastern states, including Kentucky, that contributed to downwind nonattainment or interfered with maintenance of the 1997 8-hour ozone NAAQS and the 1997 $PM_{2.5}$ NAAQS. *See* 70 FR 25162 (May 12, 2005). EPA approved a revision to Kentucky's SIP on October 4, 2007 (72 FR 56623), that addressed the requirements of CAIR for the purpose of reducing SO_2 and NO_X emissions. By 2008, the beginning of the attainment time period identified by Kentucky, CAIR had been promulgated and was achieving emission reductions.

In 2008 the D.C. Circuit initially vacated CAIR, *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR, *North Carolina* v. *EPA,* 550 F.3d 1176, 1178 (D.C. Cir. 2008). On August 8, 2011 (76 FR 48208), acting on the D.C. Circuit's remand, EPA promulgated the Cross-State Air Pollution Rule (CSAPR) to replace CAIR and thus to address the interstate transport of emissions contributing to nonattainment and interfering with maintenance of the two air quality standards covered by CAIR as well as the 2006 $PM_{2.5}$ NAAQS. CSAPR requires substantial reductions of SO_2 and NO_X emissions from EGUs in 28 states in the Eastern United States. As a general matter, because CSAPR is CAIR's replacement, emissions reductions associated with CAIR will for most areas be made permanent and enforceable through implementation of CSAPR.

Numerous parties filed petitions for review of CSAPR in the D.C. Circuit, and on August 21, 2012, the court issued its ruling, vacating and remanding CSAPR to EPA and ordering continued implementation of CAIR. *EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d 7, 38 (D.C. Cir. 2012). The D.C. Circuit's vacatur of CSAPR was reversed by the United States Supreme Court on April 29, 2014, and the case was remanded to the D.C. Circuit to resolve remaining issues in accordance with the high court's ruling. *EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. 1584 (2014). On remand, the D.C. Circuit affirmed CSAPR in most respects, but invalidated without vacating some of the Phase 2 SO_2 and NO_X ozone season CSAPR budgets as to a number of states. *EME Homer City Generation, L.P.* v. *EPA,* 795 F.3d 118 (D.C. Cir. 2015) (*EME Homer City II*). The CSAPR budgets for Kentucky are not affected by the Court's decision. The litigation over CSAPR ultimately delayed implementation of that rule for three years, from January 1, 2012, when CSAPR's cap-and-trade programs were originally scheduled to replace the CAIR cap-and-trade programs, to January 1, 2015. CSAPR's Phase 2 budgets were originally promulgated to begin on January 1, 2014, and are now scheduled to begin on January 1, 2017. CSAPR will continue to operate under the existing emissions budgets until EPA fully addresses the D.C. Circuit's remand. The Court's decision did not affect Kentucky's CSAPR emissions budgets; therefore, CSAPR ensures that the NO_X and SO_2 emissions reductions associated with CAIR and CSAPR throughout Kentucky are permanent and enforceable.[12] Although Kentucky identified CAIR as a measure that contributed to permanent and enforceable emissions reductions, the air quality modeling analysis conducted for CSAPR demonstrates that the bi-state Louisville Area would be able to attain the 1997 annual $PM_{2.5}$ NAAQS even in the absence of either CAIR or CSAPR. *See* ''Air Quality Modeling Final Rule Technical Support Document,'' App. B, pages B–43, B–45 and B–46. This modeling is available in the docket for this proposed redesignation action.

To the extent that bi-state Louisville relies on CSAPR for maintenance of the standard, EPA has identified the bi-state Louisville Area as having been significantly impacted by pollution transported from other states in both CAIR and CSAPR, and these rules greatly reduced the tons of SO_2 and NO_X emission generated in the states upwind of the area. The air quality modeling performed for the CSAPR rulemaking identified the following states as having contributed to $PM_{2.5}$ concentrations in the bi-state Louisville Area: Illinois, Indiana, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, Tennessee, West Virginia and Wisconsin. *See* 76 FR 48208 (August 8, 2011). Even though the first phase of CAIR implementation for SO_2 did not begin until 2010, many sources began reducing their emissions well in advance of the first compliance deadline because of the incentives offered by CAIR for early compliance with the rule. The emission reductions in the states upwind of the bi-state Louisville Area achieved by CAIR, and made permanent by CSAPR, are unaffected by the D.C. Circuit's remand of CSAPR.[13]

In addition to the above federal measures, Kentucky also identified the following State control measures, incorporated into Kentucky's SIP, that provide emission reductions in particulate matter and its precursors:

New Process Operations—401 KAR 59:010. This regulation provides for the control of particulate matter emissions for affected facilities or sources located in nonattainment areas as well as attainment areas.

RACT/RACM—401 KAR 50.012. This regulation establishes reasonably available control technology requirements for all air contaminant sources.

Open Burning Bans—401 KAR 63:005. In 2005, Kentucky revised the open burning regulation to prohibit most types of open burning in $PM_{2.5}$ nonattainment/maintenance areas within Kentucky during the period of May-September.

Fugitive Emissions—401 KAR 63:010. This regulation provides for the control of fugitive emissions in the Commonwealth.

Criteria (4)—The Kentucky Portion of the Bi-State Louisville Area Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the area has a fully approved maintenance plan pursuant to section 175A of the CAA

[12] CAIR and CSAPR established annual NO_X and SO_2 budgets to address nonattainment and interference with maintenance of the $PM_{2.5}$ standard, because, as discussed above in Section II, NO_X and SO_2 are two main $PM_{2.5}$ precursors.

[13] The D.C. Circuit in *EME Homer City II* remanded the SO_2 trading program budgets for four states, none of which were identified as contributing to the bi-state Louisville Area.

(CAA section 107(d)(3)(E)(iv)). In conjunction with its request to redesignate the Kentucky portion of the bi-state Louisville Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS, Kentucky submitted a SIP revision to provide for the maintenance of the 1997 Annual $PM_{2.5}$ NAAQS for at least 10 years after the effective date of redesignation to attainment. EPA believes that this maintenance plan meets the requirements for approval under section 175A of the CAA for the reasons discussed below.

a. What is required in a maintenance plan?

Section 175A of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the Commonwealth of Kentucky must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for the 10 years following the initial 10-year period. To address the possibility of future NAAQS violations, the maintenance plan must contain such contingency measures, as EPA deems necessary, to assure prompt correction of any future 1997 Annual $PM_{2.5}$ NAAQS violations. The Calcagni Memorandum provides further guidance on the content of a maintenance plan, explaining that a maintenance plan should address five requirements: The attainment emissions inventory, maintenance demonstration, monitoring, verification of continued attainment, and a contingency plan. As is discussed below, EPA finds that the Commonwealth's maintenance plan includes all the necessary components and is thus proposing to approve it as a revision to the Kentucky SIP.

b. Attainment Emissions Inventory

As discussed above, EPA has previously determined that the bi-state Louisville Area attained the 1997 Annual $PM_{2.5}$ NAAQS based on monitoring data for the 3-year period from 2007–2009, and then subsequently based on monitoring data from 2013–2015. In its maintenance plan, the Commonwealth selected 2008 as the attainment emission inventory year. The attainment inventory identifies the level of emissions in the Area that is sufficient to attain the 1997 Annual $PM_{2.5}$ NAAQS. The Commonwealth began development of the attainment inventory by first generating a baseline emissions inventory for the Area. As noted above, the year 2008 was chosen as the base year for developing a comprehensive emissions inventory for direct $PM_{2.5}$ and the $PM_{2.5}$ precursors SO_2 and NO_X. The projected inventory included with the maintenance plan estimates emissions forward to 2015 and 2025, which satisfies the 10-year interval required in section 175(A) of the CAA.

The emissions inventories are composed of four major types of sources: Point, area, on-road mobile, and non-road mobile. The attainment and future year emissions inventories were projected by the Visibility Improvement State and Tribal Association of the Southeast and the Lake Michigan Air Directors Consortium using the 2005 base year inventory methodology as provided in the Appendix D of Kentucky's submittal. The future year emissions inventories have been estimated using projected rates of growth in population, traffic, economic activity, expected control programs, and other parameters. Non-road mobile emissions estimates were based on EPA's non-road mobile model, with the exception of the railroad locomotives, commercial marine, and aircraft. On-road mobile source emissions were calculated using EPA's MOVES2010 on-road mobile emission model.[14] The 2008 SO_2, NO_X, and $PM_{2.5}$ emissions for the Kentucky portion of the bi-state Louisville Area and the entire bi-state Louisville Area, as well as the emissions for other years, were developed consistent with EPA guidance and are summarized in Tables 8 and 9.

Section 175A requires a state seeking redesignation to attainment to submit a SIP revision to provide for the maintenance of the NAAQS in the Area ''for at least 10 years after the redesignation.'' EPA has interpreted this as a showing of maintenance ''for a period of ten years following redesignation.'' Calcagni Memorandum, p. 9. Where the emissions inventory method of showing maintenance is used, the purpose is to show that emissions during the maintenance period will not increase over the attainment year inventory. Calcagni Memorandum, pp. 9–10.

As discussed in detail below, Kentucky's maintenance plan submission expressly documents that the Area's overall emissions inventories will remain well below the attainment year inventories through 2025. In addition, for the reasons set forth below, EPA believes that the Area will continue to maintain the 1997 Annual $PM_{2.5}$ NAAQS through 2027. Thus, if EPA finalizes its proposed approval of the redesignation request and maintenance plan, the approval will be based upon this showing, in accordance with section 175A, and EPA's analysis described herein, that the Commonwealth's maintenance plan provides for maintenance for at least ten years after redesignation.

c. Maintenance Demonstration

The maintenance plan for the Kentucky portion of the bi-state Louisville Area includes a maintenance demonstration that:

(i) Shows compliance with and maintenance of the Annual $PM_{2.5}$ standard by providing information to support the demonstration that current and future emissions of SO_2, NO_X, and $PM_{2.5}$ remain at or below 2008 emissions levels.

(ii) Uses 2008 as the attainment year and includes future emission inventory projections for 2015 and 2025.

(iii) Identifies an ''out year'' at least 10 years after EPA review and potential approval of the maintenance plan. Per 40 CFR part 93, NO_X and $PM_{2.5}$ MVEBs were established for the last year (2025) of the maintenance plan. Additionally, Kentucky chose, through interagency consultation, to establish NO_X and $PM_{2.5}$ MVEBs for 2015 (see section VII below).

(iv) Provides, as shown in Tables 2 through 7 below, the estimated and projected emissions inventories, in tpy, for the Kentucky portion of the Louisville (Bullitt[15] and Jefferson Counties) Area, for $PM_{2.5}$, NO_X, and SO_2. Kentucky incorporated expected CAIR reductions into the Commonwealth's redesignation request inventories and projections regarding NO_X and SO_2 but did not incorporate CAIR reductions into the $PM_{2.5}$ inventory.

[14] MOVES2010 was the approved model at the time the Kentucky SIP was submitted. Currently, MOVES2014a is the approved on-road mobile source model.

[15] Based upon an email from John E. Gowins, Kentucky Division of Air Quality, dated October 31, 2012, the Bullitt County 2025 emission inventory values for the Non-EGU sector were incorrect in the March 5, 2012, redesignation request submittal. The values presented in Tables 2, 4, and 6, as well as projected total emission estimates Tables 8 and 9, have been changed to reflect the correct values. This email is located in the docket for this proposed action.

TABLE 2—BULLITT COUNTY, KENTUCKY $PM_{2.5}$ EMISSION INVENTORY; TOTALS FOR BASE YEAR 2005, ESTIMATED 2008, AND PROJECTED 2015 AND 2025 (TPY)—WITHOUT CAIR

Sector	2005 Base	2008 Attainment	2015 Interim	2025 Maintenance
EGU Point	0	0	0	0
Non-EGU	186.67	259.07	428.02	669.37
Non-road	42.13	39.86	29.09	12.39
Area	812.93	822.39	855.23	895.91
On-road	84.08	85.40	55.96	27.72
Total	1125.81	1206.72	1368.3	1605.39

TABLE 3—JEFFERSON COUNTY, KENTUCKY $PM_{2.5}$ EMISSION INVENTORY; TOTALS FOR BASE YEAR 2005, ESTIMATED 2008, AND PROJECTED 2015 AND 2025 (TPY)—WITHOUT CAIR

Sector	2005 Base	2008 Attainment	2015 Interim	2025 Maintenance
EGU Point	3,123.24	2,763.06	2,481.90	2,481.90
Non-EGU	604.24	640.00	568.43	479.96
Non-road	579.53	571.03	212.51	124.16
Area	550.70	496.28	440.65	371.92
On-road	721.30	627.06	339.41	177.60
Total	5,579.01	5,097.43	4,042.90	3,635.54

TABLE 4—BULLITT COUNTY, KENTUCKY NO_X EMISSION INVENTORY; TOTALS FOR BASE YEAR 2005, ESTIMATED 2008, AND PROJECTED 2015 AND 2025 (TPY)—WITH CAIR

Sector	2005 Base	2008 Attainment	2015 Interim	2025 Maintenance
EGU Point	0	0	0	0
Non-EGU	221.70	288.40	444.04	666.38
Non-road	540.19	502.71	385.51	210.99
Area	29.92	8.72	1.42	1.09
On-road	2,952.07	2,820.80	1,782.71	866.81
Total	3,743.88	3,620.63	2,613.68	1745.27

TABLE 5—JEFFERSON COUNTY, KENTUCKY NO_X EMISSION INVENTORY; TOTALS FOR BASE YEAR 2005, ESTIMATED 2008, AND PROJECTED 2015 AND 2025 (TPY)—WITH CAIR

Sector	2005 Base	2008 Attainment	2015 Interim	2025 Maintenance
EGU Point	20,176.48	22,749.14	21,595.85	22,221.35
Non-EGU	1,489.68	1,987.01	1,759.66	1,479.63
Non-road	10,590.84	11,255.08	9,912.27	8,269.43
Area	1,272.69	1,382.23	1,217.32	1,015.56
On-road	22,241.72	19,094.05	10,259.60	4,935.49
Total	55,771.41	56,467.51	44,744.70	37,921.46

TABLE 6—BULLITT COUNTY, KENTUCKY SO_2 EMISSION INVENTORY; TOTALS FOR BASE YEAR 2005, ESTIMATED 2008, AND PROJECTED 2015 AND 2025 (TPY)—WITH CAIR

Sector	2005 Base	2008 Attainment	2015 Interim	2025 Maintenance
EGU Point	0	0	0	0
Non-EGU	365.91	507.16	836.74	1307.58
Non-road	32.05	14.28	3.29	0.76
Area	94.94	96.47	98.41	100.36
On-road	12.11	13.28	15.01	15.76
Total	505.01	631.19	953.45	1424.46

TABLE 7—JEFFERSON COUNTY, KENTUCKY SO_2 EMISSION INVENTORY; TOTALS FOR BASE YEAR 2005, ESTIMATED 2008, AND PROJECTED 2015 AND 2025 (TPY)—WITH CAIR

Sector	2005 Base	2008 Attainment	2015 Interim	2025 Maintenance
EGU Point	42,852.96	38,684.02	38,684.02	38,684.02
Non-EGU	1,894.40	2,080.95	2,080.95	2,080.95
Non-road	714.33	778.68	960.48	1,297.16
Area	0.00	0.00	0.00	0.00
On-road	95.26	101.00	102.55	100.43
Total	45,556.95	41,644.65	41,828.00	42,162.56

TABLE 8—ACTUAL (2008) AND PROJECTED TOTAL EMISSION ESTIMATES FOR THE KENTUCKY PORTION OF THE BI-STATE LOUISVILLE AREA (TPY)

Year	$PM_{2.5}$	NO_X	SO_2
2008	6,304.15	60,088.14	42,275.84
2015	5,411.20	47,358.38	42,781.45
2025	5,240.93	39,666.73	43,587.02
Decrease from 2008 to 2025	1,063.22	20,421.41	−1,311.18

TABLE 9—ACTUAL (2008) AND PROJECTED TOTAL EMISSION ESTIMATES FOR THE ENTIRE BI-STATE LOUISVILLE AREA (TPY)

Year	$PM_{2.5}$	NO_X	SO_2
2008	7,506.62	97,614.20	151,648.36
2015	6,521.57	70,147.12	77,397.48
2025	6,294.86	58,635.36	76,929.92
Decrease from 2008 to 2025	1,211.76	38,978.84	74,718.44

In situations where local emissions are the primary contributor to nonattainment, such as the bi-state Louisville Area, if the future projected emissions in the nonattainment area remain at or below the baseline emissions in the nonattainment area, then the ambient air quality standard should not be exceeded in the future. As reflected above in Table 9, future emissions of all the relevant pollutants in the bi-state Louisville Area are expected to be well below the ''attainment level'' emissions in 2008, thus illustrating that the bi-state Louisville Area is expected to continue to attain the 1997 $PM_{2.5}$ NAAQS through 2025 and beyond. Further, even though EPA evaluates maintenance demonstrations on an area-wide basis, EPA finds that projected emissions in only the Kentucky portion of the bi-state Louisville Area are also consistent with maintenance of the 1997 $PM_{2.5}$ NAAQS. As reflected in Table 8, emissions of direct $PM_{2.5}$ and NO_X in the Kentucky portion of the bi-state Louisville Area are expected to decrease from 2008 to 2025 by approximately 17 percent and 34 percent, respectively, while emissions of SO_2 are expected to increase by approximately 3 percent. Thus, the significant projected reductions in direct $PM_{2.5}$ and NO_X indicate that future emissions in the Kentucky portion of the bi-state Louisville Area are expected to support continued maintenance of the 1997 Annual $PM_{2.5}$ NAAQS through 2025.

A maintenance plan requires the state to show that projected future year emissions will not exceed the level of emissions which led the Area to attain the NAAQS. Kentucky has projected emissions as described previously and determined that emissions in the bi-state Louisville Area will remain below those in the attainment year inventory for the duration of the maintenance plan.

While DAQ's maintenance plan projects maintenance of the 1997 Annual $PM_{2.5}$ NAAQS through 2025, as noted above, EPA believes that the bi-state Louisville Area will continue to maintain the standard through 2027 for several reasons: All of the federal regulatory requirements that enabled the Area to attain the NAAQS will continue to be in effect and enforceable after the 10-year maintenance period; the most recent maximum potential annual $PM_{2.5}$ design value (for the period 2013–2015) for the Area, 11.7 $\mu g/m^3$, is well below the standard of 15.0 $\mu g/m^3$; and overall emissions are projected to decline significantly through 2025. Because it is unlikely that emissions will suddenly increase in 2026 and 2027 in an amount that results in overall emissions in the area exceeding attainment year inventory levels, EPA expects that the bi-state Louisville Area will continue maintain the 1997 Annual $PM_{2.5}$ NAAQS through at least 2027.

d. Monitoring Network

There are currently four monitors in Jefferson County measuring $PM_{2.5}$ in the Kentucky portion of the bi-state Louisville Area. The Commonwealth of Kentucky, through DAQ, has committed to continue operation of the monitors in the Kentucky portion of the bi-state Louisville Area in compliance with 40 CFR part 58 and have thus addressed the requirement for monitoring. EPA approved Kentucky's 2015 monitoring plan on October 28, 2015.

e. Verification of Continued Attainment

The Commonwealth of Kentucky, through DAQ, has the legal authority to enforce and implement the requirements of the Kentucky portion of the bi-state Louisville Area 1997 Annual $PM_{2.5}$ maintenance plan. This includes the authority to adopt, implement, and enforce any subsequent emissions control contingency measures determined to be necessary to correct future $PM_{2.5}$ attainment problems.

DAQ will track the progress of the maintenance plan by performing future reviews of triennial emission inventories for the Kentucky portion of the bi-state Louisville Area as required in the Air Emissions Reporting Rule (AERR). Emissions information will be compared to the 2008 attainment year and the 2025 projected maintenance year inventories to assess emission trends, as necessary, and to assure continued compliance with the annual $PM_{2.5}$ standard.

f. Contingency Measures in the Maintenance Plan

Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that a state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation, and a time limit for action by the Commonwealth. A state should also identify specific indicators to be used to determine when the contingency measures need to be implemented. The maintenance plan must include a requirement that a state will implement all measures with respect to control of the pollutant that were contained in the SIP before redesignation of the area to attainment in accordance with section 175A(d).

In the March 5, 2012, submittal, Kentucky commits to maintaining the existing control measures identified in Chapter 5 of its submission (addressing section 107(d)(3)(E)(v)) after redesignation. The contingency plan included in the submittal identifies triggers to determine when contingency measures are needed and a process of developing and implementing appropriate control measures. The Commonwealth will use actual ambient monitoring data to determine whether a trigger event has occurred and when contingency measures should be implemented.

In the event of a monitored violation of the 1997 Annual $PM_{2.5}$ NAAQS in the Area, the Commonwealth commits to adopt one or more of the following control measures within nine months of the monitored violation in order to bring the Area into compliance and to implement the control measure(s) within 18 months of the monitored violation:

- Implementation of a program to require additional emissions reductions on stationary sources;
- Implementation of fuel programs, including incentives for alternative fuels;
- Restriction of certain roads or lanes, or construction of such lanes for use by passenger buses or high-occupancy vehicles;
- Trip-reduction ordinances;
- Employer-based transportation management plans, including incentives;
- Programs to limit or restrict vehicle use in downtown areas, or other areas of emission concentration, particularly during periods of peak use;
- Programs for new construction and major reconstruction of paths or tracks for use by pedestrians or by non-motorized vehicles when economically feasible and in the public interest;
- Diesel reduction emissions strategies, including diesel retrofit programs;
- Any other control program that is developed and deemed to be more advantageous for the Area.

In the event that a measured value of the weighted annual arithmetic mean, as determined in accordance with 40 CFR part 50, Appendix N, is 15.5 $\mu g/m^3$ or greater in a single calendar year in any portion of the Area, the Commonwealth will evaluate existing controls measures to determine whether any further emission reduction measures should be implemented at that time. In addition to the triggers indicated above, Kentucky will monitor regional emissions through the AERR and compare them to the projected inventories and the attainment year inventory.

EPA preliminarily concludes that the maintenance plan adequately addresses the five basic components of a maintenance plan: Attainment emission inventory, maintenance demonstration, monitoring network, verification of continued attainment, and a contingency plan. Therefore, EPA proposes to find that the maintenance plan SIP revision submitted by the Commonwealth for the Kentucky portion of the bi-state Louisville Area meets the requirements of section 175A of the CAA and is approvable.

VI. What is the effect of the January 4, 2013, D.C. Circuit decision regarding $PM_{2.5}$ implementation under subpart 4?

a. Background

As discussed in section II of this action, the D.C. Circuit remanded the 1997 $PM_{2.5}$ Implementation Rule to EPA on January 4, 2013, in *Natural Resources Defense Council* v. *EPA,* 706 F.3d 428. The court found that EPA erred in implementing the 1997 $PM_{2.5}$ NAAQS pursuant to the general implementation provisions of subpart 1 of part D of Title I of the CAA, rather than the particulate matter-specific provisions of subpart 4 of part D of Title I.

For the purposes of evaluating Kentucky's redesignation request for its portion of the bi-state Louisville Area, to the extent that implementation under subpart 4 would impose additional requirements for areas designated nonattainment, EPA believes that those requirements are not ''applicable'' for the purposes of CAA section 107(d)(3)(E), and thus EPA is not required to consider subpart 4 requirements with respect to the redesignation of the Kentucky portion of the bi-state Louisville Area. Under its longstanding interpretation of the CAA, EPA has interpreted section 107(d)(3)(E) to mean, as a threshold matter, that the part D provisions which are ''applicable'' and which must be approved in order for EPA to redesignate an area include only those which came due prior to a state's submittal of a complete redesignation request. *See* ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (Calcagni memorandum). *See also* ''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for the plan and Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after November 15, 1992,'' Memorandum from Michael Shapiro, Acting Assistant Administrator, Air and Radiation, September 17, 1993 (Shapiro memorandum); Final Redesignation of Detroit-Ann Arbor, (60 FR 12459, 12465–66, March 7, 1995); Final Redesignation of St. Louis, Missouri, (68 FR 25418, 25424–27, May 12, 2003); *Sierra Club* v. *EPA,* 375 F.3d 537, 541 (7th Cir. 2004) (upholding EPA's redesignation rulemaking applying this interpretation and expressly rejecting Sierra Club's view that the meaning of ''applicable'' under the statute is ''whatever should have been in the plan at the time of attainment rather than whatever actually was in already implemented or due at the time of attainment'').[16] In this case, at the time that Kentucky submitted its redesignation request on March 5, 2012, requirements under subpart 4 were not due, and indeed, were not yet known to apply.

[16] Applicable requirements of the CAA that come due subsequent to the area's submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. Section 175A(c) of the CAA.

On June 2, 2014, EPA published a rule entitled ''Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) and 2006 $PM_{2.5}$ NAAQS'' (''Classification and Deadlines Rule''). *See* 79 FR 31566. In that rule, the Agency responded to the D.C. Circuit's January 2013 decision by establishing classifications for $PM_{2.5}$ nonattainment areas under subpart 4, and by establishing a new SIP submission date of December 31, 2014, for moderate area attainment plans and for any additional attainment-related or nonattainment new source review plans necessary for areas to comply with the requirements applicable under subpart 4. *Id.* at 31,567–70. Therefore, when Kentucky submitted its request in March 2012, the deadline for submitting a SIP to meet the Act's subpart 4 requirements had not yet passed, and those requirements are therefore not applicable for purposes of evaluating Kentucky's request for redesignation.

b. Subpart 4 Requirements and the Kentucky's Redesignation Request Its Portion of the Bi-State Louisville Area

Even though the substantive requirements of subpart 4 were not applicable requirements that Kentucky was required to have met at the time of its redesignation request submission, EPA believes that even the imposition of those substantive requirements would not pose a bar to the redesignation of the Kentucky portion of the bi-state Louisville Area. The additional requirements found in subpart 4 are either designed to help an area achieve attainment (also known as ''attainment planning requirements'') or are related to new source permitting. None of these additional requirements are applicable for purposes of evaluating a redesignation from nonattainment to attainment under EPA's long-standing interpretation of CAA section 107(d)(3)(E)(ii) and (v).

As background, EPA notes that subpart 4 incorporates components of subpart 1 of part D, which contains general air quality planning requirements for areas designated as nonattainment. *See* section 172(c). Subpart 4 itself contains specific planning and scheduling requirements for PM_{10} [17] nonattainment areas, and under the Court's January 4, 2013, decision in *NRDC* v. *EPA,* these same statutory requirements also apply for $PM_{2.5}$ nonattainment areas.[18] In the General Preamble, EPA's longstanding general guidance interpreting the 1990 amendments to the CAA, EPA discussed the relationship of subpart 1 and subpart 4 SIP requirements and pointed out that subpart 1 requirements were to an extent ''subsumed by, or integrally related to, the more specific PM–10 requirements.'' *See* 57 FR 13538 (April 16, 1992). The subpart 1 requirements include, among other things, provisions for attainment demonstrations, RACM, RFP, emissions inventories, and contingency measures.

As noted above, in the Classification and Deadlines Rule, EPA initially classified all areas designated nonattainment for either the 1997 or the 2006 $PM_{2.5}$ NAAQS as ''moderate'' nonattainment areas. Additional requirements that would apply to the bi-state Louisville Area as a moderate nonattainment area are therefore sections 189(a) and (c), including the following: (1) An approved permit program for construction of new and modified major stationary sources (section 189(a)(1)(A)); (2) an attainment demonstration (section 189(a)(1)(B)); (3) provisions for RACM (section 189(a)(1)(C)); and (4) quantitative milestones demonstrating RFP toward attainment by the applicable attainment date (section 189(c)).[19]

The permit requirements of subpart 4, as contained in section 189(a)(1)(A), refer to and apply the subpart 1 permit provisions requirements of sections 172 and 173 to PM_{10}, without adding to them. Consequently, EPA believes that section 189(a)(1)(A) does not itself impose for redesignation purposes any additional requirements for moderate areas beyond those contained in subpart 1.[20] In any event, in the context of redesignation, EPA has long relied on the interpretation that a fully approved nonattainment new source review program is not considered an applicable requirement for redesignation, provided the area can maintain the standard with a PSD program after redesignation. A detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' *See also* rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

With respect to the specific attainment planning requirements under subpart 4,[21] EPA applies the same interpretation that it applies to attainment planning requirements under subpart 1 or any of other pollutant-specific subparts. That is, under its long-standing interpretation of the CAA, where an area is already attaining the standard, EPA does not consider those attainment-planning requirements to be applicable for purposes of evaluating a request for redesignation because requirements that are designed to help an area achieve attainment no longer have meaning where an area is already meeting the standard.

Thus, at the time of Kentucky's submission of its redesignation request, the requirement for the bi-state Louisville Area to comply with subpart 4 had not yet come due and was, therefore, not applicable for purposes of EPA's evaluation of the redesignation. Moreover, even if Kentucky had been required to comply with those subpart 4 requirements, the additional substantive requirements for a moderate nonattainment area under subpart 4 were not applicable for purposes of redesignation anyway, given EPA's long-standing interpretation of the applicability of certain requirements to areas that are attaining the NAAQS.

c. Subpart 4 and Control of $PM_{2.5}$ Precursors

As noted previously, EPA does not believe that the requirement to comply with subpart 4 applied to Kentucky's redesignation request for its portion of the bi-state Louisville Area because that request was submitted prior to the moderate area SIP submission date of December 31, 2014. However, even if the requirements of subpart 4 were to apply to the Area, EPA nevertheless believes that the additional

[17] PM_{10} refers to particles nominally 10 micrometers in diameter or smaller.

[18] In explaining their decision, the court reasoned that the plain meaning of the CAA requires implementation of the 1997 $PM_{2.5}$ NAAQS under subpart 4 because $PM_{2.5}$ particles fall within the statutory definition of PM_{10} and are thus subject to the same statutory requirements. EPA finalized its interpretation of subpart 4 requirements as applied to the $PM_{2.5}$ NAAQS in its final rule entitled ''Air Quality State Implementation Plans; Approvals and Promulgations: Fine Particulate Matter National Ambient Air Quality Standards'' (81 FR 58010, August 24, 2016).

[19] EPA's final implementation rule (81 FR 58010, August 24, 2016) includes, among other things, the Agency's interpretation of these moderate area requirements for purposes of $PM_{2.5}$ NAAQS implementation.

[20] The potential effect of section 189(e) on section 189(a)(1)(A) for purposes of evaluating this redesignation is discussed below.

[21] These planning requirements include the attainment demonstration, quantitative milestone requirements, and RACM analysis.

requirements of subpart 4 would not pose an obstacle to our approval of the request to redesignate the Kentucky portion of the bi-state Louisville Area. Specifically, EPA proposes to determine that, because the bi-state Louisville Area is attaining the standard, no additional controls of any $PM_{2.5}$ precursors would be required. Under either subpart 1 or subpart 4, for purposes of demonstrating attainment as expeditiously as practicable, a state is required to evaluate all economically and technologically feasible control measures for direct PM emissions and precursor emissions, and adopt those measures that are deemed reasonably available. Relevant precursors to $PM_{2.5}$ pollution include SO_2, NO_X, VOCs, and ammonia. Moreover, CAA section 189(e) in subpart 4 specifically provides that control requirements for major stationary sources of direct PM_{10} shall also apply to PM_{10} precursors from those sources, except where EPA determines that major stationary sources of such precursors ''do not contribute significantly to PM_{10} levels which exceed the standard in the area.''

Under subpart 1 and EPA's prior implementation rule, all major stationary sources of $PM_{2.5}$ precursors were subject to regulation, with the exception of ammonia and VOCs. Thus, assuming subpart 4 requirements are applicable for purposes of evaluating this redesignation request, EPA is analyzing here whether additional controls of ammonia and VOCs from major stationary sources are required under section 189(e) of subpart 4 in order to redesignate the area for the 1997 $PM_{2.5}$ standard. As explained below, EPA does not believe that any additional controls of ammonia and VOCs are required in the context of this redesignation.

In the General Preamble, EPA discusses its approach to implementing section 189(e). *See* 57 FR 13538 (April 16, 1992). With regard to precursor regulation under section 189(e), the General Preamble explicitly states that control of VOCs under other Act requirements may suffice to relieve a state from the need to adopt precursor controls under section 189(e). *See* 57 FR 13542. EPA in this rulemaking proposes to determine that even if not explicitly addressed by Kentucky in its submission, the Commonwealth does not need to take further action with respect to ammonia and VOCs as precursors to satisfy the requirements of section 189(e). This proposed determination is based on our findings that: (1) The bi-state Louisville Area contains no major stationary sources of ammonia, and (2) existing major stationary sources of VOCs are adequately controlled under other provisions of the CAA regulating the ozone NAAQS.[22] In the alternative, EPA proposes to determine that, under the express exception provisions of section 189(e), and in the context of the redesignation of the area, which is attaining the 1997 annual $PM_{2.5}$ standard, at present ammonia and VOC precursors from major stationary sources do not contribute significantly to levels exceeding the 1997 $PM_{2.5}$ standard in the bi-state Louisville Area. *See* 57 FR 13539.

As noted earlier, EPA determined in March 2011 (76 FR 12860) and September 2011 (76 FR 55544) that the bi-state Louisville Area was attaining the 1997 Annual $PM_{2.5}$ NAAQS and that the Area had attained the NAAQS by the applicable attainment date of April 5, 2010. Under EPA's regulations, a determination of attainment, also known as a clean data determination, suspends the CAA's requirements to submit an attainment demonstration, including an analysis of reasonably available control measures and control technology; reasonable further progress; and contingency measures. Under subpart 4, Kentucky's plan for attaining the 1997 $PM_{2.5}$ NAAQS in the bi-state Louisville Area would have had to consider all $PM_{2.5}$ precursors, including VOCs and ammonia, and whether there were control measures, including for existing sources under section 189(e), available that would have advanced the area's attainment goals. However, because the bi-state Louisville Area has already attained the 1997 $PM_{2.5}$ NAAQS, the Commonwealth's requirement to submit a plan demonstrating how the Area would attain has been suspended, and, moreover, the Area has shown that it has attained with its current approach to regulation of $PM_{2.5}$ precursors. Therefore, EPA believes that it is reasonable to conclude in the context of this redesignation that there is no need to revisit the attainment control strategy with respect to the treatment of precursors. In addition, as noted below, EPA has analyzed projections of VOC and ammonia emissions in the area and has determined that VOC emissions are projected to decrease by over 8,000 tpy from 2007–2020 and ammonia emissions, which are emitted in marginal amounts in the bi-state Louisville Area, are projected to decrease by approximately 5 tpy. Accordingly, EPA does not view the January 4, 2013, decision of the Court as precluding redesignation of the bi-state Louisville Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. In sum, even if Kentucky were required to address precursors for the bi-state Louisville Area under subpart 4 rather than under subpart 1, EPA would still conclude that the Area had met all applicable requirements for purposes of redesignation in accordance with section 107(d)(3)(E)(ii) and (v).

f. Maintenance Plan and Evaluation of Precursors

EPA proposes to determine that the Commonwealth's maintenance plan shows continued maintenance of the standard by tracking the levels of the precursors whose control brought about attainment of the 1997 Annual $PM_{2.5}$ standard in the bi-state Louisville Area. EPA therefore believes that the only additional consideration related to the maintenance plan requirements that results from the court's January 4, 2013, decision is that of assessing the potential role of VOCs and ammonia in demonstrating continued maintenance in this area. As explained below, based upon documentation provided by Kentucky and supporting information, EPA believes that the maintenance plan for the bi-state Louisville Area need not include any additional emission reductions of VOCs or ammonia in order to provide for continued maintenance of the standard.

First, as noted above in EPA's discussion of section 189(e), VOC emission levels in this area have historically been well-controlled under SIP requirements related to ozone and other pollutants. Second, total ammonia emissions throughout the bi-state Louisville Area are projected to be approximately 2,000 tpy in 2020. *See* Table 10, below. This amount of ammonia emissions is relatively low in comparison to the individual amounts of SO_2, NO_X, and direct $PM_{2.5}$ emissions from sources in the Area. Third, as described below, available information shows that no precursor, including VOCs and ammonia, is expected to increase over the maintenance period so as to interfere with or undermine the State's maintenance demonstration.

The emissions inventories used in the regulatory impact analysis (RIA) for the 2012 $PM_{2.5}$ NAAQS, included in the docket for today's action, show that VOC emissions are projected to decrease by 8,148.91 tpy and ammonia emissions are projected to decrease by 5.22 tpy in the Area between 2007 and 2020. *See* Table 10, below. Thus, emissions of VOCs are projected to decrease by 20

[22] The bi-state Louisville Area has reduced VOC emissions through the implementation of various control programs including VOC Reasonably Available Control Technology (RACT) regulations and various on-road and non-road motor vehicle control programs.

percent, and emissions of ammonia are projected to remain about the same, decreasing by less than one percent.

projected to remain about the same, decreasing by less than one percent.

TABLE 10—COMPARISON OF 2007 AND 2020 VOC AND AMMONIA EMISSION TOTALS BY SOURCE SECTOR (tpy) FOR THE AREA [23]

Sector	VOC			Ammonia		
	2007	2020	Net change	2007	2020	Net change
Nonpoint	15,300.78	15,110.61	−190.17	1,308.11	1,386.18	78.07
Nonroad	4,369.3	2,397.67	−1,971.63	7.57	8.96	1.39
Onroad	9,533.65	3,613.66	−5,919.99	474.46	264.95	−209.51
Point	12,487.7	12,420.58	−67.12	182.13	306.96	124.83
Total	41,691.43	33,542.52	−8,148.91	1,972.27	1,967.05	−5.22

While the RIA emissions inventories are only projected out to 2020, there is no reason to believe that this downward trend would not continue through 2027. Given that the bi-state Louisville Area is already attaining the 1997 $PM_{2.5}$ NAAQS even with the current level of emissions from sources in the Area, the overall trend of emissions inventories is consistent with continued attainment.

In addition, available air quality data and modeling analysis show continued maintenance of the standard during the maintenance period. As noted above, the bi-state Louisville Area has an annual $PM_{2.5}$ design value of 11.7 μg/m³ during 2013–2015, the most recent three years available with quality-assured and certified ambient air monitoring data. This is well below the 1997 Annual $PM_{2.5}$ NAAQS of 15.0 μg/m³. Moreover, the modeling analysis conducted for RIA for the 2012 $PM_{2.5}$ NAAQS indicates that the design value for this area is expected to continue to decline through 2020. In the RIA analysis, the 2020 modeled design value for all counties in the bi-state Louisville Area is projected to be 9.8 μg/m³. Given the decrease in overall precursor emissions projected through 2025, and expected through 2027, it is reasonable to conclude that the monitored $PM_{2.5}$ concentrations in this area will also continue to decrease through 2025.

Thus, EPA believes that there is ample justification to conclude that the bi-state Louisville Area should be redesignated, even taking into consideration the emissions of VOCs and ammonia potentially relevant to $PM_{2.5}$. After consideration of the D.C. Circuit's January 4, 2013, decision, and for the reasons set forth in this notice, EPA continues to propose approval of Kentucky's maintenance plan and its request to redesignate the bi-state Louisville Area to attainment for the 1997 p.m.$_{2.5}$ NAAQS.

VII. What is EPA's analysis of the proposed NO_X and $PM_{2.5}$ MVEBs for the bi-state Louisville Area?

Under section 176(c) of the CAA, new transportation plans, programs, and projects, such as the construction of new highways, must ''conform'' to (*i.e.,* be consistent with) the part of a state's air quality plan that addresses pollution from cars and trucks. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS or any interim milestones. If a transportation plan does not conform, most new projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP. The regional emissions analysis is one, but not the only, requirement for implementing transportation conformity. Transportation conformity is a requirement for nonattainment and maintenance areas. Maintenance areas are areas that were previously nonattainment for a particular NAAQS but have since been redesignated to attainment with an approved maintenance plan for that NAAQS.

Under the CAA, states are required to submit, at various times, control strategy SIPs and maintenance plans for nonattainment areas. These control strategy SIPs (including RFP and attainment demonstration) and maintenance plans create MVEBs for criteria pollutants and/or their precursors to address pollution from cars and trucks. Per 40 CFR part 93, a MVEB must be established for the last year of the maintenance plan. A state may adopt MVEBs for other years as well. The MVEB is the portion of the total allowable emissions in the maintenance demonstration that is allocated to highway and transit vehicle use and emissions. *See* 40 CFR 93.101. The MVEB serves as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, Transportation Conformity Rule (58 FR 62188). The preamble also describes how to establish the MVEB in the SIP and how to revise the MVEB.

After interagency consultation with the transportation partners for the bi-state Louisville Area, Kentucky has elected to develop MVEBs for NO_X and $PM_{2.5}$ for the entire Area. Kentucky developed these MVEBs, as required, for the last year of its maintenance plan, 2025. Kentucky also established MVEBs for the interim year of 2015. The MVEBs reflect the total on-road emissions for 2015 and 2025, plus an allocation from the available NO_X and $PM_{2.5}$ safety margin. Under 40 CFR 93.101, the term ''safety margin'' is the difference between the attainment level (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. The safety margin can be allocated to the transportation sector; however, the total emissions must remain below the attainment level. The NO_X and $PM_{2.5}$ MVEBs and allocation from the safety margin were developed in consultation with the transportation partners and were added to account for uncertainties in population growth, changes in model vehicle miles traveled, and new emission factor models. The interagency consultation group approved a 15 percent safety margin for direct $PM_{2.5}$ mobile source emission estimates for the

[23] These emissions estimates were taken from the emissions inventories developed for the RIA for the 2012 $PM_{2.5}$ NAAQS. Table includes the entire bi-state KY-IN area.

years 2015 and 2025, and a 15 percent safety margin for NO_X mobile source emission estimates for the years 2015 and 2025.[24] The NO_X and $PM_{2.5}$ MVEBs for the bi-state Louisville Area are defined in Table 11, below.

TABLE 11—MOTOR VEHICLE EMISSIONS BUDGET FOR THE BI-STATE LOUISVILLE AREA

[tpy]

	$PM_{2.5}$	NO_X
2015 Mobile Emissions	504.95	15,392.13
2015 Safety Margin Allocation	75.74	2,308.82
2015 Total Mobile Budget	580.69	17,700.95
2025 Mobile Emissions	281.77	8,097.18
2025 Safety Margin Allocated	42.27	1,214.58
2025 Total Mobile Budget	324.04	9,311.76

As mentioned above, Kentucky has chosen to allocate a portion of the available safety margin for the bi-state Louisville Area to the NO_X and $PM_{2.5}$ MVEBs for 2015 and 2025. The NO_X safety margin allocations are 2,308.82 tpy and 1,214.58 tpy for 2015 and 2025, respectively, and the remaining safety margins for NO_X for years 2015 and 2025 are 25,288.46 tpy and 36,869.20 tpy, respectively. The $PM_{2.5}$ safety margin allocations are 75.74 tpy and 42.27 tpy for 2015 and 2025, respectively, and the remaining safety margins for $PM_{2.5}$ for years 2015 and 2025 are 1,107.98 tpy and 1,626.12 tpy, respectively.

Through this rulemaking, EPA is proposing to approve into the Kentucky SIP the MVEBs for NO_X and $PM_{2.5}$ for 2015 and 2025 for the bi-state Louisville Area because EPA has determined that the Area maintains the 1997 Annual $PM_{2.5}$ NAAQS with the emissions at the levels of the budgets. If the MVEBs for the bi-state Louisville Area are approved or found adequate (whichever is completed first), they must be used for future conformity determinations. After thorough review, EPA is proposing to approve the budgets because they are consistent with maintenance of the 1997 Annual $PM_{2.5}$ NAAQS through 2027.

VIII. What is the status of EPA's adequacy determination for the Proposed NO_X and $PM_{2.5}$ MVEBs for 2015 and 2025 for the bi-state Louisville Area?

When reviewing submitted ''control strategy'' SIPs or maintenance plans containing MVEBs, EPA may affirmatively find the MVEBs contained therein adequate for use in determining transportation conformity. Once EPA affirmatively finds that the submitted MVEBs is adequate for transportation conformity purposes, that MVEBs must be used by state and federal agencies in determining whether proposed transportation projects conform to the SIP as required by section 176(c) of the CAA.

EPA's substantive criteria for determining adequacy of a MVEBs are set out in 40 CFR 93.118(e)(4). The process for determining adequacy consists of three basic steps: Public notification of a SIP submission, a public comment period, and EPA's adequacy determination. This process for determining the adequacy of submitted MVEBs for transportation conformity purposes was initially outlined in EPA's May 14, 1999, guidance, ''Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision.'' EPA adopted regulations to codify the adequacy process in the Transportation Conformity Rule Amendments for the ''New 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments—Response to Court Decision and Additional Rule Change,'' on July 1, 2004 (69 FR 40004). Additional information on the adequacy process for transportation conformity purposes is available in the proposed rule entitled, ''Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes,'' 68 FR 38974, 38984 (June 30, 2003).

As discussed earlier, Kentucky's maintenance plan submission includes NO_X and $PM_{2.5}$ MVEBs for the bi-state Louisville Area for 2015 and 2025, the last year of the maintenance plan. EPA reviewed the NO_X and $PM_{2.5}$ MVEBs through the adequacy process described in Section I.

EPA intends to make its determination on the adequacy of the 2015 and 2025 MVEBs for the bi-state Louisville Area for transportation conformity purposes in the near future by completing the adequacy process that was started on January 24, 2012. If EPA finds these MVEBs adequate or takes final action to approve them into the Kentucky SIP, these new MVEBs for NO_X and $PM_{2.5}$ must be used for future transportation conformity determinations until such time that the 1997 $PM_{2.5}$ NAAQS is consider revoked for this Area. EPA's most recently promulgated $PM_{2.5}$ implementation rule provides that the 1997 $PM_{2.5}$ NAAQS will be revoked for any area that is redesignated for the NAAQS upon the effective date of that redesignation. In the meanwhile, for required regional emissions analysis years between 2015 and 2024, the applicable budgets will be the new 2015 MVEBs established in the maintenance plan. For years 2025 and beyond, the applicable budgets will be the new 2025 MVEB.

IX. What is the effect of EPA's proposed actions?

EPA's proposed actions establish the basis upon which EPA may take final action on the issues being proposed for approval. Approval of Kentucky's redesignation request would change the legal designation of Bullitt and Jefferson Counties in Kentucky for the 1997 Annual $PM_{2.5}$ NAAQS, found at 40 CFR part 81, from nonattainment to attainment. Approval of Kentucky's associated SIP revision would also incorporate a plan for maintaining the 1997 Annual $PM_{2.5}$ NAAQS in the Area through 2025 into the Kentucky SIP. This maintenance plan includes contingency measures to remedy any future violations of the 1997 Annual $PM_{2.5}$ NAAQS and procedures for evaluation of potential violations. The maintenance plan also includes NO_X

[24] The amount of the allocation for the safety margin is actually 15 percent of the $PM_{2.5}$ and NO_X mobile emissions for 2015 and 2025. The actual percentage of the available safety margin for $PM_{2.5}$ for 2015 and 2025 is 6.40 and 2.53, respectively. The actual percentage of the available safety margin for NO_X for 2015 and 2025 is 8.37 and 3.19, respectively.

and $PM_{2.5}$ MVEBs for the bi-state Louisville Area. The proposed NO_X and $PM_{2.5}$ MVEBs for 2025 for the bi-state Louisville Area are 9,311.76 tpy and 324.04 tpy, respectively. Kentucky also chose to establish an interim year MVEBs for 2015 of 17,700.95 tpy and 580.69 tpy for NO_X and $PM_{2.5}$, respectively.

X. Proposed Actions

EPA is proposing to: (1) Approve the maintenance plan for the Kentucky portion of the bi-state Louisville Area, including the $PM_{2.5}$ and NO_X MVEBs for 2015 and 2025 for the entire bi-state Louisville Area, and incorporate it into the Kentucky SIP, and (2) approve Kentucky's redesignation request for the 1997 $PM_{2.5}$ NAAQS for the Kentucky portion of the bi-state Louisville Area. Further as part of this proposed action, EPA is also describing the status of its adequacy determination for the $PM_{2.5}$ and NO_X MVEBs for 2015 and 2025 in accordance with 40 CFR 93.118(f)(1).

If finalized, approval of the redesignation request would change the official designation of Bullitt and Jefferson Counties in Kentucky for the 1997 Annual $PM_{2.5}$ NAAQS, found at 40 CFR part 81 from nonattainment to attainment, as found at 40 CFR part 81.

XI. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 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 CAA. Accordingly, these proposed actions merely approve Commonwealth law as meeting federal requirements and do not impose additional requirements beyond those imposed by state law. For that reason, these proposed actions:

- Are not significant regulatory actions subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January, 21, 2011);
- do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- are 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.*);
- do 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);
- do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- are 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 CAA; and
- will not have disproportionate human health or environmental effects under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs of tribal governments or preempt tribal law.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Air pollution control.

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

Dated: December 23, 2016.

Heather McTeer Toney,

Regional Administrator, Region 4.

[FR Doc. 2017–00324 Filed 1–10–17; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 393

[Docket Number MARAD–2016–0130]

RIN 2133–AB84

Revision of the America's Marine Highway Program Regulations

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice serves to inform interested parties and the public that the Maritime Administration (MARAD) proposes to revise in full Title 46 Part 393 of the Code of Federal Regulations, which concerns the America's Marine Highway Program (AMHP). This action is necessary to implement provisions of the Coast Guard and Maritime Transportation Act of 2012 (CGMTA), to improve AMHP processes and to streamline the regulations. MARAD solicits written comments on this proposed rulemaking.

DATES: Comments must be received on or before March 13, 2017. MARAD will consider comments filed after this date to the extent practicable.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2016–0130 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search MARAD–2016–0130 and follow the instructions for submitting comments.
- *Email: MH@dot.gov.* Include MARAD–2016–0130 in the subject line of the message.
- *Mail/Hand-Delivery/Courier:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590. If you would like to know that your comments reached the facility, please enclose a stamped, self-addressed postcard or envelope.
- The Docket Management Facility is open 9:00 a.m. to 5:00 p.m., Monday through Friday, except on Federal holidays.
- You may view the public comments submitted on this rulemaking at *http://www.regulations.gov.* When searching for comments, please use the Docket ID: MARAD–2016–0130.

Note: If you fax, mail or hand-deliver your input, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your

submission. If you submit your inputs by mail or hand-delivery, they must be submitted in an unbound format, no larger than 8 ½ by 11 inches, single-sided, suitable for copying and electronic filing.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Tim Pickering, Office of Marine Highways and Passenger Services, at (202) 366–0704, or via email at *MH@dot.gov*. You may send mail to Mr. Pickering at Office of Marine Highways and Passenger Services, 1200 New Jersey Avenue SE., Washington, DC 20590. If you have questions on viewing the Docket, call Docket Operations, telephone: (800) 647–5527.

SUPPLEMENTARY INFORMATION:

Background Information

What laws authorize America's Marine Highway Program?

The Energy Independence and Security Act of 2007 (EISA) authorized the Secretary of Transportation (Secretary) to promulgate regulations to implement the AMHP. The Secretary of Transportation delegated authority to the Maritime Administrator to issue AMHP implementing regulations. On April 9, 2010, MARAD published in the **Federal Register** final regulations implementing the AMHP (75 FR 18101).

The Secretary, in consultation with the Environmental Protection Agency, submitted a Report to Congress in April 2011 that included a description of the benefits of the AMHP and activities conducted under the program. It also included recommendations for further legislative and administrative action that the Secretary considered appropriate.

In December 2012, the Coast Guard and Maritime Transportation Act of 2012 (CGMTA), which built on some of the ideas in the report, was signed into law. The CGMTA expanded the scope of the AMHP by adding the words ''or to promote short sea transportation'' to the existing purpose of reducing landside congestion. This added language expanded the focus of the AMHP to include efforts that increase utilization or efficiency of short sea transportation on designated Marine Highway Routes.

In November 2015, the National Defense Authorization Act for Fiscal Year 2016 added to the definition of short sea transportation, that is the subject of the AMHP, to include the carriage by a documented vessel of cargo that is: (1) shipped in discrete units, or packages that are handled individually, palletized; or, (2) unitized for purposes of transportation or freight vehicles carried aboard commuter ferry boats.

Discussion

Why and how is MARAD revising the regulations?

As part of our routine systematic review of existing regulations, MARAD is updating its AMHP implementing regulations to conform to statutory changes and streamline the regulations for ease of use. Accordingly, the proposed rule revises in full the AMHP implementing regulations to: (1) Add ''promote short sea shipping'' as a purpose of the AMHP; (2) redesignate ''corridors, connectors, and crossings'' as used in the rule as ''Routes'' for purposes of simplicity; (3) expand and clarify the definition of AMHP-eligible cargo to include discrete units or packages that are handled individually, palletized, or unitized as well as freight vehicles carried aboard commuter ferry boats; (4) add a requirement for the project sponsors to provide updates on project status; (5) expand the eligibility criteria for services and Routes that may participate in AMHP; (6) clarify criteria for Project Designation; and, (7) reorganize the regulations for ease of use.

What is the purpose of the AMHP?

Congress authorized the AMHP to promote short sea shipping by designating routes, also called Marine Highways, as a way to relieve congestion on America's roads and railways. Marine Highway designations are intended to assist the maritime industry in meeting national freight transportation needs. The AMHP encourages the use of marine transportation to reduce freight and passenger travel delays caused by congestion, reduce greenhouse gas emissions, conserve energy, improve safety, and reduce landside infrastructure maintenance costs.

Congestion on the U.S. surface transportation system significantly impacts America's economic prosperity and way of life. Overall, the U.S. Department of Transportation (USDOT) estimates that congestion on our roads, bridges, railways, and in ports costs the United States as much as $200 billion a year and projects that cargoes moving through our ports will nearly double over the next 15 years. Most of this additional cargo will ultimately move along our surface transportation corridors, many of which are already at or beyond capacity.

Public Participation

How do I submit comments on the proposed rule?

Your comments must be written and in English. Include the docket number in your comments to ensure that your comments are correctly filed in the Docket. We encourage you to provide concise comments; however, you may attach additional documents as necessary. There is no limit on the length of the attachments. Please submit your comments, including the attachments, following the instructions provided under the above entitled heading **ADDRESSES**.

MARAD will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, MARAD will also consider comments received after that date. If a comment is received too late for MARAD to consider in developing a final rule, MARAD will consider that comment as an informal suggestion for future rulemaking action.

For access to the docket to read background documents, including those referenced in this document, or to submit or read comments received, go to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590. The Docket Management Facility is open 9:00 a.m. to 5:00 p.m., Monday through Friday, except on Federal holidays. To review documents, read comments or to submit comments, the docket is also available online at *http://www.regulations.gov.*, keyword search MARAD–2016–0130.

Please note that even after the comment period has closed, MARAD will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, MARAD recommends that you periodically check the Docket for new material.

Will my comments be made available to the public?

Before including your address, phone number, email address or other personal information in your comment, be aware that your entire comment, including

your personal identifying information, may be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. When you send comments containing information claimed to be confidential information, you should include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Procedural Matters and Required Determinations

Privacy Act

In accordance with 5 U.S.C. 553(c), USDOT solicits comments from the public to better inform its rulemaking process. USDOT posts these comments, without edit, to *www.regulations.gov*, as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

Executive Order 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review) and DOT Regulatory Policies and Procedures

Under Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993), supplemented by EO13563 (76 FR 3821, January 18, 2011) and USDOT policies and procedures, MARAD must determine whether a regulatory action is ''significant,'' and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the Order. The Order defines ''significant regulatory action'' as one 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 government or communities. (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency. (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

MARAD has determined that this notice of proposed rulemaking is not considered a significant regulatory action under section 3(f) of E.O. 12866 and, therefore, it was not reviewed by OMB. This rulemaking will not result in an annual effect on the economy of $100 million or more. It is also not considered a major rule for purposes of Congressional review under Pub. L. 104–121. This rulemaking is also not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034, February 26, 1979). The costs and overall economic impact of this rulemaking do not require further analysis.

Executive Order 13132 (Federalism)

MARAD analyzed this rulemaking in accordance with the principles and criteria contained in E.O. 13132 (''Federalism'') and has determined that it does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. This rulemaking has no substantial effect on the States, or on the current Federal-State relationship, or on the current distribution of power and responsibilities among the various local officials. Nothing in this document preempts any State law or regulation. Therefore, MARAD was not required to consult with State and local officials.

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

MARAD does not believe that this rulemaking will significantly or uniquely affect the communities of Indian tribal governments when analyzed under the principles and criteria contained in E.O. 13175 (Consultation and Coordination with Indian Tribal Governments); therefore, the funding and consultation requirements of this Executive Order do not apply.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires MARAD to assess whether this rulemaking would have a significant economic impact on a substantial number of small entities and to minimize any adverse impact. MARAD certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities.

Environmental Assessment

MARAD has evaluated this proposed rule under Maritime Administrative Order (MAO) 600–1, ''Procedures for Considering Environmental Impacts,'' 50 FR 11606 (March 22, 1985), which guides the MARAD in complying with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* MARAD has determined that this proposed rule is not a major action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4.05 of MAO 600–1. Section 4.05 reads, in pertinent part, ''[c]ategorical exclusions are Maritime Administration actions or groups of actions that do not have a significant effect on the quality of the human environment, individually or cumulatively. Categorical exclusions do not require preparation of environmental documents. Appendix 1 of this order describes the Maritime Administration's categorical exclusions.'' This action falls under Categorical Exclusion #3 because MARAD proposes to promulgate ''regulations . . . which do not require a regulatory impact analysis under section 3 of Executive Order 12291 or do not have a potential to cause a significant effect on the environment . . .'' MAO 600–1, App.1, pg. 1.

In accordance with section 4.05 and Appendix 2 of MAO 600–1, the Agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, MARAD finds that this proposed regulatory revision is not a major Federal action significantly affecting the quality of the human environment. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

Executive Order 13211 (Energy Supply, Distribution, or Use)

MARAD has determined that this rulemaking will not significantly affect energy supply, distribution, or use. Therefore, no Statement of Energy Effects is required.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminates ambiguity, and reduce burden.

Executive Order 12630 (Taking of Private Property)

This rulemaking will not affect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

International Trade Impact Assessment

This rulemaking is not expected to contain standards-related activities that create unnecessary obstacles to the foreign commerce of the United States.

Privacy Impact Assessment

Section 522(a)(5) of the Transportation, Treasury, Independent Agencies, and General Government Appropriations Act, 2005 (Pub. L. 108–447, div. H, 118 Stat. 2809 at 3268) requires the USDOT and certain other Federal agencies to conduct a privacy impact assessment of each proposed rule that will affect the privacy of individuals. Claims submitted under this rule will be treated the same as all legal claims received by MARAD. The processing and treatment of any claim within the scope of this rulemaking by MARAD shall comply with all legal, regulatory and policy requirements regarding privacy.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 requires Agencies to evaluate whether an Agency action would result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $141.3 million or more (as adjusted for inflation) in any 1 year, and if so, to take steps to minimize these unfunded mandates. This rulemaking will not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It will not result in costs of $141.3 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objectives of the rule.

Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Paperwork Reduction Act

We would evaluate any rule that might be promulgated to determine whether it would be expected to significantly change the current requirement for the collection of information.

Clarity of These Regulations

E.O. 12866 requires each Agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand. Including answers to questions such as the following:

(1) Are the requirements in the proposed rule clearly stated?

(2) Does the proposed rule contain technical language or terminology that interferes with its clarity?

(3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphs, etc.) aid or reduce its clarity?

(4) Would the rule be easier to understand if it were divided into more but shorter sections (a ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading; for example, ''§ 393.21 Who can apply?'')

(5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** part of this preamble helpful in understanding the proposed rule?

(6) What else could we do to make the proposed rule easier to understand? Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Division of Legislation and Regulations, Department of Transportation, Maritime Administration, Office of the Chief Counsel, Room W24–220, 1200 New Jersey Ave. SE., Washington, DC 20590. You may also email the comments to this address: *Rulemakings.MARAD@dot.gov*.

List of Subjects

46 CFR Part 393

America's Marine Highway Program—Short sea transportation, Marine highway route and project application and designation, Marine highway incentive, Research, Transportation.

■ For the reasons stated in the preamble, the Maritime Administration proposes to revise 46 CFR part 393 to read as follows:

PART 393—AMERICA'S MARINE HIGHWAY PROGRAM

Subpart A—General Provisions

393.1 Special definitions.

Subpart B—Marine Highway Program Designations

393.2 Marine Highway Routes.
393.3 Marine Highway Projects.

Subpart C—Department of Transportation Efforts to Foster and Support America's Marine Highways

393.4 DOT Support for Planning Activities.
393.5 DOT Support for Marine Highway-Related Research.
393.6 America's Marine Highway Program Project Grants.

Subpart A—General Provisions

§ 393.1 Special definitions.

For the purposes of this part, when used in capitalized form:

(a) *Administrator* means the Maritime Administrator, Maritime Administration, U.S. Department of Transportation USDOT. The Administrator is responsible for administering the America's Marine Highway Program (AMHP) and making route and project recommendations to the Secretary.

(b) *Department* means the U.S. Department of Transportation.

(c) *Cargo* on a Marine Highway service means goods transported in commerce and generally refers to, but is not limited by, the types and kinds of cargo that are described in the definition of ''Short Sea Transportation'', below. Neither weight nor proportionality are considered under this definition. The term as used in this context is generally interchangeable with the term ''Freight'', defined below.

(d) *Freight* on a Marine Highway service means goods transported in commerce and generally refers to, but is not limited by, the types and kinds of cargo that are described in the definition of ''Short Sea Transportation'', below. Neither weight nor proportionality are considered under this definition. The term as used in this context is generally interchangeable with the term ''Cargo'', defined above.

(e) *Marine Highway Routes* or Routes mean commercially navigable coastal, inland, and intracoastal waters of the United States as designated by the Secretary. This includes connections between U.S. ports and Canadian ports on the Great Lakes-Saint Lawrence Seaway System, and non-contiguous

U.S. ports. Marine Highway Routes are a component of the Nation's surface transportation system. Each Marine Highway Route is described in terms of the specific landside transportation routes (road or railway) that it supplements or to which it connects. All previously designated Marine Highway ''corridors,'' ''connectors,'' and ''crossings'' are now designated as ''Routes.''

(f) *Marine Highway Projects* are planned or contemplated new services, or expansions of existing services, on designated Marine Highway Routes, that seek to provide new modal choices to shippers, reduce transportation costs, and/or provide public benefits, which include reduced air emissions, reduced road maintenance costs, and improved safety and resiliency impacts. Project Applicants propose projects and the Secretary may designate projects consistent with this part.

(g) *Project Applicant* means a public entity withe operations, or administrative areas of responsibility, that are adjacent to or near the relevant Route that applies for designation of a Marine Highway Project pursuant to this part. Eligible applicants include State governments (including State departments of transportation), metropolitan planning organizations, port authorities and tribal governments.

(h) *Program Office* means Office of Marine Highways and Passenger Services.

(i) *Route Sponsors* are public entities with operations or administrative areas of responsibility that are adjacent to or related to the relevant Route that recommend a commercially navigable waterway for designation as a Marine Highway Route. Eligible Route Sponsors include State governments (including State departments of transportation), metropolitan planning organizations, port authorities, non-Federal navigation districts and tribal governments.

(j) *Secretary* means the Secretary of Transportation.

(k) *Short Sea Transportation* means the carriage by a U.S. documented vessel of cargo—

(1) That is—

(i) Contained in intermodal cargo containers and loaded by crane on the vessel;

(ii) Loaded on the vessel by means of wheeled technology;

(iii) Shipped in discrete units or packages that are handled individually, palletized, or unitized for purposes of transportation; or

(iv) Freight vehicles carried aboard commuter ferry boats; and,

(2) That is—

(i) Loaded at a port in the United States and unloaded either at another port in the United States or at a port in Canada located in the Great Lakes-Saint Lawrence Seaway System; or,

(ii) Loaded at a port in Canada located in the Great Lakes-Saint Lawrence Seaway System and unloaded at a port in the United States.

(l) *United States Documented Vessel* means a vessel documented under 46 CFR part 67.

Subpart B—Marine Highway Route and Project Designations

§ 393.2 Marine Highway Routes.

(a) What are the minimum eligibility requirements for MARAD to recommend a Marine Highway Route for the Secretary to designate?

(1) MARAD may recommend Marine Highway Routes that relieve landside congestion along coastal corridors or that promote short sea transportation; and,

(2) That advance the objectives of the AMHP in paragraph (c) of this section.

(b) When can a Route Sponsor request designation of a Marine Highway Route?

(1) The Department accepts Marine Highway Route designation requests any time. Route Sponsors must submit designation requests through the Program Office.

(2) The Maritime Administration publishes all designated Routes on its Web site. Go to *http://www.marad.dot.gov* and search ''America's Marine Highways'' to see the current list.

(c) What should Route Sponsors consider when preparing Marine Highway Route designation requests?

(1) Route Sponsors designation requests should explain how a proposed route will help achieve the following objectives:

(i) Establishing Marine Highway Routes as extensions of the national surface transportation system;

(ii) Developing multi-jurisdictional coalitions and partnerships that focus public and private efforts to improve reliability and resiliency of the Route for freight and passengers;

(iii) Obtaining public benefits as described in paragraph (d)(1)(vi) of this section; and,

(iv) Identifying potential savings that could be realized by providing an alternative to existing supply chains through short sea transportation.

(2) [Reserved].

(d) What information should Route Sponsors include in their designation requests?

(1) One or more eligible Route Sponsors may submit Marine Highway Route designation requests to the Program Office. Designation requests should include the following information:

(i) *Physical Description of the Proposed Marine Highway Route.* Describe the proposed Marine Highway Route, and its connection to existing or planned transportation infrastructure and intermodal facilities. Include key navigational factors such as available draft, channel width, bridge air draft or lock clearance, and any foreseeable impacts on navigation or commerce. When available, include one or more maps of the proposed Route.

(ii) *Surface Transportation Regions Served.* (A) Land transportation routes that would benefit. Provide a summary of any land transportation route that the Marine Highway Route would benefit. Include a description of the route, its primary users, the nature, locations and occurrence of travel delays, urban areas affected, and other geographic or jurisdictional issues that impact its overall operation and performance.

(B) U.S. Domestic Shipping Lane Served. For Marine Highway Routes that pass through waters outside U.S. territorial waters, provide a summary of the shipping routes or trade lanes that the Marine Highway Route would benefit. Include a description of the route, its primary users, the nature, locations and occurrence of travel delays, urban areas affected, and other geographic or jurisdictional issues that impact its overall operation and performance.

(iii) *Involved Parties.* Provide the organizational structure of the Route Sponsors and supporters recommending the Route designation, including business affiliations and private sector stakeholders. Multi-jurisdictional coalitions may include State Departments of Transportation, metropolitan planning organizations, municipalities and other governmental entities (including tribal governments). Include the extent to which these entities have expressed support for the route designation and describe any affiliations with environmental groups or civic associations, or affiliations with any foreign interests.

(iv) *Volume and Characteristics.* If authoritative data are available, provide the volume of passengers and/or cargo that are candidates for shifting to water transportation on the proposed Route. Otherwise provide estimates for this

information, include identified shippers, manufacturers, distributors, and other entities that could benefit from a Marine Highway alternative, and the extent to which these entities have expressed support for the Marine Highway Route designation request.

(v) *Congestion Reduction.* Describe the extent to which the proposed Route could relieve landside congestion in measurable terms, if applicable. Include any known offsetting land transportation infrastructure savings (either construction or maintenance) that would likely result from the Route, if applicable.

(vi) *Public benefits.* Provide, if known, the net savings over status quo in emissions, including greenhouse gases, energy consumption, landside infrastructure maintenance costs, safety and system resiliency. Specify if the Marine Highway Route represents the most cost-effective option among other modal improvements. Include consideration of the implications future growth may have on the proposed Route.

(vii) *Public costs.* If applicable and known, identify any costs that may result from designation of the route. If able, provide costs that are quantifiable such as the additional cost of emissions or energy consumption required to effectively leverage the benefits of the designated route. These costs should be a component in the net savings identified in (d)(6) above.

(viii) *Impediments.* Describe known or anticipated obstacles to utilization of the proposed Marine Highway Route. Include any strategies, either in place or proposed, to deal with the impediments.

(2) [Reserved].

(e) How will the Program Office evaluate and recommend Marine Highway Route designation applications?

(1) The Program Office will evaluate and recommend Route Designations based on an analysis and technical review of the information provided by the Route Applicant. The Maritime Administration will recommend Routes that receive a favorable technical review, and meet other criteria described in this part, for designation by the Secretary.

(2) The Program Office may consider additional factors and may request supplemental information during the review process. USDOT will notify Route Applicants as to the status of their application in writing once the Secretary makes a determination.

§ 393.3 Marine Highway Projects.

(a) What are the minimum eligibility requirements for MARAD to recommend a Marine Highway Project for the Secretary to designate?

(1) MARAD may recommend only those Marine Highway Projects that will use U.S. documented vessels and mitigate landside congestion or promotes short sea transportation.

(2) MARAD may recommend only those Marine Highway Projects that:

(i) Involve the carriage of cargo in Short Sea Transportation as defined in subsection 393.1(k);

(ii) Involve new or expand existing services for the carriage of cargo; and,

(iii) Are on a designated Marine Highway Route.

(3) Proposed Route Designations are accepted at any time, and may be submitted together with the proposed Project Designation.

(4) Successful MARAD Project sponsors must demonstrate a direct connection between a proposed Marine Highway Project and the carriage of cargo through ports on Designated Marine Highway Routes.

(b) When does the Program Office accept Marine Highway Project designation applications?

(1) The Administrator will announce by notice in the **Federal Register** and on MARAD's AMHP Web site open season periods to allow Project Sponsors opportunities to submit Marine Highway Project designation applications.

(2) [Reserved].

(c) What should Project Applicants include when preparing a Marine Highway Project designation application?

(1) The market or customer base to be served by the service and the service's value proposition to customers. This includes—

(i) A description of how the market is currently served by transportation options;

(ii) Identities of shippers that have indicated an interest in, and level of commitment to, the proposed service;

(iii) Specific commodities, markets, and shippers the Project is expected to attract;

(iv) Extent to which interested entities have been educated about the Project and expressed support, and,

(v) A marketing strategy for the project if one exists.

(2) *Operational Framework.* A description of the proposed operational framework of the project including origin/destination pairs, transit times, vessel types, and service frequency;

(3) *The cost model for the proposed service.* The cost model should be broken down by container, trailer, or other freight unit, including loading and discharge costs, vessel operating costs, drayage costs, and other ancillary costs. Provide a comparison cost model outlining the current costs for transportation using landside mode (truck and rail) alternatives for the identified market that the proposed project will serve. Provide the project's financial plan and provide projected revenues and expenses. Include labor and operating costs, drayage, fixed and recurring infrastructure and maintenance costs, vessel or equipment acquisition or construction costs, etc. Include any anticipated changes in local or regional short sea transportation, policy or regulations, ports, industry, or other developments affecting the project. In the event that public sector financial support is being sought, describe the amount, form and duration of public investment required. Applicants may email *mh@dot.gov* to request a sample cost model.

(4) An overall quantification of the net public benefits estimated to be gained through the successful initiation of the Marine Highway Project, including highway miles saved, road maintenance savings, air emissions savings, and safety and resiliency impacts.

(5) *Marine Highway Route(s).* Identify the designated Marine Highway Routes the Project will utilize.

(6) *Organization.* Provide the organizational structure of the proposed project, including an outline of the business affiliations, environmental, non-profit organizations and governmental or private sector stakeholders.

(7) *Partnerships:*—(i) *Private sector partners.* Identify private sector partners and describe their levels of commitment to the proposed service Private sector partners can include terminals, vessel operators, shipyards, shippers, trucking companies, railroads, third-party logistics providers, shipping lines, labor, workforce and other entities deemed appropriate by the Secretary.

(ii) *Public sector partners.* Identify State Departments of Transportation, metropolitan planning organizations, municipalities and other governmental entities, including tribal entities, that Project Sponsors have engaged and the extent to which they support the service. Include any affiliations with environmental groups or civic associations.

(iii) *Documentation.* Provide documents affirming commitment or support from entities involved in the project.

(8) *Public benefits.* These measures reflect current law and are consistent with USDOT's Strategic Goals. Project Applicants should organize external net cost savings and public benefits of the Project based on the following six categories:

(i) *Emissions benefits.* Address any net savings, in quantifiable terms, now and in the future, over current emissions practices, including greenhouse gas emissions, criteria air pollutants or other environmental benefits the project offers.

(ii) *Energy savings.* Provide an analysis of potential net reductions in energy consumption, in quantifiable terms, now and in the future, over the current practice.

(iii) *Landside transportation infrastructure maintenance savings.* To the extent the data is available indicate, in dollars per year, the projected net savings of public funds that would result in road or railroad maintenance or repair, including pavement, bridges, tunnels or related transportation infrastructure from a proposed project. Include the impacts of accelerated infrastructure deterioration caused by vehicles currently using the route, especially in cases of oversize or overweight vehicles. This information applies only to projects for a marine highway service where a landside alternative exists.

(iv) *Economic competitiveness.* To the extent the data is available describe how the project will measurably result in transportation efficiency gains for the U.S. public. For purposes of aligning a project with this outcome, applicants should provide evidence of how improvements in transportation outcomes (such as time savings, operating cost savings, and increased utilization of assets) translate into long-term economic productivity benefits.

(v) *Safety improvements.* Describe, in measurable terms, the projected safety improvements that would result from the proposed operation.

(vi) *System resiliency and redundancy.* To the extent data is available describe, if applicable, how a proposed Marine Highway Project offers a resilient route or service that can benefit the public. Where land transportation routes serving a locale or region are limited, describe how a proposed project offers an alternative and the benefit this could offer when other routes are interrupted as a result of natural or man-made incidents.

(9) *Proposed Project Timeline.* Include a proposed project timeline with estimated start dates and key milestones. If applicable, include the point in the timeline at which the enterprise is anticipated to attain self-sufficiency.

(10) *Support and Investment Required.* Describe any known or anticipated obstacles to either implementation or long-term success of the project. Include any strategies, either in place or proposed, to mitigate impediments. Identify specific infrastructure gaps such as docks, cranes, ramps, etc. that will need to be addressed in order for the project to become economically viable. Include estimates for the required investments needed to address the infrastructure gaps.

(11) *Environmental Considerations.* Applicants must provide all information necessary to assist MARAD's environmental analysis of the propose project, pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and other environmental requirements.

(e) How will the Program Office evaluate and recommend Marine Highway Project applications for designation?

(1) The Program Office will evaluate and recommend for designation by the Secretary those Projects based on an analysis and technical review of the information provided by the Project Applicant. MARAD will recommend Projects that operate on a designated Marine Highway Route, receive a favorable technical review, and meet other criteria described in this part, for designation by the Secretary.

(2) The Program Office may consider additional factors and may request supplemental information during the review process. USDOT will notify Project Applicants as to the status of their application in writing once the Secretary makes a determination.

(f) How will MARAD support designated America's Marine Highway Projects?

(1) Upon designation as a Marine Highway Project, the Department Program Office will coordinate with the Project Applicants to identify the most appropriate departmental actions to support the project. USDOT support could include any of the following, as appropriate and subject to agency resources:

(i) Promote the service with appropriate governmental, regional, State, local or tribal government transportation planners, private sector entities or other decision makers to the extent permitted by law.

(ii) Coordinate with ports, State Departments of Transportation, metropolitan planning organizations, localities, other public agencies and the private sector to support the designated service. Efforts can be aimed at identifying resources, obtaining access to land or terminals, developing landside facilities and infrastructure, and working with Federal, regional, State, local or Tribal governmental entities to remove barriers to success.

(iii) Pursue commitments from Federal entities to transport Federally owned or generated cargo using the services of the designated project, when practical or available.

(iv) In cases where transportation infrastructure is needed, Project Applicants may request to be included on the Secretary's list of high-priority transportation infrastructure projects under EO 13274, ''Environmental Stewardship and Transportation Infrastructure Project Review.''

(v) Assist with developing individual performance measures for Marine Highway Projects.

(vi) Work with Federal entities and regional, State, local and tribal governments to include designated Projects in transportation planning.

(vii) Coordinate with public and private entities to resolve impediments to the success of Marine Highway Projects.

(viii) Conduct research on issues specific to Marine Highway Projects.

(ix) Advise Route Sponsors on the availability of various Federal funding mechanisms to support the Projects.

(x) Maintain liaison with Sponsors and representatives of designated Projects to provide ongoing support and identify lessons learned and best practices for other projects and the overall Marine Highway program.

(2) [Reserved].

(g) How will the Department protect confidential information?

(1) If your application, including attachments, includes information that you consider to be a trade secret or confidential commercial or financial information, or otherwise exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552), as implemented by the Department at 49 CFR part 7, you may assert a claim of confidentiality.

(2) *What should I do if I believe my project designation application contains confidential or business sensitive information?*

(i) Note on the front cover that the submission ''Contains Confidential Business Information (CBI);''

(ii) Mark each affected page ''CBI;'' and

(iii) Clearly highlight or otherwise denote the CBI portions. The USDOT protects such information from

disclosure to the extent allowed under applicable law.

(3) *What will happen if information related to my project designation application is the subject of a request under the Freedom of Information Act (FOIA)?* We will apply the procedures contained in 49 CFR part 7 to a request from non-Federal third-parties for information related to documents you submit under this part. We will consider your claim of confidentiality at the time someone requests the information under FOIA. Only information that is ultimately determined to be confidential under that procedure will be exempt from disclosure under FOIA.

(h) Is there a specific format required for project designation applications and attached documents?

(1) When responding to specific solicitations for Marine Highway Projects by the Program Office, applicants should include all of the information requested by paragraph (c) above organized in a manner consistent with the elements set forth in that section. The Program Office reserves the right to ask any applicant to supplement the data in its application, but expects applications to be complete upon submission. The narrative portion of an application should not exceed 20 pages in length. Documentation supporting the assertions made in the narrative portion may also be provided in the form of appendices, but limited to relevant information. Applications may be submitted electronically via the **Federal Register** (*http://www.regulations.gov*). Applications submitted in writing must include the original and three copies and must be on 8.5″ x 11″ single spaced paper, excluding maps, Geographic Information Systems (GIS) representations, *etc.*

(2) In the event that the sponsor of a Marine Highway Project that has already been designated by the Secretary seeks a modification to the designation because of a change in project scope, an expansion of the project, or other significant change to the project, the project applicant should request the change in writing to the Secretary via the Maritime Administrator. The request must contain any changed or new information that is relevant to the project.

(i) What does the Program Office do to ensure designated projects are developing properly?

(1) Once designated projects enter the operational phase (either start of a new service, or expansion of existing service), the Program Office will evaluate them regularly to determine if the project is likely to achieve its objectives.

(2) Overall project performance will be assessed according to three categories-exceeds, meets, or does not meet original projections in each of the three areas defined below:

(i) *Public benefit.* Does the project meet the stated goals in shifting specific numbers of vehicles (number of trucks, rail cars or automobiles) off the designated landside routes? The Program Office will assume other public benefits, including energy savings, reduced emissions, and safety improvements to be a direct derivative of either numbers of vehicles reduced, or vehicle/ton miles avoided, unless specific factors change (such as a change in vessel fuel or emissions).

(ii) *Public cost.* Is the overall cost to the Federal Government (if any) on track with estimates at the time of designation? The overall cost to the Federal Government represents the amount of Federal investment (*i.e.,* direct funding, loan guarantees or similar mechanisms) reduced by the offsetting savings the project represents (road/bridge wear and tear avoided, infrastructure construction or expansion deferred).

(iii) *Timeliness factor.* Is the project on track for the point at which the enterprise is projected to attain self-sufficiency? For example, if the project was anticipated to attain self-sufficiency after 36 months of operation, is it on track at the point of evaluation to meet that objective? This can be determined by assessing revenues, cargo and passenger trends, expenses and other factors established in the application review process.

(j) Can a project designation expire or be terminated?

(1) Project Designations are effective for a period of five years, or until the date the project is completed, or MARAD cancels the designation. Project Designation will expire after three years of inactivity.

(2) Project Sponsors wishing to extend a Project Designation must submit an updated application no later than six months before the five-year designation period ends. Applicants who no longer wish to maintain project designation may submit a request to the Secretary to revoke their designation.

Subpart C—Department of Transportation Efforts to Foster and Support America's Marine Highways

§ 393.4 DOT Support for Planning Activities.

(a) How does DOT provide support?

(1) The Program Office engages in coordination and Planning Activities with Federal, State, local and tribal governments and planning and private entities organizations to encourage the use of designated Marine Highway Routes and Projects. These activities include:

(i) Works with these entities to assess plans and develop strategies, where appropriate, to incorporate Marine Highway transportation and other short sea transportation solutions to their statewide and metropolitan transportation plans, including the Statewide Transportation Improvement Programs and State Freight Plans.

(ii) Facilitates groups of States and multi-State transportation entities to determine how Marine Highway transportation can address port congestion, traffic delays, bottlenecks, and other interstate transportation challenges to their mutual benefit.

(iii) Identifies other Federal agencies that have jurisdiction over services, or which currently provide funding for components of services, in order to determine which agencies should be consulted and assist in the coordination process.

(iv) Organizes the Department's modal administrations, including Federal Highway Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, Saint Lawrence Seaway Development Corporation, and Federal Transit Administration, as appropriate, for support and to evaluate costs and benefits of proposed Marine Highway Routes and Projects.

§ 393.5 DOT Support for Marine Highway-Related Research.

(a) How does DOT support research?

(1) The Program Office works in consultation with public and private entities as appropriate, within the limits of available resources, to identify impediments, develop incentives, and conduct innovative research, in support of the America's Marine Highway Program or in direct support of specific designated Marine Highway Routes and Projects. The primary objectives of selected research projects are to:

(i) Identify markets, cargoes, and service parameters that could facilitate the development of new or expanded Marine Highway Services.

(ii) Identify existing or emerging technology, vessel design, infrastructure designs, and other improvements that would reduce emissions, increase fuel economy, and lower costs of Marine Highway transportation and increase the efficiency of intermodal transfers.

(iii) Identify impediments to the establishment of Marine Highway services.

(iv) Identify incentives to increase the use and efficiency of Marine Highway services.

(b) The Secretary, in consultation with the Administrator of the Environmental Protection Agency, may conduct research on short sea transportation regarding:

(1) The environmental and transportation benefits to be derived from short sea transportation alternatives for other forms of transportation;

(2) Technology, vessel design, and other improvements that would reduce emissions, increase fuel economy, and lower costs of short sea transportation and increase the efficiency of intermodal transfers; and

(3) Solutions to impediments to short sea transportation projects designated.

§ 393.6 America's Marine Highway Program Project Grants.

(a) How does MARAD administer the AMHP grant program?

(1) The Associate Administrator for Intermodal Systems Development manages the program under the guidance and the immediate administrative direction of the Maritime Administrator.

(2) MARAD establishes grant program priorities as reflected in its grant opportunity announcements and, from time-to-time, issues clarifying guidance documents through the MARAD Web site and the **Federal Register**.

(3) The Administrator makes funding recommendations to the Secretary, who has the authority to award grants.

(b) How does MARAD make grant opportunities known?

(1) MARAD determines which grant opportunities it will offer, and establishes application deadlines, and programmatic requirements when grant funds become available to the AMHP.

(2) The MARAD staff prepares Notice of Funding Opportunity (NOFO) announcements consisting of all information necessary to apply for each grant and publishes the announcement in the **Federal Register** and on *grants.gov*.

(3) The MARAD staff publishes notice of each announcement on *http://grants.gov*, a Federal government Web site widely available to the public.

(c) How may an applicant apply for an AMHP grant?

(1) Applicants may apply for a grant using *grants.gov* or, in connection with a **Federal Register** announcement, by submitting the necessary information to the AMHP Office in electronic form.

(2) [Reserved].

(Authority: Pub. L. 110–140, title XI, subtitle C sections 1121–1123, 121 Stat. 1494; Pub. L. 112–213, title IV, section 405, 126 Stat. 1541; 49 CFR 1.92 and 1.93(a), 46 U.S.C. 55601, 55604, 55605)

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By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2017–00249 Filed 1–10–17; 8:45 am]

BILLING CODE 4910–81–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 15, 25, 30, and 101

[GN Docket No. 14–177, IB Docket Nos. 15–256 and 97–95, WT Docket No. 10–112; Report No. 3065]

Petitions for Reconsideration of Action in Rulemaking Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for reconsideration; correction.

SUMMARY: The Federal Communications Commission (Commission) published a document in the **Federal Register** of December 30, 2016, concerning petitions for reconsideration filed in the Commission's rulemaking proceeding. The date for filing replies was incorrect. This document corrects the filing deadline date for replies to an opposition to the Petitions.

FOR FURTHER INFORMATION CONTACT: John Schauble, Wireless Telecommunications Bureau, (202) 418–0797; email: *John.Schauble@fcc.gov*.

Correction

In the **Federal Register** of December 30, 2016, in FR Doc. 2016–31709, on page 96415, in the first column, correct the **DATES** section to read:

DATES: Oppositions to the Petitions must be filed on or before January 17, 2017. Replies to an opposition must be filed on or before January 27, 2017.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2017–00342 Filed 1–10–17; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 25

[IB Docket No. 16–408; FCC 16–170]

Updates Concerning Non-Geostationary, Fixed-Satellite Service Systems and Related Matters

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Federal Communications Commission proposes to update, clarify, and streamline its rules to facilitate the deployment of recently proposed non-geostationary-satellite orbit (NGSO), fixed-satellite service (FSS) satellite systems.

DATES: Comments are due February 27, 2017. Reply comments are due March 27, 2017.

ADDRESSES: You may submit comments, identified by IB Docket No. 16–408, by any of the following methods:

- *Federal Communications Commission's Web site: http://apps.fcc.gov/ecfs.* Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Clay DeCell, 202–418–0803.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM), FCC 16–170, adopted December 14, 2016, and released December 15, 2016. The full text of the NPRM is available at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-170A1.pdf.* The NPRM is also available for inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities, send an email to *FCC504@fcc.gov* or call the Consumer

& Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Comment Filing Requirements

Interested parties may file comments and reply comments on or before the dates indicated in the **DATES** section above. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).

• *Electronic Filers.* Comments may be filed electronically using the Internet by accessing the ECFS, *http://apps.fcc.gov/ecfs.*

• *Paper Filers.* Parties who file by paper must include an original and four copies of each filing.

Filings may be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

○ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

○ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

○ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

• *Persons with Disabilities.* To request materials in accessible formats for persons with disabilities (braille, large print, electronic files, audio format), or to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.), send an email to *fcc504@fcc.gov* or call 202–418–0530 (voice) or 202–418–0432 (TTY).

Ex Parte Presentations

Pursuant to 47 CFR 1.1200(a), this proceeding will be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with 47 CFR 1.1206(b). In proceedings governed by 47 CFR 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Paperwork Reduction Act

This document contains proposed new and modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Synopsis

In this NPRM, we propose revisions to certain of the Commission's rules and policies governing satellite services, prompted by a planned new generation of large NGSO FSS systems. We propose to update, clarify, and streamline our rules to facilitate the deployment of NGSO FSS systems, which have the capability to provide services, including Internet access, to underserved communities worldwide. We also propose to update certain rules governing operation of FSS space stations in the geostationary-satellite orbit (GSO) to enable greater operational flexibility.

Ka-Band Plan

Proposal Overview. In light of decisions waiving the plan for the Ka-band, or the 17.7–20.2 GHz and 27.5–30 GHz bands, and to promote more flexible use of the spectrum, we propose to reinstate certain secondary FSS use in the 17.8–20.2 GHz band and to allow new FSS operations in the 19.3–19.4 GHz, 19.6–19.7 GHz, and 29.3–29.5 GHz bands. This proposal would codify existing practices and formally enable the spectrum use proposed by NGSO FSS broadband constellations currently pending before the Commission. It would further make available for FSS systems spectrum currently designated for, but never used by, NGSO mobile-satellite service (MSS) feeder links.

17.8–18.3 GHz. We propose to create a new secondary allocation to the FSS in the 17.8–18.3 GHz band, subject to protections for the primary fixed service (FS). We anticipate that the power flux-density (PFD) limits established by the International Telecommunication Union (ITU) for protection of the FS by the FSS in the 17.7–18.3 GHz band are also sufficient to protect U.S. terrestrial fixed users, without generally requiring coordination. This has long been the case in the 3700–4200 MHz band, for example, in which FSS space stations operate on a co-primary basis with FS terrestrial stations, are not typically coordinated with terrestrial operators, and are subject to ITU PFD limits codified in 47 CFR 25.208(a). And the United States participated actively in the development of ITU PFD limits in the 17.8–18.3 GHz band, with input from U.S. terrestrial operators.

Thus, we are no longer concerned about coordination and delay concerns that the Commission expressed in 2000. The Commission did not discuss the adequacy of any PFD limits in this context. And, both NGSO FSS and GSO FSS systems have been successfully authorized to operate in this band by waiver on an unprotected, non-interference basis with respect to the FS. We also note that WorldVu Satellites Limited, d/b/a OneWeb, has filed a petition for declaratory ruling to access the U.S. market in the 17.8–18.6 GHz band using its proposed system of 720 NGSO satellites. Accordingly, and to promote additional operational flexibility, we propose to adopt a secondary allocation to the FSS (space-

to-Earth) in the 17.8–18.3 GHz band currently designated solely for the FS. Both GSO FSS and NGSO FSS operations would be permitted under this secondary FSS allocation. Non-Federal FSS operations would also be secondary to primary Federal FSS operations in this band. We intend to limit this allocation to individually licensed earth stations, which are more likely than ubiquitously deployed user terminals to be able to operate successfully on an unprotected basis with respect to primary FS stations. We also propose to include in our rules the international PFD limits on space stations in this band. Finally, to promote compatibility among FSS systems, we propose to authorize NGSO FSS systems in this band only on an unprotected, non-interference basis with respect to GSO FSS networks. We seek comment on these proposals. As indicated above, we anticipate that PFD limits established by the ITU, with significant involvement of the United States, will be adequate to protect U.S. fixed users from interference. However, we seek comment on these PFD limits. In the unlikely event that harmful interference did occur to an FS station, we expect that the FS operator would attempt to locate and contact the source of the interference, or seek assistance from the Commission. We seek comment on this issue.

18.3–18.6 GHz and 19.7–20.2 GHz. We also propose to allow NGSO FSS systems to operate on an unprotected basis with respect to GSO FSS networks in the 18.3–18.6 GHz and 19.7–20.2 GHz bands, subject to limits on equivalent power flux-density (EPFD) to ensure protection of GSO FSS networks, as explained below. We do not propose to extend NGSO FSS operation to the 18.6–18.8 GHz band, in which GSO FSS networks are also currently designated co-primary, due to concerns of protection for the coequal Earth exploration-satellite service (passive) and the space research service (passive). As we concluded for operations in the 10.7–14.5 GHz band, which is available for licensing of both GSO and NGSO FSS systems, we anticipate that compliance with EPFD limits applicable internationally will be sufficient to protect GSO FSS networks from unacceptable interference, by generally limiting NGSO FSS operations near the geostationary orbit. Permitting NGSO FSS operations in the 18.3–18.6 GHz and 19.7–20.2 GHz bands would also be consistent with waivers issued on delegated authority.

18.8–19.3 GHz. In addition, we propose to allow GSO FSS operation in the 18.8–19.3 GHz downlink band on an unprotected, non-interference basis with respect to NGSO FSS systems, consistent with Bureau waivers and matching the current secondary GSO FSS designation in the paired 28.6–29.1 GHz uplink band. Because NGSO FSS systems would not be required to alter their operations to accommodate any GSO FSS operations in this band, we do not believe this allowance for GSO FSS would prove burdensome to NGSO FSS systems, but we seek comment on such burdens.

18.8–19.3 GHz and 28.6–29.1 GHz. Internationally, these bands are allocated to the FSS on a primary basis. GSO satellite networks and NGSO systems in these bands are subject to coordination, and No. 22.2 of the ITU Radio Regulations does not apply. This rule provides that, regardless of their ITU filing dates, NGSO systems must not cause unacceptable interference to and, unless otherwise specified in the Radio Regulations, must not claim protection from GSO FSS and GSO broadcasting-satellite service (BSS) networks operating in accordance with the Radio Regulations. We request comment on the possibility of giving GSO operations co-primary status with NGSO operations in these bands, as opposed to the secondary designation already existing in the 28.6–29.1 GHz band and our proposal above for the 18.8–19.3 GHz band. We seek comment on any potential difficulties that this approach might raise, particularly since our rules separately address GSO-like applications and NGSO-like applications, but do not provide a mechanism for us to consider an application of one type (GSO-like or NGSO-like) vis-à-vis previous applications or authorizations of the other type in the bands 18.8–19.3 GHz and 28.6–29.1 GHz. Significantly, in these bands NGSO-like operations do not have to meet EPFD limits in order to ensure the protection of GSO-like operations.

19.3–19.4 GHz, 19.6–19.7 GHz, and 29.3–29.5 GHz. To facilitate satellite use of the bands, we propose to permit both GSO and NGSO FSS systems to operate in the 19.3–19.4 GHz, 19.6–19.7 GHz, and 29.3–29.5 GHz bands currently designated for, but unused by, NGSO MSS feeder links. We propose to authorize NGSO FSS systems on an unprotected, non-interference basis with respect to GSO FSS networks in these bands. In the 19.3–19.4 GHz and 19.6–19.7 GHz bands, which are shared on a co-primary basis with terrestrial services, any FSS earth stations would be individually licensed and coordinated with terrestrial stations. Existing terrestrial operations in these bands would not have to protect any new FSS deployment under general first-come, first-served coordination procedures. PFD limits are already in place to protect such terrestrial operations from downlink interference. Further, we anticipate that new stations in the FS and the FSS will be compatible in these bands through coordination of the specific operating parameters of each station, FS or FSS, at the time of licensing. We seek comment on this proposal, including relevant technical analyses regarding coordination parameters for new individually licensed earth stations and future FS stations.

Codification. For clarity, we propose at this time to codify the Ka-band Plan's satellite designations into footnotes to the U.S. Table of Frequency Allocations, 47 CFR 2.106. In doing so, we propose to specify that, in the 27.5–28.35 GHz band, NGSO FSS systems must operate on an unprotected, non-interference basis with respect to GSO FSS networks. This treatment would promote compatibility between the two system designs and is consistent with our proposals in most shared GSO–NGSO FSS bands. Additionally, while the MSS is not designated in the Commission's Ka-band Plan, we do not propose to remove the allocations for this service in the 19.7–20.2 GHz and 29.5–30 GHz bands. We also propose to remove duplicative notes in 47 CFR 25.202(a)(1), except with respect to the Commission's recent decision regarding the 27.5–28.35 GHz band in the Spectrum Frontiers proceeding. Similarly, we propose to incorporate into footnotes in the Table the remaining frequency-use restrictions in 47 CFR 25.202(a)(1) that were not recently amended in the Commission's Spectrum Frontiers proceeding. However, we propose to specify the limitation on NGSO FSS deployment in the 10.7–11.7 GHz and 12.75–13.25 GHz bands as to individually licensed earth stations only, rather than to gateway earth stations only as currently prescribed. This would be consistent both with our proposal for the 17.8–18.3 GHz band and with the Commission's recent decision regarding the shared 27.5–28.35 GHz band in the Spectrum Frontiers proceeding. In addition, rather than attempt to reproduce in 47 CFR 25.202(a)(1) all of the frequency bands available for FSS, which are already stated completely in the Table of Frequency Allocations in 47 CFR 2.106, we propose to use this paragraph only to note the restrictions on FSS not codified in the Table.

PFD Limits in 17.7–19.7 GHz for GSO FSS Space Stations. Section 25.208(c)

contains PFD limits on emissions from space stations in, among others, the following frequency bands: 18.3–18.8 GHz and 19.3–19.7 GHz. In addition, 47 CFR 25.208(e) contains PFD limits on emissions by NGSO FSS space stations in the 18.8–19.3 GHz band. Since we are proposing changes to the U.S. Table of Frequency Allocations that will allow the operation of GSO FSS and/or NGSO FSS space stations in frequency bands where such operation was not previously contemplated, we propose to extend the applicability of PFD limits to these frequency bands. Accordingly, we propose to make the limits in 47 CFR 25.208(c) applicable to GSO FSS space stations in the frequency bands 17.7–19.7 GHz and to all space stations in the bands 22.55–23.55 GHz and 24.45–24.75 GHz. These limits have already been applied in portions of the 17.7–19.7 GHz band when granting authorizations for operation in this band through waivers.

PFD Limits for NGSO FSS Space Stations. We also propose to make the limits in 47 CFR 25.208(e) applicable to NGSO FSS space stations in the frequency bands 17.8–18.6 GHz and 18.8–19.7 GHz. We recognize, however, that these limits were derived for constellations up to a certain number of satellites and may not be appropriate for some of the large NGSO FSS constellations being currently proposed. The interference produced by an NGSO FSS constellation to a terrestrial station is time-varying and, for that reason, the protection of such a station would be better ensured through the establishment of an EPFD limit. We invite comment on this point and on what would be an appropriate EPFD for the protection of a terrestrial station in the frequency bands under consideration. As an alternative, and until such EPFD limit can be developed, we propose that an NGSO FSS constellation be deemed as having met the requirements in 47 CFR 25.208(e) if the aggregate PFD produced by the whole constellation at any point in the Earth's surface does not exceed -115 (dBW/m^2)/MHz. We invite comments on this proposal.

Other. As NGSO FSS systems deploy in different frequency bands, it is important to consider how these systems can share spectrum with other non-satellite systems. In this respect, we request comments on any other emerging uses, technologies, or platforms that should be taken into account as additional NGSO uses occur. Would the rules proposed in this Notice preclude in any way other uses of this spectrum or hinder future sharing with other services? Are there additional technical rules or other means by which we can facilitate additional sharing in these bands?

EPFD Limits

Ka-band. While the Commission has not previously included in its rules the Ka-band EPFD limits found in Article 22 of the ITU Radio Regulations, NGSO FSS applicants in these bands have nonetheless demonstrated compliance with the limits when seeking to operate on a non-interference basis vis-à-vis GSO FSS networks. The International Bureau has approved such operations on the basis of these showings. Similarly, we expect that compliance with the Article 22 EPFD limits will be sufficient for NGSO FSS systems to protect GSO FSS networks in the 17.8–18.6 GHz, 19.7–20.2 GHz, 27.5–28.35 GHz, and 29.5–30 GHz bands, as the U.S. GSO FSS community participated actively in their development. Accordingly, to provide greater certainty regarding the compatibility of NGSO FSS and GSO FSS operations, we propose to require NGSO FSS applicants in these bands to demonstrate conformance with applicable EPFD limits in the same manner that NGSO FSS applicants must for operation in the 10.7–14.5 GHz band. We intend that compliance with EPFD limits in the Ka-band would satisfy any obligation on an NGSO FSS system to operate on a non-interference basis with respect to a GSO FSS network. In addition, we propose to incorporate EPFD limits on inter-satellite emissions from NGSO FSS space stations into GSO FSS space stations, which are currently found in Article 22 but omitted from our rules. We also propose to extend relevant Article 22 EPFD limits to the 19.3–19.4 GHz, 19.6–19.7 GHz, and 29.3–29.5 GHz bands in which we are proposing to allow new NGSO FSS operations on an unprotected, non-interference basis with respect to GSO FSS networks.

Consolidation. In adding these Ka-band EPFD rules, we propose to consolidate our NGSO FSS licensing provisions for operation in the Ka-band, currently found in 47 CFR 25.145, into the licensing rules for NGSO FSS operation in the 10.7–14.5 GHz band, set forth in 47 CFR 25.146. In doing so, we propose to delete 47 CFR 25.145(e), similar provisions in 47 CFR 25.142(d) and 25.143(d), and the cross-references to 47 CFR 25.142(d) in 47 CFR 25.217, all of which proscribe certain exclusionary arrangements to serve foreign markets. These provisions have been superseded by section 648 of the Open-market Reorganization for the Betterment of International Telecommunications (ORBIT) Act, which contains a parallel prohibition. We also request comment on ways we might simplify 47 CFR 25.146.

NGSO–GSO Default Sharing. Finally, the first sentence of 47 CFR 25.156(d)(5) provides that, in frequency bands in which the Commission has not yet adopted sharing criteria between GSO-like and NGSO-like satellite operations, the Commission will not grant an application for NGSO-like operation after it has granted an application for GSO-like operation, or vice versa. The effect of this provision is to preclude joint NGSO-like and GSO-like use of frequency bands until the Commission has adopted formal sharing criteria between the different types of satellite operation in that band. As noted above, however, the International Bureau has approved by waiver both GSO-like and NGSO-like operations in the same Ka-band frequencies without EPFD sharing criteria yet codified in our rules. Similarly, we believe that an applicant demonstrating that it can operate compatibly with any existing operations, either through technical demonstrations or coordination, ought not be precluded from providing service to the public while the Commission initiates and conducts a rulemaking to establish formal sharing criteria. We therefore propose to delete the first sentence of 47 CFR 25.156(d)(5). We also request comment as to whether we should adopt, as a default sharing rule, a provision similar to No. 22.2 of the ITU Radio Regulations. This provision would state that, except as otherwise provided in our rules, NGSO systems must not cause unacceptable interference to, and must not claim protection from, GSO FSS networks and GSO BSS networks. For example, the 18.8–19.3 GHz and 28.6–29.1 GHz bands would be excepted from such a provision, because in these bands we require GSO FSS networks to operate on an unprotected, non-interference basis with respect to NGSO FSS systems.

Avoidance of In-line Interference

Background. The Commission has adopted a default mechanism to enable spectrum sharing among NGSO FSS systems in the 10.7–12.7 GHz, 12.75–13.25 GHz, 13.75–14.5 GHz, 18.8–19.3 GHz, and 28.6–29.1 GHz bands. Under this mechanism, an NGSO FSS system may operate throughout its authorized band except during ''in-line'' events. An ''in-line'' event occurs when satellites of different NGSO FSS systems are physically aligned with an operating earth station of one of those systems, such that the topocentric angle between the satellites is less than 10 degrees as

measured from the earth station. To avoid interference among the systems experiencing an in-line event, the Commission requires the affected satellite operators to divide the commonly assigned spectrum equally according to the chosen ''home'' spectrum for the duration of the in-line event, absent another sharing agreement by the operators.

Section 25.261. The avoidance of in-line interference mechanism is codified in 47 CFR 25.261. This section, however, omits the 10.7–12.7 GHz, 12.75–13.25 GHz, and 13.75–14.5 GHz bands. We propose to correct this omission. We also propose to include in 47 CFR 25.261 the bands in which we currently designate NGSO FSS operation on a secondary basis—27.5–28.6 GHz and 29.5–30 GHz—and the bands in which we are proposing to allow NGSO FSS operation—17.8–18.6 GHz, 19.3–19.4 GHz, 19.6–20.2 GHz, and 29.3–29.5 GHz. We otherwise propose to clarify that 47 CFR 25.261 applies only to NGSO FSS systems communicating with earth stations with directional antennas. We seek comment on expanding this spectrum sharing method to NGSO FSS operations in other frequency bands, in place of the alternative procedure for assigning spectrum to NGSO satellite systems by simply dividing it equally among the qualified applicants in a processing round. In this regard, we propose to clarify in 47 CFR 25.157 that these band-splitting procedures do not apply to applications granted on the condition of compliance with the avoidance of in-line interference mechanism specified in 47 CFR 25.261. We also seek comment on any other standard for assigning spectrum.

Ephemeris Data. In order to effectuate the avoidance of in-line interference mechanism, NGSO FSS operators must know the locations of co-frequency NGSO FSS space stations to predict when in-line events will occur. Section 25.271(e) requires NGSO FSS licensees in the 10.7–14.5 GHz band to maintain a Web site with ephemeris data for each satellite in its constellation, which facilitates coordination for this purpose. NGSO FSS licensees in the 18.8–19.3 GHz and 28.6–29.1 GHz bands must also share ephemeris data. Accordingly, we propose to include the 18.8–19.3 GHz and 28.6–29.1 GHz bands in 47 CFR 25.271(e), along with the portions of the Ka-band currently designated for NGSO FSS operation on a secondary basis or proposed for NGSO FSS operation in this Notice, *i.e.,* the 17.8–18.6 GHz, 19.3–19.4 GHz, 19.6–20.2 GHz, 27.5–28.6 GHz, and 29.3–30 GHz bands. We also propose to apply this requirement explicitly to non-U.S.-licensed NGSO FSS operators that are granted market access in the United States.

We understand that satellites in the low-Earth orbit (LEO) region, *i.e.,* the region of space at Earth altitudes below 2,000 km, that do not have station-keeping capability have experienced orbital perturbations from solar events resulting in a reduction in altitude of up to several kilometers from a single solar event. We invite comment as to whether the current ephemeris data update frequency of once every three days as required by 47 CFR 25.271(e) is appropriate for such satellites, or whether we should require more frequent updates, and if so, what the appropriate update interval would be. We also invite comment as to whether an electronic Web site bulletin board as currently required by 47 CFR 25.271(e) is the most appropriate means of making ephemeris data available, or whether another method, such as requiring active participation in the Space Data Association and/or requiring the sharing of data with the U. S. Strategic Command's Joint Space Operations Center (or any successor) might be a more effective means.

10-degree Trigger. In addition, we note that the 10-degree default separation for co-frequency NGSO FSS space station operations is based on the characteristics of satellite systems proposed around the turn of the millennium. We invite comment as to whether the separation-angle trigger should be increased or decreased to reflect current system designs.

Accommodation of Later Entrants. Finally, when authorizing NGSO FSS systems in the past, the International Bureau has required licensees to abide by the avoidance of in-line interference mechanism generally with respect to later-authorized NGSO FSS systems, unless coordination agreements are reached. To the extent that later-authorized systems increase the frequency of in-line events, or increase the number of satellite systems involved in an in-line event, such later entrants can diminish the amount of spectrum available to an existing NGSO FSS system. We invite comment on how best to balance the competing interests of encouraging new market entry and providing NGSO FSS operators certainty with respect to a minimum amount of spectrum available for their services. For example, should we specify that the avoidance of in-line interference mechanism applies only to those in-line events among the existing grantee, O3b Limited, and any licensees and market access holders approved as a result of a processing round? In this case, an applicant requesting authority after any processing round would be required to protect existing NGSO FSS authorization holders, and would be required, during an in-line event, to cease operations on the commonly authorized spectrum.

Earth Station E.I.R.P. Density Limits

In light of the ability of the O3b NGSO FSS system to operate within existing e.i.r.p. density criteria for GSO FSS earth stations, and considering the spectrum sharing benefits of such criteria, we invite comment on adopting e.i.r.p. density limits for NGSO FSS uplink transmissions. These could be based, for example, on the limits we have prescribed for FSS earth stations transmitting to GSO space stations. Such default limits could be exceeded to the extent that higher levels are coordinated with all other NGSO FSS systems authorized in the same frequency bands. If we were to adopt e.i.r.p. density limits for NGSO FSS uplink transmissions, should we simply require a certification from applicants that they will abide by these default power limits unless higher transmission levels are appropriately coordinated? This certification requirement could be similar to certification requirements the Commission has recently adopted for GSO FSS and 17/24 GHz BSS space station operations. We also seek comment on whether, similar to our policy regarding GSO FSS space stations, there are appropriate downlink power limits and earth station receive gain criteria that we should adopt to facilitate sharing among NGSO FSS systems. We further seek comment on any other measures that should be recommended to facilitate sharing.

Milestones

Background. The Commission requires all satellites in an authorized NGSO constellation to be launched and operated within six years of grant. This milestone requirement is intended to ensure timely provision of service, and to prevent ''warehousing'' of spectrum and orbital resources. Failure to meet this requirement, incorporated as a condition of the constellation grant, renders the authorization null and void, and subjects the grantee to forfeiture of up to $5 million under the surety bond posted for the authorization.

NGSO Milestone. Operation of every space station in an authorized constellation, however, may not be necessary to provide the services proposed in the application. Additional space stations could be authorized to reduce latency or to increase capacity and reliability, for example. And while

failure to successfully launch and operate such additional space stations within six years might not preclude service to the public, it could, under current rules, result in automatic termination of the license. To afford operators greater flexibility with system design and implementation, we propose to modify the six-year milestone obligation for NGSO systems to require the launch and operation of a percentage of the authorized constellation sufficient to provide substantial service to the public. We tentatively conclude that 75 percent is an appropriate number for this requirement. Satisfaction of this milestone would release the operator from its surety bond obligation. Failure to operate the minimum number of space stations by this milestone, however, would result in forfeiture of the bond and an automatic reduction in the number of authorized satellites to the number actually in orbit as of the milestone date. Even under this ''keep what you use'' proposal, however, we would continue to terminate automatically the full license of a satellite system if no authorized space stations were functional in orbit as of the time of the milestone deadline. For operators that satisfy the first milestone, we propose a second milestone, nine years after grant, requiring launch and operation of the entire authorized constellation. Operators failing to complete their constellations by this second milestone date would similarly have their number of authorized space stations reduced automatically to the number deployed as of the second milestone date. We invite comment on this and any other modifications to our NGSO milestone policy.

As an alternative to specifying a percentage of the authorized constellation for an initial milestone, for example, should we require the launch and operation of a number of satellites specific to the services and constellation proposed? If so, should the applicant be required to state the minimum number of satellites necessary to provide the services it proposes? If we adopt a more flexible milestone requirement, should it be limited to large NGSO constellations, and if so what size? Should we add additional, periodic milestones, to automatically reduce the number of authorized satellites if a licensee demonstrates that it is unlikely to maintain its larger, authorized constellation size following the decommissioning of its initial deployment? We could, for example, specify that the number of authorized satellites is reduced automatically to the greatest number operated concurrently during the previous year if the licensee falls below a certain percentage of its authorized constellation. If, after satisfaction of any milestones, an NGSO licensee fails to maintain at least one operational satellite in orbit for a specified period of time, should its license be terminated automatically?

Replacements. We also propose to clarify in 47 CFR 25.164 that both GSO and NGSO replacement space stations, which must be scheduled for launch before the retirement of the space stations being replaced, are not subject to the separate milestone requirements in that section.

Geographic Coverage

The Commission requires the design of NGSO FSS systems that will operate in the 10.7–14.5 GHz, 18.8–19.3 GHz, or 28.6–29.1 GHz bands to enable service worldwide for at least 18 hours every day. This requirement is intended to foster seamless global communication networks and to maximize the use of global spectrum resources, but also prohibits certain NGSO system designs. In light of the spectrum sharing opportunities among NGSO FSS systems, and given the separate requirements for coverage of the United States already included in our rules, we propose to eliminate this global coverage requirement in order to provide operators greater flexibility to design their systems to meet market demands. We invite comment on this proposal.

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this NPRM. We request written public comments on this IRFA. Commenters must identify their comments as responses to the IRFA and must file the comments by the deadlines for comments on the Notice in the **DATES** section above. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, summaries of the Notice and IRFA will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

The Notice seeks comment on several proposals relating to the Commission's rules and policies for satellite services, especially those concerning non-geostationary-satellite (NGSO), fixed-satellite service (FSS) systems. Adoption of the proposed changes would, among other things, provide for more flexible use of the 17.8–20.2 GHz bands for FSS; promote shared use of spectrum among NGSO FSS satellite systems; and remove unnecessary design restrictions on NGSO FSS systems.

The NPRM proposes several changes to 47 CFR parts 2 and 25. Principally, it proposes to:

(1) Allocate additional spectrum for use by FSS systems on a secondary basis in the 17.8–18.3 GHz band, subject to power flux-density limits designed to protect primary terrestrial services.

(2) Allow additional operation of NGSO FSS systems in segments of the 17.8–20.2 GHz band within limits protective of FSS satellite systems in the geostationary-satellite orbit (GSO).

(3) Allow GSO FSS operation in the 18.8–19.3 GHz band on an unprotected, non-interference basis with regard to NGSO FSS systems, to provide additional operational flexibility.

(4) Amend the Commission's satellite milestone policies and geographic coverage rules to provide additional regulatory flexibility to operators of NGSO FSS systems.

B. Legal Basis

The proposed action is authorized under sections 4(i), 303, and 316 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, 316.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by adoption of proposed rules. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Below, we describe and estimate the number of small entity licensees that may be affected by adoption of the proposed rules.

Satellite Telecommunications and All Other Telecommunications

The rules proposed in this Notice would affect some providers of satellite telecommunications services, if adopted. Satellite telecommunications service providers include satellite and earth station operators. Since 2007, the SBA has recognized two census categories for satellite telecommunications firms: ''Satellite Telecommunications'' and ''Other Telecommunications.'' Under both categories, a business is considered small if it had $32.5 million or less in annual receipts.

The first category of Satellite Telecommunications ''comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' For this category, Census Bureau data for 2007 show that there were a total of 512 satellite communications firms that operated for the entire year. Of this total, 482 firms had annual receipts of under $25 million.

The second category of Other Telecommunications is comprised of entities ''primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.'' For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year. Of this total, 2,346 firms had annual receipts of under $25 million. We anticipate that some of these ''Other Telecommunications firms,'' which are small entities, are earth station applicants/licensees that might be affected if our proposed rule changes are adopted.

We anticipate that our proposed rule changes may have an impact on earth station and space station applicants and licensees. Space station applicants and licensees, however, rarely qualify under the definition of a small entity. Generally, space stations cost hundreds of millions of dollars to construct, launch, and operate. Consequently, we do not anticipate that any space station operators are small entities that would be affected by our proposed actions.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

The Notice proposes and seeks comment on several rule changes that would affect compliance requirements for earth station and space station operators. Most proposed changes, however, are directed at space station applicants and licensees. As noted above, these parties rarely qualify as small entities.

For example, we propose to allow additional uses of certain frequencies within the 17.8–20.2 GHz band, subject to compliance with power limits designed to protect other users of the bands. We also seek comment on revised or new technical standards to promote sharing among NGSO FSS systems, and ask whether we should allow entities to certify that that will comply with such resulting requirements, as a means to avoid unnecessary regulatory burdens.

We also propose modified rules for satellite system implementation to provide additional flexibility to operators. We propose to eliminate a geographic service requirement that restricts the design possibilities of certain NGSO FSS satellite systems. In total, the proposals and questions in the Notice are designed to achieve the Commission's mandate to regulate in the public interest while imposing the lowest necessary burden on all affected parties, including small entities.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

The Notice seeks comment from all interested parties. The Commission is aware that some of the proposals under consideration may impact small entities. Small entities are encouraged to bring to the Commission's attention any specific concerns they may have with the proposals outlined in the Notice.

The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the NPRM, in reaching its final conclusions and taking action in this proceeding.

In this NPRM, the Commission invites comment on means to minimize negative economic impacts on applicants and licensees, including small entities. For example, the Commission seeks comment on whether compliance with certain power limits could be certified to by applicants, rather than demonstrated technically, thereby reducing burdens. And the Commission proposes to relax a satellite system geographic coverage requirement, which could lessen the economic burden on applicants and licensees. Overall, the proposals in the Notice seek to increase flexibility for NGSO FSS applicants and licensees and reduce burdens, while maintaining adequate protections against interference.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

Incorporation by Reference

In § 25.108, we propose to incorporate by reference a portion of Appendix 4 of the ITU Radio Regulations concerning the orbital information of satellite networks. Specifically, we propose to incorporate by reference the ITU Radio Regulations, Volume 2: Appendices, Appendix 4, ''Consolidated list and tables of characteristics for use in the application of the procedures of Chapter III,'' Annex 2, ''Characteristics of satellite networks, earth stations or radio astronomy stations,'' Section A.4, ''Orbital Information,'' Edition of 2012. This material is reasonably available to interested parties from the International Telecommunication Union (ITU), Place des Nations, 1211 Geneva 20 Switzerland; *www.itu.int;* Voice: +41 22 730 5111; Fax: +41 22 733 7256; email: *itumail@itu.int.* The material is also directly available online at *http://www.itu.int/pub/R-REG-RR-2012,* and would be made available for inspection at the Commission.

List of Subjects

47 CFR Part 2

Radio, Table of frequency allocations.

47 CFR Part 25

Administrative practice and procedure, Earth stations, Incorporation by reference, Satellites.

Federal Communications Commission.

Katura Howard,

Federal Register Liaison Officer. Office of the Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 2 and 25 as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 2. Amend § 2.106 as follows:

■ a. Revise pages 48, 49, 52, and 55 of the Table of Frequency Allocations.

■ b. Revise footnotes NG164, NG165, and NG166.

■ c. Add footnotes NGXX1, NGXX2, NGXX3, and NGXX4.

§ 2.106 Table of Frequency Allocations.

BILLING CODE 6712–01–P

9.9-10 RADIOLOCATION Fixed 5.477 5.478 5.479			9.9-10 RADIOLOCATION 5.479	9.9-10 Radiolocation 5.479	
10-10.45 FIXED MOBILE RADIOLOCATION Amateur 5.479	10-10.45 RADIOLOCATION Amateur 5.479 5.480	10-10.45 FIXED MOBILE RADIOLOCATION Amateur 5.479	10-10.5 RADIOLOCATION US108 G32 5.479 US128	10-10.45 Amateur Radiolocation US108 5.479 US128 NG50	Private Land Mobile (90) Amateur Radio (97)
10.45-10.5 RADIOLOCATION Amateur Amateur-satellite 5.481				10.45-10.5 Amateur Amateur-satellite Radiolocation US108 US128 NG50	
10.5-10.55 FIXED MOBILE Radiolocation	10.5-10.55 FIXED MOBILE RADIOLOCATION		10.5-10.55 RADIOLOCATION US59		Private Land Mobile (90)
10.55-10.6 FIXED MOBILE except aeronautical mobile Radiolocation			10.55-10.6	10.55-10.6 FIXED	Fixed Microwave (101)
10.6-10.68 EARTH EXPLORATION-SATELLITE (passive) FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY SPACE RESEARCH (passive) Radiolocation 5.149 5.482 5.482A			10.6-10.68 EARTH EXPLORATION-SATELLITE (passive) SPACE RESEARCH (passive) US130 US131 US482	10.6-10.68 EARTH EXPLORATION-SATELLITE (passive) FIXED US482 SPACE RESEARCH (passive) US130 US131	
10.68-10.7 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340 5.483			10.68-10.7 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY US74 SPACE RESEARCH (passive) US131 US246		
10.7-11.7 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 5.484A (Earth-to-space) 5.484 MOBILE except aeronautical mobile	10.7-11.7 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 5.484A MOBILE except aeronautical mobile		10.7-11.7 US131 US211	10.7-11.7 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 US131 US211 NG52 NGXX1	Satellite Communications (25) Fixed Microwave (101)
11.7-12.5 FIXED MOBILE except aeronautical mobile BROADCASTING BROADCASTING-SATELLITE 5.492 5.487 5.487A	11.7-12.1 FIXED 5.486 FIXED-SATELLITE (space-to-Earth) 5.484A 5.488 Mobile except aeronautical mobile 5.485 12.1-12.2 FIXED-SATELLITE (space-to-Earth) 5.484A 5.488 5.485 5.489	11.7-12.2 FIXED MOBILE except aeronautical mobile BROADCASTING BROADCASTING-SATELLITE 5.492 5.487 5.487A	11.7-12.2	11.7-12.2 FIXED-SATELLITE (space-to-Earth) 5.485 5.488 NG55 NG143	Satellite Communications (25)

International Table			United States Table		FCC Rule Part(s)
Region 1 Table	Region 2 Table	Region 3 Table	Federal Table	Non-Federal Table	
(See previous page)	12.2-12.7 FIXED MOBILE except aeronautical mobile BROADCASTING BROADCASTING-SATELLITE 5.492 5.487A 5.488 5.490	12.2-12.5 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile BROADCASTING 5.484A 5.487	12.2-12.75	12.2-12.7 FIXED BROADCASTING-SATELLITE 5.487A 5.488 5.490	Satellite Communications (25) Fixed Microwave (101)
12.5-12.75 FIXED-SATELLITE (space-to-Earth) 5.484A (Earth-to-space) 5.494 5.495 5.496	12.7-12.75 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE except aeronautical mobile	12.5-12.75 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A MOBILE except aeronautical mobile BROADCASTING-SATELLITE 5.493		12.7-12.75 FIXED NG118 FIXED-SATELLITE (Earth-to-space) MOBILE	TV Broadcast Auxiliary (74F) Cable TV Relay (78) Fixed Microwave (101)
12.75-13.25 FIXED FIXED-SATELLITE (Earth-to-space) 5.441 MOBILE Space research (deep space) (space-to-Earth)			12.75-13.25 US251	12.75-13.25 FIXED NG118 FIXED-SATELLITE (Earth-to-space) 5.441 NG52 NGXX1 MOBILE US251 NG53	Satellite Communications (25) TV Broadcast Auxiliary (74F) Cable TV Relay (78) Fixed Microwave (101)
13.25-13.4 EARTH EXPLORATION-SATELLITE (active) AERONAUTICAL RADIONAVIGATION 5.497 SPACE RESEARCH (active) 5.498A 5.499			13.25-13.4 EARTH EXPLORATION-SATELLITE (active) AERONAUTICAL RADIONAVIGATION 5.497 SPACE RESEARCH (active) 5.498A	13.25-13.4 AERONAUTICAL RADIONAVIGATION 5.497 Earth exploration-satellite (active) Space research (active)	Aviation (87)
13.4-13.75 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH 5.501A Standard frequency and time signal-satellite (Earth-to-space) 5.499 5.500 5.501 5.501B			13.4-13.75 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION G59 SPACE RESEARCH 5.501A Standard frequency and time signal-satellite (Earth-to-space) 5.501B	13.4-13.75 Earth exploration-satellite (active) Radiolocation Space research Standard frequency and time signal-satellite (Earth-to-space)	Private Land Mobile (90)
13.75-14 FIXED-SATELLITE (Earth-to-space) 5.484A RADIOLOCATION Earth exploration-satellite Standard frequency and time signal-satellite (Earth-to-space) Space research 5.499 5.500 5.501 5.502 5.503			13.75-14 RADIOLOCATION G59 Standard frequency and time signal-satellite (Earth-to-space) Space research US337 US356 US357	13.75-14 FIXED-SATELLITE (Earth-to-space) US337 Standard frequency and time signal-satellite (Earth-to-space) Space research Radiolocation US356 US357	Satellite Communications (25) Private Land Mobile (90)
14-14.25 FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B RADIONAVIGATION 5.504 Mobile-satellite (Earth-to-space) 5.504B 5.504C 5.506A Space research			14-14.2 Space research US133	14-14.2 FIXED-SATELLITE (Earth-to-space) NG55 Mobile-satellite (Earth-to-space) Space research US133	Satellite Communications (25)

	17.8-18.1 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A (Earth-to-space) 5.516 MOBILE 5.519		17.8-18.3 FIXED-SATELLITE (space-to-Earth) US334 G117 US519	17.8-18.3 FIXED Fixed-satellite (space-to-Earth) NGXX2 NGXX3 US334 US519	Satellite Communications (25) TV Broadcast Auxiliary (74F) Cable TV Relay (78) Fixed Microwave (101)
18.1-18.4 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A 5.516B (Earth-to-space) 5.520 MOBILE 5.519 5.521			18.3-18.6 FIXED-SATELLITE (space-to-Earth) US334 G117 US139	18.3-18.6 FIXED-SATELLITE (space-to-Earth) NGXX3 US139 US334	Satellite Communications (25)
18.4-18.6 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A 5.516B MOBILE					
18.6-18.8 EARTH EXPLORATION-SATELLITE (passive) FIXED FIXED-SATELLITE (space-to-Earth) 5.522B MOBILE except aeronautical mobile Space research (passive) 5.522A 5.522C	18.6-18.8 EARTH EXPLORATION-SATELLITE (passive) FIXED FIXED-SATELLITE (space-to-Earth) 5.516B 5.522B MOBILE except aeronautical mobile SPACE RESEARCH (passive) 5.522A	18.6-18.8 EARTH EXPLORATION-SATELLITE (passive) FIXED FIXED-SATELLITE (space-to-Earth) 5.522B MOBILE except aeronautical mobile Space research (passive) 5.522A	18.6-18.8 EARTH EXPLORATION-SATELLITE (passive) FIXED-SATELLITE (space-to-Earth) US255 US334 G117 SPACE RESEARCH (passive) US139 US254	18.6-18.8 EARTH EXPLORATION-SATELLITE (passive) FIXED-SATELLITE (space-to-Earth) US255 NG164 SPACE RESEARCH (passive) US139 US254 US334	
18.8-19.3 FIXED FIXED-SATELLITE (space-to-Earth) 5.516B 5.523A MOBILE			18.8-20.2 FIXED-SATELLITE (space-to-Earth) US334 G117	18.8-19.3 FIXED-SATELLITE (space-to-Earth) NG165 US139 US334	
19.3-19.7 FIXED FIXED-SATELLITE (space-to-Earth) (Earth-to-space) 5.523B 5.523C 5.523D 5.523E MOBILE				19.3-19.7 FIXED FIXED-SATELLITE (space-to-Earth) NG166 NGXX2 NGXX3 US334	Satellite Communications (25) TV Broadcast Auxiliary (74F) Cable TV Relay (78) Fixed Microwave (101)
19.7-20.1 FIXED-SATELLITE (space-to-Earth) 5.484A 5.516B Mobile-satellite (space-to-Earth) 5.524	19.7-20.1 FIXED-SATELLITE (space-to-Earth) 5.484A 5.516B MOBILE-SATELLITE (space-to-Earth) 5.524 5.525 5.526 5.527 5.528 5.529	19.7-20.1 FIXED-SATELLITE (space-to-Earth) 5.484A 5.516B Mobile-satellite (space-to-Earth) 5.524		19.7-20.2 FIXED-SATELLITE (space-to-Earth) NGXX3 MOBILE-SATELLITE (space-to-Earth)	Satellite Communications (25)
20.1-20.2 FIXED-SATELLITE (space-to-Earth) 5.484A 5.516B MOBILE-SATELLITE (space-to-Earth) 5.524 5.525 5.526 5.527 5.528			US139	5.525 5.526 5.527 5.528 5.529 US334	
20.2-21.2 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Standard frequency and time signal-satellite (space-to-Earth) 5.524			20.2-21.2 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Standard frequency and time signal-satellite (space-to-Earth) G117	20.2-21.2 Standard frequency and time signal-satellite (space-to-Earth)	

Table of Frequency Allocations	27-34.7 GHz (SHF/EHF)				Page 55
International Table			United States Table		FCC Rule Part(s)
Region 1 Table	Region 2 Table	Region 3 Table	Federal Table	Non-Federal Table	
27-27.5 FIXED INTER-SATELLITE 5.536 MOBILE	27-27.5 FIXED FIXED-SATELLITE (Earth-to-space) INTER-SATELLITE 5.536 5.537 MOBILE		27-27.5 FIXED INTER-SATELLITE 5.536 MOBILE	27-27.5 Inter-satellite 5.536	RF Devices (15)
27.5-28.5 FIXED 5.537A FIXED-SATELLITE (Earth-to-space) 5.484A 5.516B 5.539 MOBILE 5.538 5.540			27.5-30	27.5-28.35 FIXED FIXED-SATELLITE (Earth-to-space) NGXX3 MOBILE	RF Devices (15) Satellite Communications (25) Upper Microwave Flexible Use (30) Fixed Microwave (101)
28.5-29.1 FIXED FIXED-SATELLITE (Earth-to-space) 5.484A 5.516B 5.523A 5.539 MOBILE Earth exploration-satellite (Earth-to-space) 5.541 5.540				28.35-29.1 FIXED-SATELLITE (Earth-to-space) NG165 NGXX3	Satellite Communications (25)
29.1-29.5 FIXED FIXED-SATELLITE (Earth-to-space) 5.516B 5.523C 5.523E 5.535A 5.539 5.541A MOBILE Earth exploration-satellite (Earth-to-space) 5.541 5.540				29.1-29.25 FIXED FIXED-SATELLITE (Earth-to-space) NG166 MOBILE	RF Devices (15) Satellite Communications (25) Fixed Microwave (101)
				29.25-29.5 FIXED-SATELLITE (Earth-to-space) NGXX3 NGXX4	Satellite Communications (25)
29.5-29.9 FIXED-SATELLITE (Earth-to-space) 5.484A 5.516B 5.539 Earth exploration-satellite (Earth-to-space) 5.541 Mobile-satellite (Earth-to-space) 5.540 5.542	29.5-29.9 FIXED-SATELLITE (Earth-to-space) 5.484A 5.516B 5.539 MOBILE-SATELLITE (Earth-to-space) Earth exploration-satellite (Earth-to-space) 5.541 5.525 5.526 5.527 5.529 5.540 5.542	29.5-29.9 FIXED-SATELLITE (Earth-to-space) 5.484A 5.516B 5.539 Earth exploration-satellite (Earth-to-space) 5.541 Mobile-satellite (Earth-to-space) 5.540 5.542		29.5-30 FIXED-SATELLITE (Earth-to-space) NGXX3 MOBILE-SATELLITE (Earth-to-space) 5.525 5.526 5.527 5.529 5.543	Satellite Communications (25)
29.9-30 FIXED-SATELLITE (Earth-to-space) 5.484A 5.516B 5.539 MOBILE-SATELLITE (Earth-to-space) Earth exploration-satellite (Earth-to-space) 5.541 5.543 5.525 5.526 5.527 5.538 5.540 5.542					
30-31 FIXED-SATELLITE (Earth-to-space) 5.338A MOBILE-SATELLITE (Earth-to-space) Standard frequency and time signal-satellite (space-to-Earth) 5.542			30-31 FIXED-SATELLITE (Earth-to-space) MOBILE-SATELLITE (Earth-to-space) Standard frequency and time signal-satellite (space-to-Earth) G117	30-31 Standard frequency and time signal-satellite (space-to-Earth)	

NG164 The use of the band 18.6–18.8 GHz by the fixed-satellite service (space-to-Earth) is limited to geostationary-satellite networks.

NG165 In the bands 18.8–19.3 GHz (space-to-Earth) and 28.6–29.1 GHz

(Earth-to-space), geostationary-satellite networks in the fixed-satellite service shall not cause harmful interference to, or claim protection from, non-geostationary-satellite systems in the fixed-satellite service.

NG166 The use of the bands 19.4–19.6 GHz (space-to-Earth) and 29.1–29.25 GHz (Earth-to-space) by the fixed-satellite service is limited to feeder links for non-geostationary-satellite systems in the mobile-satellite service.

* * * * *

NGXX1 The use of the bands 10.7–11.7 GHz (space-to-Earth) and 12.75–13.25 GHz (Earth-to-space) by non-geostationary-satellite systems in the fixed-satellite service is limited to communications with individually licensed earth stations.

NGXX2 The use of the bands 17.8–18.3 GHz, 19.3–19.4 GHz, and 19.6–19.7 GHz by the fixed-satellite service (space-to-Earth) is limited to communications with individually licensed earth stations. Ubiquitously deployed user terminals are not permitted.

NGXX3 In the bands 17.8–18.6 GHz (space-to-Earth), 19.3–19.4 GHz (space-to-Earth), 19.6–20.2 GHz (space-to-Earth), 27.5–28.6 GHz (Earth-to-space), and 29.3–30 GHz (Earth-to-space), non-geostationary-satellite systems in the fixed-satellite service shall not cause unacceptable interference to, or claim protection from, geostationary-satellite networks in the fixed-satellite service.

A non-geostationary-satellite system operating within the applicable equivalent power flux-density limits set forth in § 25.208 of this chapter shall not be considered to cause unacceptable interference to any geostationary-satellite network in the fixed-satellite service.

NGXX4 The use of the band 29.25–29.3 GHz by the fixed-satellite service (Earth-to-space) is limited to geostationary-satellite networks and to feeder links for non-geostationary-satellite systems in the mobile-satellite service.

* * * * *

PART 25—SATELLITE COMMUNICATIONS

■ 3. The authority citation for part 25 continues to read as follows: Authority: Interprets or applies 47 U.S.C. 154, 301, 302, 303, 307, 309, 310, 319, 332, 605, and 721, unless otherwise noted.

■ 4. In § 25.108, revise paragraph (a), redesignate paragraphs (b)(2) through (b)(5) as paragraphs (b)(3) through (b)(6) and add new paragraph (b)(2) to read as follows:

§ 25.108 Incorporation by Reference.

(a) Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the Federal Communications Commission, 445 12th Street SW., Reference Information Center, Room CY–A257, Washington, DC 20554, 202–418–0270, and is available from the sources listed below. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(b) * * *

(2) ITU Radio Regulations, Volume 2: Appendices, Appendix 4, ''Consolidated list and tables of characteristics for use in the application of the procedures of Chapter III,'' Annex 2, ''Characteristics of satellite networks, earth stations or radio astronomy stations,'' Section A.4, ''Orbital Information,'' Edition of 2012, *http://www.itu.int/pub/R–REG–RR–2012.* Incorporation by reference approved for § 25.146.

* * * * *

■ 5. In § 25.114, revise paragraph (d)(12) to read as follows:

§ 25.114 Applications for space station authorizations.

* * * * *

(d) * * *

(12) The information required by § 25.146, if the application is for an NGSO FSS system authorization in the 10.7–14.5 GHz, 17.8–18.6 GHz, 18.8–19.4 GHz, 19.6–20.2 GHz, 27.5–29.1 GHz, or 29.3–30 GHz bands.

* * * * *

§ 25.142 [Amended]

■ 6. In § 25.142, remove paragraphs (c) and (d).

§ 25.143 [Amended]

■ 7. Remove § 25.143(d).

§ 25.145 [Removed]

■ 8. Remove § 25.145.

■ 9. In § 25.146, revise the section heading, the first sentence in paragraph (a) introductory text, the first sentence in paragraph (b) introductory text, and paragraphs (b)(1)(v), (b)(2), (c), (e), and (i) to read as follows:

§ 25.146 Licensing and operating provisions for NGSO FSS satellite systems in the 10.7–14.5 GHz, 17.8–18.6 GHz, 18.8–19.4 GHz, 19.6–20.2 GHz, 27.5–29.1 GHz, or 29.3–30 GHz bands.

(a) A comprehensive technical showing must be submitted for the proposed NGSO FSS system in the 10.7–14.5 GHz, 17.8–18.6 GHz, 18.8–19.4 GHz, 19.6–20.2 GHz, 27.5–29.1 GHz, or 29.3–30 GHz bands. * * *

* * * * *

(b) Ninety days prior to the initiation of service to the public, the NGSO FSS system licensee must submit a comprehensive technical showing for the NGSO FSS system. * * *

(1) * * *

(v) Provide the result, the cumulative probability distribution function of EPFD, of the execution of the verification computer program described in paragraph (b)(1)(iii) of this section by using only the input parameters contained in paragraphs (b)(1)(i) and (b)(1)(iv) of this section for each of the submitted test points provided by the Commission. These test points are based on information from U.S.-licensed GSO FSS and Broadcasting-Satellite Service operators in the 10.7–14.5 GHz, 17.8–18.6 GHz, 18.8–19.4 GHz, 19.6–20.2 GHz, 27.5–29.1 GHz, and 29.3–30 GHz bands. Each U.S.-licensed GSO FSS and Broadcasting-Satellite Service operator may submit up to 10 test points for this section containing the latitude, longitude, altitude, azimuth, elevation angle, antenna size, efficiency to be used by NGSO FSS licensees during the upcoming year.

(2) *Operational equivalent power flux-density, space-to-Earth direction, (operational EPFD*$_{down}$) limits. Using the information contained in (b)(1) of this section plus the measured space station antenna patterns, provide the result of the execution of the computer simulation for the anticipated in-line operational EPFD$_{down}$ levels for each of the submitted test points provided by the Commission. Submitted test points are based on inputs from U.S.-licensed GSO FSS and Broadcasting-Satellite Service operators in the 10.7–14.5 GHz, 17.8–18.6 GHz, 18.8–19.4 GHz, 19.6–20.2 GHz, 27.5–29.1 GHz, and 29.3–30 GHz bands. Each U.S.-licensed GSO FSS and Broadcasting-Satellite Service operator may submit up to 10 test points for this section containing the latitude, longitude, altitude, azimuth, elevation angle, antenna size, efficiency to be used by NGSO FSS licensees during the upcoming year.

(c) Applicants for NGSO FSS system authorizations proposing space-to-Earth transmissions in the 10.7–11.7 GHz,

12.5–12.75 GHz, or 17.8–18.4 GHz frequency bands must also demonstrate, in accordance with ITU–R S.1503–2 (incorporated by reference, *see* § 25.108), that the $EPFD_{is}$ limits in § 25.208(f) will be met.

* * * * *

(e) An NGSO FSS system licensee operating a system in compliance with the limits specified in § 25.208(g), (i), (j), (k), (l), and (m) must not claim protection from GSO FSS and BSS networks operating in accordance with this part.

* * * * *

(i) NGSO FSS applicants must also provide the following:

(1) Sufficient information on the NGSO FSS system characteristics to properly model the system in computer sharing simulations, including, at a minimum, NGSO hand-over and satellite switching strategies, NGSO satellite antenna gain patterns, and NGSO earth station antenna gain patterns. In particular, except for operation in the 18.8–19.3 GHz or 28.6–29.1 GHz bands, each NGSO FSS applicant must explain the switching protocols it will use to avoid transmitting while passing through the geostationary satellite orbit arc, or provide an explanation as to how the PFD limits in § 25.208 will be met without using geostationary-satellite orbit arc avoidance. In addition, each NGSO FSS applicant must provide the orbital parameters contained in Section A.4 of Annex 2 to Appendix 4 of the ITU Radio Regulations (incorporated by reference, *see* § 25.108). Further, each NGSO FSS applicant must provide a sufficient technical showing to demonstrate that the proposed NGSO system meets the applicable PFD limits in § 25.208.

(2) For operation in the 10.7 GHz-14.5 GHz, 18.8–19.3 GHz, or 28.6–29.1 GHz bands, a demonstration that the proposed system is capable of providing FSS on a continuous basis throughout the fifty states, Puerto Rico and the U.S. Virgin Islands.

§ 25.156 [Amended]

■ 10. Remove the first sentence of § 25.156(d)(5).

■ 11. Revise § 25.157(b) to read as follows:

§ 25.157 Consideration of applications for NGSO-like satellite operation.

* * * * *

(b)(1) The procedures prescribed in this section do not apply to an application for authority to operate a replacement space station(s) that meets the relevant criteria in § 25.165(e)(1) and (2) and that will be launched before the space station(s) to be replaced is retired from service or within a reasonable time after loss of a space station during launch or due to premature failure in orbit.

(2) The procedures in paragraphs (e), (f), and (g) of this section do not apply to an application granted with a condition to share spectrum pursuant to § 25.261.

* * * * *

■ 12. Revise § 25.161(a) to read as follows:

§ 25.161 Automatic termination of station authorization.

* * * * *

(a)(1) The failure to meet an applicable milestone specified in § 25.164(a) and/or (b), if no authorized space station is functional in orbit;

(2) The failure to meet an applicable milestone specified in § 25.164(b)(1) or (b)(2), if at least one authorized space station is functional in orbit, which failure will result in the termination of authority for the number, type, and orbital parameters of space stations not in orbit as of the milestone date; or

(3) The failure to meet any other milestone or construction requirement imposed as a condition of authorization. In the case of a space station authorization when at least one authorized space station is functional in orbit, however, such termination will be with respect to only the authorization for any space stations not in orbit as of the milestone date.

* * * * *

■ 13. In § 25.164, revise paragraphs (a), (b), and (g) to read as follows:

§ 25.164 Milestones.

(a) The recipient of an initial license for a GSO space station, other than a DBS space station, SDARS space station, or replacement space station as defined in § 25.165(e), must launch the space station, position it in its assigned orbital location, and operate it in accordance with the station authorization no later than five years after the grant of the license, unless a different schedule is established by Title 47, Chapter I, or the Commission.

(b)(1) The recipient of an initial authorization for an NGSO satellite system, other than an SDARS system, must launch 75 percent of the maximum number of space stations authorized for service, place them in their assigned orbits, and operate them in accordance with the station authorization no later than six years after the grant of the authorization, unless a different schedule is established by Title 47, Chapter I, or the Commission. This paragraph does not apply to replacement NGSO space stations as defined in § 25.165(e).

(2) A licensee that satisfies the requirement in paragraph (b)(1) of this section must launch the remaining space stations necessary to complete its authorized service constellation, place them in their assigned orbits, and operate each of them in accordance with the authorization no later than nine years after the grant of the authorization.

* * * * *

(g) Licensees of satellite systems that include both NGSO satellites and GSO satellites must meet the requirement in paragraph (a) of this section with respect to the GSO satellite(s) and the applicable requirements in paragraph (b) of this section with respect to the NGSO satellites.

* * * * *

■ 14. In § 25.165, revise paragraphs (c) and (d) to read as follows:

§ 25.165 Surety bonds.

* * * * *

(c) A licensee will be considered to be in default with respect to a bond filed pursuant to paragraph (a) of this section if it surrenders the license before meeting the applicable milestone requirement(s) in § 25.164(a) and/or (b)(1) or if it fails to satisfy any such milestone.

(d) A licensee will be relieved of its bond obligation under paragraph (a) of this section upon a Commission finding that the licensee has satisfied the applicable milestone requirement(s) in § 25.164(a) and/or (b)(1) for the authorization.

* * * * *

■ 15. Revise § 25.202(a)(1) to read as follows:

§ 25.202 Frequencies, frequency tolerance, and emission limits.

(a)(1) In addition to the frequency-use restrictions set forth in § 2.106 of this chapter, the following restrictions apply:

(i) In the 27.5–28.35 GHz band, the FSS (Earth-to-space) is secondary to the Upper Microwave Flexible Use Service authorized pursuant to part 30 of this chapter, except for FSS operations associated with earth stations authorized pursuant to § 25.136.

(ii) Use of the 37.5–40 GHz band by the FSS (space-to-Earth) is limited to individually licensed earth stations. Earth stations in this band must not be ubiquitously deployed and must not be used to serve individual consumers.

* * * * *

■ 16. In § 25.208, revise the section heading, paragraph (c) introductory text, the first sentence of paragraph (e), and

paragraphs (f), (g), (h), (j), and (k) to read as follows:

§ 25.208 Power flux-density limits.

* * * * *

(c) For a GSO space station in the 17.7–19.7 GHz, 22.55–23.55 GHz, or 24.45–24.75 GHz bands, or for an NGSO space station in the 22.55–23.55 GHz or 24.45–24.75 GHz bands, the PFD at the Earth's surface produced by emissions for all conditions and for all methods of modulation must not exceed the following values:

* * * * *

(e) For an NGSO space station, the PFD at the Earth's surface produced by emissions in the 17.8–18.6 GHz or 18.8–19.7 GHz bands, for all conditions and for all methods of modulation, must not exceed the following values, unless the aggregate PFD produced by the entire authorized constellation at any point at the Earth's surface does not exceed -115 ((dBW/m²)/MHz):

* * * * *

(f) The EPFD produced at any point in the geostationary-satellite orbit by emissions from all the space stations in an NGSO FSS system ($EPFD_{is}$), in the frequency bands and Regions listed below, for all conditions and for all methods of modulation, must not exceed the given limits for the specified percentages of time. These limits relate to the EPFD that would be obtained under free-space propagation conditions into a reference antenna and in the reference bandwidth specified below, for all pointing directions towards the Earth's surface visible from any given location in the geostationary-satellite orbit.

LIMITS TO THE $EPFD_{IS}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [1]
10.7–11.7, 12.5–12.75	−160	100	40	4° Recommendation ITU–R S.672–4, *Ls* = −20
17.8–18.4, 19.3–19.4, 19.6–19.7	−160	100	40	4° Recommendation ITU–R S.672–4, *Ls* = −20

[1] In this Table, the reference pattern of Recommendation ITU–R S. 672.4 must be used only for the calculation of interference from NGSO FSS systems into GSO FSS networks. In applying the equations of Annex 1 to Recommendation ITU–R S.672–4, the parabolic main beam equation must start at zero.

(g) In the frequency bands and Regions listed in Tables IG through 4G below, the single-entry EPFD in the space-to-Earth direction ($EPFD_{down}$) at any point on the Earth's surfaceproduced by emissions from all co-frequency space stations of a single NGSO FSS system must not exceed limits for the given percentages of time.

TABLE 1G—LIMITS TO THE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [1 2]

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [3]
10.7–11.7 in all Regions; 11.7–12.2 in Region 2; 12.2–12.5 in Region 3; and 12.5–12.75 in Regions 1 and 3.	−175.4	0	40	60 cm Recommendation ITU–R S.1428–1.
	−174	90		
	−170.8	99		
	−165.3	99.73		
	−160.4	99.991		
	−160	99.997		
	−160	100		
	−181.9	0	40	1.2 m Recommendation ITU–R S.1428–1.
	−178.4	99.5		
	−173.4	99.74		
	−173	99.857		
	−164	99.954		
	−161.6	99.984		
	−161.4	99.991		
	−160.8	99.997		
	−160.5	99.997		
	−160	99.9993		
	−160	100		

TABLE 1G—LIMITS TO THE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [1] [2]—Continued

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [3]
	−190.45	0	40	3 m Recommendation ITU–R S.1428–1.
	−189.45	90		
	−187.45	99.5		
	−182.4	99.7		
	−182	99.855		
	−168	99.971		
	−164	99.988		
	−162	99.995		
	−160	99.999		
	−160	100		
	−195.45	0	40	10 m Recommendation ITU–R S.1428–1.
	−195.45	99		
	−190	99.65		
	−190	99.71		
	−172.5	99.99		
	−160	99.998		
	−160	100		

[1] In addition to the limits shown in Table 1G, the limits shown in Table 2G apply to all antenna sizes greater than 60 cm in the frequency bands listed in Table 1G.

[2] For each reference antenna diameter, the limit consists of the complete curve on a plot which is linear in decibels for the $EPFD_{down}$ levels and logarithmic for the time percentages, with straight lines joining the data points.

[3] The earth station antenna reference patterns are to be used only for the calculation of interference from NGSO FSS systems into GSO FSS networks.

TABLE 2G—LIMITS TO THE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS AT CERTAIN LATITUDES

100% of the time $EPFD_{down}$ (dB(W/(m²/40 kHz)))	Latitude (North or South in degrees)
−160	0 <| Latitude | ≤ 57.5.
−160 + 3.4(57.5 − | Latitude |)/4	57.5 <| Latitude | ≤ 63.75.
−165.3	63.75 ≤| Latitude |.

TABLE 3G—LIMITS TO THE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [2] [4]

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [3]
17.8–18.6	−175.4	0	40	1 m Recommendation ITU–R S.1428–1.
	−175.4	90		
19.3–19.4	−172.5	99		
	−167	99.714		
19.6–19.7	−164	99.971		
	−164	100		
	−161.4	0	1000	
	−161.4	90		
	−158.5	99		
	−153	99.714		
	−150	99.971		
	−150	100		
	−178.4	0	40	2 m Recommendation ITU–R S.1428–1.
	−178.4	99.4		
	−171.4	99.9		
	−170.5	99.913		
	−166	99.971		
	−164	99.977		
	−164	100		
	−164.4	0	1000	
	−164.4	99.4		
	−157.4	99.9		
	−156.5	99.913		

TABLE 3G—LIMITS TO THE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [2 4]—Continued

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [3]
	−152	99.971		
	−150	99.977		
	−150	100		
	−185.4	0	40	5 m Recommendation ITU–R S.1428–1.
	−185.4	99.8		
	−180	99.8		
	−180	99.943		
	−172	99.943		
	−164	99.998		
	−164	100		
	−171.4	0	1000	
	−171.4	99.8		
	−166	99.8		
	−166	99.943		
	−158	99.943		
	−150	99.998		
	−150	100		

[4] An NGSO satellite system must meet the limits of Table 3G in both the 40 kHz and the 1 MHz reference bandwidths.

TABLE 4G—LIMITS TO THE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [2 4]

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [3]
19.7–20.2	−187.4	0	40	70 cm Recommendation ITU–R S.1428–1.
	−182	71.429		
	−172	97.143		
	−154	99.983		
	−154	100		
	−173.4	0	1000	
	−168	71.429		
	−158	97.143		
	−140	99.983		
	−140	100		
	−190.4	0	40	90 cm Recommendation ITU–R S.1428–1.
	−181.4	91		
	−170.4	99.8		
	−168.6	99.8		
	−165	99.943		
	−160	99.943		
	−154	99.997		
	−154	100		
	−176.4	0	1000	
	−167.4	91		
	−156.4	99.8		
	−154.6	99.8		
	−151	99.943		
	−146	99.943		
	−140	99.997		
	−140	100		
	−196.4	0	40	2.5 m Recommendation ITU–R S.1428–1.
	−162	99.98		
	−154	99.99943		
	−154	100		
	−182.4	0	1000	
	−148	99.98		
	−140	99.99943		
	−140	100		

TABLE 4G—LIMITS TO THE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [2 4]—Continued

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [3]
	−200.4	0	40	5 m Recommendation ITU–R S.1428–1.
	−189.4	90		
	−187.8	94		
	−184	97.143		
	−175	99.886		
	−164.2	99.99		
	−154.6	99.999		
	−154	99.9992		
	−154	100		
	−186.4	0	1000	
	−175.4	90		
	−173.8	94		
	−170	97.143		
	−161	99.886		
	−150.2	99.99		
	−140.6	99.999		
	−140	99.9992		
	−140	100		

Note to paragraph (g): These limits relate to the EPFD that would be obtained under free-space propagation conditions for all conditions and for all methods of modulation. (h) In the frequency bands and Regions listed in Tables 1H through 4H below, the aggregate EPFD in the space-to-Earth direction ($EPFD_{down}$) at any point on the Earth's surface produced by emissions from all co-frequency space stations of all NGSO FSS systems must not exceed the specified limits for the given percentages of time.

TABLE 1H—LIMITS ON AGGREGATE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [1 2]

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [3]
10.7–11.7 in all Regions; 11.7–12.2 in Region 2; 12.2–12.5 in Region 3; and 12.5–12.75 in Regions 1 and 3.	−170	0	40	60 cm Recommendation ITU–R S.1428.
	−168.6	90		
	−165.3	99		
	−160.4	99.97		
	−160	99.99		
	−160	100		
	−176.5	0	40	1.2 m Recommendation ITU–R S.1428.
	−173	99.5		
	−164	99.84		
	−161.6	99.945		
	−164.4	99.97		
	−160.8	99.99		
	−160.5	99.99		
	−160	99.9975		
	−160	100		
	−185	0	40	3 m Recommendation ITU–R S.1428.
	−184	90		
	−182	.....		
	−168	99.5		
	−164	99.9		
	−162	99.96		
	−160	99.982		
	−160	99.997		
		100		

TABLE 1H—LIMITS ON AGGREGATE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [1] [2]—Continued

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [3]
	−190	0	40	10 m Recommendation ITU–R S.1428.
	−190	99		
	−166	99.99		
	−160	99.998		
	−160	100		

[1] In addition to the limits shown in Table 1H, the aggregate $EPFD_{down}$ limits shown in Table 2H apply to all antenna sizes greater than 60 cm in the frequency bands listed in Table 1H.

[2] For each reference antenna diameter, the limit consists of the complete curve on a plot which is linear in decibels for the $EPFD_{down}$ levels and logarithmic for the time percentages, with straight lines joining the data points.

[3] The earth station antenna reference patterns are to be used only for the calculation of interference from NGSO FSS systems into GSO FSS networks.

TABLE 2H— LIMITS ON AGGREGATE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS AT CERTAIN LATITUDES

100% of the time $EPFD_{down}$ (dB(W/(m²/40 kHz)))	Latitude (North or South in degrees)
−160	0 <| Latitude | ≤ 57.5.
−160 + 3.4(57.5 − | Latitude |)/4	57.5 <| Latitude | ≤ 63.75.
−165.3	63.75 ≤| Latitude |.

TABLE 3H—LIMITS ON AGGREGATE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [2] [4]

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [3]
17.8–18.6	−170	0	40	1 m Recommendation ITU–R S.1428.
	−170	90		
19.3–19.4	−164	99.9		
	−164	100		
19.6–19.7	−156	0	1000	
	−156	90		
	−150	99.9		
	−150	100		
	−173	0	40	2 m Recommendation ITU–R S.1428.
	−173	99.4		
	−166	99.9		
	−164	99.92		
	−164	100		
	−159	0	1000	
	−159	99.4		
	−152	99.9		
	−150	99.92		
	−150	100		
	−180	0	40	5 m Recommendation ITU–R S.1428.
	−180	99.8		
	−172	99.8		
	−164	99.992		
	−164	100		
	−166	0	1000	
	−166	99.8		
	−158	99.8		
	−150	99.992		
	−150	100		

[4] An NGSO system must meet the limits of this Table in both the 40 kHz and the 1 MHz reference bandwidths.

TABLE 4H—LIMITS ON AGGREGATE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BAND [2 4]

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna diameter and reference radiation pattern [3]
19.7–20.2	−182	0	40	70 cm Recommendation ITU–R S.1428.
	−172	90		
	−154	99.94		
	−154	100		
	−168	0	1000	
	−158	90		
	−140	99.94		
	−140	100		
	−185	0	40	90 cm Recommendation ITU–R S.1428.
	−176	91		
	−165	99.8		
	−160	99.8		
	−154	99.99		
	−154	100		
	−171	0	1000	
	−162	91		
	−151	99.8		
	−146	99.8		
	−140	99.99		
	−140	100		
	−191	0	40	2.5 m Recommendation ITU–R S.1428
	−162	99.933		
	−154	99.998		
	−154	100		
	−177	0	1000	
	−148	99.933		
	−140	99.998		
	−140	100		
	−195	0	40	5 m Recommendation ITU–R S.1428.
	−184	90		
	−175	99.6		
	−161	99.984		
	−154	99.9992		
	−154	100		
	−181	0	1000	
	−170	90		
	−161	99.6		
	−147	99.984		
	−140	99.9992		
	−140	100		

Note to paragraph (h): These limits relate to the EPFD, which would be obtained under free-space propagation conditions, for all conditions and for all methods of modulation.

* * * * *

(j) In the frequency bands and Regions listed in Tables 1J and 2J, the operational EPFD in the space-to-Earth direction (operational $EPFD_{down}$) at any point on the Earth's surface, produced by actual operational emissions from the in-line co-frequency space station of an NGSO FSS system, must never exceed the specified operational limits:

TABLE 1J—OPERATIONAL LIMITS TO THE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [1]

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m²))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	GSO system receive earth station antenna gain (dBi)	Orbital inclination of the GSO satellite (degrees)
10.7–11.7 in all Regions	−163	100	40	3	≤2.5
11.7–12.2 in Region 2	−166			6	
12.2–12.5 in region 3, and	−167.5			9	
12.5–12.75 in Region 1 and 3 (prior to 31 December 2005).	−169.5			≥18	

TABLE 1J—OPERATIONAL LIMITS TO THE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [1]—Continued

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m^2))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	GSO system receive earth station antenna gain (dBi)	Orbital inclination of the GSO satellite (degrees)
	−160	100	40	3	≥2.5 and ≤4.5.
	−163			6	
	−164.5			9	
	−166.5			≥18	
10.7–11.7 in all Regions;	−161.25	100	40	3	≤2.5.
11.7–12.2 in Region 2;	−164	.....	.....	6	
12.2–12.5 in Region 3;	−165.5	.....	.....	9	
and 12.5–12.75 in Regions 1 and 3 (from 31 December 2005)	−167.5	.....	.....	≥18	
	−158.25	100	40	3	≥2.5 and ≤4.5.
	−161			6	
	−162.5			9	
	−164.5			≥18	

[1] The operational limits on the $EPFD_{down}$ radiated by NGSO FSS systems must be the values given in Table 2G or this table, whichever are the more stringent.

[2] For antenna diameters between the values given in this table, the limits are given by linear interpolation using a linear scale for $EPFD_{down}$ in decibels and a logarithmic scale for antenna diameter in meters.

TABLE 2J—OPERATIONAL LIMITS TO THE $EPFD_{DOWN}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS [3]

Frequency band (GHz)	$EPFD_{down}$ (dB(W/m^2))	Percentage of time during which $EPFD_{down}$ may not be exceeded	Reference bandwidth (kHz)	GSO system receive earth station antenna gain (dBi)	Orbital inclination of the GSO satellite (degrees)
19.7–20.2	−157	100	40	≥49	≤2.5
	−157	100	40	[3] ≥43	≤2.5
	−155	100	40	≥49	>2.5 and ≤4.5
19.7–20.2	−143	100	1000	≥49	≤2.5
	−143	100	1000	[3] ≥43≤	≤2.5
	−141	100	1000	≥49	>2.5 and ≤4.5
17.8–18.6	−164	100	40	≥49	≤2.5
19.3–19.4	−162	100	40	≥49	>2.5 and ≤4.5
19.6–19.7					
17.8–18.6	−150	100	1000	≥49	≤2.5
19.3–19.4	−148	100	1000	≥49	>2.5 and ≤4.5
19.6–19.7					

[3] The operational limit applies to NGSO systems operating at altitudes of 7000 km or above in order to protect GSO FSS networks employing adaptive coding.

Note to paragraph (j): These limits relate to the operational EPFD which would be obtained under free-space propagation conditions, for all conditions, for all methods of modulation and for the specified inclined GSO FSS operations.

(k) In the frequency bands and Regions listed in the following Table, the EPFD in the Earth-to-space direction ($EPFD_{up}$) produced at any point on the GSO by the emissions from all co-frequency earth stations in an NGSO FSS system, for all conditions and for all methods of modulation, must not exceed the specified limits for the given percentages of time:

LIMITS TO THE $EPFD_{UP}$ RADIATED BY NGSO FSS SYSTEMS IN CERTAIN FREQUENCY BANDS

Frequency band (GHz)	$EPFD_{up}$ (dB(W/m^2))	Percentage of time during which $EPFD_{up}$ may not be exceeded	Reference bandwidth (kHz)	Reference antenna beamwidth and reference radiation pattern [1]
12.5–12.75	−160	100	40	4 ° Recommendation ITU–R S.672–4, *Ls* = –20.
12.75–13.25				
13.75–14.5				
17.3–18.1 (Regions 1 and 3)	−160	100	40	4 ° Recommendation ITU–R S.672–4, *Ls* = −20.
17.8–18.1 (Region 2) [2]				
27.5–28.6	–162	100	40	1.55 ° Recommendation ITU–R S.672–4, *Ls* = −20.
29.3–30	–162	100	40	1.55 ° Recommendation ITU–R S.672–4, *Ls* = −20.

[1] For the case of $L_s = -10$, the values a = 1.83 and b = 6.32 should be used in the equations in the Annex of Recommendation ITU–R S.672–4 for single-feed circular beams. In all cases of L_s, the parabolic main beam equation should start at zero.

[2] This $EPFD_{up}$ level also applies to the 17.3–17.8 GHz band to protect BSS feeder links in Region 2 from NGSO FSS Earth-to-space transmissions in Regions 1 and 3.

Note to paragraph **(k):** These limits relate to the uplink EPFD, which would be obtained under free-space propagation conditions, for all conditions and for all methods of modulation.

* * * * *

■ 17. In § 25.217, revise paragraphs (b)(1) and (c)(1) to read as follows:

§ 25.217 Default service rules.

* * * * *

(b)(1) For all NGSO-like satellite licenses for which the application was filed pursuant to the procedures set forth in § 25.157 after August 27, 2003, authorizing operations in a frequency band for which the Commission has not adopted frequency band-specific service rules at the time the license is granted, the licensee will be required to comply with the following technical requirements, notwithstanding the frequency bands specified in these rule provisions: §§ 25.143(b)(2)(ii), (iii), 25.204(e), 25.210(f), (i).

* * * * *

(c)(1) For all GSO-like satellite licenses for which the application was filed pursuant to the procedures set forth in § 25.158 after August 27, 2003, authorizing operations in a frequency band for which the Commission has not adopted frequency band-specific service rules at the time the license is granted, the licensee will be required to comply with the following technical requirements, notwithstanding the frequency bands specified in these rule provisions: §§ 25.143(b)(2)(iv), 25.204(e), 25.210(f), (i), (j).

* * * * *

■ 18. Revise § 25.261 to read as follows:

§ 25.261 Procedures for avoidance of in-line interference among NGSO FSS systems.

(a) *Scope.* This section applies to NGSO FSS satellite systems that communicate with earth stations with directional antennas and that operate under a Commission license or grant of U.S. market access under this part in the 10.7–12.7 GHz (space-to-Earth), 12.75–13.25 GHz (Earth-to-space), 13.75–14.5 GHz (Earth-to-space), 17.8–18.6 GHz (space-to-Earth), 18.8–19.4 GHz (space-to-Earth), 19.6–20.2 GHz (space-to-Earth), 27.5–29.1 GHz (Earth-to-space), or 29.3–30 GHz (Earth-to-space) bands.

(b) *Definition of ''In-line event.''* For purposes of this section, an ''in-line event'' associated with a specific frequency range occurs when there is physical alignment of space stations of two or more NGSO FSS satellite systems authorized to use this frequency range with an operating earth station of one of these systems such that the angular separation between operational links of the satellite systems is less than 10° as measured at the earth station.

(c) *Default procedure.* Unless otherwise coordinated pursuant to paragraph (d) of this section, NGSO FSS satellite operators experiencing an in-line event must divide their commonly assigned spectrum in accordance with the following procedure:

(1) Each of *n* (number of) satellite systems involved in a particular in-line event must select 1/*n* of the commonly assigned frequency range for its ''home'' spectrum. The selection order for each satellite system will be determined by the date that the first space station in the satellite system commences operation.

(2) The affected space station(s) of the respective satellite systems must operate only in the selected (1/*n*) spectrum associated with its satellite system, its home spectrum, for the duration of the in-line event.

(3) All affected space station(s) may resume operations throughout the frequency range associated with the in-line event once the angular separation between the space stations exceeds 10°.

(d) *Coordination procedure.* Any coordination procedure agreed among the affected operating satellite systems, which allows operations of the satellite systems when each system's respective space stations are within the 10 degree avoidance angle associated with an in-line event, will supersede the default procedure of paragraph (c) of this section. All parties must coordinate in good faith.

■ 19. Revise § 25.271(e) to read as follows:

§ 25.271 Control of transmitting stations.

* * * * *

(e) The licensee or market access recipient for an NGSO FSS satellite system operating in the 10.7–14.5 GHz, 17.8–18.6 GHz, 18.8–19.4 GHz, 19.6–20.2 GHz, 27.5–29.1 GHz, or 29.3–30 GHz bands must maintain an electronic Web site bulletin board to list the satellite ephemeris data for each satellite in the constellation, using the North American Aerospace Defense Command (NORAD) two-line orbital element format. The orbital elements must be updated at least once every three days.

* * * * *

[FR Doc. 2016–31795 Filed 1–10–17; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket Nos. 14–50, 09–182, 07–294, and 04–256; Report No. 3064]

Petitions for Reconsideration of Action in Rulemaking Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for reconsideration; correction.

SUMMARY: The Federal Communications Commission (Commission) published a document in the **Federal Register** of December 30, 2016, concerning petitions for reconsideration filed in the Commission's rulemaking proceeding. The date for filing replies was incorrect. This document corrects the filing deadline date for replies to an opposition to the Petitions.

FOR FURTHER INFORMATION CONTACT: Benjamin Arden, Media Bureau, (202) 418–2605; email: *Benjamin.Arden@fcc.gov.*

Correction

In the **Federal Register** of December 30, 2016, in FR Doc. 2016–31708, on page 96415, in the second column, correct the **DATES** section to read:

DATES: Oppositions to the Petitions must be filed on or before January 17, 2017. Replies to an opposition must be filed on or before January 27, 2017.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2017–00341 Filed 1–10–17; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 82, No. 7
Wednesday, January 11, 2017

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 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 Telecommunications and Information Administration.

Title: Community Connectivity Initiative Self-Assessment Tool.

OMB Control Number: None.

Form Number(s): None.

Type of Request: Regular submission; new collection.

Number of Respondents: 500.

Average Hours Per Response: Annually: 12 hours.

Burden Hours: 6,000.

Needs and Uses:

The National Telecommunications and Information Administration (NTIA) launched BroadbandUSA in January 2015 in response to demand from communities that realized broadband access and use are vital to their economic development, innovation, education, and healthcare needs. BroadbandUSA provides technical assistance, guidance, and resources to communities across the country that want to expand their broadband capacity and promote broadband adoption. BroadbandUSA brings stakeholders together to solve problems, contribute to emerging policies, link communities to other federal agencies and funding sources, and address barriers to collaboration across agencies.

In March 2015, President Obama created the Broadband Opportunity Council (Council), an interagency collaboration among 25 federal agencies co-chaired by the Departments of Commerce and Agriculture, to determine what actions the federal government could take to eliminate regulatory barriers to broadband deployment and to encourage investment in broadband networks and services.[1] The Community Connectivity Initiative is one of NTIA's commitments outlined in the Council's report released in September 2015.[2]

The purpose of the Community Connectivity Initiative is to support communities with tools and resources to attract broadband investment and promote meaningful use. NTIA and the National Economic Council conducted outreach to more than 200 stakeholders and communities to seek input on the implementation of the Community Connectivity Initiative. The initial findings of that outreach resulted in collaborators and communities assisting in the creation of the framework for the community connectivity self-assessment tool. The questions developed for the community connectivity self-assessment tool reflect extensive input from stakeholders in communities, businesses, and nonprofits across America. Throughout 2016, NTIA conducted more than 20 webinars and workshops where individuals and groups served as collaborators in shaping the Community Connectivity framework, assessment, and resources. That stakeholder input is the foundation of the Community Connectivity Initiative.

The objectives of the Community Connectivity Initiative are to: (1) Support communities as they convene, assess, and act to promote local priorities and advance broadband access, adoption, policies, and use; and (2) increase the number of communities actively assessing connectivity impacts and investing to improve broadband outcomes. The Community Connectivity Initiative includes three resources for communities, including the community connectivity framework, an online self-assessment tool, and resources that support local planning and action. The community connectivity framework provides a structure to engage local stakeholders in conversations about broadband access and community priorities.

The online self-assessment tool will provide local leaders with a means for assessing broadband needs in their communities. The tool will enable them to record findings and integrate assessments with national datasets on community broadband by providing users with data and asking questions covering three specific categories: access, adoption, and community. Initially, at the time of the 60-day **Federal Register** Notice, NTIA intended to collect input through the community connectivity self-assessment tool across four major categories: access, adoption, policy, and use. However, in response to stakeholder engagement in clarifying the framework, NTIA decided to combine the policy and use categories into one category called community.

The community connectivity self-assessment tool will collect input on the same information outlined in the 60-day **Federal Register** Notice. Since the Notice, NTIA has also decided to reorganize the tool's categories and sub-categories. The reorganized approach does not change the information that NTIA intends to collect, only the order in which NTIA collects the information.

Upon completion of the self-assessment tool, communities will receive a report that combines input from the self-assessment tool with other data sources, along with resources that communities could use to improve their broadband capabilities. Through this effort, the community connectivity self-assessment tool will produce improved broadband planning assets for communities, thereby increasing the number of communities actively investing to improve broadband access and digital inclusion.

Affected Public: State, regional, local, and tribal government organizations.

Frequency: Annually.

Respondent's Obligation: Voluntary.

NTIA published a Notice in the **Federal Register** on June 28, 2016 soliciting comments on this information collection, with a 60-day public comment period. NTIA did not receive comments on this Notice.

This information collection request may be viewed at reginfo.gov or *http://federalregister.gov/a/2016-15149.* Follow the instructions to view

[1] The White House, Office of the Press Secretary, *Presidential Memorandum—Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training* (March 23, 2015), available at *https://www.whitehouse.gov/the-press-office/2015/03/23/presidential-memorandum-expanding-broadband-deployment-and-adoption-addr.*

[2] *Id.* at 19. The report tasked NTIA, in collaboration with the National Economic Council, to ''convene stakeholders to design and launch a community connectivity index.''

Department of Commerce collections currently under review by OMB.

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* or fax to (202) 395–5806.

Sheleen Dumas,

PRA Departmental Lead, Office of the Chief Information Officer.

[FR Doc. 2017–00399 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Open Meeting

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on February 1, 2017, 9:30 a.m., (Pacific Standard Time) at the SPIE Photonics West, Moscone South, 747 Howard Street, Exhibit Level, Room 102, San Francisco, CA 94103. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

Agenda

Public Session

1. Welcome and Introductions.
2. Remarks from the Bureau of Industry and Security Management.
3. Industry Presentations.
4. New Business.

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than January 25, 2017.

A limited number of seats will be available during the public session of the meeting.

Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that the materials be forwarded before the meeting to Ms. Springer.

For more information contact Yvette Springer on (202) 482–2813.

Dated: January 5, 2017.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2017–00339 Filed 1–10–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Information Systems; Technical Advisory Committee; Notice of Open Meeting

The Information Systems Technical Advisory Committee (ISTAC) will meet on January 25, 2017, 9:00 a.m., in the Herbert C. Hoover Building, Room 3884, 14th Street between Constitution and Pennsylvania Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to information systems equipment and technology.

Wednesday, January 25

Open Session

1. Welcome and Introductions
2. Working Group Reports
3. Old Business
4. Industry Presentations
5. New business

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than January 18, 2017.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that public presentation materials or comments be forwarded before the meeting to Ms. Springer.

For more information, call Yvette Springer at (202) 482–2813.

Dated: January 5, 2017.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2017–00338 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Docket No.: 170103004–7004–01]

RIN 0625–XC028

Revisions to User Fees for Export and Investment Promotion Services/Events

AGENCY: U.S. & Foreign Commercial Service, International Trade Administration, Department of Commerce.

ACTION: Extension of comment period.

SUMMARY: The U.S. & Foreign Commercial Service (US&FCS) within the International Trade Administration (ITA) is extending the comment period for the notice, ''Revisions to User Fees for Export and Investment Promotion Services/Events.'' The comment period is extended from January 16, 2016, to January 21, 2017.

DATES: The comment period for the notice that was published on December 21, 2016 (81 FR 93660), is extended. Comments must be received on or before January 21, 2017.

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

- *Federal eRulemaking Portal: www.Regulations.gov.* The identification number is ITA–2016–0012.
- Postal Mail/Commercial Delivery to Docket No. ITA–2016–0012, International Trade Administration, U.S. & Foreign Commercial Service, Office of Strategic Planning & Resource Management, 1400 Constitution Avenue NW., Rm. C125, Washington, DC 20235.

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 US&FCS. 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. US&FCS will accept anonymous comments (enter ''N/A'' in required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Ms. Aditi Palli, International Trade Administration, U.S. & Foreign Commercial Service, Office of Strategic Planning, 1400 Constitution Avenue NW., Rm. 21022, Washington, DC 20230, Phone: (202) 482–2025.

SUPPLEMENTARY INFORMATION: On December 21, 2016, US&FCS published

in the **Federal Register** (81 FR 93660) proposed revisions to the user fees for export and investment promotion services/events. US&FCS is extending the public comment period from January 16, 2016, until January 21, 2017.

Aditi Palli,

Program Analyst International Trade Administration, U.S. & Foreign Commercial Service.

[FR Doc. 2017–00310 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–037]

Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products From the People's Republic of China: Final Affirmative Determination and Final Determination of Critical Circumstances, in Part

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the ''Department'') determines that countervailable subsidies are being provided to producers and exporters of certain biaxial integral geogrid products (''geogrids'') from the People's Republic of China (the ''PRC''). The period of investigation is January 1, 2015, through December 31, 2015. For information on the estimated subsidy rates, see the ''Suspension of Liquidation'' section of this notice.

DATES: Effective January 11, 2017.

FOR FURTHER INFORMATION CONTACT: Bob Palmer or Ryan Mullen, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone 202–482–9068 or 202–482–5260, respectively.

SUPPLEMENTARY INFORMATION:

Background

The petitioner in this investigation is Tensar Corporation (''Petitioner''). In addition to the Government of China (''GOC''), the mandatory respondents in this investigation are BOSTD Geosynthetics Qingdao Ltd. and its crossed-owned company Beijing Orient Science & Technology Development Co., Ltd. (''BOSTD''), and Taian Modern Plastic Co., Ltd. (''Taian Modern'').

The Department published its *Preliminary Determination* on June 24, 2016, and its *Amended Preliminary Determination* on July 26, 2016.[1] A complete summary of the events that occurred since the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the ''Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China: Issues and Decision Memorandum for the Final Affirmative Determination,'' [2] which is dated concurrently with and hereby adopted by this notice. The Issues and Decision Memorandum is a public document and is available electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''ACCESS''). Access to ACCESS is available to registered users at *https://access.trade.gov* and to all parties in the Central Records Unit, Room B8024 of the Department's main building. In addition, a complete version of the Issues and Decision Memorandum can be viewed at *http://enforcement.trade.gov/frn.* The signed Issues and Decision Memorandum and the electronic version are identical in content.

Methodology

The Department conducted this countervailing duty (''CVD'') investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the ''Act''). For each of the subsidy programs found countervailable, we determine that there is a subsidy (*i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient) and that the subsidy is specific. For a full description of the methodology underlying our preliminary conclusions, *see* the Issues and Decisions Memo.

Scope of the Investigation

The products covered by this investigation are geogrids from the PRC. For a complete description of the scope of this investigation, see Appendix II.

Analysis of Subsidy Programs and Comments Received

All issues raised in the comments filed by interested parties to this proceeding are discussed in the Issues and Decision Memorandum. A list of the issues raised by interested parties and responded to by the Department in the Issues and Decisions Memo are attached at Appendix II to this notice.

Use of Adverse Facts Available

For purposes of this final determination, we relied, in part, on facts available and, because certain respondents did not act to the best of their ability to respond to the Department's requests for information, we drew an adverse inference, where appropriate, in selecting from among the facts otherwise available.[3] A full discussion of our decision to rely on adverse facts available is presented in the ''Use of Facts Otherwise Available and Adverse Inferences'' section of the Issues and Decisions Memo.

Final Determination

In accordance with sections 705(c)(1)(B)(i)(I) and 705(c)(5)(A)(i) of the Act, we calculated an estimated countervailable subsidy rate for each producer/exporter of the subject merchandise individually investigated. These rates are:

Company	Subsidy rate
BOSTD Geosynthetics Qingdao Ltd. and Beijing Orient Science & Technology Development Co., Ltd	15.61
Taian Modern Plastic Co., Ltd	56.24
All-Others	35.93

[1] *See Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China: Preliminary Determination and Alignment of Final Determination with Final Antidumping Duty Determination,* 81 FR 41292 (June 24, 2016) (''*Preliminary Determination*'') and *Certain Biaxial Integral Geogrid Products from the People's Republic of China: Amended Preliminary Results of Countervailing Duty Investigation,* 81 FR 48384 (July 26, 2016) (''*Amended Preliminary Determination*'').

[2] *See* Memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, '' Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China: Issues and Decision Memorandum for the Final Affirmative Determination,'' dated concurrently with this notice (''Issues and Decisions Memo'').

[3] *See* sections 776(a) and (b) of the Act.

Company	Subsidy rate
Chengdu Tian Road Engineering Materials Co., Ltd*	152.50
Chongqing Jiudi Reinforced Soil Engineering Co., Ltd*	152.50
CNBM International Corporation*	152.50
Dezhou Yaohua Geosynthetics Ltd*	152.50
Dezhou Zhengyu Geosynthetics Ltd*	152.50
Hongye Engineering Materials Co., Ltd*	152.50
Hubei Nete Geosynthetics Ltd*	152.50
Jiangsu Dingtai Engineering Material Co., Ltd*	152.50
Jiangsu Jiuding New Material Ltd*	152.50
Lewu New Material Ltd*	152.50
Nanjing Jinlu Geosynthetics Ltd*	152.50
Nanjing Kunchi Composite Material Ltd*	152.50
Nanyang Jieda Geosynthetics Co., Ltd*	152.50
Qingdao Hongda Plastics Corp*	152.50
Shandong Dexuda Geosynthetics Ltd*	152.50
Shandong Haoyang New Engineering Materials Co., Ltd*	152.50
Shandong Tongfa Glass Fiber Ltd*	152.50
Shandong Xinyu Geosynthetics Ltd*	152.50
Tai'an Haohua Plastics Co., Ltd*	152.50
Taian Hengbang Engineering Material Co., Ltd*	152.50
Taian Naite Geosynthetics Ltd*	152.50
Taian Road Engineering Materials Co., Ltd*	152.50
Tenax*	152.50
Hengshui Zhongtiejian Group Co*	152.50
Qingdao Sunrise Dageng Import and Export Co., Ltd*	152.50

* Non-cooperative company to which an adverse facts available rate is being applied. *See* ''Use of Facts Otherwise Available and Adverse Inferences'' section in the Issus and Decisions Memo.

In accordance with sections 705(c)(5)(A) of the Act, for companies not investigated, we apply an ''all-others'' rate, which is normally calculated by weighting the subsidy rates of the individual companies selected as mandatory respondents by those companies' exports of the subject merchandise to the United States. Under section 705(c)(5)(i) of the Act, the all-others rate should exclude zero and *de minimis* rates calculated for the exporters and producers individually investigated as well as rates based entirely on facts otherwise available. Notwithstanding the language of section 705(c)(5)(A)(i) of the Act, we have not calculated the ''all-others'' rate by weight-averaging the rates of the two individually investigated respondents, because doing so risks disclosure of proprietary information. Therefore, for the ''all-others'' rate, we calculated a simple average of the two responding firms' rates.

Suspension of Liquidation

As a result of our *Preliminary Determination* and pursuant to section 703(d) of the Act, we instructed U.S. Customs and Border Protection (''CBP'') to suspend liquidation of all entries of geogrids from the PRC, that were entered, or withdrawn from warehouse, for consumption on or after March 26, 2016, for BOSTD and all other companies, for which we found critical circumstances exist, and on or after June 24, 2016, the date of the publication of the *Preliminary Determination* in the **Federal Register**, for Taian Modern. In accordance with section 703(d) of the Act, we instructed CBP to discontinue the suspension of liquidation for CVD purposes for subject merchandise entered, or withdrawn from warehouse, on or after October 22, 2016, but to continue the suspension of liquidation of all entries from June 24, 2016, or March 26, 2016, as applicable, through October 21, 2016.

If the U.S. International Trade Commission (''ITC'') issues a final affirmative injury determination, we will issue a CVD order and will reinstate the suspension of liquidation under section 706(a) of the Act and will require a cash deposit of estimated CVDs for such entries of subject merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

International Trade Commission Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (''APO''), without the written consent of the Assistant Secretary for Enforcement and Compliance.

Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties such to an APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or, alternatively, conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation that is subject to sanction.

This determination is published pursuant to section 705(d) and 777(i) of the Act.

Dated: January 4, 2017.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memo

I. Summary
II. Background
III. Final Determination of Critical Circumstances, in Part
IV. Scope of the Investigation

V. Application of the Countervailing Duty Law to Imports From the PRC
VI. Subsidy Valuation
VII. Benchmarks and Discount Rates
VIII. Use of Facts Otherwise Available and Adverse Inferences
IX. Analysis of Programs
X. Analysis of Comments
Comment 1: Whether the Export Buyer's Credit Program Was Used by Respondents
Comment 2: Policy Loans for Geogrids Industry
Comment 3: Whether the Provision of Polypropylene for LTAR Is Specific
Comment 4: Whether To Attribute Polypropylene LTAR Benefits to Only Polypropylene Products
Comment 5: Whether To Use a Different Polypropylene Benchmark
Comment 6: Whether To Remove Certain Freight Expenses From the Polypropylene Benchmark
Comment 7: Whether To Exclude Non-Production Related Income From the Denominator
Comment 8: Whether To Exclude Negative Offsets in the Benefit Calculation for Electricity
Comment 9: Whether To Apply AFA to BOSTD's Electricity
Comment 10: Whether To Include Certain Loans in the Subsidy Calculations
Comment 11: Whether To Include Certain Electricity Funds
Comment 12: Whether the Department's Finding of Critical Circumstance for BOSTD Is Contrary to Law
Comment 13: Land-Use Rights for LTAR, Plant and Equipment for LTAR, and Installment Plans for Land-Use Rights
XI. Recommendation

Appendix II

The products covered by the scope are certain biaxial integral geogrid products. Biaxial integral geogrid products are a polymer grid or mesh material (whether or not finished, slit, cut-to-length, attached to woven or non-woven fabric or sheet material, or packaged) in which four-sided openings in the form of squares, rectangles, rhomboids, diamonds, or other four-sided figures predominate. The products covered have integral strands that have been stretched to induce molecular orientation into the material (as evidenced by the strands being thinner in width toward the middle between the junctions than at the junctions themselves) constituting the sides of the openings and integral junctions where the strands intersect. The scope includes products in which four-sided figures predominate whether or not they also contain additional strands intersecting the four-sided figures and whether or not the inside corners of the four-sided figures are rounded off or not sharp angles. As used herein, the term ''integral'' refers to strands and junctions that are homogenous with each other. The products covered have a tensile strength of greater than 5 kilonewtons per meter (''kN/m'') according to American Society for Testing and Materials (''ASTM'') Standard Test Method D6637/D6637M in any direction and average overall flexural stiffness of more than 100,000 milligram-centimeter according to the ASTM D7748/D7748M Standard Test Method for Flexural Rigidity of Geogrids, Geotextiles and Related Products, or other equivalent test method standards.

Subject merchandise includes material matching the above description that has been finished, packaged, or otherwise further processed in a third country, including by trimming, slitting, coating, cutting, punching holes, stretching, attaching to woven or non-woven fabric or sheet material, or any other finishing, packaging, or other further processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the country of manufacture of the biaxial integral geogrid.

The products subject to the scope are currently classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under the following subheading: 3926.90.9995. Subject merchandise may also enter under subheadings 3920.20.0050 and 3925.90.0000. The HTSUS subheadings set forth above are provided for convenience and U.S. Customs purposes only. The written description of the scope is dispositive.

[FR Doc. 2017–00429 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–036]

Certain Biaxial Integral Geogrid Products From the People's Republic of China: Final Determination of Sales at Less Than Fair Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Department) determines that certain biaxial integral geogrid products (geogrids) are being, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The final weighted-average dumping margins for the investigation on geogrids from the PRC are listed in the ''Final Determination Margins'' section of this notice.

DATES: Effective January 11, 2017.

FOR FURTHER INFORMATION CONTACT: Julia Hancock or Susan Pulongbarit, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1394 or (202) 482–4031, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2016, the Department published its *Preliminary Determination*.[1] We invited interested parties to comment on our *Preliminary Determination* of sales at LTFV. For a list of the parties that filed case and rebuttal briefs, *see* the Issues and Decision Memorandum.[2]

Period of Investigation

The period of investigation (POI) is July 1, 2015, through December 31, 2015. This period corresponds to the two most recent fiscal quarters prior to the month of the filing of the petition, which was January 2016.[3]

Scope of the Investigation

The products covered by this investigation are geogrids from the People's Republic of China (PRC). Subject geogrids enter the United States through Harmonized Tariff Schedule of the United States (HTSUS) statistical subheading 3926.90.9995, but may also enter through HTSUS subheadings 3920.20.0050 and 3925.90.0000. While HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of this investigation is dispositive.

No interested party commented on the scope of this investigation. For a complete description of the scope of the investigation, *see* Appendix I to this notice.

Analysis of Comments Received

We addressed all issues raised by parties in case and rebuttal briefs in the Issues and Decision Memorandum.[4] Appendix II to this notice includes a list of the issues which the parties raised and to which the Department responded in the Issues and Decision Memorandum. 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 (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* The Issues and Decision Memorandum is available

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[1] *See Certain Biaxial Integral Geogrid Products from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value, Affirmative Determination of Critical Circumstances, in Part, and Postponement of Final Determination,* 81 FR 56584 (August 22, 2015) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, ''Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China,'' dated concurrently with this notice (Issues and Decision Memorandum).

[3] *See* 19 CFR 351.204(b)(1).

[4] *See* Issues and Decision Memorandum.

to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum is available at *http://enforcement.trade.gov/frn/index.html.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Verification

As provided in section 782(i) of the Act, in September 2016, the Department conducted verification of the information submitted by BOSTD Geosynthetics Qingdao Ltd. (BOSTD) and Taian Modern Plastic Co., Ltd. (Taian Modern) for use in the final determination. We issued our verification reports on November 4, 2016, and November 14, 2016.[5] The Department used standard verification procedures, including examination of relevant accounting and production records and original source documents provided by respondents.[6]

Changes Since the Preliminary Determination

Based on the Department's analysis of the comments received and our findings at verification, we find that BOSTD and Taian Modern failed to cooperate by not acting to the best of their ability in this proceeding and, pursuant to section 776(b) of the Act and 19 CFR 351.308(a), we based BOSTD's and Taian Modern's respective dumping margins on total adverse facts available (AFA). For further discussion, *see* the Issues and Decision Memorandum.

Combination Rates

In the *Initiation Notice,*[7] the Department stated that it would calculate combination rates for the respondents that are eligible for a separate rate in this investigation. *Policy Bulletin 05.1* describes this practice.[8] In this case, because neither respondent qualified for a separate rate, combination rates were not calculated.

Final Affirmative Determination of Critical Circumstances, in Part

For the *Preliminary Determination,* the Department found that critical circumstances existed with respect to imports of geogrids from the PRC produced or exported by Taian Modern and the PRC-wide entity, but not with respect to imports of geogrids from BOSTD.[9] We are not modifying our final critical circumstances finding for the PRC-wide entity (which now includes Taian Modern and BOSTD). Thus, pursuant to section 735(a)(3) of the Act and 19 CFR 351.206, we find that critical circumstances exist with respect to all exports of subject merchandise in this investigation. For further discussion, *see* the Issues and Decision Memorandum at Comments 1, 9 and 13.

PRC-Wide Entity

In this final determination, as discussed above, we are applying a rate based entirely on adverse facts available to the PRC-wide entity (which now includes the two mandatory respondents). Additionally, as explained in the *Preliminary Determination,* the Department did not receive timely responses to its Q&V questionnaire or separate rate applications from the PRC exporters and/or producers of subject merchandise that were named in the petition and to which the Department issued Q&V questionnaires.[10] As these non-responsive PRC companies did not demonstrate that they are eligible for separate rate status, the Department continues to consider them to be part of the PRC-wide entity.

PRC-Wide Rate

For the final determination, we assigned as the AFA rate for the PRC-wide entity the highest dumping margin from the petition, *i.e.,* 372.81 percent. In selecting this AFA rate for the PRC-wide entity, the Department's practice is to select a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.[11] Specifically, it is the Department's practice to select, as an AFA rate, the higher of: (a) The highest dumping margin alleged in the petition; or, (b) the highest calculated dumping margin of any respondent in the investigation.[12] There are no calculated margins for any respondents in this investigation. Therefore, as AFA, the Department has assigned to the PRC-wide entity the rate of 372.81 percent, which is the highest dumping margin alleged in the petition. The dumping margin for the PRC-wide entity applies to all entries of the merchandise under investigation.[13]

Final Determination

The Department determines that the estimated final weighted-average dumping margins are as follows:

Exporter	Producer	Weighted-average margin (percent)
PRC-Wide Entity [14]	.....	372.81

[14] As discussed above, the PRC-wide entity includes BOSTD and Taian Modern.

Disclosure

Because our final determination is based entirely on AFA, there are no calculations to disclose.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of geogrids from the PRC as described in the ''Scope of the Investigation'' section, which were entered, or withdrawn from warehouse, for consumption on or after August 22, 2016, the date of publication in the **Federal Register** of the *Preliminary Determination.* For entries made by Taian Modern and the PRC-wide entity, in accordance with section 735(c)(4)(A) of the Act, because we

[5] *See* the Department's two memoranda regarding: ''Verification of the Sales and Factors Response of Taian Modern Plastic Co., Ltd. (Taian Modern) in the Antidumping Duty Less Than Fair Value Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China,'' dated November 4, 2016 (Taian Modern Verification Report); and ''Verification of the Sales and Factors Responses of BOSTD Geosynthetics Qingdao Ltd. (BOSTD) in the Antidumping Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China,'' dated November 15, 2016 (BOSTD Verification Report).

[5] *Id.*

[6] *Id.*

[7] *See Certain Biaxial Integral Geogrid Products from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation,* 81 FR 7755, 7756 (February 16, 2016) (*Initiation Notice*).

[8] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,'' (April 5, 2005) (Policy Bulletin 05.1), available on the Department's Web site at *http://enforcement.trade.gov/policy/bull05-1.pdf.*

[9] *See Preliminary Determination,* and accompanying Preliminary Decision Memorandum at 7–10.

[10] *See Preliminary Determination,* and accompanying Preliminary Decision Memorandum at 16–17 (Separate Rate).

[11] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Purified Carboxymethylcellulose from Finland,* 69 FR 77216 (December 27, 2004), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Purified Carboxymethylcellulose from Finland,* 70 FR 28279 (May 17, 2005).

[12] *See, e.g., Certain Stilbenic Optical Brightening Agents from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 77 FR 17436, 17438 (March 26, 2012); *Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from the People's Republic of China,* 65 FR 34660 (May 31, 2000), and accompanying Issues and Decision Memorandum.

[13] For a detailed discussion, *see* Issues and Decision Memorandum.

continue to find that critical circumstances exist, we will instruct CBP to continue to suspend liquidation of all appropriate entries of geogrids from the PRC which were entered, or withdrawn from warehouse, for consumption on or after May 24, 2016, which is 90 days prior to the date of publication in the **Federal Register** of the *Preliminary Determination.* Provisional measures were not imposed retrospectively for BOSTD because of the Department's preliminary negative critical circumstances determination with respect to it. However, the final affirmative critical circumstances determination now applies to BOSTD as it is now being treated as part of the PRC-wide entity. Accordingly, pursuant to section 735(c)(4)(C) of the Act, the Department will instruct CBP to suspend liquidation of all entries of geogrids from the PRC from BOSTD, which were entered, or withdrawn from warehouse, for consumption on or after 90-days prior to the date of publication of this final determination in the **Federal Register**.

Further, pursuant to section 735(c)(1)(B)(ii) of the Act, the Department will instruct CBP to require a cash deposit [15] equal to the amount by which the normal value exceeds U.S. price, adjusted where appropriate for export subsidies and estimated domestic subsidy pass-through. For all combinations of PRC exporters/producers of merchandise under consideration, the cash deposit rate will be equal to the dumping margin established for the PRC-wide entity.

As we stated in the *Preliminary Determination,* consistent with our practice, where the product under investigation is also subject to a concurrent countervailing duty investigation, we instruct CBP to require a cash deposit equal to the amount by which the normal value exceeds the export price or constructed export price, less the amount of the countervailing duty determined to constitute an export subsidy.[16] In this LTFV investigation, for the PRC-wide entity, which received an AFA rate, pursuant to section 776(b) of the Act, the Department has adjusted the PRC-wide entity's AD cash deposit rate by the lowest export subsidy rate determined for any party in the companion CVD proceeding.[17] Here, that rate is zero and, thus, no adjustment is necessary for the PRC-wide rate.[18] Furthermore, the Department did not adjust the final determination AD cash deposit rates for estimated domestic subsidy pass-through because respondents provided no reliable, accurate information to support an adjustment, pursuant to section 777A(f) of the Act.[19]

International Trade Commission Notification

In accordance with section 735(d) of the Act, we notified the International Trade Commission (ITC) of the final affirmative determination of sales at LTFV. As the Department's final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of geogrids for sale from the PRC, or sales (or the likelihood of sales) for importation, of geogrids from the PRC. If the ITC determines that such injury does not exist, this proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

Return or Destruction of Proprietary Information

This notice also serves as a reminder to the parties subject to administrative protective order (APO) of their responsibility concerning the disposition of propriety information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: January 4, 2017.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix I—Scope of the Investigation

The products covered by the scope are certain biaxial integral geogrid products. Biaxial integral geogrid products are a polymer grid or mesh material (whether or not finished, slit, cut-to-length, attached to woven or non-woven fabric or sheet material, or packaged) in which four-sided openings in the form of squares, rectangles, rhomboids, diamonds, or other four-sided figures predominate. The products covered have integral strands that have been stretched to induce molecular orientation into the material (as evidenced by the strands being thinner in width toward the middle between the junctions than at the junctions themselves) constituting the sides of the openings and integral junctions where the strands intersect. The scope includes products in which four-sided figures predominate whether or not they also contain additional strands intersecting the four-sided figures and whether or not the inside corners of the four-sided figures are rounded off or not sharp angles. As used herein, the term ''integral'' refers to strands and junctions that are homogenous with each other. The products covered have a tensile strength of greater than 5 kilonewtons per meter (''kN/m'') according to American Society for Testing and Materials (''ASTM'') Standard Test Method D6637/D6637M in any direction and average overall flexural stiffness of more than 100,000 milligram-centimeter according to the ASTM D7748/D7748M Standard Test Method for Flexural Rigidity of Geogrids, Geotextiles and Related Products, or other equivalent test method standards.

Subject merchandise includes material matching the above description that has been finished, packaged, or otherwise further processed in a third country, including by trimming, slitting, coating, cutting, punching holes, stretching, attaching to woven or non-woven fabric or sheet material, or any other finishing, packaging, or other further processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the country of manufacture of the biaxial integral geogrid.

The products subject to the scope are currently classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under the following subheading: 3926.90.9995. Subject merchandise may also enter under subheadings 3920.20.0050 and 3925.90.0000. The HTSUS subheadings set forth above are provided for convenience and U.S. Customs purposes only. The written description of the scope is dispositive.

Appendix II—Issues and Decision Memorandum

I. Summary

[15] *See Modification of Regulations Regarding the Practice of Accepting Bonds During the Provisional Measures Period in Antidumping and Countervailing Duty Investigations,* 76 FR 61042 (October 3, 2011).

[16] *See Preliminary Determination,* 81 FR at 56585–6.

[17] *See, e.g., Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value; Preliminary Affirmative Determination of Critical Circumstances; In Part and Postponement of Final Determination,* 80 FR 4250 (January 27, 2015), and accompanying Issues and Decision Memorandum at 35.

[18] *See* Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Affirmative Determination and Final Determination of Critical Circumstances, in Part, dated concurrently with this notice.

[19] *See* Issues and Decision Memorandum at Comments 1 and 9 for further discussion of our findings to apply total AFA to BOSTD and Taian Modern.

II. Background
III. Period of Investigation
IV. Scope of the Investigation
V. Changes Since the Preliminary Determination
VI. Application of Adverse Facts Available
VII. Affirmative Finding of Critical Circumstances
VIII. List of Comments
IX. Discussion of the Issues

Company-Specific Issues

BOSTD

Comment 1: Application of Total Adverse Facts Available (AFA) to BOSTD
Comment 2: Moot Arguments for BOSTD

Taian Modern

Comment 3: Application of Total AFA to Taian Modern
Comment 4: Moot Arguments for Taian Modern

General Issues

Comment 5: Selection of AFA Rate to PRC-Wide Entity
Comment 6: Critical Circumstances
Comment 7: Moot Arguments for General Issues

[FR Doc. 2017–00428 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF130

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Application for one enhancement permit renewal.

SUMMARY: Notice is hereby given that NMFS has received, from the United States Bureau of Reclamation (Reclamation), a permit application (16608–2R) to enhance the propagation and survival of species listed under the Endangered Species Act (ESA) of 1973, as amended. Under permit application 16608–2R, Reclamation is requesting renewal of permit 16608, for a five year period, to continue implementation of the San Joaquin River Restoration Program (SJRRP) Steelhead Monitoring Program. The permit application may be viewed online at: *https://apps.nmfs.noaa.gov/preview/preview_open_for_comment.cfm.*

DATES: Comments or requests for a public hearing on the applications must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific standard time on February 10, 2017.

ADDRESSES: Written comments on the application should be submitted to the California Central Valley Office, NMFS, 650 Capitol Mall, Suite 5–100, Sacramento, CA 95814. Comments may also be submitted via fax to 916–930–3629 or by email to *Jeff.Abrams@noaa.gov* (include the permit number in the subject line of the fax or email).

FOR FURTHER INFORMATION CONTACT: Jeff Abrams, Sacramento, CA (ph.: 916–930–3714, Fax: 916–930–3629, email: *Jeff.Abrams@noaa.gov*). Permit application instructions are available from the address above, or online at *https://apps.nmfs.noaa.gov.*

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

The following listed species are covered in this notice:

Chinook salmon (*Oncorhynchus tshawytscha*): Threatened Central Valley (CV) spring-run;

Steelhead (*O. mykiss*): Threatened California Central Valley (CCV).

Authority

Enhancement permits are issued in accordance with Section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 *et. seq*) and regulations governing listed fish and wildlife permits (50 CFR parts 222–227). NMFS issues permits based on findings that such permits: (1) Are applied for in good faith; (2) if granted and exercised, would not operate to the disadvantage of the listed species that are the subject of the permit; and (3) are consistent with the purposes and policy of Section 2 of the ESA. The authority to take listed species is subject to conditions set forth in the permits.

Anyone requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). Such hearings are held at the discretion of the Assistant Administrator for Fisheries, NMFS.

Permit Application(s) Received

Permit 16608–2R

Reclamation has applied for an enhancement permit under Section 10(a)(1)(A) of the ESA for a period of 5 years that would allow take of adult CCV steelhead, and adult CV spring-run Chinook salmon. Actions taken pursuant to the application are designed to monitor for the presence of CCV steelhead that may be attracted into the SJRRP Restoration Area (Restoration Area), and to relocate those captured fish to locations with better access to suitable spawning habitat. Prior to the completion of ongoing SJRRP efforts to improve fish passage, fish that are attracted into the Restoration Area will not have access to spawning habitat upstream. The proposed activities are intended to benefit listed species by relocating captured steelhead back to areas where they have access to spawning habitat in the Merced River or other San Joaquin River tributaries. The proposed monitoring would further benefit steelhead by providing data on the distribution of steelhead and their use of the Restoration Area in order to inform future ESA consultations and SJRRP management actions. While adult CV spring-run Chinook salmon are not the target species for these efforts, some may be captured during permitted activities. The post capture handling of CV spring-run Chinook salmon is covered under ESA Section 10(a)(1)(A) permit 17781.

Listed fish would be captured by: Boat mounted electrofisher, fyke net, and trammel net. Handling would include conducting length measurements, gender identification, tissue and scale collection, checking for the presence of tags, and tagging by Passive Integrated Transponder (PIT). Captured steelhead would be transported by tank truck and released in the San Joaquin River downstream of the mouth of the Merced River. Observe/harass take may occur at occur at temporary weirs with electronic fish counting devices installed. Recaptured steelhead would be identified by the presence of a PIT tag. All persons implementing proposed activities would follow appropriate protocols to minimize injury to captured fish, including: Handling live steelhead with extreme care, monitoring water temperature to the maximum extent possible during sampling and processing procedures, maintaining adequate circulation and replenishment of water in holding units, following the NMFS 2000 electrofishing guidelines, and checking all traps at least daily. In addition, when a sample is comprised of a mix of species, any captured steelhead would be processed first, and steelhead rescued at the capture site would be allowed to recover to the maximum extent possible prior to being released into the mainstem San Joaquin River. The applicants are not proposing to kill any of the fish they capture, but a small number may die as an unintended result of the activities.

Public Comments Solicited

NMFS invites the public to comment on the permit application and associated HGMPs during a 30 day public comment period beginning on the date of this notice. This notice is

provided pursuant to Section 10(c) of the ESA (16 U.S.C. 1529(c)). All comments and materials received, including names and addresses, will become part of the administrative record and may be released to the public. We provide this notice in order to allow the public, agencies, or other organizations to review and comment on these documents.

Next Steps

NMFS will evaluate the applications, associated documents, and comments submitted to determine whether the applications meet the requirements of Section 10(a)(1)(A) of the ESA and Federal regulations. The final permit decisions will not be made until after the end of the 30-day public comment period and after NMFS has fully considered all relevant comments received. NMFS will publish notice of its final action in the **Federal Register**.

Dated: January 4, 2017.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2017–00300 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Reporting Requirements for the Ocean Salmon Fishery Off the Coasts of Washington, Oregon, and California

AGENCY: National Oceanic and Atmospheric Administration (NOAA), 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.

DATES: Written comments must be submitted on or before March 13, 2017.

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 and instructions should be directed to Peggy Mundy, (206) 526–4323 or *peggy.mundy@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection.

Based on the management regime specified each year, designated regulatory areas in the commercial ocean salmon fishery off the coasts of Washington, Oregon, and California may be managed by numerical quotas. To accurately assess catches relative to quota attainment during the fishing season, catch data by regulatory area must be collected in a timely manner. Requirements to land salmon within specific time frames and in specific areas may be implemented in the preseason regulations to aid in timely and accurate catch accounting for a regulatory area. State landing systems normally gather the data at the time of landing. If unsafe weather conditions or mechanical problems prevent compliance with landing requirements, fishermen need an alternative to allow for a safe response. Fishermen would be exempt from landing requirements if the appropriate notifications are made to provide the name of the vessel, the port where delivery will be made, the approximate amount of salmon (by species) on board, and the estimated time of arrival.

II. Method of Collection

Notifications are made by at-sea radio or cellular phone transmissions.

III. Data

OMB Control Number: 0648–0433.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 40.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 10 hours.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

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 5, 2017.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2017–00348 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request; Vessel Monitoring System Requirements in Western Pacific Fisheries

AGENCY: National Oceanic and Atmospheric Administration (NOAA), 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.

DATES: Written comments must be submitted on or before March 13, 2017.

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 and instructions should be directed to Walter Ikehara, (808) 725–5175 or *Walter.Ikehara@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

As part of fishery management plans developed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act, owners of commercial fishing vessels in the Hawaii pelagic longline fishery, American Samoa pelagic longline fishery (only vessels longer than 50 feet), Northwestern Hawaiian Islands lobster fishery (currently inactive), and Northern Mariana Islands bottomfish fishery (only vessels longer than 40 feet) must allow the National Oceanic and Atmospheric Administration (NOAA) to install vessel monitoring system (VMS) units on their vessels when directed to do so by NOAA enforcement personnel. VMS units automatically send periodic reports on the position of the vessel. NOAA uses the reports to monitor the vessel's location and activities, primarily to enforce regulated fishing areas. NOAA pays for the units and messaging. There is no public burden for the automatic messaging; however, VMS installation and annual maintenance are considered public burden.

II. Method of Collection

Automatic electronic submission.

III. Data

OMB Control Number: 0648–0441.

Form Number: None.

Type of Review: Regular (extension of a currently approved information collection).

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 209.

Estimated Time per Response: 4 hours for installation or replacement of a VMS unit; 2 hours for annual maintenance.

Frequency: Annually and on occasion.

Respondent's Obligation: Mandatory.

Estimated Total Annual Burden Hours: 478 (estimated 15 installations per year).

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

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 5, 2017.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2017–00349 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF142

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC's) Summer Flounder, Scup, and Black Sea Bass Advisory Panel will hold a public meeting via webinar, jointly with the Atlantic States Marine Fisheries Commission's (ASMFC's) Summer Flounder, Scup, and Black Sea Bass Advisory Panel.

DATES: The meeting will be held on Monday, February 6, 2017, from 2 p.m. to 5 p.m. See **SUPPLEMENTARY INFORMATION** for agenda details.

ADDRESSES: The meeting will take place over webinar with a telephone-only connection option. The webinar can be accessed at: *http://mafmc.adobeconnect.com/bsb-ap-2017/.* To access via telephone, dial 1–800–832–0736 and use room number 4472108.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; Web site: *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The Mid-Atlantic Fishery Management Council's Summer Flounder, Scup, and Black Sea Bass Advisory Panel, together with the Atlantic States Marine Fisheries Commission's Advisory Panel, will meet on Monday, February 6, 2017 via webinar (see **DATES** and **ADDRESSES**). The purpose of this meeting is to review and comment on the recently approved stock assessment information for black sea bass, as well as the reports and recommendations of the Council's Scientific and Statistical Committee (SSC) and the Summer Flounder, Scup, and Black Sea Bass Monitoring Committee regarding black sea bass fishery specifications for 2017–19 (*i.e.,* catch and landings limits for 2017–19, as well as recreational management measures for 2017). The Council and ASMFC will consider input from the AP at their joint meeting in February when reviewing these specifications.

A detailed agenda and background documents will be made available on the Council's Web site (*www.mafmc.org*) prior to the meeting.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: January 6, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–00418 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF110

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice of availability and request for comment.

SUMMARY: Notice is hereby given that the Northwest Indian Fisheries Commission (NWIFC) has submitted a Tribal Resource Management Plan (Tribal Plan) for NMFS to evaluate. It was presented by the Bureau of Indian Affairs (BIA) on behalf of the Northwest Indian Tribes. The submission fulfills the Tribes' obligations under the protective regulations promulgated for Puget Sound (PS) Chinook salmon, Hood Canal summer-run (HCS) chum salmon, PS steelhead, and Southern (S) eulachon under the Endangered Species

Act (ESA). The Tribal Plan describes research and assessment activities that may affect listed PS Chinook salmon, HCS chum salmon, PS steelhead, and S eulachon in Washington State. The proposed research is intended to increase knowledge of species listed under the ESA and to help guide management and conservation efforts. NMFS has completed a proposed evaluation of how well the Tribal Plan fulfills ESA criteria, and the Secretary of Commerce (Secretary) is making that proposed evaluation available for public comment.

DATES: Comments or requests for a public hearing on the applications must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific standard time on February 10, 2017.

ADDRESSES: Written comments on the applications should be sent to the Protected Resources Division, NMFS, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232–1274. Comments may also be sent via fax to 503–230–5441.

FOR FURTHER INFORMATION CONTACT: Mitch Dennis, Lacey, WA (ph.: 360–753–9580), Fax: 360–753–9517, email: *Mitch.Dennis@noaa.gov*).

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

The following listed species are covered in this notice:

Chinook salmon (*Oncorhynchus tshawytscha*): Threatened Puget Sound (PS).

Steelhead (*O. mykiss*): Threatened PS.

Chum salmon (*O. keta*): Threatened Hood Canal Summer-run (HCS).

Eulachon (*Thaleichthys pacificus*): Threatened Southern (S).

Authority

Under section 4 of the ESA, the Secretary is required to adopt such regulations as he deems necessary and advisable for the conservation of the species listed as threatened. The ESA Tribal 4(d) rule (70 FR 37160; June 28, 2005) states that the ESA section 9 take prohibitions do not apply to Tribal Plans that will not appreciably reduce the likelihood of survival and recovery for the listed species.

The Tribal Plan

The NWIFC—through the BIA and on behalf of the Northwest Indian Tribes—has submitted a Tribal Plan for scientific research and assessment activities within the range of the PS Chinook salmon, HCS chum salmon, PS steelhead, and S eulachon. The Northwest Indian Tribes conduct, independently and in cooperation with other agencies, a variety of research and assessment projects. These projects provide the technical basis for managing fisheries and conserving and restoring salmon stocks and their habitat. The need for an improved understanding of salmonid survival in the freshwater and early marine life stages drives much of the current research. The Tribal Plan includes implementation, monitoring, and evaluation procedures designed to ensure that the research is consistent with the objectives of the ESA. The research activities described in the Tribal Plan would take place over a five-year period starting in 2017.

As 50 CFR 223.209 requires, the Secretary must determine whether the Tribal Plan would appreciably reduce the likelihood of survival and recovery for PS Chinook salmon, HCS chum salmon, PS steelhead, and S eulachon. The Secretary must take comments on how the Tribal Plan addresses the criteria in 50 CFR 223.209 in making that determination.

Dated: January 4, 2017.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2017–00299 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Nominations for the National Sea Grant Advisory Board (NSGAB)

AGENCY: National Oceanic and Atmospheric Administration, Commerce. (NOAA)

ACTION: Notice of solicitation for nominations for the National Sea Grant Advisory Board.

SUMMARY: This notice responds to Section 209 of the Sea Grant Program Improvement Act of 1976, which requires the Secretary of Commerce to solicit nominations at least once a year for membership on the National Sea Grant Advisory Board (Board), a Federal Advisory Committee that provides advice on the implementation of the National Sea Grant College Program. The NOAA intends to fill two expected vacancies on the Board in 2017. To apply for membership to the Board, applicants should submit a current resume, via the methodology discussed in the Contact Information Section of this notice. A cover letter highlighting specific areas of expertise relevant to the purpose of the Board is helpful, but not required. NOAA is an equal opportunity employer.

DATES: Applications must be postmarked no later than March 1st 2017. Applications will be kept on file for consideration of any Board vacancy for a period of three years from the closing date of this notice.

ADDRESSES: Nominations will be accepted by email or mail. They should be sent to the attention of Ms. Mary Ann Garlic, National Sea Grant College Program, National Oceanic and Atmospheric Administration, 1315 East-West Highway, SSMC 3, Room 11717, Silver Spring, Maryland 20910.

FOR FURTHER INFORMATION CONTACT: If you need additional assistance, please email *maryann.garlic@noaa.gov* or call 301–734–1088.

SUPPLEMENTARY INFORMATION: Established by Section 209 of the Act and as amended the National Sea Grant College Program Amendments Act of 2008 (Pub. L. 110–394), the duties of the Board are as follows:

(1) In general, the Board shall advise the Secretary and the Director concerning:

(A) Strategies for utilizing the Sea Grant College Program to address the Nation's highest priorities regarding the understanding, assessment, development, management, utilization, and conservation of ocean, coastal, and Great Lakes resources;

(B) The designation of Sea Grant Colleges and Sea Grant Institutes; and

(C) Such other matters as the Secretary refer to the Board for review and advice.

(2) Biennial Report. The Board shall report to the Congress every two years on the state of the National Sea Grant College Program. The Board shall indicate in each such report the progress made toward meeting the priorities identified in the strategic plan in effect under section 204(c). The Secretary shall make available to the Board such information, personnel, and administrative services and assistance as it may reasonably require carrying out its duties under this title.

The Board shall consist of 15 voting members who shall be appointed by the Secretary for a 4-year term, renewable for a 2nd 4-year term at the discretion of the Secretary. The Director and a director of a Sea Grant program who is elected by the various directors of Sea Grant programs shall serve as nonvoting members of the Board. Not less than 8 of the voting members of the Board shall be individuals who, by reason of knowledge, experience, or training, are especially qualified in one or more of

the disciplines and fields included in marine science. The other voting members shall be individuals who, by reason of knowledge, experience, or training, are especially qualified in, or representative of, education, marine affairs and resource management, coastal management, extension services, State government, industry, economics, planning, or any other activity which is appropriate to, and important for, any effort to enhance the understanding, assessment, development, management, utilization, or conservation of ocean, coastal, and Great Lakes resources. No individual is eligible to be a voting member of the Board if the individual is (A) the director of a Sea Grant College or Sea Grant Institute; (B) an applicant for, or beneficiary (as determined by the Secretary) of, any grant or contract under section 205 [33 USCS § 1124]; or (C) a full-time officer or employee of the United States.

INDIVIDUALS SELECTED FOR FEDERAL ADVISORY COMMITTEE MEMBERSHIP: Upon selection and agreement to serve on the National Sea Grant Advisory Board, you become a Special Government Employee (SGE) of the United States Government. According to 18 U.S.C. 202(a), an SGE is an officer or employee of an agency who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, not to exceed 130 days during any period of 365 consecutive days, either on a fulltime or intermittent basis. Please be aware that after the selection process is complete, applicants selected to serve on the Board must complete the following actions before they can be appointed as a Board member:

(a) Security Clearance (on-line Background Security Check process and fingerprinting), and other applicable forms, both conducted through NOAA Workforce Management; and (b) Confidential Financial Disclosure Report. As an SGE, you are required to file a Confidential Financial Disclosure Report annually to avoid involvement in a real or apparent conflict of interest. You may find the Confidential Financial Disclosure Report at the following Web site. *http://www.oge.gov/Forms-Library/OGE-Form-450-Confidential-Financial-Disclosure-Report/.*

Dated: January 5, 2017.

Jason Donaldson,

Chief Financial Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2017–00465 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–KA–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF144

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The North Pacific Fishery Management Council (Council) and its advisory committees will meet in Seattle, WA.

DATES: The meetings will be held January 30, 2017 through February 7, 2017. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the Renaissance Hotel, 515 Madison St., Seattle, WA 98104.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252; telephone: (907) 271–2809.

FOR FURTHER INFORMATION CONTACT: David Witherell, Council staff; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The Council will begin its plenary session at 8 a.m. in the South Room on Wednesday, February 1, continuing through Tuesday, February 7, 2017. The Scientific and Statistical Committee (SSC) will begin at 8 a.m. in the East Room on Monday, January 30, and continue through Wednesday, February 1, 2017. The Council's Advisory Panel (AP) will begin at 8 a.m. in the North/West Room on Tuesday, January 31, and continue through Saturday, February 4, 2017. The IFQ Committee will meet on Monday, January 30, 2017 at 12 p.m. in the Marion Room. The Ecosystem Committee will meet on Tuesday, January 31, 2017, from 8 a.m. to 12 p.m. in the Marion Room.

Agenda

Monday, January 30, 2017 Through Tuesday, February 7, 2017

Council Plenary Session: The agenda for the Council's plenary session will include the following issues. The Council may take appropriate action on any of the issues identified.

(1) Executive Director's Report
(2) NMFS Management Report (Including Report on NS1 Guidelines, and Halibut decksorting EFP renewal)
(3) ADF&G Report
(4) NOAA Enforcement
(5) USCG Report
(6) USFWS Report
(7) Protected Species Report
(8) IPHC Report
(9) NAVY (GOA Training Report)
(10) CDQ Ownership Caps
(11) Mixing of Guided and Unguided Halibut
(12) Area 4 Halibut IFQ Leasing
(13) IFQ Committee Report on Potential New Actions
(14) BSAI Crab Specifications for Norton Sound Red King Crab
(15) BSAI YFS TLA Fishery Limited Entry
(16) AFA 10-Year Program Review
(17) Squid to Ecosystem Component Category
(18) GOA Gear Specific Skate MRAs
(19) Bristol Bay Red King Crab PSC
(20) Stock Assessment Prioritization
(21) Staff Tasking

The Advisory Panel will address most of the same agenda issues as the Council except B reports.

The SSC agenda will include the following issues:

(1) BSAI YFS TLA Fishery Limited Entry
(2) BSAI Crab Specifications for Norton Sound Red King Crab
(3) Squid to Ecosystem Component Category
(4) Stock Assessment Prioritization
(5) National Standard 1 Guidelines
(6) Economic SAFE Report
(7) Ensemble Modeling Workshop

In addition to providing ongoing scientific advice for fishery management decisions, the SSC functions as the Councils primary peer review panel for scientific information as described by the Magnuson-Stevens Act section 302(g)(1)(e), and the National Standard 2 guidelines (78 FR 43066). The peer review process is also deemed to satisfy the requirements of the Information Quality Act, including the OMB Peer Review Bulletin guidelines.

The Agenda is subject to change, and the latest version will be posted at *http://www.npfmc.org/.*

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shannon Gleason at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: January 6, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–00420 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE348

Endangered Species; File No. 17225

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

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that the NMFS Northeast Fisheries Science Center (NEFSC), 166 Water Street, Woods Hole, MA 02543 [Responsible Party: Jon Hare, Ph.D.], has been issued a permit to take Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*), loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempii*), green (*Chelonia mydas*), hawksbill (*Eretmochelys imbricata*) and leatherback (*Dermochelys coriacea*) sea turtles for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

FOR FURTHER INFORMATION CONTACT: Malcolm Mohead or Amy Hapeman, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On January 15, 2016, notice was published in the **Federal Register** (81 FR 2196) that a request for a scientific research permit to take Atlantic sturgeon, loggerhead Kemp's ridley, green, hawksbill and leatherback sea turtles had been submitted by the above-named organization. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 17255 authorizes the NEFSC to conduct research on Atlantic sturgeon and sea turtles in Northwest Atlantic waters from Massachusetts to Florida, testing and evaluating gear modifications used within commercial fisheries in efforts to minimize or prevent future interactions with sea turtles and Atlantic sturgeon. Researchers may capture, measure, weigh, tag, genetic tissue sample, and photograph animals prior to release. The permit is valid for five years from the date of issuance.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: January 5, 2017.

Julia Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2017–00360 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF143

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Habitat Advisory Panel to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Monday, January 30, 2017 at 9:30 a.m.

ADDRESSES: The meeting will be held at the Four Points by Sheraton, 1 Audubon Road, Wakefield, MA 01880; phone: (781) 245–9300.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The advisory panel will review the alternatives and analyses in the Council's Deep-Sea Coral Amendment and provide feedback. They will specifically review (1) Management alternatives: Are the alternatives clearly specified, *i.e.* is clarification required? Are any boundary modifications recommended? What are the potential implementation/operational issues? Does the advisory panel have any preferred alternatives? (2) Impacts analysis completed to date: Are there questions about the approaches used or the results? Are there additional factors or issues that should be considered? (3) Further amendment development: Does the advisory panel have suggestions about how to conduct outreach with the fishing industry? With other groups? Are there specific actions that would make a public workshop to refine the coral zone boundaries more effective? Other business may be discussed as needed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: January 6, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–00419 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF145

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Law Enforcement Committee of the Mid-Atlantic Fishery Management Council (Council) will hold a meeting.

DATES: The meeting will be held on Tuesday, February 7, beginning at 2

p.m. and conclude by 3:30 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held via webinar with a telephone-only connection option.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331 or on their Web site at *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to review and comment on the NOAA Fisheries 2017 Enforcement Priorities.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: January 6, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–00427 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF027

Draft Arctic Marine Mammal Disaster Response Guidelines

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

ACTION: Notice of availability.

SUMMARY: NMFS, in an effort to increase preparedness for wildlife response under the Oil Pollution Act of 1990, has drafted guidelines for marine mammal response in northern Alaska entitled ''Arctic Marine Mammal Disaster Response Guidelines.'' NMFS invites the public to comment on and/or provide additional information for NMFS to consider in finalizing the guidelines.

DATES: Comments must be submitted on or before March 13, 2017.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2016–0143, by any one 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-2016-0143* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments;
- *Mail:* Submit written comments to Sadie Wright, attention Ellen Sebastian, National Marine Fisheries Service, Protected Resources Division, Alaska Region, 709 West 9th Street, P.O. Box 21668, Juneau, AK 99802.

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), 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).

Electronic copies of the Draft Arctic Marine Mammal Disaster Response Guidelines and associated Appendices may be obtained from *www.regulations.gov* or from the NMFS Alaska Region Web site at *alaskafisheries.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Sadie Wright, (907) 586–7630 or *Sadie.Wright@noaa.gov.*

SUPPLEMENTARY INFORMATION: Marine mammal oil spill response and preparedness in Arctic Alaska presents many challenges including large populations of marine mammals, remote conditions, and lack of infrastructure, equipment, and trained personnel. Additionally, marine mammals are important subsistence and cultural resources for Alaska Native coastal communities, and response efforts must be cooperative with and sensitive to local communities. NMFS developed the Arctic Marine Mammal Disaster Response Guidelines (Guidelines) for the Bering Strait, Northwest Alaska, and the North Slope of Alaska through stakeholder engagement to develop regionally specific and culturally sensitive response strategies.

NMFS sought input on communication and response protocols for carcass collection, de-oiling, tissue sampling, necropsies, and subsistence food issues through meetings with local leaders in Nome, Kotzebue, Wainwright, and Barrow, and teleconferences and email correspondence with outlying communities. These stakeholder meetings resulted in three key recommendations for the Guidelines: (1) Include a communication structure that is locally based and efficient, (2) prioritize public health and food safety, and (3) address the lack of infrastructure, equipment, and trained personnel for response efforts.

These recommendations are addressed by the Guidelines in the following ways:

(1) The local stranding agreement holder or community-appointed organization(s) is the local lead, and communication protocols outline cooperative approaches between stakeholders;

(2) All response protocols are congruent with food safety testing, and the Alaska state public health representative is part of the communication loop; and

(3) Caches of equipment should be developed and stored in hub communities with smaller caches in outlying villages, to include modular and adaptive infrastructure for response activities.

Finally, the Guidelines recommend that trainings be developed for village residents that can be deployed remotely.

The draft Guidelines focus on Arctic marine mammal species under NMFS jurisdiction (principally whales and ice-associated seals), and different approaches may be appropriate for walrus and polar bears, which are managed by the U.S. Fish and Wildlife Service. Any response to marine mammals per these Guidelines should occur in coordination with NMFS through the Incident Command Structure, if put in place for an oil spill or other major incident.

Comments are invited on any aspect of the draft Guidelines. We are particularly interested in maintaining an efficient communication strategy for marine mammal disaster response in the Arctic, and seek suggestions to ensure the Guidelines provide that framework. In addition, NMFS appreciates specific suggestions on how to improve the

clarity of the Guidelines. NMFS also requests residents of Utqiaġvik (Barrow) to advise on the preferred name of their town to be used in this planning/communication document. We understand the official name is now Utqiaġvik, but many responders may be more familiar with the name Barrow in the near future.

Dated: January 5, 2017.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2017–00308 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF122

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Post-Data Workshop Webinar for Atlantic Blueline Tilefish; Public Meeting

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

ACTION: Notice of SEDAR 50 Post-Data Workshop Webinar.

SUMMARY: The SEDAR 50 assessment of the Atlantic stock of *blueline tilefish* will consist of a series of workshops and webinars: Stock ID Work Group Meeting; Data Workshop; Assessment Workshop and Webinars; and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 50 Post-Data Workshop Webinar will be held on Thursday, February 2, 2017, from 1 p.m. to 5 p.m.

ADDRESSES: *Meeting address:* The meetings will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julia Byrd at SEDAR (see **FOR FURTHER INFORMATION CONTACT** below) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405. *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Julia Byrd, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone (843) 571–4366; email: *julia.byrd@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the Pre-Data Workshop webinar are as follows:

Participants will finalize data recommendations from the Data Workshop and provide early modeling advice.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 10 business days prior to the meeting.

The times and sequence specified in this agenda are subject to change.

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

Dated: January 6, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–00426 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Proposed Information Collection; Comment Request; NTIA/FCC Web-Based Frequency Coordination System

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice; information collection.

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 comment on this proposed information collection, pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before March 13, 2017.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6612, 1401 Constitution Avenue NW., Washington, DC 20230 (or via email at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Bruce M. Washington at *bwashington@ntia.doc.gov,* (202) 482–6415.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Telecommunications and Information Administration (NTIA) hosts a web-based system that collects specific identification information (*e.g.,* entity name, location and projected

range of the operation) from applicants seeking authorization by the Federal Communications Commission (FCC) to operate in radio frequency (RF) bands that are shared on a co-primary basis by federal and non-federal spectrum users. The web-based system provides a means for non-federal applicants to rapidly determine the availability of RF spectrum in a specific location, or the need for detailed frequency coordination of a specific newly proposed assignment within the shared portions of the radio spectrum. It allows proposed radio site information from non-federal applicants to be analyzed, and a real-time determination made as to whether a potential for RF interference to, or from, existing Federal government radio operations exists in the vicinity of the proposed site. This web-based coordination helps expedite the coordination process for non-federal applicants while assuring protection of government data relating to national security. The information provided by non-federal applicants also will assist in the protection of the applicant's station from interference from future government operations.

II. Method of Collection

NTIA collects the data by means of an Internet-based system. The system provides real-time responses for an applicant to obtain either: (1) A validation of the coordination of a single frequency, or (2) a notification of the unavailability of a frequency at one site which will require further coordination by the FCC and NTIA.

III. Data

OMB Control No: 0660–0018.

Form No.: N/A.

Type of Review: Regular submission (extension of currently approved information collection).

Affected Public: Applicants seeking to operate in the 71–76 GHz, 81–86 GHz, and 92–95 GHz radio frequency bands.

Estimated Total Number of Annual Respondents: 4,000.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 1,000.

Estimated Total Annual Cost to Public: $0.00.

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 a 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.

Sheleen Dumas,

PRA Department Lead, Office of the Chief Information Officer.

[FR Doc. 2017–00326 Filed 1–10–17; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF DEFENSE

Department of the Army

Intent To Grant an Exclusive License of U.S. Government-Owned Patents

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: The comment period for the Intent to Grant an Exclusive License of U.S. Government-Owned Patents published in the **Federal Register** on Friday, December 9, 2016, (81 FR 89087), required comments be postmarked on or before December 24, 2016. The comment period has been extended to January 23, 2017.

FOR FURTHER INFORMATION CONTACT: Mr. Barry Datlof, Office of Research & Technology Assessment, (301) 619–0033. For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808, both at telefax (301) 619–5034.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2017–00247 Filed 1–10–17; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Department of the Navy

Record of Decision (ROD) for the United States Marine Corps Santa Margarita River Conjunctive Use Project (SMR CUP) at Marine Corps Base (MCB) Camp Pendleton, California

AGENCIES: Bureau of Reclamation (Reclamation), Department of the Navy (DoN).

ACTION: Record of Decision.

SUMMARY: The Department of the Navy (DoN), after carefully considering the environmental consequences of the proposed action, announces its decision to implement a project for the conjunctive use of surface water and groundwater within the Lower Santa Margarita River (SMR) Basin. The DoN has selected the preferred alternative as identified in the 2016 Final Environmental Impact Statement (EIS)/Environmental Impact Report (EIR). This alternative consists of construction and operation of new facilities for adaptive management of surface water and groundwater resources that would be achieved through the enhanced diversion of SMR surface waters to groundwater recharge ponds and the active use of groundwater aquifers for water storage. The proposed action would resolve the water rights disputes between the United States (on behalf of the Marine Corps) and Fallbrook Public Utility District (FPUD) and satisfy the United States District Court for the Southern District of California order to find a ''physical solution'' to the ongoing litigation in *United States* v. *Fallbrook Public Utility District, et al.* The Proposed Action would also efficiently meet the long-term water demands of Marine Corps Installations (MCI) West-MCB Camp Pendleton and FPUD, reduce FPUD's dependence on imported water, maintain watershed resources, and improve water supply reliability by managing the yield of the Lower SMR Basin. The DoN and Reclamation are the designated co-lead agencies for review of this project under the National Environmental Policy Act (NEPA), and FPUD is the designated lead agency for review of this project under the California Environmental Quality Act (CEQA) in the preparation of the joint EIS/EIR.

This ROD documents why the DoN has chosen to implement the preferred alternative as described in the 2016 Final EIS/EIR. The ROD includes descriptions and discussions of the anticipated environmental impacts of the proposed action as well as all practical means to avoid or minimize environmental impacts from the selected alternative. It also includes descriptions and discussions of all related actions and their anticipated impacts.

FOR FURTHER INFORMATION CONTACT: SMR CUP EIS Project Manager, Commanding General, Marine Corps Installations West-Marine Corps Base Camp Pendleton, CA 92055–5010, Attn: Environmental Security, 760–725–1721.

SUPPLEMENTARY INFORMATION: Pursuant to Section 102(2)(c) of the NEPA of

1969, 42 United States Code (U.S.C.) § 4332(2)(c), as implemented by the Council on Environmental Quality (CEQ) Regulations at 40 Code of Federal Regulations (CFR) Parts 1500–1508; DoN NEPA regulations (32 CFR part 775); and the United States Marine Corps Environmental Compliance and Protection Manual (Marine Corps Order P5090.2A, Change 3), the DoN announces its decision to implement the SMR CUP at MCB Camp Pendleton, California as described in Alternative 1 of the 2016 Final EIS/EIR.

In addition to NEPA and other environmental laws, the DoN considered applicable executive orders (EO), including the requirements of EO 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; EO 13045, Environmental Health Risk and Safety Risks to Children; EO 11990, Protection of Wetlands; and EO 11988, Floodplain Management.

Purpose and Need: The purpose of the proposed action is to resolve the water rights dispute between the United States and FPUD and satisfy the United States District Court for the Southern District of California order to find a ''physical solution'' to the ongoing litigation in *United States* v. *Fallbrook Public Utility District, et al.* The proposed action is needed to upgrade/develop infrastructure and cooperative water management processes that satisfy MCI West-MCB Camp Pendleton and FPUD's respective current and future water requirements.

MCB Camp Pendleton and FPUD entered into a Memorandum of Understanding in 2001 agreeing to jointly participate in the project in good faith and with full cooperation. MCB Camp Pendleton, Reclamation, and FPUD signed a Conceptual Points of Agreement in January 2011.

Public Involvement: NEPA and CEQA regulations require an early and open process for determining the scope of issues related to a Proposed Action or project. In accordance with NEPA and CEQA, DoN, Reclamation, and FPUD initiated a public and agency scoping process to assist in determining the range of issues to be addressed in the EIS/EIR. A Notice of Intent was issued in November 2004 and a public scoping meeting was held in January 2005.

The range of issues analyzed in the EIS/EIR was determined from the initial DoN, Reclamation, and FPUD evaluation of the action alternatives, as well as, comments received during the public scoping process and written and verbal comments received during the 2010 public review period for the California State Water Resources Control Board water right permit extension petitions.

A Notice of Availability/Notice of Completion for the Draft EIS/EIR was published in the **Federal Register** on May 9, 2014, and a Notice of Completion was provided to the California State Clearinghouse on May 9, 2014 to initiate a 45-day public review of the Draft EIS/EIR. A public meeting was held on May 29, 2014 at the FPUD, and the public review period for the Draft EIS/EIR concluded on July 10, 2014. Written and verbal comments on the Draft EIS/EIR were provided by the United States Environmental Protection Agency (USEPA) and FPUD Board members, respectively.

The Final EIS/EIR was published in the **Federal Register** on October 14, 2016; written comments were received from the USEPA on November 14, 2016 and are being addressed through the consultation process with the United States Army Corps of Engineers (USACE) and completion and implementation of the Adaptive Management Plan/Facilities Operating Plan (AMP/FOP).

Alternatives Considered: The DoN identified and evaluated a reasonable range of alternatives that consisted of two action alternatives and a no action alternative. The following provides a description of the two action alternatives:

Alternative 1

This alternative would include diversion system upgrades, groundwater recharge, and groundwater production. Raw groundwater would be pumped from the aquifer and conveyed to the Haybarn Canyon area on MCB Camp Pendleton. The water delivered to Haybarn Canyon would then be diverted to either MCB Camp Pendleton's existing Haybarn Canyon Advanced Water Treatment Plant (AWTP), or to a new FPUD water treatment plant (WTP) via a new bi-directional pipeline. The bi-directional pipeline between FPUD and MCB Camp Pendleton would also allow imported water to be delivered from FPUD to MCB Camp Pendleton during drier than normal periods when local groundwater is insufficient to meet demands or during emergency conditions.

Improvements to Existing Facilities

Replacement of Existing Sheet Pile Diversion with Inflatable Weir Diversion Structure. The existing sheet pile diversion structure on the SMR (within MCB Camp Pendleton) would be replaced with an inflatable weir diversion structure. The inflatable weir diversion structure would extend for up to one foot (ft) (0.3 meter [m]) higher than the existing diversion structure to allow for the proposed increase in the amount of water to be diverted from the SMR into O'Neill Ditch from the current 60 cubic feet per second (cfs) to a maximum of 200 cfs. Water diverted from the SMR would flow to the aquifer recharge ponds, be stored in Lake O'Neill, or bypassed back to the SMR.

The inflatable weir gates would be operated based on the operation plan outlined in the AMP/FOP guidelines and procedures as described below. During large streamflow events (*i.e.,* 10-year event and greater), however, the inflatable weir would be fully lowered to allow floodwaters, sediment, and debris to pass downstream without adversely affecting water diversion facilities.

Improvements to O'Neill Ditch and Headgate. The headgate (*i.e.,* a gate for controlling the flow of water into a ditch) and O'Neill Ditch would be modified to increase the capacity from 60 cfs to 200 cfs to accommodate the maximum amount of water to be diverted under the project design. Operation of the headgate and O'Neill Ditch would be based on the operation plan outlined in the AMP/FOP guidelines and procedures as described below.

Improvements to Recharge Ponds 1–7. The overall performance of the existing MCB Camp Pendleton Recharge Ponds 1–7 is currently reduced by operational inefficiencies related to lack of water level control and the inability to measure flow between ponds. Proposed improvements to Recharge Ponds 1–7 include redesigning the culverts and weirs that transfer water from one pond to the next. Operation of the recharge ponds would be based on the AMP/FOP guidelines and procedures as described below.

Proposed New Facilities

Groundwater Production Wells and Associated Collection System Infrastructure. The existing groundwater production wells operated and maintained by MCI West-MCB Camp Pendleton would be augmented by the installation of four new groundwater production wells in the Upper Ysidora and Chappo sub-basins, along with appurtenant collection pipelines, power lines, and access roads. Operation of existing and new production wells would be based on AMP/FOP guidelines and procedures as described below. The pumping schedule would be designed to optimize groundwater levels during the winter to create storage in the aquifer, capture wintertime flow events, and

minimize groundwater mounding at the recharge ponds. Pumping would be reduced during extremely dry years, with restricted groundwater pumping continuing until wetter hydrologic conditions occur.

Water Conveyance/Distribution, including Bi-Directional Pipeline from MCB Camp Pendleton to a new FPUD Water Treatment Plant. Raw groundwater would be pumped from the aquifer and conveyed to the Haybarn Canyon area on MCB Camp Pendleton. The water delivered to Haybarn Canyon would then be diverted to either MCB Camp Pendleton's existing Haybarn Canyon AWTP, or to the new FPUD WTP via a new bi-directional pipeline. The bi-directional pipeline between FPUD and MCB Camp Pendleton would also allow imported water to be delivered from FPUD to MCB Camp Pendleton during drier than normal periods when local groundwater is insufficient to meet demands or during emergency conditions.

MCB Camp Pendleton would continue to process water for its own use at the existing Haybarn Canyon AWTP and FPUD would treat its portion of the project water at a new FPUD WTP (see detailed description below). Raw groundwater delivered to FPUD would average 3,100 acre-feet per year (afy) and would not exceed 800 acre-feet (af) in any given month.

However, total volumes of raw water deliveries to FPUD would vary annually dependent upon multiple factors including, but not limited to, precipitation, river surface flows, surface diversions, and environmental considerations.

FPUD WTP. A new FPUD WTP would be constructed on FPUD property adjacent to the existing FPUD WTP. The new FPUD WTP would be designed to provide potable water and would include an iron and manganese removal and demineralization facility. The new FPUD WTP would have the capacity to treat a maximum of 800 af per month, equivalent to up to 8.4 million gallons per day, although it would remain subject to the maximum 3,100 afy raw water processing limit.

Brine from the FPUD WTP would be discharged to the Pacific Ocean via FPUD's pipeline connection to the City of Oceanside Ocean Outfall (Ocean Outfall). FPUD's existing National Pollutant Discharge Elimination System (NPDES) Permit (CA0108031) would be amended to allow for the inclusion of the additional brine from the project.

Supervisory Control and Data Acquisition (SCADA) System. Operation of a SCADA system, as included in the project, would be overseen and managed by the MCI West-MCB Camp Pendleton Facilities Maintenance Division. The spillway gates on the inflatable weir diversion structure, turnouts to the recharge ponds and Lake O'Neill, production and monitoring wells, flow measurement, and pumping plants would be designed for remote operation and/or data acquisition using the SCADA system.

Open Space Management Zone (OSMZ). A legal framework would be established by FPUD to permanently preserve 1,392 acres (563 hectares) of riparian open-space land in the City of Fallbrook that was acquired by FPUD in 1958 for water supply development purposes. Under Alternative 1, all or most of the OSMZ would be placed in conservation management to preserve open space and riparian values that currently exist on the site. Conservation approaches currently being considered by FPUD include, but are not limited to: (1) purchase and management of the OSMZ by Reclamation, MCI West-MCB Camp Pendleton, or another agency or conservation related organization; (2) continued ownership of the property by FPUD subject to a conservation easement purchased by a third party that restricts future development; or (3) management of the property as a mitigation bank by FPUD or its designee.

Adaptive Management Plan/Facilities Operation Plan (AMP/FOP). As part of the project, an AMP/FOP would be developed by MCI West-MCB Camp Pendleton to manage project diversion, recharge, production, and delivery facilities. The AMP/FOP would allow for diversions, recharge, production, and delivery to vary based on hydrologic conditions, with greater amounts of water diverted, recharged, produced, and delivered during wet years and less during drier years. The AMP/FOP would rely on near real-time and historical environmental and hydrologic data from existing and proposed gauges to determine project operations and meet delivery requirements balanced with environmental constraints. Actual field data gathered during project operations would be processed using a numerical groundwater model to determine future locations and rates of pumping that would protect environmental concerns while meeting project proponents' water requirements. The pumping schedules and proposed operations would then be published annually in a FOP that would describe how and when the inflatable weir, headgate, turnout gates, and wells are operated on a seasonal and monthly basis. The use of the AMP/FOP and its ability to rely on an alternative water supply (*i.e.,* imported water from FPUD via a bi-directional pipeline) to meet demands on MCB Camp Pendleton would allow for increased sustained basin yield in the Lower SMR Basin. The AMP/FOP would continue to be developed, updated, and implemented by appropriate MCI West-MCB Camp Pendleton subject matter experts.

Alternative 2

Alternative 2 is similar to Alternative 1 in terms of diversion system upgrades, groundwater recharge, and groundwater production. Alternative 2 includes the following components described under Alternative 1 (see Alternative 1 description for details on each of the following components):

- Replacement of Existing Sheet Pile Diversion with Inflatable Weir Diversion Structure,
- Improvements to O'Neill Ditch and Headgate,
- Improvements to Recharge Ponds 1–7,
- Groundwater Production Wells and Associated Collection System Infrastructure,
- Bi-directional Pipeline,
- The OSMZ, and
- The SCADA system.

Alternative 2 differs from Alternative 1 in that a new surface water treatment facility located adjacent to the MCB Camp Pendleton Haybarn Canyon AWTP would treat surface water diverted from four new gallery wells installed between the recharge ponds and SMR. Treated water would be delivered to the MCB Camp Pendleton potable water distribution system and to FPUD via a bi-directional pipeline as previously discussed. The project components specific to Alternative 2 are discussed below.

Expand Haybarn Canyon AWTP and Add a Surface Water Treatment Facility at MCB Camp Pendleton. Groundwater from MCB Camp Pendleton's existing wells and SMR CUP's four new production wells would be treated at an expanded Haybarn Canyon AWTP. The expansion of MCB Camp Pendleton's existing Haybarn Canyon AWTP would occur to handle the increased Alternative 2 flow volumes. The existing Haybarn Canyon AWTP's groundwater water quality treatment goals would continue to be met under this expansion. The gallery wells would produce surface water that would be treated at the proposed new surface water treatment facility located adjacent to the existing Haybarn Canyon AWTP. The treated surface water would then be blended with the treated groundwater and distributed to MCB Camp Pendleton and FPUD.

Under Alternative 2, an additional average daily brine discharge of 3.5 cfs would be produced and discharged to the Pacific Ocean via the existing Ocean Outfall. The additional brine would be conveyed to the Ocean Outfall via the existing brine discharge pipeline constructed for MCB Camp Pendleton's Haybarn AWTP, which is connected to the Ocean Outfall via the Haybarn Canyon AWTP's connection to the Ocean Outfall Pump Station. The brine discharge would be covered under either an amendment to FPUD's existing NPDES Permit (CA0108031) to the Ocean Outfall or an amendment to MCI West-MCB Camp Pendleton NPDES Permit (CA0109347).

Gallery Wells and Associated Collection System Infrastructure. Four gallery wells would be installed adjacent to the SMR along the west side of the recharge ponds at MCB Camp Pendleton. Operation of the gallery wells would be based on AMP/FOP guidelines and procedures as described under Alternative 2 in the Final EIS/EIR.

Water Conveyance/Distribution System, including Bi-Directional Pipeline. As previously discussed, a bi-directional water conveyance pipeline would be installed between the Haybarn Canyon AWTP and FPUD's WTP. The new pipeline would have two main turnouts to provide treated water directly MCB Camp Pendleton and FPUD users. As noted in Alternative 1, the bi-directional pipeline would also allow water to be delivered to MCB Camp Pendleton during drier than normal periods when groundwater is insufficient to meet demands or emergency situations.

No Action Alternative

Under the No-Action Alternative, the water rights are not perfected, and other water development projects upstream of MCB Camp Pendleton could occur that would result in a reduction of water supply available to MCB Camp Pendleton to meet its existing and future water demands. Without implementation of a ''physical solution,'' the ongoing *United States* v. *Fallbrook Public Utility District et al.* litigation would not be settled. Although other alternatives may exist, they are neither feasible nor prudent. Failure to reach a physical solution may propel the parties into active litigation prone to lead to a probable court judgment not satisfactory to either party. MCB Camp Pendleton would continue to use its existing diversion, recharge, storage, and recovery system to meet its water demands. FPUD would rely solely on imported water purchased from the San Diego County Water Authority.

Existing and future water demands on MCB Camp Pendleton would be met through the use of existing facilities or from the development of more expensive alternative water supplies, such as ocean desalination or construction of a new pipeline to an off-base water purveyor and purchase of imported water. Without access to an alternative water supply through the bi-directional pipeline, groundwater level declines during extended drought periods could not be mitigated nor could MCB Camp Pendleton water demands be met during drier than normal periods or emergency conditions.

Under the No-Action Alternative, FPUD has no direct water supply benefit from the OSMZ property and no remaining justification for maintaining this property as open space. Without implementation of the SMR CUP, the OSMZ is eligible to revert to the original landowners and be developed, in which case there could be adverse impacts on wildlife, water quality, aesthetics, and other environmental values at the site and downstream. Under this alternative, the potential development of water resources by landowners could result in a reduction of available water supply to MCB Camp Pendleton and FPUD.

Although the No-Action Alternative would not meet the purpose and need for the proposed action, it is included to serve as the baseline against which impacts of the alternatives can be compared.

Preferred Alternative and Environmentally Preferable Alternative

The Final EIS/EIR identifies Alternative 1 as the Preferred Alternative. The Preferred Alternative best meets the purpose and need; has environmental impacts less than or comparable to the other action alternative (making Alternative 1 the Environmentally Preferable Alternative); and provides the most operational efficiency, construction flexibility, and cost-effectiveness of the action alternatives.

Environmental Impacts: Impacts were assessed for the following resource areas: Geological resources, water resources, biological resources, cultural resources, air quality, hazardous materials and wastes, and utilities. With the implementation of the AMP/FOP, Best Management Practices (BMPs), Special Conservation Measures (SCMs), and mitigation measures described in the Final EIS/EIR, implementation of the Preferred Alternative (Alternative 1) would have no or less than significant impacts to geological resources, water resources, biological resources, cultural resources, air quality, hazardous materials and wastes, and utilities.

Geological Resources

Significant impacts to geological resources would not occur due to project design, implementation of SCMs, and implementation of the AMP/FOP.

Water Resources

Significant impacts to water resources would not occur due to the implementation of the following mitigation measures. The AMP/FOP would include the maintenance of groundwater levels within historical range constraints; groundwater levels would be monitored by a series of telemetered groundwater monitoring wells; and pumping would be reduced or shut off if the groundwater level drops to within historic levels and remains reduced or discontinued until the average monthly groundwater levels recover to above historic levels.

Biological Resources

Significant impacts to biological resources would not occur due to the implementation of the following mitigation measures. MCB Camp Pendleton will implement the AMP/FOP and adhere to the terms and conditions of the United States Fish and Wildlife Service (USFWS) and National Oceanic and Atmospheric Administration/National Marine Fisheries Service (NMFS) Biological Opinions (BOs) for Federal threatened and endangered species and state special status species, including least Bell's vireo, southwestern willow flycatcher, arroyo toad, and southern California steelhead.

Cultural Resources

Significant impacts to cultural resources would not occur, because adverse impacts to cultural resources within the Area of Potential Effect will be avoided through construction design.

Air Quality

Significant impacts to air quality would not occur due to project design, implementation of SCMs, and implementation of the AMP/FOP.

Hazardous Materials and Waste

Significant impacts would not occur due to hazardous materials and waste, which would be managed during construction and operation in accordance with applicable Federal and state regulations. The proposed new wells have been sited so that

groundwater pumping would not impact the mapped plumes associated with Installation Restoration Program sites and would be monitored and managed through the AMP/FOP.

Utilities

Significant impacts to existing utilities would not occur due to project design, implementation of SCMs, and implementation of the AMP/FOP.

Cumulative Impacts: Implementation of the Preferred Alternative, when considered in combination with other past, present, and reasonably foreseeable future actions identified in the Final EIS/EIR, will not result in significant cumulative impacts on the human environment. Many potential impacts are localized and are of relatively short duration. With the implementation of BMPs, SCMs, and mitigation measures described in the Final EIS/EIR, cumulative impacts on geological resources, water resources, biological resources, cultural resources, air quality, hazardous materials and wastes, and utilities resulting from implementation of the Preferred Alternative would be negligible.

Mitigation Measures: Projects comprising the Preferred Alternative will be designed to minimize impacts to the maximum extent practicable and will be implemented using SCMs, BMPs, and the AMP/FOP, as discussed under Agency Coordination and Consultation below. Special conservation and construction measures listed in the Final EIS/EIR will be implemented as part of the action as conditions of construction contracts for the projects. The DoN has identified specific avoidance, minimization, and mitigation measures for impacts to biological resources.

Unavoidable impacts to jurisdictional wetlands and other waters of the United States may require mitigation. The development of a mitigation and monitoring plan is a requirement of Clean Water Act Sections 401 and 404 permit applications for activities that would discharge dredge or fill materials into Waters of the United States. This plan will include details regarding site appropriateness, preparation (*e.g.,* grading), recontouring, planting specifications (including seed mixes and plant palettes), and irrigation design (if determined necessary), as well as maintenance and monitoring procedures (including monitoring period and reporting).

Agency Coordination and Consultation: No cooperating agencies participated in the EIS/EIR process; however, MCI West-MCB Camp Pendleton completed consultation with the USFWS and NMFS under Section 7 of the Endangered Species Act and with Native American tribes and the California State Historic Preservation Office (SHPO) under Section 106 of the National Historic Preservation Act. In accordance with Section 401 and 404 of the Clean Water Act, coordination is also underway with the San Diego Regional Water Quality Control Board (RWQCB) and U.S. Army Corps of Engineers (USACE).

USFWS: Endangered Species Act Section 7 Consultation

MCI West-MCB Camp Pendleton submitted a Biological Assessment to the USFWS on September 15, 2015, and received a Final BO on August 15, 2016, concluding that the proposed action is not likely to jeopardize the continued existence of Federal threatened and endangered species and state special status species within the project area, including least Bell's vireo, southwestern willow flycatcher, and arroyo toad.

NMFS: Endangered Species Act Section 7 Consultation

MCI West-MCB Camp Pendleton submitted a Biological Assessment to NMFS on February 10, 2014, and received a Final BO on September 28, 2016, concluding that the proposed action is not likely to jeopardize the continued existence of the southern California steelhead.

SHPO/Native American Tribes: National Historic Preservation Act, Section 106 Consultation

MCI West-MCB Camp Pendleton submitted a consultation letter to the SHPO on March 19, 2012, requesting concurrence on the Finding of Effect for the proposed action, and received concurrence on September 19, 2013. MCI West-MCB Camp Pendleton consulted with the following Native American Tribes: La Jolla Band of Mission Indians; Pauma Band of Mission Indians; Pechanga Band of Luiseno Mission Indians; Rincon Band of Luiseno Indians; Pala Band of Mission Indians, Soboba Band of Luiseno Indians; San Luis Rey Band of Luiseno Indians; Juaneno Band of Mission Indians-Acjachemen Nation (Belardes); Juaneno Band of Mission Indians-Acjachemen Nation (Rivera/Romero); and Juaneno Band of Mission Indians-Acjachemen Nation (Reyes). The Rincon Band of Luiseno Indians requested to be kept informed on all updates for the project. The Pala Band of Mission Indians concurred with the methods for determining eligibility and treatment of historic properties and asked to be consulted if any new information or conclusions are reached.

USACE and San Diego RWQCB: Clean Water Act Sections 401 and 404

MCI West-MCB Camp Pendleton has submitted a Section 401 water quality certification application to the San Diego RWQCB and a 404 individual permit application to the USACE for the Preferred Alternative. To the maximum extent practicable, MCI West-MCB Camp Pendleton will avoid and minimize impacts to waters of the United States and will implement pre- and post-construction BMPs for sediment and erosion control. The proposed action will also comply with the MCI West-MCB Camp Pendleton Integrated Natural Resources Management Plan.

Conclusion: After careful consideration of the purpose and need for the proposed action, the analysis contained in the Final EIS/EIR, and comments received on the Draft and Final EIS/EIR from Federal, State, and local agencies, Native American Tribes, non-governmental organizations, and individual members of the public, I have decided to proceed with Alternative 1, the Final EIS/EIR Preferred Alternative, which entails improvements to existing facilities and construction of new facilities to efficiently meet the long-term water demands of MCB Camp Pendleton and FPUD, reduce FPUD's dependence on imported water, maintain watershed resources, and improve water supply reliability by managing the yield of the Lower SMR Basin.

Authority: 35 U.S.C. 207; 37 CFR part 404.

Dated: January 3, 2017.

A.M. Nichols,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2017–00422 Filed 1–10–17; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the U.S. Naval Academy Board of Visitors

AGENCY: Department of the Navy, DoD.

ACTION: Notice of Partially Closed Meeting.

SUMMARY: The U.S. Naval Academy Board of Visitors will meet to make such inquiry, as the Board shall deem necessary, into the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, and

academic methods of the Naval Academy. The executive session of this meeting from 11:00 a.m. to 12:00 p.m. on March 27, 2017, will include discussions of new and pending administrative/minor disciplinary infractions and non-judicial punishment proceedings involving midshipmen attending the Naval Academy to include but not limited to individual honor/conduct violations within the Brigade; the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. For this reason, the executive session of this meeting will be closed to the public.

DATES: The open session of the meeting will be held on March 27, 2017, from 9:00 a.m. to 11:00 a.m. The executive session held from 11:00 a.m. to 12:00 p.m. will be the closed portion of the meeting.

ADDRESSES: The meeting will be held at the U.S. Naval Academy, Annapolis, MD. The meeting will be handicap accessible.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Eric Madonia, USN, Executive Secretary to the Board of Visitors, Office of the Superintendent, U.S. Naval Academy, Annapolis, MD 21402–5000, 410–293–1503.

SUPPLEMENTARY INFORMATION: This notice of meeting is provided per the Federal Advisory Committee Act, as amended (5 U.S.C. App.). The executive session of the meeting from 11:00 a.m. to 12:00 p.m. on March 27, 2017, will consist of discussions of new and pending administrative/minor disciplinary infractions and non-judicial punishments involving midshipmen attending the Naval Academy to include but not limited to, individual honor/conduct violations within the Brigade. The discussion of such information cannot be adequately segregated from other topics, which precludes opening the executive session of this meeting to the public. Accordingly, the Department of the Navy/Assistant for Administration has determined in writing that the meeting shall be partially closed to the public because the discussions during the executive session from 11:00 a.m. to 12:00 p.m. will be concerned with matters protected under sections 552b(c) (5), (6), and (7) of title 5, United States Code.

(Authority: 5 U.S.C. 552b)

Dated: January 3, 2017.

A.M. Nichols,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2017–00430 Filed 1–10–17; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

National Energy Technology Laboratory

Notice of Intent To Grant an Exclusive License

AGENCY: National Energy Technology Laboratory, Department of Energy.

ACTION: Notice of intent to grant an exclusive license.

SUMMARY: This notice is issued in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i). The National Energy Technology Laboratory (NETL) hereby gives notice that the Department of Energy (DOE) intends to grant an exclusive license to practice the invention described and claimed in U.S. Patent Application Number 14/619,501, ''Variable Grid Method for Simultaneously Visualizing Uncertainty and Attribute Trends Associated with Spatial Data'' to VariGrid Explorations, LLC, a small business, having its principal place of business in Missouri City, Texas. The patent application is owned by the United States of America, as represented by DOE. The prospective exclusive license complies with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

DATES: Written comments, objections, or nonexclusive license applications must be received at the address listed below no later than fifteen (15) days after the date of this published Notice. Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

ADDRESSES: Comments, applications for nonexclusive licenses, or objections relating to the prospective exclusive license should be submitted to Jessica Sosenko, Technology Transfer Program Manager, U.S. Department of Energy, National Energy Technology Laboratory, P.O. Box 10940, Pittsburgh, PA 15236–0940 or via facsimile to (412) 386–4183.

FOR FURTHER INFORMATION CONTACT: Jessica Sosenko, Technology Transfer Program Manager, U.S. Department of Energy, National Energy Technology Laboratory, P.O. Box 10940, Pittsburgh, PA 15236; Telephone (412) 386–7417; Email: *jessica.sosenko@netl.doe.gov.*

SUPPLEMENTARY INFORMATION: Section 209(c) of title 35 of the United States Code gives DOE the authority to grant exclusive or partially exclusive licenses in Department-owned inventions where a determination is made that, among other things, the desired practical application of the invention has not been achieved, or is not likely to be achieved expeditiously, under a nonexclusive license. The statute and implementing regulations (37 CFR 404) require that the necessary determinations be made after public notice and opportunity for filing written comments and objections.

VariGrid Explorations, Inc., a small business, has applied for an exclusive license to practice the invention and has a plan for commercialization of the invention. DOE intends to grant the license, upon a final determination in accordance with 35 U.S.C. 209(c), unless within 15 days of publication of this notice, NETL's Technology Transfer Manager (contact information listed above), receives in writing any of the following, together with supporting documents:

(i) A statement from any person setting forth reasons why it would not be in the best interest of the United States to grant the proposed license; or

(ii) An application for a nonexclusive license to the invention, in which the applicant states that it already has brought the invention to practical application or is likely to bring the invention to practical application expeditiously.

The proposed license would be exclusive, subject to a license and other rights retained by the United States, and subject to a negotiated royalty. DOE will review all timely written responses to this notice, and will grant the license if, after expiration of the 15-day notice period, and after consideration of any written responses to this notice, a determination is made in accordance with 35 U.S.C. 209(c) that the license is in the public interest.

Issued: December 15, 2016

Grace M. Bochenek,

Director, National Energy Technology Laboratory.

[FR Doc. 2017–00434 Filed 1–10–17; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP17–27–000]

Northern Natural Gas Company; Notice of Request Under Blanket Authorization

Take notice that on December 23, 2016 Northern Natural Gas Company (Northern Natural), 1111 South 103rd Street, Omaha, Nebraska 68124 filed a prior notice request pursuant to sections 157.205 and 157.213(b) of the Commission's regulations under the Natural Gas Act for authorization to

abandon in-place the Fort Buford compressor station located in McKenzie County, North Dakota. Specifically, Northern Natural proposes to abandon in-place the Fort Buford compressor station consisting of one compressor building, three compressor units with 3,100 total horsepower, and associated piping in the station yard. All gas and service piping to the compressor units will be disconnected and sealed off either by the installation of blind flanges or weld caps, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, 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 Michael T. Loeffler, Senior Director, Certificates and External Affairs for Northern, 1111 South 103rd Street, Omaha, Nebraska 68124, by calling (402) 398–7278, or by fax (402) 398–7592, or by email at *mike.loeffler@nngco.com.*

Any person may, within 60 days after the 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. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed 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 he 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 via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*www.ferc.gov*) under the ''e-Filing'' link. Persons unable to file electronically should submit original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: January 3, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00381 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG17–37–000.
Applicants: CP Bloom Wind LLC.
Description: Self-Certification of Exempt Wholesale Generator Status of CP Bloom Wind LLC.
Filed Date: 1/4/17.
Accession Number: 20170104–5116.
Comments Due: 5 p.m. ET 1/25/17.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–741–000.
Applicants: Northern States Power Company, a Minnesota corporation.
Description: § 205(d) Rate Filing: 2017–01–04 OTP Sheyenne Ltr Agrmt—639—0.0.0 to be effective 3/6/2017.
Filed Date: 1/4/17.
Accession Number: 20170104–5077.
Comments Due: 5 p.m. ET 1/25/17.

Docket Numbers: ER17–742–000.
Applicants: CP Bloom Wind LLC.
Description: Baseline eTariff Filing: Initial Application for Market-Based Rate Authority to be effective 3/6/2017.
Filed Date: 1/4/17.
Accession Number: 20170104–5101.
Comments Due: 5 p.m. ET 1/25/17.

Docket Numbers: ER17–743–000.
Applicants: American Falls Solar, LLC.
Description: Baseline eTariff Filing: Filing of Shared Facilities Agreement and Request Certain Waivers to be effective 1/5/2017.
Filed Date: 1/4/17.
Accession Number: 20170104–5119.
Comments Due: 5 p.m. ET 1/25/17.

Docket Numbers: ER17–744–000.
Applicants: American Falls Solar II, LLC.
Description: Baseline eTariff Filing: Filing of Shared Facilities Agreement and Request Certain Waivers to be effective 1/5/2017.
Filed Date: 1/4/17.
Accession Number: 20170104–5120.
Comments Due: 5 p.m. ET 1/25/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 4, 2017.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–00388 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2576–171]

FirstLight Hydro Generating Company; Notice of Application Accepted for Filing and 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. *Application Type:* Non-Project Use of Project Lands.

b. *Project No:* 2576–171.

c. *Date Filed:* October 6, 2016 and supplemented on December 22, 2016.

d. *Applicant:* FirstLight Hydro Generating Company.

e. *Name of Project:* Housatonic River Project.

f. *Location:* The project is located on the Housatonic River, in Fairfield, New Haven, and Litchfield counties, Connecticut.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Stuart H. Piermarini, Plant Manager; (860) 350–3617; 143 West Street, Suite E, New Milford, CT 06776.

i. *FERC Contact:* Krista.Sakallaris, (202) 502–6302, *Krista.Sakallaris@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* February 6, 2017.

The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, 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–2576–171.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears 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. *Description of Request:* FirstLight Hydro Generating Company is requesting permission to issue a permit to reconfigure existing docks at the O&M Enterprises Chatterton Marina, located in Fairfield County, Connecticut. The permit would authorize the Chatterton Marina to reduce the three existing docks to two while maintaining docks to accommodate 75-watercraft. One of the docks would be relocated approximately 20 feet westward and be reconfigured to have slips on both sides, increasing its capacity to 36-watercraft. The filings include a request and a detailed justification for a waiver from the Shoreline Management Plans 50-foot-wide shoreline buffer zone requirement, which requires abutting landowners who occupy project lands to install a 50-foot-wide shoreline vegetative buffer zone when, among other things, there is a request for reconfiguration of an existing structure or the installation of a new structure.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also 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. 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. Agencies may obtain copies of the application directly from the applicant.

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, respectively. 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 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 commenting, 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. Any filing made by an intervenor 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 385.2010.

Dated: January 4, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00386 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1942–014; ER10–1862–016; ER10–1877–004; ER10–1893–016; ER10–1934–016; ER10–1938–017; ER10–2042–022; ER10–2985–020; ER10–3049–021; ER10–3051–021; ER17–696–002.

Applicants: Calpine Construction Finance Company, L.P., Calpine Energy Services, L.P., Calpine Energy Solutions, LLC, Calpine Power America–CA, LLC, CES Marketing IX, LLC, CES Marketing X, LLC, Champion Energy Marketing LLC, Champion Energy Services, LLC, Champion Energy, LLC, Hermiston Power, LLC, Power Contract Financing, L.L.C.

Description: Updated Market Power Analysis for the Northwest Region of the Calpine Corporation MBR Sellers.

Filed Date: 12/30/16.

Accession Number: 20161230–5127.

Comments Due: 5 p.m. ET 2/28/17.

Docket Numbers: ER11–4717–002.

Applicants: International Paper Company.

Description: Notice of Non-Material Change in Status of International Paper Company.

Filed Date: 12/30/16.

Accession Number: 20161230–5043.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER15–2582–002; ER10–1851–007; ER10–1852–015; ER10–1930–007; ER10–1931–008; ER15–2101–004; ER12–2226–007; ER12–2225–007; ER14–2138–004; ER10–1966–008; ER10–1976–008; ER10–1985–008; ER10–1971–034; ER11–4462–025.

Applicants: Carousel Wind Farm, LLC, ESI Vansycle Partners, L.P., Florida Power & Light Company, FPL Energy Stateline II, Inc., FPL Energy Vansycle, L.L.C, Golden West Power Partners, LLC, Limon Wind, LLC, Limon Wind II, LLC, Limon Wind III, LLC, Logan Wind Energy LLC, Northern Colorado Wind Energy, LLC, Peetz Table Wind Energy, LLC, NextEra Energy Power Marketing, LLC, NEPM II, LLC.

Description: Triennial Market Power Update for the Northwest Region of NextEra Companies.

Filed Date: 12/30/16.

Accession Number: 20161230–5176.

Comments Due: 5 p.m. ET 2/28/17.

Docket Numbers: ER17–696–001.

Applicants: Calpine Energy Solutions, LLC.

Description: Notification of Change in Status of Calpine Energy Solutions, LLC.

Filed Date: 12/30/16.

Accession Number: 20161230–5113.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–715–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2016–12–30_SA 2988 MidAmerican-MidAmerican GIA (J500) to be effective 12/31/2016.

Filed Date: 12/30/16.

Accession Number: 20161230–5023.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–716–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Compliance filing: 2016–12–30 _Order 828 Compliance Filing to be effective N/A.

Filed Date: 12/30/16.

Accession Number: 20161230–5025.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–717–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Queue Position AB2–048, Original Service Agreement No. 4597 to be effective 11/30/2016.

Filed Date: 12/30/16.

Accession Number: 20161230–5028.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–718–000

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Revisions to MISO–PJM JOA, Article IX sections 9.3 and 9.4 to be effective 12/31/9998.

Filed Date: 12/30/16.

Accession Number: 20161230–5057.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–719–000.

Applicants: PJM Interconnection, L.L.C., Metropolitan Edison Company, American Transmission Systems, Incorporated.

Description: § 205(d) Rate Filing: ATSI et. al. submits OIA SA No. 2852 & ECSA SA No. 4554 to be effective 1/1/2017.

Filed Date: 12/30/16.

Accession Number: 20161230–5059.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–720–000.

Applicants: Midcontinent Independent System Operator, Inc., Ameren Illinois Company.

Description: § 205(d) Rate Filing: 2016–12–30_SA 2991 Ameren Illinois-Prairie Power CA (Shelbyville Substation) to be effective 12/1/2016.

Filed Date: 12/30/16.

Accession Number: 20161230–5060.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–721–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2016–12–30_Targeted Market Efficiency Amendments to MISO–PJM JOA to be effective 6/28/2017.

Filed Date: 12/30/16.

Accession Number: 20161230–5066.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–722–000.

Applicants: ITC Midwest LLC.

Description: § 205(d) Rate Filing: Second Amended and Restated Corn Belt Interconnection Agreement to be effective 3/1/2017.

Filed Date: 12/30/16.

Accession Number: 20161230–5078.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–723–000.

Applicants: NRG Power Marketing LLC.

Description: § 205(d) Rate Filing: Tariff Filing to be effective 2/1/2017.

Filed Date: 12/30/16.

Accession Number: 20161230–5106.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–724–000.

Applicants: Palouse Wind, LLC.

Description: Market-Based Triennial Review Filing: Northwest Triennial to be effective 12/31/2016.

Filed Date: 12/30/16.

Accession Number: 20161230–5133.

Comments Due: 5 p.m. ET 2/28/17.

Docket Numbers: ER17–725–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Revisions to OATT Sch 12-Appdx and Appdx A for 2017 RTEP Annual Cost Allocations to be effective 1/1/2017.

Filed Date: 12/30/16.

Accession Number: 20161230–5154.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–726–000.

Applicants: California Independent System Operator Corporation.

Description: § 205(d) Rate Filing: 2016–12–30 Amdt 1 to CAISO and BANC Dynamic Transfer Balancing Authority Agmt to be effective 3/1/2017.

Filed Date: 12/30/16.

Accession Number: 20161230–5175.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–727–000.

Applicants: Valley Electric Association, Inc.

Description: § 205(d) Rate Filing: Revisions to Transmission Revenue Requirement to be effective 3/1/2017.

Filed Date: 12/30/16.

Accession Number: 20161230–5178.

Comments Due: 5 p.m. ET 1/20/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 30, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–00378 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2847–003; ER10–2818–003; ER10–2806–003; ER14–963–003.
Applicants: TransAlta Centralia Generation LLC, TransAlta Energy Marketing Corporation, TransAlta Energy Marketing (US) Inc., TransAlta Wyoming Wind LLC.
Description: Updated Market Power Analysis for Northwest Region of TransAlta MBR Sellers under ER10–2847, et. al.
Filed Date: 12/29/16.
Accession Number: 20161229–5193.
Comments Due: 5 p.m. ET 2/27/17.

Docket Numbers: ER10–2984–030.
Applicants: Merrill Lynch Commodities, Inc.
Description: Notice of Non-Material Change in Status of Merrill Lynch Commodities, Inc.
Filed Date: 12/29/16.
Accession Number: 20161229–5198.
Comments Due: 5 p.m. ET 1/19/17.

Docket Numbers: ER11–2447–003.
Applicants: Pacific Northwest Generating Cooperative.
Description: Updated Market Power Analysis of Pacific Northwest Generating Cooperative.
Filed Date: 12/29/16.
Accession Number: 20161229–5199.
Comments Due: 5 p.m. ET 2/27/17.

Docket Numbers: ER13–434–005; ER13–1403–006; ER13–2100–002; ER13–2106–006; ER13–2109–006; ER13–321–006; ER13–412–004; ER13–450–004; ER13–518–004; ER16–1750–003; ER16–2601–001.
Applicants: Dominion Energy Marketing, Inc., Dominion Nuclear Connecticut, Inc., Dominion Energy Manchester Street, Inc., Dominion Retail, Inc., Fairless Energy, LLC, NedPower Mount Storm, LLC, Fowler Ridge Wind Farm LLC, Virginia Electric and Power Company, Dominion Bridgeport Fuel Cell, LLC, Eastern Shore Solar LLC, Summit Farms Solar, LLC.
Description: Triennial Market Power Analysis of the Dominion Northeast Region Companies.
Filed Date: 12/29/16.
Accession Number: 20161229–5195.
Comments Due: 5 p.m. ET 2/27/17.

Docket Numbers: ER17–704–000.
Applicants: Powerex Corp.
Description: Market-Based Triennial Review Filing: Updated Market Power Analysis for the NW Region and Amendment to RS No. 1 to be effective 2/25/2016.
Filed Date: 12/29/16.
Accession Number: 20161229–5158.
Comments Due: 5 p.m. ET 2/27/17.

Docket Numbers: ER17–706–000.
Applicants: GridLiance West Transco LLC.
Description: Baseline eTariff Filing: GridLiance West Formula Rate Template to be effective 3/1/2017.
Filed Date: 12/30/16.
Accession Number: 20161230–5002.
Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–707–000.
Applicants: GridLiance West Transco LLC.
Description: Initial rate filing: GridLiance West Interconnection Agreement to be effective 3/1/2017.
Filed Date: 12/30/16.
Accession Number: 20161230–5003.
Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–708–000.
Applicants: Public Service Company of Colorado.
Description: § 205(d) Rate Filing: PSCo–TSGT–E&P–Mtrg Mod JM Shafer–459–0.1.0 to be effective 12/30/2016.
Filed Date: 12/30/16.
Accession Number: 20161230–5016.
Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–709–000.
Applicants: Meadow Creek Project Company LLC.
Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/31/2016.
Filed Date: 12/30/16.
Accession Number: 20161230–5017.
Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–710–000.
Applicants: Rockland Wind Farm LLC.
Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/31/2016.
Filed Date: 12/30/16.
Accession Number: 20161230–5018.
Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–711–000.
Applicants: Bethlehem Renewable Energy, LLC.
Description: Tariff Cancellation: Notice of Cancellation of MBR Tariffs to be effective 12/31/2016.
Filed Date: 12/30/16.
Accession Number: 20161230–5019.
Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–712–000.
Applicants: Pepco Energy Services, Inc.
Description: Tariff Cancellation: Notice of Cancellation of MBR Tariffs to be effective 12/31/2016.
Filed Date: 12/30/16.
Accession Number: 20161230–5020.
Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–713–000.
Applicants: Eastern Landfill Gas, LLC.
Description: Tariff Cancellation: Notice of Cancellation of MBR Tariffs to be effective 12/31/2016.
Filed Date: 12/30/16.
Accession Number: 20161230–5021.
Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–714–000.
Applicants: Virginia Electric and Power Company, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Dominion Virginia Power submits Revisions to H–16A re: ADIT Changes to be effective 1/1/2017.
Filed Date: 12/30/16.
Accession Number: 20161230–5022.
Comments Due: 5 p.m. ET 1/20/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 30, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–00377 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG17–38–000.
Applicants: Darby Power, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Darby Power, LLC.
Filed Date: 1/5/17.
Accession Number: 20170105–5059.
Comments Due: 5 p.m. ET 1/26/17.

Docket Numbers: EG17–39–000.
Applicants: Gavin Power, LLC.
Description: Self-Certification of Exempt Wholesale Generator Status of Gavin Power, LLC.
Filed Date: 1/5/17.
Accession Number: 20170105–5062.
Comments Due: 5 p.m. ET 1/26/17.

Docket Numbers: EG17–40–000.
Applicants: Lawrenceburg Power, LLC.
Description: Self-Certification of Exempt Wholesale Generator Status of Lawrenceburg Power, LLC.
Filed Date: 1/5/17.
Accession Number: 20170105–5066.
Comments Due: 5 p.m. ET 1/26/17.

Docket Numbers: EG17–41–000.
Applicants: Waterford Power, LLC.
Description: Self-Certification of Exempt Wholesale Generator Status of Waterford Power, LLC.
Filed Date: 1/5/17.
Accession Number: 20170105–5067.
Comments Due: 5 p.m. ET 1/26/17.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–358–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: Amended Filing in ER17–358—Enhanced Combined Cycle Tariff Revisions to be effective 3/1/2017.
Filed Date: 1/5/17.
Accession Number: 20170105–5000.
Comments Due: 5 p.m. ET 1/19/17.

Docket Numbers: ER17–745–000.
Applicants: ITC Midwest LLC.
Description: § 205(d) Rate Filing: Cancellation of Louisa Connection Facilities Agreements to be effective 10/21/2016.
Filed Date: 1/4/17.
Accession Number: 20170104–5133.
Comments Due: 5 p.m. ET 1/25/17.

Docket Numbers: ER17–746–000.
Applicants: California Independent System Operator Corporation.
Description: § 205(d) Rate Filing: 2017–01–04 Arlington Valley Solar 2 LGIA to be effective 3/6/2017.
Filed Date: 1/4/17.
Accession Number: 20170104–5145.
Comments Due: 5 p.m. ET 1/25/17.

Docket Numbers: ER17–747–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: GIA and Distribution Service Agmt Morwind Project to be effective 12/16/2016.
Filed Date: 1/5/17.
Accession Number: 20170105–5007.
Comments Due: 5 p.m. ET 1/26/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 5, 2017.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–00389 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of the Commission's staff may attend the following meetings related to the transmission planning activities of the New York Independent System Operator, Inc. (NYISO):

NYISO Business Issues Committee Meeting

January 11, 2017, 10:00 a.m.–4:00 p.m. (EST)

The above-referenced meeting will be via web conference and teleconference.

The above-referenced meeting is open to stakeholders.

Further information may be found at: *http://www.nyiso.com/public/committees/documents.jsp?com=bic&directory=2017-01-11.*

NYISO Electric System Planning Working Group Meeting

January 11, 2017, 1:00 p.m.–4:00 p.m. (EST)

The above-referenced meeting will be via web conference and teleconference.

The above-referenced meeting is open to stakeholders.

Further information may be found at: *http://www.nyiso.com/public/committees/documents.jsp?com=bic_espwg&directory=2017-01-11.*

NYISO Operating Committee Meeting

January 13, 2017, 10:00 a.m.–4:00 p.m. (EST)

The above-referenced meeting will be via web conference and teleconference.

The above-referenced meeting is open to stakeholders.

Further information may be found at: *http://www.nyiso.com/public/committees/documents.jsp?com=oc&directory=2017-01-13.*

NYISO Electric System Planning Working Group Meeting

January 24, 2017, 10:00 a.m.–4:00 p.m. (EST)

The above-referenced meeting will be via web conference and teleconference.

The above-referenced meeting is open to stakeholders.

Further information may be found at: *http://www.nyiso.com/public/committees/documents.jsp?com=bic_espwg&directory=2017-01-24.*

NYISO Management Committee Meeting

January 25, 2017, 10:00 a.m.–4:00 p.m. (EST)

The above-referenced meeting will be via web conference and teleconference.

The above-referenced meeting is open to stakeholders.

Further information may be found at: *http://www.nyiso.com/public/committees/documents.jsp?com=mc&directory=2017-01-25.*

The discussions at the meetings described above may address matters at issue in the following proceedings:

New York Independent System Operator, Inc., Docket No. ER13–102.

New York Independent System Operator, Inc., Docket No. ER15–2059.

New York Transco, LLC, Docket No. ER15–572.

For more information, contact James Eason, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–8622 or *James.Eason@ferc.gov.*

Dated: January 3, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00383 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CD17–7–000]

Mountain Regional Water Special Services District; Notice of Preliminary Determination of a Qualifying Conduit Hydropower Facility and Soliciting Comments and Motions To Intervene

On December 30, 2016, Mountain Regional Water Special Services District filed a notice of intent to construct a qualifying conduit hydropower facility, pursuant to section 30 of the Federal Power Act (FPA), as amended by section 4 of the Hydropower Regulatory Efficiency Act of 2013 (HREA). The proposed Silver Creek Hydro Energy Recovery Facility Project would have a maximum installed capacity of 200 kilowatts (kW) and would be located on Signal Hill Water Treatment Plant's proposed 14-inch-diameter water transmission pipe, in an existing pump station. The project would be located in Park City, in Summit County, Utah.

Applicant Contact: Doug Evans—Water and Energy Manager, Mountain Regional Water Special Services District, P.O. Box 982320, 6421 N Business Park Loop Road, Suite A, Park City, UT 84098, Phone No. (435) 940–1916, Extension 313.

FERC Contact: Robert Bell, Phone No. (202) 502–6062, email: *robert.bell@ferc.gov.*

Qualifying Conduit Hydropower Facility Description: The proposed project would consist of: (1) Two proposed generating units with a maximum installed capacity of 200-kW on a proposed 14-inch-diameter, 5,800 foot-long water distribution pipe, located in an existing pump station, discharging into a new 2 million gallon water storage tank; and (2) appurtenant facilities. The proposed project would have an initial estimated annual generating capacity of 250 megawatt-hours, and increase to approximately 1,000 megawatt-hours by 2022.

A qualifying conduit hydropower facility is one that is determined or deemed to meet all of the criteria shown in the table below.

TABLE 1—CRITERIA FOR QUALIFYING CONDUIT HYDROPOWER FACILITY

Statutory provision	Description	Satisfies (Y/N)
FPA 30(a)(3)(A), as amended by HREA ...	The conduit is a tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.	Y
FPA 30(a)(3)(C)(i), as amended by HREA	The facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit.	Y
FPA 30(a)(3)(C)(ii), as amended by HREA	The facility has an installed capacity that does not exceed 5 megawatts	Y
FPA 30(a)(3)(C)(iii), as amended by HREA.	On or before August 9, 2013, the facility is not licensed, or exempted from the licensing requirements of Part I of the FPA.	Y

Preliminary Determination: Based upon the above criteria, Commission staff has preliminarily determined that the proposal satisfies the requirements for a qualifying conduit hydropower facility under 16 U.S.C. 823a, and is exempted from the licensing requirements of the FPA.

Comments and Motions to Intervene: The deadline for filing comments contesting whether the facility meets the qualifying criteria is 45 days from the issuance date of this notice.

The deadline for filing motions to intervene is 30 days from the issuance date of this notice.

Anyone may submit comments or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210 and 385.214. Any motions to intervene must be received on or before the specified deadline date for the particular proceeding.

Filing and Service of Responsive Documents: All filings must (1) bear in all capital letters the ''COMMENTS CONTESTING QUALIFICATION FOR A CONDUIT HYDROPOWER FACILITY'' or ''MOTION TO INTERVENE,'' as applicable; (2) state in the heading the name of the applicant and the project number of the application to which the filing responds; (3) state the name, address, and telephone number of the person filing; and (4) otherwise comply with the requirements of sections 385.2001 through 385.2005 of the Commission's regulations.[1] All comments contesting Commission staff's preliminary determination that the facility meets the qualifying criteria must set forth their evidentiary basis.

The Commission strongly encourages electronic filing. Please file motions to intervene and 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. 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.

Locations of Notice of Intent: Copies of the notice of intent can be obtained directly from the applicant or such copies can be viewed and reproduced at the Commission in its Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the web at *http://www.ferc.gov/docs-filing/elibrary.asp* using the ''eLibrary'' link. Enter the docket number (*e.g.,* CD17–7–000) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659.

Dated: January 4, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00379 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR 385.2001–2005 (2015).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL17–35–000; QF17–502–001]

Sustainable Power Group, LLC; sPower Development Company, LLC; sPower Development Company, LLC; Notice of Petition for Enforcement

Take notice that on December 30, 2016, pursuant to section 210(h)(2)(B) of the Public Utility Regulatory Policies Act of 1978 (PURPA),[1] Sustainable Power Group, LLC and sPower Development Company, LLC (Petitioners) filed a Petition for Enforcement, requesting that the Federal Energy Regulatory Commission (Commission) initiate an enforcement action against the Colorado Public Utilities Commission for its failure to implement PURPA consistent with the federal law and the Commission's regulation, all as more fully explained in their petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Petitioners.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on January 23, 2017.

Dated: January 3, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00382 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

[1] 16 U.S.C. 824a–3(h)(2)(B).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC17–59–000.
Applicants: ITC Midwest LLC.
Description: Application Pursuant to Section 203 of the Federal Power Act of ITC Midwest LLC.
Filed Date: 1/3/17.
Accession Number: 20170103–5294.
Comments Due: 5 p.m. ET 1/24/17.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER16–914–001.
Applicants: Axpo U.S. LLC.
Description: Notice of Non-Material Change in Status of Axpo U.S. LLC.
Filed Date: 1/3/17.
Accession Number: 20170103–5250.
Comments Due: 5 p.m. ET 1/24/17.

Docket Numbers: ER17–739–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3101R1 Heartland Consumers Power District NITSA and NOA to be effective 12/1/2016.
Filed Date: 1/3/17.
Accession Number: 20170103–5214.
Comments Due: 5 p.m. ET 1/24/17.

Docket Numbers: ER17–740–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: Amended SGIA Pearblossom Solar Project to be effective 12/16/2015.
Filed Date: 1/4/17.
Accession Number: 20170104–5034.
Comments Due: 5 p.m. ET 1/25/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 4, 2017.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–00387 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR13–14–002]

Western Refining Pipeline Company; Notice for Temporary Waiver of Filing and Reporting Requirements

On December 16, 2016, Western Refining Pipeline Company (Western) filed a Request to Amend previously granted waiver of Interstate Commerce Act tariff and reporting requirements and Commission's related implementing regulations.

Any person desiring to intervene or to protest in this proceeding must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.or* call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern time on January 19, 2017.

Dated: January 5, 2017.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–00393 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–742–000]

CP Bloom Wind LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of CP Bloom Wind LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 25, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 5, 2017.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–00392 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2368–000]

Algonquin Power and Utilities Corporation; Notice of Existing Licensee's Failure To File Notice of Intent To File a New License Application, Soliciting Pre-Application Documents and Notices of Intent To File a License Application

The current license for Algonquin Power and Utilities Corporation's (Algonquin) Squa Pan Hydroelectric Project No. 2368 was issued on December 4, 1991, for a term of 30 years, ending December 3, 2021.[1] The 1.5-megawatt (MW) project is located on Squa Pan Stream in Aroostook County, Maine. The project does not occupy federal land.

The principal project works consist of: (1) A 35-foot-high, 60-foot-long reinforced concrete dam; (2) a 45-foot-high embankment dam, consisting of a 330-foot-long northern section and a 370-foot-long southern section; (3) a 24-foot-wide, 13.5-foot-high radial gate; (4) a 5,043-acre reservoir at a normal maximum water surface elevation of 603.2 feet National Geodetic Vertical Datum of 1929; (5) a 26-foot-wide, 67-foot-long concrete powerhouse with a single 1.5-MW turbine-generator unit; and (6) a 7.6-mile-long transmission line.

The project is subject to section 15 of the Federal Power Act (FPA),[2] which states that an existing licensee must ''notify the Commission whether the licensee intends to file an application for a new license or not . . . at least 5 years before the expiration of the license.'' [3] Section 5.5(d) of the Commission's regulations provides that an existing licensee must file its notice of intent (NOI) no later than five years before the existing license's expiration and section 5.6(a) of the Commission's regulations requires a potential applicant to file a pre-application document (PAD) with its NOI. And, while the integrated licensing process (ILP) is the default pre-filing process, section 5.3(b) of the Commission's regulations allows a potential license applicant to request to use alternative licensing procedures when it files its NOI.

Pursuant to FPA section 15 and 18 CFR 16.9, any application for a new license for this project must be filed with the Commission at least 24 months prior to the expiration of the existing license. Because the current license expires on December 3, 2021, all applications for license for this project must be filed by December 3, 2019.

Because the existing license expires on December 3, 2021, the NOI, PAD, and any request to use alternative licensing procedures were due to be filed no later than the close of business on December 5, 2016.[4] No entity filed a timely NOI and PAD. However, Algonquin filed an NOI on December 8, 2016, along with a request for an extension until August 2017 to file the

[1] *See Maine Public Service Company,* 57 FERC 62,178 (1991).

[2] *See* ordering paragraph (D) of the license.

[3] 16 U.S.C. 808(b)(1) (2012).

[4] The Commission's Rules of Practice and Procedure provide that, if a filing deadline falls on a Saturday, Sunday, holiday, or other day when the Commission is closed for business, the filing deadline ''does not end until the close of . . . business on the next business day. . . .'' 18 CFR 385.2007(a)(2) (2016). The filing deadline was December 3, 2016, which fell on a Saturday. Thus, the filing deadline was the close of business on Monday, December 5, 2016.

PAD and any request to use alternative licensing procedures.[5]

Pursuant to 18 CFR 16.23(a), an existing licensee subject to section 15 of the FPA that fails to file a an NOI at least 5 years before the existing license expires shall be deemed to have filed a notice indicating that it does not intend to file an application for new license. Additionally, pursuant to 18 CFR 16.24(a), an existing licensee that informs the Commission that it does not intend to file an application, may not file an application for a new license for the project, either individually or in conjunction with an entity or entities that are not currently licensees of the project.

The Commission is not taking action on Algonquin's late-filed NOI at this time;[6] however, Algonquin's request to delay filing the PAD or any request to use an alternative licensing process until August, 2017 is denied because the requested delay would unreasonably shorten the time available for preparation of a license application and/or conducting necessary studies. Instead, this notice sets a deadline of 120 days from the date of this notice for Algonquin and competing applicants to file NOIs, PADs, and requests to use an alternative licensing process.

To the extent that Algonquin or any competing applicant elects or is required to use the Commission's ILP, a process plan will be issued within 180 days of this notice that accelerates the steps of the ILP to allow for filing a new license application by the December 3, 2019, deadline.

Questions concerning this notice should be directed to John Baummer at (202) 502–6837 or *John.Baummer@ferc.gov.*

Dated: January 5, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00385 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

[5] Algonquin's December 8, 2016, filing indicates it is working to finalize the sale of the project to another entity by the end of the first quarter of 2017 and the additional time would ''allow'' the potential purchaser time to prepare a PAD and select a licensing process. We note however that any transfer of ownership would require Commission approval. *See* FPA Section 8, 16 U.S.C. 801 (2012) and 18 CFR part 9 (2016).

[6] Algonquin indicates that its NOI was late due to ''administrative oversight.'' However, Commission staff sent letters reminding Algonquin of the NOI deadline on April 1, 2015, and February 10, 2016. In addition, Commission staff contacted Algonquin via email on August 16, 2016 and September 27, 2016 and via phone on March 15, 2016 and December 5, 2016, to remind it of the NOI deadline. Algonquin suggests that due to a ''telecommunications failure,'' it did not receive these messages.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP17–26–000]

Pomelo Connector, LLC; Notice of Application

Take notice that on December 22, 2016, Pomelo Connector, LLC (Pomelo), 1331 Lamar Street, Suite 1675, Houston, Texas 77010, filed in Docket No. CP17–26–000 an application pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA), as amended, for authorization to: (i) Construct, own, operate, and maintain an approximately 14-mile 30-inch-diameter pipeline in Nueces County, Texas; (ii) construct a 9,000 horsepower compressor station; and (iii) abandon by lease the entire 400,000 dekatherms per day of capacity to Texas Eastern Transmission, LP. Pomelo further requests a Part 157, Subpart F blanket certificate, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site 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, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application may be directed to Mark Fuqua, Senior Vice President, Pomelo Connector, LLC, 1331 Lamar Street, Suite 1675, Houston, Texas 77010, by telephone at (713) 308–8117.

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 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 EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: January 25, 2017.

Dated: January 4, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00380 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER15–2114–002.

Applicants: Transource West Virginia, LLC, PJM Interconnection, L.L.C.

Description: Compliance filing: Transource submits revisions to Attachment H–26 re: settlement 12/5/16 to be effective 9/5/2015.

Filed Date: 1/4/17.

Accession Number: 20170104–5132.

Comments Due: 5 p.m. ET 1/25/17.

Docket Numbers: ER17–748–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 798—Agreement with Upper Missouri Power Cooperative to be effective 1/6/2017.

Filed Date: 1/5/17.

Accession Number: 20170105–5085.

Comments Due: 5 p.m. ET 1/26/17.

Docket Numbers: ER17–749–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Violation Relaxation Limit Annual Update to be effective 3/6/2017.

Filed Date: 1/5/17.

Accession Number: 20170105–5116.

Comments Due: 5 p.m. ET 1/26/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 5, 2017.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–00390 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR17–3–000]

Enbridge Energy, Limited Partnership; Notice of Filing of Supplement to Facilities Surcharge Settlement

Take notice that on December 14, 2016, Enbridge Energy, Limited Partnership (Petitioner), with the support of the Canadian Association of Petroleum Producers (CAPP), submitted a Supplement to the Facilities Surcharge Settlement approved by the Commission on June 30, 2004, in Docket No. OR04–2–000 at 107 FERC ¶ 61,336 (2004).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214 (2016)) on or before 5:00 p.m. Eastern time on the specified comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on Petitioner.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern time on January 13, 2017.

Dated: January 5, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00384 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Effectiveness of Exempt Wholesale Generator Status

	Docket Nos.
ESS Lewes Project, LLC	EG17–1–000
Comanche Peak Power Company LLC.	EG17–2–000
Clinton Battery Utility, LLC	EG17–3–000
CXA Sundevil Power I, Inc	EG17–4–000
CXA Sundevil Power II, Inc	EG17–5–000
Broadview Energy JN, LLC	EG17–6–000
Broadview Energy KW, LLC	EG17–7–000
Moapa Southern Paiute Solar, LLC.	EG17–8–000
Ocean State Power LLC	EG17–9–000
Applied Energy LLC	EG17–10–000
Applied Energy LLC	EG17–11–000
Javelina Wind Energy II, LLC	EG17–12–000
ESS Snook Project, LLC	EG17–13–000
ESS Rabbit Hill Project, LLC	EG17–14–000
Bluestem Wind Energy, LLC	EG17–15–000
96WI 8me LLC	EG17–16–000
TransCanada Maine Wind Development Inc.	EG17–17–000
Innovative Solar 47, LLC	EG17–18–000

Take notice that during the month of December 2016, the status of the above-captioned entities as Exempt Wholesale Generators became effective by operation of the Commission's regulations. 18 CFR 366.7(a) (2017)

Dated: January 5, 2017.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–00391 Filed 1–10–17; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL 9958–17–Region 3]

Notice of Tentative Approval and Opportunity for Public Comment and Public Hearing for Public Water System Supervision Program Revision for West Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of approval and solicitation of requests for public hearing.

SUMMARY: Notice is hereby given that the State of West Virginia is revising its approved Public Water System Supervision Program. West Virginia has adopted drinking water regulations for the Revised Total Coliform Rule. The U.S. Environmental Protection Agency (EPA) has determined that West Virginia's Revised Total Coliform Rule meets all minimum federal requirements, and that it is no less stringent than the corresponding federal regulation. Therefore, EPA has tentatively decided to approve the State program revisions.

DATES: Comments or a public hearing must be submitted by February 10, 2017. This determination shall become final and effective on February 10, 2017 if no timely and appropriate request for a hearing is received, and the Regional Administrator does not elect to hold a hearing on his own motion, and if no comments are received which cause EPA to modify its tentative approval.

ADDRESSES: Comments or a request for a public hearing must be submitted to the U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103–2029. All documents relating to this determination are available for inspection between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, at the following offices:

- Drinking Water Branch, Water Protection Division, U.S. Environmental Protection Agency Region III, 1650 Arch Street, Philadelphia, PA 19103–2029.
- West Virginia Department of Health and Human Resources, Environmental Engineering Division, 350 Capitol Street, Room 313, Charleston, West Virginia 25301–3713.

FOR FURTHER INFORMATION CONTACT: Kelly Moran, Drinking Water Branch (3WP21) at the Philadelphia address given above, via email at *moran.kelly@epa.gov,* or telephone (215) 814–2331 or fax (215) 814–2302.

SUPPLEMENTARY INFORMATION: All interested parties are invited to submit written comments on this determination and may request a hearing. All comments will be considered, and if necessary EPA will issue a response. Frivolous or insubstantial requests for a hearing will be denied by the Regional Administrator. If a substantial request for a public hearing is made by February 10, 2017, a public hearing will be held. A request for public hearing shall include the following: (1) The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; (2) a brief statement of the requesting person's interest in the Regional Administrator's determination and of information that the requesting person intends to submit at such hearing; and (3) the signature of the individual making the request; or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

Dated: December 28, 2016.

Shawn M. Garvin,

Regional Administrator.

[FR Doc. 2017–00449 Filed 1–10–17; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0095, 3060–0176, 3060–0474, 3060–0996]

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before March 13, 2017. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0095.

Title: Multi-Channel Video Programming Distributors Annual Employment Report, FCC Form 395–A.

Form Number: FCC Form 395–A

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not for profit institutions.

Number of Respondents and Responses: 2,500 respondents; 2,500 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: Recordkeeping requirement and annual reporting requirement.

Total Annual Burden: 2,500 hours.

Total Annual Cost: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority is contained in Sections 154 and 634 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: FCC Form 395–A, ''The Multi-Channel Video Programming Distributor Annual Employment Report,'' is a data collection device used to assess industry employment trends and provide reports to Congress. The report identifies employees by gender and race/ethnicity in sixteen job categories. FCC Form 395–A contains a grid which collects

data on full and part-time employees and requests a list of employees by job title, indicating the job category and full or part-time status of the position. Every cable entity with 6 or more full-time employees and all Satellite Master Antenna Television Systems (SMATV) serving 50 or more subscribers and having 6 or more full-time employees must complete Form 395–A in its entirety and file it by September 30 each year. However, cable entities with 5 or fewer full-time employees are not required to file but if they do, they need to complete and file only Sections I, II and VIII of the FCC Form 395–A, and thereafter need not file again unless their employment increases.

OMB Control Number: 3060–0176.

Title: Section 73.1510, Experimental Authorizations.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for-profit entities.

Number of Respondents and Responses: 230 respondents; 230 responses.

Estimated Time per Response: 2.25–5.25 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 983 hours.

Total Annual Costs: $231,250.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Section 154(i) of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The information collection requirements contained in 47 CFR 73.1510 require that a licensee of an AM, FM, and TV broadcast station to file an informal application with the FCC to request an experimental authorization to conduct technical experimentation directed toward improvement of the technical phases of operation and service. This request shall describe the nature and purpose of experimentation to be conducted, the nature of the experimental signal transmission, and the proposed hours and duration of the experimentation. The data are used by FCC staff to maintain complete technical information about a broadcast station and to ensure that such experimentation does not cause interference to other broadcast stations.

OMB Control Number: 3060–0474.

Title: Section 74.1263, Time of Operation.

Form Number: N/A

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for profit entities; not-for-profit institutions.

Number of Respondents and Responses: 110 respondents; 110 responses.

Estimated Time per Response: 0.5 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 55 hours.

Total Annual Costs: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The information collection requirements contained in 47 CFR 74.1263(c) require licensees of FM translator or booster stations to notify the Commission of its intent to discontinue operations for 30 or more consecutive days. In addition, licensees must notify the Commission within 48 hours of the station's return to operation. The information collection requirements contained in 47 CFR Section 74.1263(d) require FM translator or booster station licensees to notify the Commission of its intent to discontinue operations permanently and to forward the station license to the FCC for cancellation.

OMB Control Number: 3060–0996.

Title: AM Auction Section 307(b) Submissions.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit entities; State, local or Tribal governments.

Number of Respondents and Responses: 210 respondents; 210 responses.

Estimated Time per Response: 0.5–6 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for the information collection requirements is contained in Sections 154(i), 307(b) and 309 of the Communications Act of 1934, as amended.

Total Annual Burden: 1,029 hours.

Total Annual Costs: $2,126,100.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On January 28, 2010, the Commission adopted a First Report and Order and Further Notice of Proposed Rulemaking (''First R&O'') in MB Docket No. 09–52, FCC 10–24. The First R&O adopted changes to certain procedures associated with the award of broadcast radio construction permits by competitive bidding, including modifications to the manner in which it awards preferences to applicants under the provisions of Section 307(b). In the First R&O, the Commission added a new Section 307(b) priority that would apply only to Native American and Alaska Native Tribes, Tribal consortia, and majority Tribal-owned entities proposing to serve Tribal lands. As adopted in the First R&O, the priority is only available when all of the following conditions are met: (1) The applicant is either a Federally recognized Tribe or Tribal consortium, or an entity that is 51 percent or more owned or controlled by a Tribe or Tribes; (2) at least 50 percent of the area within the proposed station's daytime principal community contour is over that Tribe's Tribal lands, in addition to meeting all other Commission technical standards; (3) the specified community of license is located on Tribal lands; and (4) in the commercial AM service, the applicant must propose first or second aural reception service or first local commercial Tribal-owned transmission service to the proposed community of license, which must be located on Tribal lands. Applicants claiming Section 307(b) preferences using these factors will submit information to substantiate their claims.

On March 3, 2011, the Commission adopted a Second Report and Order (''Second R&O''), First Order on Reconsideration, and Second Further Notice of Proposed Rule Making in MB Docket No. 09–52, FCC 11–28. The First Order on Reconsideration modified the initially adopted Tribal Priority coverage requirement, by creating an alternate coverage standard under criterion (2), enabling Tribes to qualify for the Tribal Priority even when their Tribal lands are too small or irregularly shaped to comprise 50 percent of a station's signal. In such circumstances, Tribes may claim the priority (i) if the proposed principal community contour encompasses 50 percent or more of that Tribe's Tribal lands, but does not cover more than 50 percent of the Tribal lands

of a non-applicant Tribe; (ii) serves at least 2,000 people living on Tribal lands, and (iii) the total population on Tribal lands residing within the station's service contour constitutes at least 50 percent of the total covered population, with provision for waivers as necessary to effectuate the goals of the Tribal Priority. This modification will now enable Tribes with small or irregularly shaped lands to qualify for the Tribal Priority.

The modifications to the Commission's allotment and assignment policies adopted in the Second R&O included a rebuttable ''Urbanized Area service presumption'' under Priority (3), whereby an application to locate or relocate a station as the first local transmission service at a community located within an Urbanized Area, that would place a daytime principal community signal over 50 percent or more of an Urbanized Area, or that could be modified to provide such coverage, will be presumed to be a proposal to serve the Urbanized Area rather than the proposed community. In the case of an AM station, the determination of whether a proposed facility ''could be modified'' to cover 50 percent or more of an Urbanized Area will be made based on the applicant's certification in the Section 307(b) showing that there could be no rule-compliant minor modifications to the proposal, based on the antenna configuration or site, and spectrum availability as of the filing date, that could cause the station to place a principal community contour over 50 percent or more of an Urbanized Area. To the extent the applicant wishes to rebut the Urbanized Area service presumption, the Section 307(b) showing must include a compelling showing (a) that the proposed community is truly independent from the Urbanized Area; (b) of the community's specific need for an outlet of local expression separate from the Urbanized Area; and (c) the ability of the proposed station to provide that outlet.

In the case of applicants for new AM stations making a showing under Priority (4), other public interest matters, an applicant that can demonstrate that its proposed station would provide third, fourth, or fifth reception service to at least 25 percent of the population in the proposed primary service area, where the proposed community of license has two or fewer transmission services, may receive a dispositive Section 307(b) preference under Priority (4). An applicant for a new AM station that cannot demonstrate that it would provide the third, fourth, or fifth reception service to the required population at a community with two or fewer transmission services may also, under Priority (4), calculate a ''service value index'' as set forth in the case of Greenup, Kentucky and Athens, Ohio, Report and Order, 2 FCC Rcd 4319 (MMB 1987). If the applicant can demonstrate a 30 percent or greater difference in service value index between its proposal and the next highest ranking proposal, it can receive a dispositive Section 307(b) preference under Priority (4). Except under these circumstances, dispositive Section 307(b) preferences will not be granted under Priority (4) to applicants for new AM stations. The Commission specifically stated that these modified allotment and assignment procedures will not apply to pending applications for new AM stations and major modifications to AM facilities filed during the 2004 AM Auction 84 filing window.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2017–00346 Filed 1–10–17; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–XXXX]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before March 13, 2017. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–XXXX.

Title: Data Breach Reporting.

Type of Review: New collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 145 respondents; 290 responses.

Estimated Time per Response: 36 hours.

Frequency of Response: On occasion reporting requirements; record keeping requirement, one-time reporting requirement, third party disclosure requirement, (the required disclosures need only be made once upon each triggering instance, *e.g.* each time that a breach occurs).

Obligation to Respond: Mandatory. Statutory authority for this information collection is contained in sections 1, 2, 4, 201, 202, 222, 303, 316, 338, 631, 705 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. Sections 151, 152, 154, 201, 202, 222, 303, 316, 338, 551, 605, and 1302.

Total Annual Burden: 5,220 hours.

Total Annual Cost: No Cost.

Privacy Act Impact Assessment: This information collection affects individuals or households; thus, there are impacts under the Privacy Act. However, the government is not directly collecting this information and the Report and Order directs carriers to

protect the information to the extent it is customer proprietary information.

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information. Any respondent who submits information to the Commission, which the respondent believes is confidential, may request confidential treatment of such information under section 0.459 of the Commission's rules. *See* 47 CFR Section 0.459.

Needs and Uses: Section 222 requires that telecommunications carriers protect the confidentiality of customer proprietary information, and places restrictions on the use, disclosure, or permission of access to customer information absent customer approval. To include broadband Internet access services, and also to update the privacy rules for the changing business and technology landscape, the Commission adopted updated rules on October 27, 2016 (*2016 Privacy Order*).[1] Among other things, the rules require telecommunications carriers, including BIAS providers, as well as interconnected VoIP providers, to: (1) Notify customers, the Commission, and the Federal Bureau of Investigation and the Secret Service under certain circumstances, when customer proprietary information is breached; and (2) maintain records of breaches and breach notifications. Each of these information collections is necessary to fulfill the purposes of the Act as implemented by the Report and Order. Requirements to disclose breaches of customer proprietary information are necessary to ensure that customers and law enforcement can act to limit the harms caused by breaches. Similarly, the rules' recordkeeping requirements for information about breaches of customer information are necessary to ensure continued protection of customer information through, *inter alia,* the identification of possible security vulnerabilities.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2017–00343 Filed 1–10–17; 8:45 am]

BILLING CODE 6712–01–P

[1] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services,* WC Docket No. 16–106, Report and Order, FCC 16–148 (Nov. 2, 2016).

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0674]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before March 13, 2017. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0674.

Title: Section 76.1618, Basic Tier Availability.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 8,250 respondents; 8,250 responses.

Estimated Time per Response: 2.25 hours.

Frequency of Response: Third party disclosure.

Obligation to Respond: Required to obtain or retain benefits.

Total Annual Burden: 18,563 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The information collection requirements contained in 47 CFR 76.1618 state that a cable operator shall provide written notification to subscribers of the availability of basic tier service to new subscribers at the time of installation. This notification shall include the following information: (a) That basic tier service is available; (b) the cost per month for basic tier service; and (c) a list of all services included in the basic service tier. These notification requirements are to ensure the subscribers are made aware of the availability of basic cable service at the time of installation.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2017–00344 Filed 1–10–17; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0787]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communication Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of

information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before March 13, 2017. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0787.

Title: Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94–129, FCC 07–223.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or household; Business or other for-profit; State, Local or Tribal Government.

Number of Respondents and Responses: 4,160 respondents; 22,330 responses.

Estimated Time per Response: 30 minutes (.50 hours) to 10 hours.

Frequency of Response: Recordkeeping requirement; Biennial, on occasion and one-time reporting requirements; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for the information collection requirements is found at Sec. 258 [47 U.S.C. 258] Illegal Changes In Subscriber Carrier Selections, Public Law 104–104, 110 Stat. 56.

Total Annual Burden: 91,547 hours.

Total Annual Cost: 51,285,000.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's system of records notice (SORN), FCC/CGB–1, ''Informal Complaints, Inquiries and Requests for Dispute Assistance.'' As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published a SORN, FCC/CGB–1 ''Informal Complaints, Inquiries and Requests for Dispute Assistance'', in the **Federal Register** on August 15, 2014 (79 FR 48152) which became effective on September 24, 2014.

Privacy Impact Assessment: No impacts(s).

Needs and Uses: Section 258 of the Telecommunications Act of 1996 (1996 Act) directed the Commission to prescribe rules to prevent the unauthorized change by telecommunications carriers of consumers' selections of telecommunications service providers (slamming). On March 17, 2003, the FCC released the *Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking,* CC Docket No. 94–129, FCC 03–42 (*Third Order on Reconsideration*), in which the Commission revised and clarified certain rules to implement section 258 of the 1996 Act. On May 23, 2003, the Commission released an *Order* (CC Docket No. 94–129, FCC 03–116) clarifying certain aspects of the *Third Order on Reconsideration.* On January 9, 2008, the Commission released the *Fourth Report and Order,* CC Docket No. 94–129, FCC 07–223, revising its requirements concerning verification of a consumer's intent to switch carriers.

The *Fourth Report and Order* modified the information collection requirements contained in § 64.1120(c)(3)(iii) of the Commission's rules to provide for verifications to elicit ''confirmation that the person on the call understands that a carrier change, not an upgrade to existing service, bill consolidation, or any other misleading description of the transaction, is being authorized.''

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2017–00345 Filed 1–10–17; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection Renewals; Comment Request (3064–0006, & –0184)

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of existing information collections, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comment on renewal of the information collections described below.

DATES: Comments must be submitted on or before March 13, 2017.

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 and number of the collection in the subject line of the message.
- *Mail:* Jennifer Jones (202–898–6768), Counsel, MB–3105, 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 7:00 a.m. and 5:00 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.

FOR FURTHER INFORMATION CONTACT: Jennifer Jones, at the FDIC address above.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently approved collections of information:

1. *Title:* Interagency Biographical and Financial Report.

OMB Number: 3064–0006.

Form Number: Interagency Biographical and Financial Report.

Affected Public: Insured State Nonmember Banks and State Savings Associations.

BURDEN ESTIMATE

	Type of burden	Estimated number of respondents	Estimated number of responses	Estimated time per response (hours)	Frequency of response	Total annual estimated burden (hours)
Interagency Biographical and Financial Report.	Reporting	574	1	4	On Occasion	2,296

General Description of Collection: The Report is submitted to the FDIC by: (1) Each individual director, officer or individual or group of shareholders acting in concert that will own or control 10% or more, of a proposed or operating depository institution applying for FDIC deposit insurance; (2) a person proposing to acquire control of an insured state nonmember bank or state savings association (FDIC-supervised institution); (3) each proposed new director or proposed new chief executive officer of an FDIC-supervised institution which has undergone a change in control within the preceding twelve months; and (4) each proposed new director or senior executive officer of an FDIC-supervised institution that is not in compliance with the applicable capital requirements or is otherwise in a troubled condition. The information is used by the FDIC to make an evaluation of the general character and financial condition of individuals who will be involved in the management or control of financial institutions, as required by statute. In order to lessen the burden on applicants, the FDIC cooperates with the other federal banking agencies to the maximum extent possible in processing the various applications. Notably, the Interagency Biographical and Financial Report will be amended to remove all references to the Office of Thrift Supervision as it appears on the form as well as changing the term ''thrift'' to ''savings association.'' These changes are technical and non-substantive in nature.

2. *Title:* Prohibitions and Restrictions on Proprietary Trading and Certain Interests In and Relationships With, Hedge Funds and Private Equity Funds.

OMB Number: 3064–0184.

Form Number: None.

Affected Public: Insured state nonmember banks not under a holding company; state savings associations and state savings banks not under a holding company; subsidiaries of state nonmember banks, state savings associations, and state savings banks not under a holding company; and foreign banks having an insured branch and their branches and agencies.

BURDEN ESTIMATE

	Type of burden	Estimated number of respondents	Estimated hours per response	Frequency of response	Total annual estimated burden (hours)
IMPLEMENTATION:					
§ 351.12(e)	Reporting	1	50	1	50
Total Reporting					50
§ 351.3(d)(3)	Recordkeeping	1	3	1	3
§ 351.4(b)(3)(i)(A)	Recordkeeping	1	2	4	8
§ 351.11(a)(2)	Recordkeeping	1	10	1	10
§ 351.20(b)	Recordkeeping	1	795	1	795
§ 351.20(e)	Recordkeeping	1	200	1	200
§ 351.20(f)(1)	Recordkeeping	1	8	1	8
§ 351.20(f)(2)	Recordkeeping	1	100	1	100
Total Recordkeeping					1,124
§ 351.11(a)(8)(i)	Disclosure	1	0.1	26	3
Total Disclosure					3
TOTAL IMPLEMENTATION					1,177
ONGOING:					
§ 351.12(e)	Reporting	23	20	10	4,600
Total Reporting					4,600
§ 351.3(d)(3)	Recordkeeping	23	1	1	23
§ 351.4(b)(3)(i)(A)	Recordkeeping	23	2	4	184
§ 351.11(a)(2)	Recordkeeping	23	10	1	230
§ 351.20(b)	Recordkeeping	4	265	1	1,060
§ 351.20(e)	Recordkeeping	4	200	1	800
§ 351.20(f)(1)	Recordkeeping	774	8	1	6,192
§ 351.20(f)(2)	Recordkeeping	23	40	1	920
Total Recordkeeping					9,409
§ 351.11(a)(8)(i)	Disclosure	23	0.1	26	60
Total Disclosure					60

BURDEN ESTIMATE—Continued

	Type of burden	Estimated number of respondents	Estimated hours per response	Frequency of response	Total annual estimated burden (hours)
TOTAL ONGOING					14,069
Total Estimated Burden					15,246

General Description of Collection: Section 619 of the Dodd-Frank Act added a new section 13 to the Bank Holding Company (''BHC'') Act (to be codified at 12 U.S.C. 1851) that generally prohibits any banking entity from engaging in proprietary trading or from investing in, sponsoring, or having certain relationships with a hedge fund or private equity fund (''covered fund''), subject to certain exemptions. New section 13 of the BHC Act also provides for certain nonbank financial companies that engage in such activities or have such investments or relationships to be subject to additional capital requirements, quantitative limits, or other restrictions. The respondent/recordkeepers are for-profit financial institutions, including small businesses. A covered entity must retain these records for a period that is no less than 5 years in a form that allows it to promptly produce such records to the FDIC on request.

The reporting requirements are found in §§ 351.12(e) and 351.20(d); the recordkeeping requirements are found in §§ 351.3(d)(3), 351.4(b)(3)(i)(A), 351.5(c), 351.11(a)(2), and 351.20(b)–(f); and the disclosure requirements are found in § 351.11(a)(8)(i). The recordkeeping burden for §§ 351.4(a)(2)(iii), 351.4(b)(2)(iii), 351.5(b)(1), 351.5(b)(2)(i), 351.5(b)(2)(iv), 351.13(a)(2)(i), and 351.13(a)(2)(ii)(A) is accounted for in § 351.20(b); the recordkeeping burden for Appendix B is accounted for in § 351.20(c); the reporting and recordkeeping burden for Appendix A is accounted for in § 351.20(d); and the recordkeeping burden for §§ 351.10(c)(12)(i) and 351.10(c)(12)(iii) is accounted for in § 351.20(e). The information collection requirements affecting FDIC-supervised institutions are described more fully below.

Reporting Requirements

Section 351.12(e) states that, upon application by a banking entity, the Board may extend the period of time to meet the requirements on ownership limitations in this section for up to 2 additional years, if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest. An application for extension must (1) be submitted to the Board at least 90 days prior to expiration, (2) provide the reasons for application including information that addresses the factors in paragraph (e)(2) of § 351.12, and (3) explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods.

Recordkeeping Requirements

Section 351.3(d)(3) specifies that proprietary trading does not include any purchase or sale of a security by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that (1) specifically contemplates and authorizes the particular securities to be used for liquidity management purposes, the amount, types, and risks of these securities that are consistent with liquidity management, and the liquidity circumstances in which the particular securities may or must be used; (2) requires that any purchase or sale of securities contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes; (3) requires that any securities purchased or sold for liquidity management purposes be highly liquid and limited to securities the market, credit and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements; (4) limits any securities purchased or sold for liquidity management purposes, together with any other instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan; (5) includes written policies and procedures, internal controls, analysis and independent testing to ensure that the purchase and sale of securities that are not permitted under § 351.6(a) or (b) of this part are for the purpose of liquidity management and in accordance with the liquidity management plan described in this paragraph; and (6) is consistent with the appropriate agency's supervisory requirements, guidance and expectations regarding liquidity management.

Section 351.4(b)(3)(i)(A) provides that a trading desk or other organizational unit of another entity with more than $50 billion in trading assets and liabilities is not a client, customer, or counterparty unless the trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of § 351.4(b). This modification responds to comments received on the proposal regarding the definition of client, customer, or counterparty for purposes of the market making exemption.

Section 351.11(a)(2) requires that covered funds generally must be organized and offered only in connection with the provision of bona fide trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity, pursuant to a written plan or similar documentation outlining how the banking entity intends to provide advisory or other similar services to its customers through organizing and offering the covered fund.

Section 351.20(b) specifies the contents of the compliance program for a banking entity with total consolidated assets of $10 billion or more. It includes: (1) Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities, including setting and monitoring required limits set out in § 351.4 and § 351.5 and activities and investments with respect to a covered fund (including those permitted under

§§ 351.3 through 351.6 or §§ 351.11 through 351.14) to ensure that all activities and investments conducted by the banking entity that are subject to section 13 of the BHC Act and this part comply with section 13 of the BHC Act and applicable regulations; (2) a system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and this part and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and applicable regulations; (3) a management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in this part or by management as requiring attention; (4) independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party; (5) training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and (6) records sufficient to demonstrate compliance with section 13 of the BHC Act and applicable regulations, which a banking entity must promptly provide to the [Agency] upon request and retain for a period of no less than 5 years or such longer period as required by [Agency].

Section 351.20(e) specifies additional documentation required for covered funds. Any banking entity that has more than $10 billion in total consolidated assets as reported on December 31 of the previous two calendar years shall maintain records that include: (1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund; (2) for each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by §§ 351.10(c)(1), 351.10(c)(5), 351.10(c)(8), 351.10(c)(9), or 351.10(c)(10) of subpart C, documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions; (3) for each seeding vehicle described in §§ 351.10(c)(12)(i) or 351.10(c)(12)(iii) of subpart C that will become a registered investment company or SEC-regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC-regulated business development company; the period of time during which the vehicle will operate as a seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC-regulated business development company within the time period specified in § 351.12(a)(2)(i)(B) of subpart C; and (4) for any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 351.10(c)(1) of subpart C owned by such banking entity (including ownership interests owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters, beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters.

Section 351.20(f)(1) applies to banking entities with no covered activities. A banking entity that does not engage in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted pursuant to § 351.6(a) of subpart B) may satisfy the requirements of this section by establishing the required compliance program prior to becoming engaged in such activities or making such investments (other than trading activities permitted pursuant to § 351.6(a) of subpart B).

Section 351.20(f)(2) applies to banking entities with modest activities. A banking entity with total consolidated assets of $10 billion or less as reported on December 31 of the previous two calendar years that engages in activities or investments pursuant to subpart B or subpart C of this part (other than trading activities permitted under section 351.6(a)) may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 and this part and adjustments as appropriate given the activities, size, scope and complexity of the banking entity.

Disclosure Requirements

Section 351.11(a)(8)(i) requires that a banking entity must clearly and conspicuously disclose, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents) (1) that ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity]; therefore, [the banking entity's] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity]''; (2) that such investor should read the fund offering documents before investing in the covered fund; (3) that the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and (4) the role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund.

Request for Comment

Comments are invited on: (a) Whether the collections of information are 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 collections, 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 collections of information 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 5th day of January 2017.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2017–00361 Filed 1–10–17; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request (3064–0018 & –0137)

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of existing information collections, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). On October 27, 2016, (81 FR 74802), the FDIC requested comment for 60 days on a proposal to renew the information collections described below. No comments were received. The FDIC hereby gives notice of its plan to submit to OMB a request to approve the renewal of these collections, and again invites comment on this renewal.

DATES: Comments must be submitted on or before February 10, 2017.

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 and number of the collection in the subject line of the message.
- *Mail:* Jennifer Jones (202–898–6768), Counsel, MB–3105, 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 7:00 a.m. and 5:00 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.

FOR FURTHER INFORMATION CONTACT: Jennifer Jones, at the FDIC address above.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently-approved collections of information:

1. *Title:* Application Pursuant to Section 19 of the Federal Deposit Insurance Act.

OMB Number: 3064–0018.

Form Number: FDIC 6710/07.

Affected Public: Insured Depository Institutions.

BURDEN ESTIMATE

	Type of burden	Estimated number of respondents	Estimated number of responses	Estimated time per response	Frequency of response	Total annual estimated burden (hours)
APPLICATION PURSUANT TO SECTION 19 OF THE FEDERAL DEPOSIT INSURANCE ACT.	Reporting	75	1	16	On Occasion	1,200
TOTAL HOURLY BURDEN						1,200

General Description of Collection: Section 19 of the Federal Deposit Insurance Act (FDI), 12 U.S.C. Section 1829, requires the FDIC's consent prior to any participation in the affairs of an insured depository institution by a person who has been convicted of crimes involving dishonesty or breach of trust, and included drug-related convictions. To obtain that consent, an insured depository institution must submit an application to the FDIC for approval on Form FDIC 6710/07.

2. *Title:* Interagency Guidance on Asset Securitization Activities

OMB Number: 3064–0137.

Form Number: None.

Affected Public: Insured State Nonmember Banks and Savings Associations.

BURDEN ESTIMATE

	Type of burden	Estimated number of respondents	Estimated number of responses	Estimated time per response	Frequency of response	Total annual estimated burden (hours)
Asset Securitization Policies—New Entrant.	Recordkeeping ...	1	1	32	On Occasion	32
Asset Securitization Policies—Upgrades of Policies.	Recordkeeping ...	2	1	3	On Occasion	6
Documentation of Fair Value	Recordkeeping ...	22	1	4	On Occasion	88
MIS Improvements—New Entrant ..	Recordkeeping ...	1	1	21	On Occasion	21
MIS Improvements—Systems Upgrades.	Recordkeeping ...	2	1	5	On Occasion	10
TOTAL HOURLY BURDEN						157

General Description of Collection: The Interagency Guidance on Asset Securitization Activities informs bankers and examiners of safe and sound practices regarding asset securitization. The information

collections contained in the Interagency Guidance are needed by institutions to manage their asset securitization activities in a safe and sound manner. Bank management uses this information as the basis for the safe and sound operation of their asset securitization activities and to ensure that they minimize operational risk in these activities.

Request for Comment

Comments are invited on: (a) Whether the collections of information are 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 collections 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 collections of information 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 5th day of January 2017.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2017–00362 Filed 1–10–17; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2017–N–01]

Proposed Collection; Comment Request

AGENCY: Federal Housing Finance Agency.

ACTION: 30-day notice of submission of information collection for approval from Office of Management and Budget.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995, the Federal Housing Finance Agency (FHFA or the Agency) is seeking public comments concerning the information collection known as ''Community Support Requirements,'' which was assigned control number 2590–0005 by the Office of Management and Budget (OMB). FHFA intends to submit the information collection to OMB for review and approval of a reinstatement of the control number, which expired on February 29, 2016, for a period of three years.

DATES: Interested persons may submit comments on or before February 10, 2017.

ADDRESSES: Submit comments to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Attention: Desk Officer for the Federal Housing Finance Agency, Washington, DC 20503, Fax: (202) 395–3047, Email: *OIRA_submission@omb.eop.gov.* Please also submit comments to FHFA, identified by ''Proposed Collection; Comment Request: 'Community Support Requirements, (No. 2017–N–01)' '' by any of the following methods:

- *Agency Web site: www.fhfa.gov/open-for-comment-or-input.*
- *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.
- *Courier/Hand Delivery, U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Federal Housing Finance Agency, 400 Seventh Street SW., Eighth Floor, Washington, DC 20219. Courier/Hand Delivery packages must be delivered on business days between 9 a.m. and 5 p.m.

We will post all public comments we receive without change, including any personal information you provide, such as your name and 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 20219. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649–3804.

FOR FURTHER INFORMATION CONTACT: Deattra D. Perkins, Senior Policy Analyst, Division of Housing Mission & Goals, *Deattra.Perkins@fhfa.gov,* (202) 649–3133; or Sylvia C. Martinez, Manager, Federal Home Loan Bank Housing and Community Investment Programs, Division of Housing Mission & Goals, *Sylvia.Martinez@fhfa.gov,* (202) 649–3301 (these are not toll-free numbers); Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20219. The Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Home Loan Bank System consists of eleven regional Federal Home Loan Banks (Banks) and the Office of Finance (a joint office of the Banks that issues and services their debt securities). The Banks are wholesale financial institutions, organized under authority of the Federal Home Loan Bank Act (Bank Act) to serve the public interest by enhancing the availability of residential housing finance and community lending credit through their member institutions and, to a limited extent, through eligible non-member ''housing associates.'' [1] Each Bank is structured as a regional cooperative that is owned and controlled by member financial institutions located within its district, which are also its primary customers.

Section 10(g)(1) of the Bank Act requires the Director of FHFA to promulgate regulations establishing standards of community investment or service that Bank member institutions must meet in order to maintain access to long-term advances (*i.e.,* loans with a maturity of five years or greater made by a Bank to a member).[2] Section 10(g)(2) of the Bank Act requires that, in establishing these community support requirements for Bank members, FHFA take into account factors such as the member's performance under the Community Reinvestment Act of 1977 (CRA)[3] and record of lending to first-time homebuyers.[4] FHFA's community support regulation, which establishes standards and review criteria for determining compliance with section 10(g) of the Bank Act, is set forth at 12 CFR part 1290.

Part 1290 requires that each Bank member submit to FHFA biennially a completed Community Support Statement (Form 060), which contains several short questions the answers to which are used by FHFA to assess the responding member's compliance with the community support standards.[5] Previously, this was accomplished by requiring approximately one-eighth of all members to submit a completed Form in each calendar quarter of a two-year review cycle. Under new streamlined procedures that FHFA is in the process of implementing, all members subject to community support review will be required to submit a

[1] Certain non-member entities are permitted by statute to engage in limited business activities with a Bank. *See* 12 U.S.C. 1430b. FHFA's regulations refer to these entities as ''housing associates.'' *See* 12 CFR part 1264.

[2] *See* 12 U.S.C. 1430(g)(1).

[3] 12 U.S.C. 2901 *et seq.*

[4] *See* 12 U.S.C. 1430(g)(2).

[5] *See* 12 CFR 1290.2(b).

completed Form 060 at approximately the same time every two years.[6]

FHFA has revised Form 060 to reflect the new streamlined procedures. These revisions reduce slightly the number of questions on the Form and modify the formatting so that members will be able to complete and submit the Form online. In substance, the revised Form 060 is materially the same as the existing Form. In part I of the Form, a member that is subject to the CRA must record its most recent CRA rating and the year of that rating. Part II of the Form addresses a member's efforts to assist first-time homebuyers. A member may either record the number and dollar amount of mortgage loans made to first-time homebuyers in the previous or current calendar year (part II.A), or indicate the types of programs or activities it has undertaken to assist first-time homebuyers by checking selections from a list (part II.B), or do both. If a member has received a CRA rating of ''Outstanding,'' it need not complete part II of the Form. A copy of the revised Form and related instructions appear at the end of this Notice.

Part 1290 also establishes the circumstances under which FHFA will restrict a member's access to long-term Bank advances and to Affordable Housing Program (AHP), Community Investment Program (CIP) and Community Investment Cash Advance (CICA) programs for failure to meet the community support requirements.[7] It permits Bank members whose access to long-term advances has been restricted to apply directly to FHFA to remove the restriction if certain criteria are met.[8]

[5] *See* 12 CFR 1290.2(b).

[6] *See* 12 CFR 1290.2(a).

[7] *See* 12 CFR 1290.5(b), (e).

B. Need for and Use of the Information Collection

FHFA uses the information collection contained in FHFA Form 060 and part 1290 to determine whether Bank members satisfy the statutory and regulatory community support requirements and to ensure that, as required by statute and regulation, only Bank members that meet those requirements maintain continued access to long-term Bank advances and to AHP, CIP, and CICA programs.

C. Burden Estimate

FHFA has analyzed the two facets of this information collection in order to estimate the hour burdens that the collection will impose upon Bank members annually over the next three years. Based on that analysis, FHFA estimates that the total annual hour burden will be 2,287 hours. The method FHFA used to determine the annual hour burden for each facet of the information collection is explained in detail below.

I. Community Support Statements

FHFA estimates that, on average over the next several years, 7,000 Bank members will be required to submit completed Community Support Statements biennially. This corresponds to an annual average of 3,500 respondents. FHFA estimates that the average preparation time for each Community Support Statement will be 0.65 hours. The estimate for the total annual hour burden on Bank members in connection with the preparation and submission of Community Support Statements is 2,275 hours (3,500 Statements × 0.65 hours).

II. Requests To Remove a Restriction on Access to Long-Term Advances

FHFA estimates that an annual average of 16 Bank members whose access to long-term advances and to AHP, CIP, and CICA programs has been restricted will submit requests to FHFA to remove those restrictions, and that the average preparation time for each request will be 0.75 hours. The estimate for the total annual hour burden on members in connection with the preparation and submission of requests to remove a restriction on access to long-term advances is 12 hours (16 requests × 0.75 hours).

D. Comment Request

In accordance with the requirements of 5 CFR 1320.8(d), FHFA published an initial notice requesting comments regarding this information collection in the **Federal Register** on September 23, 2016.[9] The 60 day comment period closed on November 22, 2016. No comments were received.

In accordance with the requirements of 5 CFR 1320.10(a), FHFA is publishing this second notice to request comments regarding 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 members and project sponsors, including through the use of automated collection techniques or other forms of information technology. Comments should be submitted in writing to both OMB and FHFA as instructed above in the Comments section.

Dated: January 5, 2017.

Kevin Winkler,

Chief Information Officer, Federal Housing Finance Agency.

[8] *See* 12 CFR 1290.5(d).

FHFA Form # 060
(date)

FEDERAL HOUSING FINANCE AGENCY
COMMUNITY SUPPORT STATEMENT

(see instructions page 2)

FHFA ID Number: _____

Name of Institution: *[online form: FHFA automatically fills in once the member enters its FHFA ID Number]*

Address: *[online form: FHFA fills in]*

City: *[online form: FHFA fills in]* **State:** *[online form: FHFA fills in]* **Zip Code:** *[online form: FHFA fills in]*

Submitter: _____ **Title:** _____

Work Email: *[not on the paper form; online form only; used for online validation purposes only]*

Part I. Community Reinvestment Act (CRA) Standard.

Most recent federal CRA rating: *[drop down list]* Year of most recent federal CRA rating: *[drop down list]*

Part II. First-time Homebuyer Standard: *All Federal Home Loan Bank members must complete either Section A or B of this part, except that members with "Outstanding" federal CRA ratings need not complete this part. Members should use data or activities for the previous or current calendar year in completing this part.*

A. Complete the following two questions: *If your institution did not make, or did not track, mortgage loans to first-time homebuyers, you must complete Section B of this part.*

1. Number of mortgage loans made to first-time homebuyers #
2. Dollar amount of mortgage loans made to first-time homebuyers $

B. Check as many as applicable:

1. Offer in-house first-time homebuyer program (e.g., underwriting, marketing plans, outreach programs) _____
2. Offer other in-house lending products that serve first-time or low- and moderate-income homebuyers _____
3. Offer flexible underwriting standards for first-time homebuyers _____
4. Participate in nationwide first-time homebuyer programs (e.g., Fannie Mae, Freddie Mac) _____
5. Participate in federal government programs that serve first-time homebuyers (e.g., FHA, VA, USDA RD) _____
6. Participate in state or local government programs targeted to first-time homebuyers (e.g., mortgage revenue bond financing) _____
7. Provide financial support or technical assistance to community organizations that assist first-time homebuyers _____
8. Participate in loan consortia that make loans to first-time homebuyers _____
9. Participate in or support special counseling or homeownership education targeted to first-time homebuyers _____
10. Hold investments or make loans that support first-time homebuyer programs _____
11. Hold mortgage-backed securities that may include a pool of loans to low- and moderate-income homebuyers _____
12. Use affiliated lenders, credit union service organizations, or other correspondent, brokerage or referral arrangements with specific unaffiliated lenders, that provide mortgage loans to first-time or low- and moderate-income homebuyers _____
13. Participate in the Affordable Housing Program or other targeted community investment/development programs offered by the Federal Home Loan Bank _____
14. Other (attach description of other activities supporting first-time homebuyers; see instructions for Part II) _____
15. None of the above (attach explanation of any mitigating factors; see instructions for Part II) _____

Part III. Certification: By submitting this Community Support Statement, I certify that I am an official of the above institution, that I am authorized to provide this information to FHFA, and that the information in this Statement and any attachments is accurate to the best of my knowledge.

Signed *[not on the online form; "Submit" button is equivalent]* **Date** *[not on the online form; date is automatic]*

Community Support Statement (FHFA Form 060) Instructions

Purpose: Section 10(g) of the Federal Home Loan Bank Act [12 U.S.C. § 1430(g)] sets forth the community support requirements. Under the Federal Housing Finance Agency's (FHFA) implementing community support regulation [12 CFR part 1290], FHFA is required to take into account a Federal Home Loan Bank (Bank) member's performance under the Community Reinvestment Act of 1977 [12 U.S.C. § 2901 et seq.] (federal CRA) and its record of lending to first-time homebuyers, in determining whether to maintain the member's access to long-term Bank advances and to a Bank's Affordable Housing Program (AHP) and targeted Community Investment Cash Advances (CICA) programs. For purposes of community support review, the term "long-term advances" means advances with a term to maturity greater than one year.

Part I (CRA Standard): Members subject to the federal CRA must complete this part. Provide your institution's most recent federal CRA rating and the year of the rating. Credit unions and insurance companies, which are not subject to the federal CRA, should indicate "N/A" [i.e., not applicable] in the CRA rating field on this Community Support Statement. If your institution is not a credit union or insurance company and is not subject to the federal CRA, indicate the reason for the exemption.

If a member's most recent federal CRA rating is "Needs to Improve," FHFA will place the member on probation. During the probationary period, the member will retain access to long-term Bank advances and Bank AHP and CICA programs. If the member does not receive an improved federal CRA rating at its next CRA evaluation, FHFA will restrict its prospective access to long-term Bank advances and Bank AHP and CICA programs. If a member's most recent federal CRA rating is "Substantial Non-compliance," FHFA will restrict the member's prospective access to long-term Bank advances and AHP and CICA programs. The restriction will remain in effect until the member's federal CRA rating improves.

Part II (First-time Homebuyer Standard): All members, <u>except</u> those with "Outstanding" federal CRA ratings, must complete this part. A member may satisfy the first-time homebuyer standard either by: demonstrating lending performance to first-time homebuyers (Section A); or demonstrating other financial support or participation in programs, products, services or investments, that directly or indirectly assists first-time homebuyers (Section B); or by a combination of both factors. If none of the information requested in this part describes your institution's activities to support first-time homebuyers, you may attach a brief description of other activities of your institution that support first-time homebuyers, or a brief explanation of any mitigating factors that adversely affect your institution's ability to assist first-time homebuyers, such as charter or operational limitations or market conditions.

If a member does not demonstrate assistance to first-time homebuyers or include an explanation of mitigating factors on this Community Support Statement, FHFA will restrict the member's prospective access to long-term Bank advances and Bank AHP and CICA programs. The restriction will remain in effect until the member submits applicable information to FHFA that demonstrates the member's compliance with the first-time homebuyer standard.

Part III (Certification): All members must complete this section. A senior official of your institution with authorization to provide the information in this Community Support Statement must certify that the information in this Community Support Statement and any attachments are accurate to the best of his/her knowledge.

If a member submits a Community Support Statement that does not include this required certification, FHFA will restrict the member's prospective access to long-term Bank advances and Bank AHP and CICA programs.

Assistance: Your institution's Bank has a Community Support Program that can assist you in preparing this Community Support Statement.

Submission: Complete and submit the Community Support Statement and any attachments online to the Federal Housing Finance Agency at https//www.*[specific fhfa.gov address TBD]*.

Federal Housing Finance Agency
Division of Housing Mission and Goals
400 7th Street, S.W.
Washington, D.C. 20219
hmgcommunitysupportprogram@fhfa.gov fax 202.649.4133

Paperwork Reduction Act Statement: Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

[FR Doc. 2017–00435 Filed 1–10–17; 8:45 am]
BILLING CODE 8070–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project ''*AHRQ Research Reporting System (ARRS).*'' In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3521, AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by March 13, 2017.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by email at *doris.lefkowitz@AHRQ.hhs.gov.*

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *doris.lefkowitz@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

AHRQ Research Reporting System (ARRS)

AHRQ has developed a systematic method for its grantees and vendors to report project progress and important preliminary findings for grants and contracts funded by the Agency. This system, the AHRQ Research Reporting System (ARRS), previously known as the Grants Reporting System (GRS), was last approved by OMB on May 16, 2014. The system addressed the shortfalls in the previous reporting process and established a consistent and comprehensive grants reporting solution for AHRQ. The ARRS provides a centralized repository of grants and contract research progress and additional information that can be used to support initiatives within the Agency. This includes future research planning and support for administrative activities such as performance monitoring, budgeting, dissemination and strategic planning.

This project has the following goals:

(1) To promote the transfer of critical information more frequently and efficiently and enhance the Agency's ability to support research designed to improve the outcomes and quality of health care, reduce its costs, and broaden access to effective services
(2) To increase the efficiency of the Agency in responding to ad-hoc information requests
(3) To support Executive Branch requirements for increased transparency and public reporting
(4) To establish a consistent approach throughout the Agency for information collection regarding grant and contract progress and a systematic basis for oversight and for facilitating potential collaborations among grantees
(5) To decrease the inconvenience and burden on grantees and vendors of unanticipated ad-hoc requests for information by the Agency in response to particular one-time internal and external requests for information

This study is being conducted by AHRQ pursuant to AHRQ's statutory authority to conduct and support research on health care and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of health care services and with respect to quality measurement and improvement. 42 U.S.C. 299a(a)(1) and (2).

Method of Collection

To achieve the goals of this project the following data collections will be implemented:

AHRQ Research Reporting System (ARRS)—Grantees and vendors use the ARRS system to report project progress and important preliminary findings for grants and contracts funded by the Agency. Grantees and vendors submit progress reports on a monthly or quarterly basis which are reviewed by AHRQ personnel. All users access the ARRS system through a secure online interface which requires a user I.D. and password entered through the ARRS login screen. When status reports are due AHRQ notifies principal investigators and vendors via email.

The ARRS is an automated user-friendly resource that is utilized by AHRQ staff for preparing, distributing, and reviewing reporting requests to grantees and vendors for the purpose of information sharing. AHRQ personnel are able to systematically search the information collected and stored in the ARRS database. Personnel will also use the information to address internal and/or external requests for information regarding grant progress, preliminary findings, and other requests, such as Freedom of Information Act requests, and producing responses related to federally mandated programs and regulations.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the respondents. It will take grantees and vendors an estimated 10 minutes to enter the necessary data into the ARRS System and reporting will occur four times annually. The total annualized burden hours are estimated to be 333 hours.

Exhibit 2 shows the estimated annualized cost burden for the respondents. The total estimated cost burden for respondents is $12,454.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Data entry into ARRS	500	4	10/60	333
Total	500	N/A	N/A	333

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents	Total burden hours	Average hourly wage rate *	Total cost burden
Data entry into ARRS	500	333	$37.40	$12,454
Total	500	333	N/A	$12,454

* Based upon the average wages for Healthcare Practitioner and Technical Occupations (29–0000), ''National Compensation Survey: Occupational Wages in the United States, May 2015,'' U.S. Department of Labor, Bureau of Labor Statistics, *http://www.bls.gov/oes/current/oes_nat.htm#29-0000.*

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Sharon B. Arnold,

Deputy Director.

[FR Doc. 2017–00433 Filed 1–10–17; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10265]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by March 13, 2017.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10265 Mandatory Insurer Reporting Requirements of Section 111 of the Medicare, Medicaid and SCHIP Act of 2007

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Mandatory Insurer Reporting Requirements of Section 111 of the Medicare, Medicaid and SCHIP Act of 2007; *Use:* The CMS

is responsible for oversight and implementation of the MSP provisions as part of its overall authority for the Medicare program. The CMS accomplishes this through a combination of direct CMS action and work by CMS' contractors. The CMS efforts include policy and operational guidelines, including regulations (as necessary), as well as oversight over contractor MSP responsibilities. As a result of litigation in the mid-1990's, certain GHP insurers were mandated to report coverage information for a number of years. Subsequent to this litigation related mandatory reporting, CMS instituted a Voluntary Data Sharing Agreement (VDSA) effort which expanded the scope of the GHP participants and added some NGHP participants. This VDSA process complemented the IRS/SSA/CMS Data Match reporting by employers, but clearly did not include the universe of primary payers and had few NGHP participants. Both GHP and NGHP entities have had and continue to have the responsibility for determining when they are primary to Medicare and to pay appropriately, even without the mandatory Section 111 process. In order to make this determination, they should already and always be collecting most of the information CMS will require in connection with Section 111 of the MMSEA. Section 111 establishes separate mandatory reporting requirements for GHP arrangements as well as for liability insurance (including self-insurance), no-fault insurance, and workers' compensation, these may collectively be referred to as ''Non-GHP or NGHP.'' *Form Number:* CMS–10265 (OMB control number: 0938–1074); *Frequency:* Yearly, Quarterly; *Affected Public:* Private Sector (Business or other for-profits); *Number of Respondents:* 19,248; *Total Annual Responses:* 5,019,248; *Total Annual Hours:* 557,826. (For policy questions regarding this collection contact John Albert at 410–786–7457.)

Dated: January 5, 2017.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2017–00298 Filed 1–10–17; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–4619]

International Drug Scheduling; Convention on Psychotropic Substances; Single Convention on Narcotic Drugs; World Health Organization; Scheduling Recommendations; 4-Methylethcathinone and Nine Other Substances; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing interested persons with the opportunity to submit written comments, and to request an informal public meeting concerning recommendations by the World Health Organization (WHO) to impose international manufacturing and distributing restrictions, under international treaties, on certain drug substances. The comments received in response to this notice and/or public meeting will be considered in preparing the United States' position on these proposals for a meeting of the United Nations Commission on Narcotic Drugs (CND) in Vienna, Austria, in March 2017. This notice is issued under the Controlled Substances Act (CSA).

DATES: Submit either electronic or written comments by February 10, 2017. Submit requests for a public meeting on or before January 23, 2017. The short time period for the submission of comments and requests for a public meeting is needed to ensure that HHS may, in a timely fashion, carry out the required action and be responsive to the United Nations. For additional information, see section IV of this document.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–N–4619 for ''International Drug Scheduling; Convention on Psychotropic Substances; Single Convention on Narcotic Drugs; World Health Organization; Scheduling Recommendations; 4-Methylethcathinone and Nine Other Substances; Request for Comments.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on

https://www.regulations.gov. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

James R. Hunter, Center for Drug Evaluation and Research, Controlled Substance Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5150, Silver Spring, MD 20993–0002, 301–796–3156, *james.hunter@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The United States is a party to the 1971 Convention on Psychotropic Substances (Psychotropic Convention). Section 201(d)(2)(B) of the CSA (21 U.S.C. 811(d)(2)(B)) provides that when the United States is notified under Article 2 of the Psychotropic Convention that the CND proposes to decide whether to add a drug or other substance to one of the schedules of the Psychotropic Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of State must transmit notice of such information to the Secretary of Health and Human Services (Secretary of HHS). The Secretary of HHS must then publish a summary of such information in the **Federal Register** and provide opportunity for interested persons to submit comments. The Secretary of HHS must then evaluate the proposal and furnish a recommendation to the Secretary of State that shall be binding on the representative of the United States in discussions and negotiations relating to the proposal.

As detailed in the following paragraphs, the Secretary of State has received notification from the Secretary-General of the United Nations (the Secretary-General) regarding eight substances to be considered for control under the Psychotropic Convention. This notification reflects the recommendation from the 38th WHO Expert Committee for Drug Dependence (ECDD), which met in November 2016. In the **Federal Register** of September 19, 2016 (81 FR 64162), FDA announced the WHO ECDD review and invited interested persons to submit information for WHO's consideration.

The full text of the notification from the Secretary-General is provided in section II of this document. Section 201(d)(2)(B) of the CSA requires the Secretary of HHS, after receiving a notification proposing scheduling, to publish a notice in the **Federal Register** to provide the opportunity for interested persons to submit information and comments on the proposed scheduling action.

The United States is also a party to the 1961 Single Convention on Narcotic Drugs (1961 Single Convention). The Secretary of State has received a notification from the Secretary-General regarding two substances to be considered for control under this convention. The CSA does not require HHS to publish a summary of such information in the **Federal Register**. Nevertheless, in an effort to provide interested and affected persons an opportunity to submit comments regarding the WHO recommendations for narcotic drugs, the notification regarding these substances is also included in this **Federal Register** notice. The comments will be shared with other relevant Agencies to assist the Secretary of State in formulating the position of the United States on the control of these substances. The HHS recommendations are not binding on the representative of the United States in discussions and negotiations relating to the proposal regarding control of substances under the 1961 Single Convention.

II. United Nations Notification

The formal notification from the United Nations that identifies the drug substances and explains the basis for the recommendations is reproduced as follows (non-relevant text removed):

Reference:
NAR/CL.8/2016
WHO/ECDD38; 1961C–Art.3; 1971C–Art.2
CU 2016/495/DTA/SGB

The Secretary-General of the United Nations presents his compliments to the Secretary of State of the United States of America and has the honour to inform the Government that the Director-General of the World Health Organization (WHO), pursuant to article 3, paragraphs 1 and 3 of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol (1961 Convention) and article 2, paragraphs 1 and 4 of the Convention on Psychotropic Substances of 1971 (1971 Convention) notified the Secretary-General of the following recommendations:

Substances recommended to be placed in Schedule I of the Single Convention on Narcotic Drugs (1961), as amended by the 1972 Protocol:

—U–4770
chemical name: 3,4-dichloro-N-(2-dimethylamino-cyclohexyl)-N-methyl-benzamide
—butyrfentanyl
chemical name: N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]butanamide

Substances recommended to be placed in Schedule II of the 1971 Convention:

—4–MEC (4-methylethcathinone)
chemical name: 2-(ethylamino)-1-(4-methylphenyl)propan-1-one
—ethylone
chemical name: 1-(2H–1,3-benzodioxol-5-yl)-2-(ethylamino)propan-1-one
—pentedrone
chemical name: 2-(methylamino)-1-phenylpentan-1-one
—ethylphenidate
chemical name: ethyl phenyl(piperidin-2-yl)acetate
—MPA (methiopropamine)
chemical name: N-methyl-1-(thiophen-2-yl)propan-2-amine
—MDMB–CHMICA
chemical name: methyl N-{[1-(cyclohexylmethyl)-1H-indol-3-yl]carbonyl}-3-methyl-L-valinate
—5F–APINACA (5F–AKB–48)
chemical name: N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide
—XLR–11
chemical name: [1-(5-fluoropentyl)-1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone

In addition, in the letter from the Director-General of the World Health Orgazniation to the Secretary-General, reference is also made to the recommendations by the thirty-eighth meeting of the WHO Expert Committee on Drug Dependence (ECDD) for carrying out a critical review of one substance at a subsequent Expert Committee meeting, as well as for one substance to continue to be kept under surveillance. Furthermore, the letter also makes reference to the recommendation by the Expert Committee with regard to cannabis and its component substances.

In accordance with the provisions of article 3, paragraph 2 of the 1961 Convention and article 2, paragraph 2 of the 1971 Convention, the Secretary-General hereby transmits the notification as annex I to the present note. In accordance with the provisions of article 3, paragraph 2 of the 1961 Convention and article 2, paragraph 2 of the 1971 Convention, the notification from WHO will be brought to

the attention of the sixtieth session of the Commission on Narcotic Drugs (13–17 March 2017).

In connection with the notification, WHO has also submitted the relevant extract from the report of the thirty-eighth meeting of the WHO Expert Committee on Drug Dependence which is hereby transmitted as annex II.

In order to assist the Commission in reaching a decision, it would be appreciated if the Government could communicate any economic, social, legal, administrative or other factors that it considers relevant to the possible scheduling of the afore-mentioned substances that are recommended by WHO to be placed under international control under the 1961 Convention (namely: U–4770 and butyrfentanyl) and the 1971 Convention (namely: 4–MEC, ethylone, pentedrone, ethylphenidate, MPA, MDMB–CHMICA, 5F-APINACA, and XLR–11).

Communications are to be sent at the latest by 20 January 2017 to the Executive Director of the United Nations Office on Drugs and Crime, c/o Secretary, Commission on Narcotic Drugs, P.O. Box 500, 1400 Vienna, Austria, fax: +43–1–26060–5885, email: *sgb@unodc.org.*

21 December 2016

His Excellency
Mr. John Kerry
Secretary of State of the United States of America

Annex I

Letter Addressed to the Secretary-General of the United Nations From the Director-General of the World Health Organization

''The Thirty-eighth meeting of the WHO Expert Committee on Drug Dependence convened from 14 to 18 November 2016, at WHO headquarters in Geneva. The objective of this meeting was to carry out an in-depth evaluation of psychoactive substances in order to determine whether or not WHO should recommend these substances to be placed under international control.

With reference to Article 2, paragraphs 1 and 4 of the Convention on Psychotropic Substances (1971) and Article 3, paragraphs 1 and 3 of the Single Convention on Narcotic Drugs (1961), as amended by the 1972 Protocol, I am pleased to submit recommendations of the World Health Organization as follows:

to be placed in Schedule I of the Single Convention on Narcotic Drugs (1961), as amended by the 1972 Protocol:

—U–47700
chemical name: 3,4-dichloro-N-(2-dimethylamino-cyclohexyl)-N-methyl-benzamide

—butyrfentanyl
chemical name: N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]butanamide

to be placed in Schedule II of the Convention on Psychotropic Substances (1971):

—4–MEC (4-methylethcathinone)
chemical name: 2-(ethylamino)-1-(4-methylphenyl)propan-1-one

—ethylone
chemical name: 1-(2H–1,3-benzodioxol-5-yl)-2-(ethylamino)propan-1-one

—pentedrone
chemical name: 2-(methylamino)-1-phenylpentan-1-one

—ethylphenidate
chemical name: ethyl phenyl(piperidin-2-yl)acetate

—MPA (methiopropamine)
chemical name: N-methyl-1-(thiophen-2-yl)propan-2-amine

—MDMB–CHMICA
chemical name: methyl N-{[1-(cyclohexylmethyl)-1H-indol-3-yl]carbonyl}-3-methyl-L-valinate

—5F–APINACA (5F–AKB–48)
chemical name: N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide

—XLR–11
chemical name: [1-(5-fluoropentyl)-1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone.

In addition, the Expert Committee recommended to carry out a critical review at a subsequent Expert Committee meeting for:

—3–MMC (3-Methylmethcathinone)
chemical name: 2-(methylamino)-1-(3-methylphenyl)propan-1-one

It also recommended to continue to keep the following substance under surveillance:

—JWH–073
chemical name: (1-butyl-1H-indol-3-yl)(1-naphthyl)methanone

The Committee recommended that a specific ECDD meeting dedicated to cannabis and its component substances should be held within the next eighteen months from the 38th meeting, and will carry out pre-reviews for the following substances:

—Cannabis plant and cannabis resin;
—Extracts and tinctures of cannabis;
—Delta-9-tetrahydrocannabinol (THC);
—Cannabidiol (CBD);
—Stereoisomers of THC.

The recommendations and the assessments and findings on which they are based are set out in detail in the Report of the 38th Expert Committee on Drug Dependence, which is the Committee that advises me on these issues. An extract of the Committee's Report is attached in Annex 1 to this letter.

I am very pleased with the ongoing collaboration among the United Nations Office on Drugs and Crime (UNODC), International Narcotics Control Board (INCB) and WHO, in particular, how this collaboration has supported the work of the WHO Expert Committee on Drug Dependence, and more generally, the implementation of operational recommendations from the United Nations General Assembly Special Session (UNGASS) 2016.''

NAR/CL.8/2016

Annex II

Extract From the Report of the 38th Expert Committee on Drug Dependence

Substances recommended to be scheduled in Schedule I and Schedule IV of the Single Convention on Narcotic Drugs (1961), as amended by the 1972 Protocol:

U–47700

Chemically, U–47700 is 3,4-dichloro-N-(2-dimethylamino-cyclohexyl)-N-methyl-benzamide. U47700 has two chiral centres resulting in four isomers; cis and trans conformations each have two enantiomers [cis: are (1R,2R), and (1S,2S); trans are (1R,2S) and (1S,2R)].

U–47700 was not previously pre-reviewed or critically reviewed by the Committee. A direct critical review is proposed based on information brought to the attention of the WHO that U–47700 is clandestinely manufactured, poses risk to public health and society, and has no recognized therapeutic use by any Party.

U–47700 (3,4-dichloro-N-(2-dimethylamino-cyclohexyl)-N-methyl-benzamide) is a compound liable to similar abuse and with similar ill-effects to controlled opioids such as morphine and AH–7921 that are included in Schedule I of the 1961 Single Convention on Narcotic Drugs. It has no recorded therapeutic use, and its use has resulted in fatalities. There is sufficient evidence that it is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control. Thus, because it meets the required condition of similarity, it is recommended that U–47700 be placed in Schedule I of the Single Convention on Narcotic Drugs, 1961, as consistent with Article 3, paragraph 3 (iii) of that Convention in that the substance is liable to similar abuse and productive of similar ill effects as drugs in Schedule I.

Butyrfentanyl

Chemically, butyrfentanyl is N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]butanamide.

Butyrfentanyl has not been previously pre-reviewed or critically reviewed by the Committee. A direct critical review is proposed based on information brought to the attention of the WHO that butyrfentanyl is clandestinely manufactured, poses risk to public health and society, and has no recognized therapeutic use by any Party.

Butyrfentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]butanamide) is a compound liable to similar abuse and with similar ill-effects to controlled opioids such as morphine and fentanyl that are included in Schedule I of the 1961 Single Convention on Narcotic Drugs. It can be converted into fentanyl as well. It has no recorded therapeutic use and its use has resulted in fatalities. There is sufficient evidence that it is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control. Thus, because it meets either of the required conditions of similarity or convertibility, it is recommended that butyrfentanyl be placed in Schedule I of the Single Convention on Narcotic Drugs, 1961, as consistent with Article 3, paragraph 3 (iii) of that Convention in that the substance is liable to similar abuse and productive of similar ill effects as drugs in Schedule I.

Substances recommended to be scheduled in Schedule II of the Convention on Psychotropic Substances (1971):

4–MEC (4-Methylethcathinone)

Chemically, 4-methylethcathinone (4–MEC) is 2-(ethylamino)-1-(4-methylphenyl)propan-1-one. 4–MEC has a chiral centre giving rise to an enantiomeric pair of (S)-4–MEC and (R)-4–MEC isomers.

A critical review report on 4–MEC was discussed in June 2014 at the 36th meeting of the WHO Expert Committee on Drug Dependence. The Committee recommended that 4–MEC not be placed under international control at that time due to insufficiency of data regarding dependence, abuse and risks to public health, but be kept under surveillance. 4–MEC continues to appear as a psychostimulant with monoamine transporter activity with indications of abuse liability. New data have emerged from in vitro and in vivo studies since the 36th ECCD meeting that has prompted the current critical review.

The Committee considered that the degree of risk to public health and society associated with the abuse of 4–MEC (2-(ethylamino)-1-(4-methylphenyl)propan-1-one) is substantial. Therapeutic usefulness has not been recorded. It recognized that it has similar abuse and similar ill-effects as substances in Schedule II of the UN 1971 Convention on Psychotropic Substances. The Committee considered that there is sufficient evidence that 4–MEC is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control. As per the Guidance on the WHO review of psychoactive substances for international control, higher regard was accorded to the substantial public health risk than to the lack of therapeutic usefulness. The Committee recommended that 4–MEC be placed in Schedule II under the UN 1971 Convention on Psychotropic Substances.

Ethylone

Chemically, ethylone is 1-(2H-1,3-benzodioxol-5-yl)-2-(ethylamino)propan-1-one. It is a chiral compound with isomers, and its hydrochloride salt can exist in two conformations (polymorphs) at the C–C bond linking the side chain to the aromatic ring.

Ethylone was not previously pre-reviewed or critically reviewed. A direct critical review is proposed based on information brought to the attention of the WHO that ethylone is clandestinely manufactured, poses serious risk to public health and society, and has no recognized therapeutic use by any Party.

The Committee considered that the degree of risk to public health and society associated with the abuse of ethylone (1-(2H-1,3-benzodioxol-5-yl)-2-(ethylamino)propan-1-one) is substantial. Therapeutic usefulness has not been recorded. It recognized that it has similar abuse and similar ill-effects as substances in Schedule II of the UN 1971 Convention on Psychotropic Substances. The Committee considered that there is sufficient evidence that ethylone is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control. As per the Guidance on the WHO review of psychoactive substances for international control, higher regard was accorded to the substantial public health risk than to the lack of therapeutic usefulness. The Committee recommended that ethylone be placed in Schedule II under the UN 1971 Convention on Psychotropic Substances.

Pentedrone (α-Methylaminovalerophenone)

Chemically, pentedrone is 2-(methylamino)-1-phenylpentan-1-one. It has a chiral centre giving rise to two stereoisomers, (S)- and (R)- pentedrone.

Pentedrone has not been previously reviewed or critically reviewed by the Expert Committee on Drug Dependence of the WHO. A direct critical review is proposed based on information brought to WHO's attention that pentedrone is clandestinely manufactured, poses serious risk to public health and society, and has no recognized therapeutic use by any Party.

The Committee considered that the degree of risk to public health and society associated with the abuse of pentedrone (2-(methylamino)-1-phenylpentan-1-one) is substantial. Therapeutic usefulness has not been recorded. It recognized that it has similar abuse and similar ill-effects as substances in Schedule II of the UN 1971 Convention on Psychotropic Substances. The Committee considered that there is sufficient evidence that pentedrone is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control. As per the Guidance on the WHO review of psychoactive substances for international control, higher regard was accorded to the substantial public health risk than to the lack of therapeutic usefulness. The Committee recommended that pentedrone be placed in Schedule II under the UN 1971 Convention on Psychotropic Substances.

Ethylphenidate (EPH)

Chemically, ethylphenidate is ethyl phenyl(piperidin-2-yl)acetate.

Ethylphenidate was not previously pre-reviewed or critically reviewed. A direct critical review is proposed based on information brought to the attention of the WHO that ethylphenidate is clandestinely manufactured, poses serious risk to public health and society, and has no recognized therapeutic use by any Party.

The Committee considered that the degree of risk to public health and society associated with the abuse of ethylphenidate (ethyl phenyl(piperidin-2-yl)acetate) is substantial. Therapeutic usefulness has not been recorded. It recognized that it has similar abuse and similar ill-effects as substances in Schedule II of the UN 1971 Convention on Psychotropic Substances. The Committee considered that there is sufficient evidence that ethylphenidate is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control. As per the Guidance on the WHO review of psychoactive substances for international control, higher regard was accorded to the substantial public health risk than to the lack of therapeutic usefulness. The Committee recommended that ethylphenidate be placed in Schedule II under the UN 1971 Convention on Psychotropic Substances.

MPA (Methiopropamine)

Chemically, methiopropamine is N-methyl-1-(thiophen-2-yl)propan-2-amine. It has a chiral centre with two enantiomers.

Methiopropamine was previously critically reviewed by the Committee at its 36th meeting. Owing to the insufficiency of data regarding dependence, abuse and risks to public health, the Committee recommended that methiopropamine not be placed under international control but be kept under surveillance. Subsequent data collected from the literature and from different countries indicated that this substance may cause substantial harm and that it has no medical use warranting an updated critical review.

The Committee considered that the degree of risk to public health and society associated with the abuse of methiopropamine (N-methyl-1-(thiophen-2-yl)propan-2-amine) is substantial. Therapeutic usefulness has not been recorded. It recognized that it has similar abuse and similar ill-effects as substances in Schedule II of the UN 1971 Convention on Psychotropic Substances. The Committee considered that there is sufficient evidence that methiopropamine is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control. As per the Guidance on the WHO review of psychoactive substances for international control, higher regard was accorded to the substantial public health risk than to the lack of therapeutic usefulness. The Committee recommended that methiopropamine be placed in Schedule II under the UN 1971 Convention on Psychotropic Substances.

MDMB–CHMICA

Chemically, MDMB–CHMICA is methyl N-{[1-(cyclohexylmethyl)-1H-indol-3-yl]carbonyl}-3-methyl-L-valinate. MDMB–CHMICA has a chiral carbon in the butanoic chain. Therefore, two stereoisomers exist: (S)-MDMB–CHMICA and (R)-MDMB–CHMICA.

MDMB–CHMICA has not been previously pre-reviewed or critically reviewed. A direct critical review is proposed based on information brought to the attention of the WHO that MDMB–CHMICA is clandestinely manufactured, poses serious risk to public health and society, and has no recognized therapeutic use by any Party.

The Committee considered that the degree of risk to public health and society associated with the abuse of MDMB–CHMICA (methyl N-{[1-(cyclohexylmethyl)-1H-indol-3-yl]carbonyl}-3-methyl-L-valinate) is substantial. Therapeutic usefulness has not been recorded. It recognized that it has similar abuse and similar ill-effects as substances in Schedule II of the UN 1971 Convention on Psychotropic Substances. The Committee considered that there is sufficient evidence that MDMB–CHMICA is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control. As per the Guidance on the WHO review of psychoactive substances for international control, higher regard was accorded to the substantial public health risk than to the lack of therapeutic usefulness. The Committee recommended that MDMB–CHMICA be placed in Schedule II under the UN 1971 Convention on Psychotropic Substances.

5F–APINACA (5F–AKB–48)

Chemically, 5F–APINACA is N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide.

5F–APINACA has not been previously pre-reviewed or critically reviewed by the Expert

Committee on Drug Dependence of the WHO. A direct critical review is proposed based on information brought to the attention of the WHO that 5F–APINACA is clandestinely manufactured, poses serious risk to public health and society, and has no recognized therapeutic use by any Party.

The Committee considered that the degree of risk to public health and society associated with the abuse of 5F–APINACA (N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide) is substantial. Therapeutic usefulness has not been recorded. It recognized that it has similar abuse and similar ill-effects as substances in Schedule II of the UN 1971 Convention on Psychotropic Substances. The Committee considered that there is sufficient evidence that 5F–APINACA is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control. As per the Guidance on the WHO review of psychoactive substances for international control, higher regard was accorded to the substantial public health risk than to the lack of therapeutic usefulness. The Committee recommended that 5F–APINACA be placed in Schedule II under the UN 1971 Convention on Psychotropic Substances.

XLR–11

Chemically, XLR–11 is [1-(5-fluoropentyl)-1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone.

XLR–11 has not been previously pre-reviewed or critically reviewed. A direct critical review is proposed based on information brought to WHO's attention that XLR–11 is clandestinely manufactured, poses serious risk to public health and society, and has no recognized therapeutic use by any Party.

The Committee considered that the degree of risk to public health and society associated with the abuse of XLR–11 ([1-(5-fluoropentyl)-1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone) is substantial. Therapeutic usefulness has not been recorded. It recognized that it has similar abuse and similar ill-effects as substances in Schedule II of the UN 1971 Convention on Psychotropic Substances such as JWH–018 and AM–2201. The Committee considered that there is sufficient evidence that XLR–11 is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control. As per the Guidance on the WHO review of psychoactive substances for international control, higher regard was accorded to the substantial public health risk than to the lack of therapeutic usefulness. The Committee recommended that XLR–11 be placed in Schedule II under the UN 1971 Convention on Psychotropic Substances.

Substance recommended for critical review:

3-Methylmethcathinone (3-methyl-N-methylcathinone; 3–MMC)

Chemically, 3–MMC is 2-(methylamino)-1-(3-methylphenyl)propan-1-one. 3–MMC contains a chiral centre at the C–2 carbon of the propane sidechain, so two enantiomers exist: (R)-3–MMC and (S)-3–MMC.

3–MMC was not previously pre-reviewed or critically reviewed. A direct critical review is proposed based on information brought to the attention of the WHO that 3–MMC is clandestinely manufactured, poses serious risk to public health and society, and has no recognized therapeutic use by any Party.

The Committee deliberated at length regarding the information available pertinent to the degree of risk to public health and society associated with the abuse of 3–MMC (2-(methylamino)-1-(3-methylphenyl)propan-1-one). The Committee decided that the information as currently provided, and the ensuing discussions that had occurred, were inadequate to form a consensus and confident recommendation regarding the scheduling of 3–MMC. As per paragraph 59 of the Guidance on the WHO review of psychoactive substances for international control, and as supported by its procedural reference to the Thirty-fourth report of the WHO Expert Committee on Drug Dependence, ''. . . in cases where additional information concerning the substance under review is required, the Committee may decide that it will reach a final opinion at a subsequent meeting.'' ''. . . then it should request another critical review in order to refer the matter to a subsequent Expert Committee.'' As directed by these guidelines, the Committee requested that the Secretariat arrange another critical review of 3–MMC at a subsequent Expert Committee.

Substance recommended for surveillance:

JWH–073

Chemically, JWH–073 is (1-butyl-1H-indol-3-yl)(1-naphthyl)methanone.

During its 36th meeting, the WHO Expert Committee on Drug Dependence discussed the critical review report on JWH–073 and concluded that owing to the current insufficiency of data regarding dependence, abuse and risks to public health, JWH–073 should not be placed under international control at that time but be kept under surveillance. New information on its pharmacology and abuse potential warranted an update of the critical review report for discussion at the 38th ECDD.

The available pharmacodynamic data related to JWH–073 (1-butyl-1H-indol-3-yl)(1-naphthyl)methanone) demonstrates that this substance has the capacity to produce some effects similar to its homologue, JWH–018, that is included in Schedule II of the UN 1971 Convention on Psychotropic Substances. However, the data currently available does not make it possible to establish a direct link between JWH–073 abuse and appearance of public health and social problems that would be a requirement for placing this substance under international control. It is therefore recommended not to place JWH–073 under international control but to continue to keep it under surveillance.

Update on Cannabis and Cannabis resin:

At the 37th ECDD meeting the Committee requested that Secretariat begin collecting data towards a pre-review of cannabis, cannabis resin, extracts and tinctures of cannabis at a future meeting. Consistent with this request, two updates on the scientific literature on cannabis were prepared and subsequently presented to the Expert Committee. Following its deliberations the Committee noted that the current Schedule I of the 1961 Convention groups together cannabis and cannabis resin, extracts and tinctures of cannabis. Cannabis plant and cannabis resin are also in Schedule IV of the 1961 Convention. The Committee further noted that there are natural and synthetic cannabinoids in Schedule I and Schedule II of the 1971 Convention. The Committee recognized:

—An increase in the use of cannabis and its components for medical purposes;
—The emergence of new cannabis-related pharmaceutical preparations for therapeutic use;
—Cannabis has never been subject to a formal pre-review or critical review by the ECDD.

The Committee requested that the Secretariat prepare relevant documentation in accordance with the Guidance on the WHO review of psychoactive substances for international control in order to conduct pre-reviews for the following substances:

—Cannabis plant and cannabis resin;
—Extracts and tinctures of cannabis;
—Delta-9-tetrahydrocannabinol (THC);
—Cannabidiol (CBD);
—Stereoisomers of THC.

The Committee recommended that these pre-reviews be evaluated at a specific ECDD meeting dedicated to cannabis and its component substances to be held within the next eighteen months from the 38th meeting.

The purpose of the pre-review is to determine whether current information justifies an Expert Committee critical review. The categories of information for evaluating substances in pre-reviews are identical to those used in critical reviews. The pre-review is a preliminary analysis, and findings at this stage should not determine whether the control status of a substance should be changed.

III. Discussion

Although WHO has made specific scheduling recommendations for each of the drug substances, the CND is not obliged to follow the WHO recommendations. Options available to the CND for substances considered for control under the Psychotropic Convention include the following: (1) Accept the WHO recommendations; (2) accept the recommendations to control, but control the drug substance in a schedule other than that recommended; or (3) reject the recommendations entirely.

U–47700 is a synthetic opioid drug developed in the 1970s. U–47700 is structurally related to the opioid AH–7921. U–47700 is selective for the μ-opioid receptor. U–47700 has never been studied on humans, but would be expected to produce effects similar to those of other potent opioid agonists, including strong analgesia, sedation, euphoria, constipation, itching, and respiratory depression which could be harmful or fatal. Overdoses and

overdose fatalities have been directly attributed to U–47700 misuse. There have been reports of U–47700 being encountered in counterfeit pills. On November 14, 2016, the U.S. Drug Enforcement Administration (DEA) temporarily scheduled U–47700 into schedule I pursuant to the temporary scheduling provisions of the Controlled Substances Act. As such, additional permanent controls will be necessary to fulfill U.S. obligations if U–47700 is controlled under Schedule I of the 1961 Single Convention.

Butyrfentanyl (butyrylfentanyl) is a synthetic opioid and analog of fentanyl. Fentanyl is controlled in Schedule II of the CSA, and an active ingredient in drug products approved for medical use and marketed in the United States. Butyrylfentanyl has a pharmacological profile similar to that of fentanyl and other μ-opioid receptor agonists. Risks associated with abuse of butyrylfentanyl include development of substance use disorder, overdose, and death similar to that of other μ-opioid agonists. The DEA is aware of at least 40 confirmed fatalities associated with butyrylfentanyl. It has no approved medical use in the United States. On May 12, 2016, butyrylfentanyl was temporarily placed into Schedule I of the CSA for 2 years upon finding that it posed an imminent hazard to the public safety. The Attorney General, though, may extend this temporary scheduling for up to 1 year. As such, additional permanent controls will be necessary to fulfill U.S. obligations if butyrylfentanyl is controlled under Schedule I of the 1961 Single Convention.

4-Methylethcathinone (4–MEC), 3-Methylmethcathinone (3-methyl-N-methylcathinone; 3–MMC): 3-methyl-methcathinone (3–MMC), pentedrone, and ethylone (3,4-methylenedioxy-N-ethylcathinone; bk-MDEA; MDEC) are synthetic cathinones that are structurally and pharmacologically similar to amphetamine, 3–4 methylenedioxymethamphetamine (MDMA), cathinone, and other related substances. These substances are central nervous system stimulants with psychoactive properties similar to Schedule I and II amphetamine type substances. Public health risks associated with the use of synthetic cathinones suggest that these substances are associated with cardiac, psychiatric, and neurological symptoms that may lead to emergency department admissions, violent behaviors causing harm to self or others, or death. 4–MEC and pentedrone have no known medical use in the United States. On March 7, 2014, the DEA published a final order in the **Federal Register** amending 21 CFR 1308.11(h) to temporarily place 4–MEC and pentedrone into Schedule I of the CSA pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h). On March 4, 2016, the temporary Schedule I status of 4–MEC and pentedrone was extended for 1 year, or until permanent scheduling is completed. Permanent scheduling for 4–MEC and pentedrone was initiated on March 4, 2016, upon publication of the notice of proposed rulemaking. As such, additional permanent controls will be necessary to fulfill U.S. obligations if 4–MEC and pentedrone is controlled under Schedule II of the 1971 Convention on Psychotropic Substances.

In the United States, ethylone has been sold as the street drug ''Molly'' and encountered as a replacement for methylone. Ethylone has no known medical use in the United States. As a positional isomer of the controlled drug butylone, ethylone is considered a Schedule I controlled substance under the CSA. As such, no additional controls will be necessary to fulfill U.S. obligations if ethylone is controlled under Schedule II of the 1971 Convention on Psychotropic Substances.

Ethylphenidate is structurally related to methylphenidate. Methylphenidate is controlled in Schedule IV of the CSA, and an active ingredient in drug products approved for medical use and marketed in the United States. Ethylphenidate is not approved for medical use in the United States. Ethylphenidate is structurally related to methylphenidate are being marketed as novel psychoactive substances with psychoactive effects similar to methylphenidate, therefore posing similar health risks to the users. Ethylphenidate is a controlled substance in several European countries, and is not a controlled substance in the United States under the CSA. As such, additional permanent controls will be necessary to fulfill U.S. obligations if ethylphenidate is controlled under Schedule II of the 1971 Convention on Psychotropic Substances.

Methiopropamine (MPA) is a structural analogue of the Schedule II controlled substance methamphetamine. Pharmacologically, it functions as a norepinephrine-dopamine reuptake inhibitor and, secondarily, as a serotonin reuptake inhibitor. MPA is a thiophene based analog of methamphetamine. It has stimulant properties as an inhibitor of dopamine, norepinephrine transporters in the central nervous system. MPA is not approved for medical use or controlled in the United States under the CSA. As such, additional permanent controls will be necessary to fulfill U.S. obligations if MPA is controlled under Schedule II of the 1971 Convention on Psychotropic Substances.

MDMB–CHMICA is an indole-based synthetic cannabinoid that is a potent full agonist at cannabinoid type 1 (CB1) receptors and mimics functionally (biologically) the effects of the structurally unrelated delta-9-tetrahydrocannabinol, a Schedule I substance, and the main active ingredient of marijuana. Synthetic cannabinoids are marketed under the guise of ''herbal incense,'' and promoted by drug traffickers as legal alternatives to marijuana. MDMB–CHMICA use is associated with serious adverse events including death in several European countries. There are no commercial or approved medical uses for MDMB–CHMICA. MDMB–CHMICA is not controlled under the CSA, but may be treated as a ''controlled substance analogue'' under the CSA pursuant to 21 U.S.C. 802(32)(A) and 813, and is a controlled substance in the State of Louisiana. As such, additional permanent controls will be necessary to fulfill U.S. obligations if MDMB–CHMICA is controlled under Schedule II of the 1971 Convention on Psychotropic Substances.

5F–APINACA (5F–AKB48) is a synthetic cannabinoid belonging to a chemical structural class with an indazole core. In vitro studies show that it binds to the CB1 receptors and displays agonist properties in functional assays, suggesting that it would share in vivo effects with delta-9–THC and various synthetic cannabinoids. There are no commercial or medical uses for 5F–APINACA. Synthetic cannabinoids are marketed under the guise of ''herbal incense,'' and promoted by drug traffickers as legal alternatives to marijuana. SF–APINACA is not a controlled substance under the CSA, but may be treated as a ''controlled substance analogue'' under the CSA pursuant to 21 U.S.C. 802(32)(A) and 813. As such, additional permanent controls will be necessary to fulfill U.S. obligations if SF–APINACA is controlled under Schedule II of the 1971 Convention on Psychotropic Substances.

XLR–11 (5-Fluoro-UR–144, 5F–UR–144) is an indole-based synthetic cannabinoid and acts as an agonist at CB1 receptors. Animal studies indicate that it mimics functionally (biologically) the effects of the structurally unrelated delta-9–THC, a Schedule I substance, and the main active ingredient of marijuana and numerous other

Schedule I synthetic cannabinoids. Synthetic cannabinoids are marketed under the guise of ''herbal incense,'' and promoted by drug traffickers as legal alternatives to marijuana. On May 11, 2016, XLR11 was permanently controlled as a Schedule I substance under the CSA. As such, additional permanent controls will not be necessary to fulfill U.S. obligations if XLR–11 is controlled under Schedule II of the 1971 Convention on Psychotropic Substances.

FDA, on behalf of the Secretary of HHS, invites interested persons to submit comments on the notifications from the United Nations concerning these drug substances. FDA, in cooperation with the National Institute on Drug Abuse, will consider the comments on behalf of HHS in evaluating the WHO scheduling recommendations. Then, under section 201(d)(2)(B) of the CSA, HHS will recommend to the Secretary of State what position the United States should take when voting on the recommendations for control of substances under the Psychotropic Convention at the CND meeting in March 2017.

Comments regarding the WHO recommendations for control of U–47700 and Butyrylfentanyl under the 1961 Single Convention will also be forwarded to the relevant Agencies for consideration in developing the U.S. position regarding narcotic substances at the CND meeting.

IV. Opportunity for Public Meeting

FDA does not presently plan to hold a public meeting. If any person believes that, in addition to written comments, a public meeting would contribute to the development of the U.S. position on the substances to be considered for control under the Psychotropic Convention, a request for a public meeting and the reasons for such a request should be sent to James R. Hunter (see **FOR FURTHER INFORMATION CONTACT**) on or before January 23, 2017.

Dated: January 5, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–00373 Filed 1–10–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–1862]

Recommended Warning for Over-the-Counter Acetaminophen-Containing Drug Products and Labeling Statements Regarding Serious Skin Reactions; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Recommended Warning for Over-the-Counter Acetaminophen-Containing Drug Products and Labeling Statements Regarding Serious Skin Reactions.'' This guidance is intended to inform manufacturers, members of the medical and scientific community, and other interested persons that at this time FDA does not intend to take action against the marketing of single- and combination-ingredient, acetaminophen-containing, nonprescription (commonly referred to as over-the-counter (OTC)) drug products bearing a warning as described in the guidance alerting consumers that the use of acetaminophen may cause severe skin reactions.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–D–1862 for ''Recommended Warning for Over-the-Counter Acetaminophen-Containing Drug Products and Labeling Statements Regarding Serious Skin Reactions; Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other

applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Emily Baker, Office of Unapproved Drugs and Labeling Compliance, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–7524, *Emily.Baker@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Recommended Warning for Over-the-Counter Acetaminophen-Containing Drug Products and Labeling Statements Regarding Serious Skin Reactions.'' Acetaminophen, included in many prescription and OTC products, is a common active ingredient indicated to treat pain and reduce fever. On August 1, 2013, FDA issued a Drug Safety Communication (DSC) informing the public that use of acetaminophen has been associated with a risk of rare but serious skin reactions.[1] These skin reactions, including Stevens-Johnson Syndrome, toxic epidermal necrolysis, and acute generalized exanthematous pustulosis, can be fatal.

The DSC explained that reddening of the skin, rash, blisters, and detachment of the upper surface of the skin can occur with the use of drug products that contain acetaminophen. These skin reactions can occur with the first-time use of acetaminophen or even if acetaminophen has been used in the past without any problems. FDA advised health care professionals to be aware of this rare risk and consider acetaminophen, along with other drugs already known to have such an association, when assessing patients with potentially drug-induced skin reactions. FDA also advised that anyone who develops a skin rash or reaction while using acetaminophen or any other pain reliever/fever reducer should stop taking the drug and seek medical attention right away. Furthermore, the announcement advised that anyone who has experienced a serious skin reaction when taking acetaminophen in the past should not take the drug again and should contact their health care professional to discuss alternative pain relievers/fever reducers.

In response to FDA's letters to manufacturers holding new drug applications and abbreviated new drug applications, most manufacturers of acetaminophen-containing prescription and OTC drug products marketed under an approved application now include a warning statement on their product labels to address the risk of serious skin reactions. FDA recommends that manufacturers of all acetaminophen-containing OTC drug products (both single- and combination-ingredient acetaminophen products) marketed under the Tentative Final Monograph (TFM) for Internal Analgesic, Antipyretic, and Antirheumatic Drug Products include in labeling the language recommended in this guidance to warn consumers that acetaminophen may cause severe skin reactions. At this time, FDA does not intend to take action against the marketing of single- and combination-ingredient, acetaminophen-containing, OTC drug products bearing the recommended allergy warning that are otherwise marketed in compliance with the TFM and applicable regulations.

In the **Federal Register** of November 28, 2014 (79 FR 70879), FDA published a draft guidance entitled ''Recommended Warning for Over-the-Counter Acetaminophen-Containing Drug Products and Labeling Statements Regarding Serious Skin Reactions.'' See: *http://www.fda.gov/downloads/drugs/guidancecompliance regulatoryinformation/guidances/ucm424898.pdf.* The November 2014 draft guidance gave interested persons an opportunity to submit comments through January 27, 2015. We have made changes to the guidance in response to comments received and have added labeling information about products that contain both acetaminophen and aspirin.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on the recommended warning for OTC acetaminophen-containing drug products and labeling statements regarding serious skin reactions. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

Under the guidance, manufacturers may add to their drug product labeling a warning statement supplied by FDA that pertains to acetaminophen to address the risk of serious skin reactions. Inclusion of the warning statement on the labels for these drug products would be exempt from review by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) because the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within the definition of ''collection of information'' (see 5 CFR 1320.3(c)(2)).

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: January 5, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–00375 Filed 1–10–17; 8:45 am]

BILLING CODE 4164–01–P

[1] FDA Drug Safety Communication: FDA warns of rare but serious skin reactions with the pain reliever/fever reducer acetaminophen. *http://www.fda.gov/Drugs/DrugSafety/ucm363041.htm.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–N–0067]

Joint Meeting of the Drug Safety and Risk Management Advisory Committee and the Anesthetic and Analgesic Drug Products Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Drug Safety and Risk Management Advisory Committee and the Anesthetic and Analgesic Drug Products Advisory Committee. The general function of the committees is to provide advice and recommendations to the Agency on FDA's regulatory issues. At least one portion of the meeting will be closed to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on March 13, 2017, from 8 a.m. to 5 p.m. and March 14, 2017, from 8 a.m. to 5 p.m.

ADDRESSES: College Park Marriott Hotel and Conference Center, Potomac Ballroom, 3501 University Blvd. East, Hyattsville, MD 20783. The conference center's telephone number is 301–985–7300. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.* You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• Mail/Hand delivery/Courier (for written/paper submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–N–0067 for ''Joint Meeting of the Drug Safety and Risk Management Advisory Committee and the Anesthetic and Analgesic Drug Products Advisory Committee; Notice of Meeting; Request for Comments.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Stephanie L. Begansky, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, email: *AADPAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION: *Agenda:* The committees will be asked to discuss safety issues for new drug application (NDA) 201655, OPANA ER (oxymorphone hydrochloride) Extended-release Tablets, by Endo Pharmaceuticals Inc., with the indication of management of pain severe enough to require daily, around-the-clock, long-term opioid treatment and for which alternative treatment options are inadequate. The product is an approved extended-release (ER) formulation intended to have abuse-deterrent properties based on its physicochemical properties, however, this information is not currently reflected in product labeling. The committees will be asked to discuss pre- and post-marketing data about the abuse of OPANA ER, and the overall risk-benefit of this product. The committees will also discuss abuse of generic oxymorphone ER and oxymorphone immediate-release (IR) products.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the

location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: On March 13, 2017, from 9:15 a.m. to 5 p.m., and on March 14, 2017, from 8 a.m. to 5 p.m., the meeting is open to the public. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committees. All electronic and written submissions submitted to the Docket (see the **ADDRESSES** section) on or before February 27, 2017, will be provided to the committees. Oral presentations from the public will be scheduled between approximately 8:30 a.m. and 10:30 a.m. on March 14, 2017. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before February 16, 2017. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by February 17, 2017.

Closed Committee Deliberations: On March 13, 2017, from 8 a.m. to 9:15 a.m., the meeting will be closed to permit discussion and review of trade secret and/or confidential commercial information (5 U.S.C. 552b(c)(4)). During this session, the committees will discuss the premarketing drug development program of an extended-release opioid product.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2017–N–0067. The docket will close on March 10, 2017. Comments received on or before February 27, 2017, will be provided to the committee. Comments received after that date will be taken into consideration by the Agency.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Stephanie L. Begansky at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: January 6, 2017.

Janice M. Soreth,

Associate Commissioner for Special Medical Programs.

[FR Doc. 2017–00463 Filed 1–10–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0529]

Recommended Statement for Over-the-Counter Aspirin-Containing Drug Products Labeled With Cardiovascular Related Imagery; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Recommended Statement for Over-the-Counter Aspirin-Containing Drug Products Labeled With Cardiovascular Related Imagery.'' The guidance is intended to promote the safe use of nonprescription (also referred to as over-the-counter or OTC) aspirin drug products by encouraging drug manufacturers, packagers, and labelers marketing aspirin drug products with cardiovascular related imagery to include a statement that reminds consumers to talk to their health care provider before using aspirin for their heart.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(a)(5)), to ensure that the Agency considers your comments on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by March 13, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2012–D–0529 for ''Recommended Statement for Over-the-Counter Aspirin-Containing Drug Products Labeled With Cardiovascular Related Imagery; Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential

information that you do not wish to be made publicly available submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Emily Baker, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5203, Silver Spring, MD 20993–0002, 301–796–7524, *Emily.Baker@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Recommended Statement for Over-the-Counter Aspirin-Containing Drug Products Labeled With Cardiovascular Related Imagery.'' Aspirin is a common active ingredient in many prescription and OTC drug products. Most OTC aspirin drug products are currently marketed pursuant to the Tentative Final Monograph (TFM) for Internal Analgesic, Antipyretic, and Antirheumatic (IAAA) Drug Products (53 FR 46204, November 16, 1988) for the temporary relief of minor aches and pains associated with a cold, headache, backache, toothache, premenstrual and menstrual cramps; minor pain of arthritis; and reduction in fever.

In addition to the OTC conditions of use in the IAAA TFM, FDA regulations at § 343.80 (21 CFR 343.80) also contain professional labeling about cardiovascular uses of aspirin directed at health care practitioners (63 FR 56802, October 23, 1998). After publication of the professional labeling regulation for aspirin, some OTC aspirin labels were modified to include cardiovascular related imagery (*e.g.,* heart image, electrocardiography graphic, stethoscope around a heart image). However, the final rule for IAAA products at § 343.80 authorizes labeling for cardiovascular events only in professional labeling directed to health care professionals.

Because of the potential side effects associated with long-term aspirin therapy, FDA recommends that any cardiovascular related imagery on OTC aspirin labels be accompanied by a statement that reminds consumers to talk to their health care provider before using aspirin for the professional indication of secondary prevention of cardiovascular events. Therefore, this draft guidance provides that FDA does not intend to take action against manufacturers of single-ingredient aspirin, buffered aspirin, and aspirin in combination with an antacid, marketed pursuant to the TFM for IAAA Drug Products because the product label includes cardiovascular related imagery (*e.g.,* heart image, electrocardiography graphic, stethoscope around a heart image) if the label also includes language as described in the draft guidance recommending that patients talk to a health care professional before taking aspirin for cardiovascular uses and the product is otherwise marketed in accordance with the TFM.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on this topic. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

The recommendations in this draft guidance are not subject to review by the Office of Management and Budget because they do not constitute a ''collection of information'' under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Rather, the labeling statements are a ''public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public'' (5 CFR 1320.3(c)(2)).

III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: January 5, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–00374 Filed 1–10–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–D–0198]

Current Good Manufacturing Practice Requirements for Combination Products; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a final guidance for industry and FDA staff entitled ''Current Good Manufacturing Practice Requirements for Combination Products.'' The guidance describes and explains the document on current good manufacturing practice (CGMP) requirements for combination products, which published in the **Federal Register** of January 22, 2013, and includes general considerations for CGMP compliance as well as analysis of hypothetical scenarios.

DATES: Submit either electronic or written comments on this guidance at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2015–D–0198 for ''Current Good Manufacturing Practice Requirements for Combination Products; Final Guidance for Industry and FDA Staff.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the guidance document entitled ''Current Good Manufacturing Practice Requirements for Combination Products'' to the Office of Combination Products, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5129, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Melissa Burns or John Barlow Weiner, Office of Combination Products, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5129, Silver Spring, MD 20993–0002, 301–796–8930.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry and FDA staff entitled ''Current Good Manufacturing Practice Requirements for Combination Products.'' The guidance provides background on combination products, including an overview of the document on CGMP requirements for combination products, which published in the **Federal Register** of January 22, 2013 (78 FR 4307), and the role of the lead center and other Agency components with respect to combination product CGMP issues. The guidance addresses general considerations for CGMP requirements for combination products and the purpose and content of specific CGMP provisions addressed in part 4 (21 CFR part 4). The guidance also contains hypothetical scenarios intended to clarify how to comply with certain CGMP requirements addressed in part 4 by presenting compliance considerations for specific types of combination products.

FDA carefully considered the comments received on the draft guidance, and, where possible, has incorporated into the final guidance additional detailed discussion of how the requirements apply and acceptable CGMP compliance approaches. FDA encourages combination product manufacturers to contact the lead Center for their combination product and/or the Office of Combination Products if they have questions on CGMP compliance or approaches they are considering for meeting CGMP requirements.

II. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.fda.gov/downloads/RegulatoryInformation/Guidances/UCM429304.pdf.*

III. Paperwork Reduction Act

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). We note that the information collected under the underlying CGMP regulations for drugs, devices, and biological products, including current good tissue practices for human cells, tissues, and cellular and tissue-based products, found at parts 211, 820, 600 through 680, and 1271 (21 CFR parts

211, 820, 600 through 680, and 1271), have already been approved and are in effect. The provisions of part 211 are approved under OMB control number 0910–0139. The provisions of part 820 are approved under OMB control number 0910–0073. The provisions of parts 606 and 640 are approved under OMB control number 0910–0116. The provisions of part 610 are approved under OMB control numbers 0910–0116 and 0910–0338 (also for part 680). The provisions of part 1271, subparts C and D, are approved under OMB control number 0910–0543.

Dated: January 6, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–00411 Filed 1–10–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Nurse Anesthetist Traineeship (NAT) Program

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than February 10, 2017.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call the HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Nurse Anesthetist Traineeship (NAT) Program Application

OMB No.: 0915–0374—Revision

Abstract: HRSA provides advanced education nursing training grants to educational institutions to increase the numbers of Nurse Anesthetists through the NAT Program. The NAT Program is authorized by Section 811 of the Public Health Service (PHS) Act (42 U.S.C. 296j). The NAT Tables request information on program participants from the previous year, including the number of enrollees; number of enrollees/trainees supported; number of graduates; number of graduates supported; projected data on the number of enrollees/trainees and graduates; the degree program (Master's and Doctoral) the Nurse Anesthesia student trainees are enrolling into and/or from which enrollees/trainees are graduating; and the distribution of Nurse Anesthetists who practice in underserved, rural, and/or public health practice settings.

Need and Proposed Use of the Information: Funds appropriated for the NAT Program are distributed among eligible institutions based on a formula, as permitted by PHS Act Section 806(e)(1). HRSA uses the data from the NAT Tables to determine the award amount, ensure compliance with programmatic and grant requirements, and provide information to the public and Congress.

HRSA is streamlining the data collection forms from three tables to two tables by making the following changes:

- *Table 1—NAT:* Enrollment, Traineeship Support, Graduates, Graduates Supported, and Projected Data will no longer capture data by students in the first 12 months of study and students beyond the first 12 months of study in the program. Data will continue to be captured by Master's and Doctoral students.
- *Table 2A—NAT:* Graduate Data—Rural, Underserved, or Public Health is now Table 2 due to the elimination of Table 2B. There are no other changes to this form.
- *Table 2B—NAT:* Graduates Supported by Traineeship Data—Rural, Underserved, or Public Health (7/01/15–6/30/16) will be discontinued.

Rationale: The NAT Program Specific Data Forms will be revised to streamline the process and capture only essential data for use in the formula calculation, ensure grantee compliance, and measure and evaluate the program.

Likely Respondents: Eligible applicants are education programs that provide registered nurses with full-time nurse anesthesia education and are accredited by the Council on Accreditation (COA) of Nurse Anesthesia Educational Programs. Such programs may include schools of nursing, nursing centers, academic health centers, state or local governments, and other public or private nonprofit entities authorized by the Secretary to confer degrees to registered nurses for full-time nurse anesthesia education. Faith-based and community-based organizations, Tribes, and tribal organizations may apply for these funds if otherwise eligible. In addition to the 50 states, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Northern Mariana Islands, American Samoa, the U.S. Virgin Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau may apply.

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 Information Collection Request are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Table 1: NAT: Enrollment, Traineeship Support, Graduate, Graduates Supported and Projected Data	100	1	100	3.4	340
Table 2—NAT: Graduate Data—Rural, Underserved, or Public Health	100	1	100	2.78	278
Total	*100		100		618

*The same respondents are completing Table 1 and Table 2.

Jason E. Bennett,

Director, Division of the Executive Secretariat.

[FR Doc. 2017–00337 Filed 1–10–17; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Ryan White HIV/AIDS Program Outcomes and Expanded Insurance Coverage

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period.

DATES: Comments on this ICR should be received no later than February 10, 2017.

ADDRESSES: Submit your comments, including the ICR Title, to the desk officer for HRSA, either by email to *OIRA_submission@omb.eop.gov* or by fax to 202–395–5806.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–1984.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Ryan White HIV/AIDS Program Outcomes and Expanded Insurance Coverage

OMB No. 0906–xxxx—NEW

Abstract: HRSA, HIV/AIDS Bureau (HRSA/HAB) implements the Ryan White HIV/AIDS Program (RWHAP). This program provides HIV-related services in the United States for those who do not have sufficient health care coverage or financial resources for coping with HIV disease. The recent expansion of health coverage impacted a significant portion of RWHAP's traditional clients (newly-eligible Medicaid recipient clients, qualified health plan (QHP) insured clients, and uninsured clients) who are now eligible to receive third party reimbursement care. These changes require RWHAP sites to fill the different gaps in care experienced by clients across the varying health care coverage options. The purpose of this evaluation study is to determine the effect that changing health care coverage has had on overall health outcomes, service utilization, and gaps in care of HIV-positive individuals. This evaluation also seeks to understand how RWHAP provider sites meet the needs of clients under the variety of health care coverage options.

Need and Proposed Use of the Information: The expansion of health coverage offers new options of obtaining health care services for many individuals with HIV. Due to these changes, additional information concerning overall client health outcomes, pharmaceutical and core medical processes and outcomes, and client access to and utilization of support services is needed. Data from this evaluation study will be used to provide HRSA/HAB with the necessary information to understand the changes in primary health care outcomes of RWHAP clients, pre- and post-implementation of recent insurance expansion and inform how the RWHAP can best serve clients.

As a result of the 60-day **Federal Register** Notice, two comments were received. Both commenters strongly supported the proposed information collection and urged HRSA to include whether access and coverage to medical nutritional therapy and food bank/home delivered meals are impacted by the expanded insurance coverage. Medical nutrition therapy and food bank/home-delivered meals had already been included in the project design.

Likely Respondents: RWHAP Administrators, RWHAP Care Providers, and RWHAP Clients.

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	Total responses	Average burden per response (in hours)	Total burden hours
Site Survey	305	1	305	0.5	152.5

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Medical Chart/Record Abstraction	*25	1	25	2	50
Focus Group (recruit participants)	*25	1	25	1	25
Site Interview Guide	50	1	50	2	100
Focus Groups Guide	60	1	60	1.5	90
Total	*440		*440		417.5

* The same respondents will complete the medical chart/record abstraction and recruit participants for the focus group.

Jason E. Bennett,

Director, Division of the Executive Secretariat.

[FR Doc. 2017–00322 Filed 1–10–17; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

[CFDA Number: 93.164]

Loan Repayment Program for Repayment of Health Professions Educational Loan; Announcement Type—Initial

Key Dates: January 15, 2017 first award cycle deadline date; August 15, 2017 last award cycle deadline date; September 15, 2017 last award cycle deadline date for supplemental loan repayment program funds; September 30, 2017 entry on duty deadline date.

I. Funding Opportunity Description

The Indian Health Service (IHS) estimated budget request for Fiscal Year (FY) 2017 includes $30,022,000 for the IHS Loan Repayment Program (LRP) for health professional educational loans (undergraduate and graduate) in return for full-time clinical service as defined in the IHS LRP policy at *https://www.ihs.gov/loanrepayment/policiesandprocedures/* in Indian health programs.

This program announcement is subject to the appropriation of funds. This notice is being published early to coincide with the recruitment activity of the IHS which competes with other Government and private health management organizations to employ qualified health professionals.

This program is authorized by the Indian Health Care Improvement Act (IHCIA) Section 108, codified at 25 U.S.C. 1616a.

II. Award Information

The estimated amount available is approximately $18,400,000 to support approximately 400 competing awards averaging $46,000 per award for a two year contract. The estimated amount available is approximately $9,325,000 to support approximately 373 competing awards averaging $25,000 per award for a one year extension. One year contract extensions will receive priority consideration in any award cycle. Applicants selected for participation in the FY 2017 program cycle will be expected to begin their service period no later than September 30, 2017.

III. Eligibility Information

A. Eligible Applicants

Pursuant to 25 U.S.C. 1616a(b), to be eligible to participate in the LRP, an individual must:

(1)(A) Be enrolled—

(i) In a course of study or program in an accredited institution, as determined by the Secretary, within any State and be scheduled to complete such course of study in the same year such individual applies to participate in such program; or

(ii) In an approved graduate training program in a health profession; or

(B) Have a degree in a health profession and a license to practice in a State; and

(2)(A) Be eligible for, or hold an appointment as a commissioned officer in the Regular Corps of the Public Health Service (PHS); or

(B) Be eligible for selection for service in the Regular Corps of the PHS; or

(C) Meet the professional standards for civil service employment in the IHS; or

(D) Be employed in an Indian health program without service obligation; and

(3) Submit to the Secretary an application for a contract to the LRP. The Secretary must approve the contract before the disbursement of loan repayments can be made to the participant. Participants will be required to fulfill their contract service agreements through full-time clinical practice at an Indian health program site determined by the Secretary. Loan repayment sites are characterized by physical, cultural, and professional isolation, and have histories of frequent staff turnover. Indian health program sites are annually prioritized within the Agency by discipline, based on need or vacancy. The IHS LRP's ranking system gives high site scores to those sites that are most in need of specific health professions. Awards are given to the applications that match the highest priorities until funds are no longer available.

Any individual who owes an obligation for health professional service to the Federal Government, a State, or other entity is not eligible for the LRP unless the obligation will be completely satisfied before they begin service under this program.

25 U.S.C. 1616a authorizes the IHS LRP and provides in pertinent part as follows:

(a)(1) The Secretary, acting through the Service, shall establish a program to be known as the Indian Health Service Loan Repayment Program (hereinafter referred to as the Loan Repayment Program) in order to assure an adequate supply of trained health professionals necessary to maintain accreditation of, and provide health care services to Indians through, Indian health programs.

For the purposes of this program, the term ''Indian health program'' is defined in 25 U.S.C. 1616a(a)(2)(A), as follows:

(A) The term Indian health program means any health program or facility funded, in whole or in part, by the Service for the benefit of Indians and administered—

(i) Directly by the Service;

(ii) By any Indian Tribe or Tribal or Indian organization pursuant to a contract under—

(I) The Indian Self-Determination Act, or

(II) Section 23 of the Act of April 30, 1908, (25 U.S.C. 47), popularly known as the Buy Indian Act; or

(iii) By an urban Indian organization pursuant to Title V of this Act.

25 U.S.C. 1616a, authorizes the IHS to determine specific health professions for which IHS LRP contracts will be awarded. Annually, the Director, Division of Health Professions Support, sends a letter to the Director, Office of Clinical and Preventive Services, IHS Area Directors, Tribal health officials,

and urban Indian health programs directors to request a list of positions for which there is a need or vacancy. The list of priority health professions that follows is based upon the needs of the IHS as well as upon the needs of American Indians and Alaska Natives.

(a) Medicine—Allopathic and Osteopathic doctorate degrees
(b) Nursing—Associate Degree in Nursing (ADN)
(c) Nursing—Bachelor of Science (BSN)
(d) Nursing (NP, DNP)—Nurse Practitioner/Advanced Practice Nurse in Family Practice, Psychiatry, Geriatric, Women's Health, Pediatric Nursing.
(e) Nursing—Certified Nurse Midwife (CNM)
(f) Certified Registered Nurse Anesthetist (CRNA)
(g) Physician Assistant (Certified)
(h) Dentistry—DDS or DMD degrees
(i) Dental Hygiene
(j) Social Work—Independent Licensed Master's degree
(k) Counseling—Master's degree
(l) Clinical Psychology—Ph.D. or PsyD
(m) Counseling Psychology—Ph.D.

(n) Optometry—OD

(o) Pharmacy—PharmD

(p) Podiatry—DPM

(q) Physical/Occupational/Speech Language Therapy or Audiology — MS, Doctoral

(r) Registered Dietician—BS

B. Cost Sharing or Matching

Not applicable.

C. Other Requirements

Interested individuals are reminded that the list of eligible health and allied health professions is effective for applicants for FY 2017. These priorities will remain in effect until superseded.

IV. Application and Submission Information

A. Content and Form of Application Submission

Each applicant will be responsible for submitting a complete application. Go to *http://www.ihs.gov/loanrepayment* for more information on how to apply electronically. The application will be considered complete if the following documents are included:

- Employment Verification—Documentation of your employment with an Indian health program as applicable:
  - Commissioned Corps orders, Tribal employment documentation or offer letter, or Notification of Personnel Action (SF–50)—For current Federal employees.
- License to Practice—A photocopy of your current, non-temporary, full and unrestricted license to practice (issued by any state, Washington, DC or Puerto Rico).
- Loan Documentation—A copy of all current statements related to the loans submitted as part of the LRP application.
- Transcripts—Official Transcripts
- If applicable, if you are a member of a Federally recognized Tribe or Alaska Native (recognized by the Secretary of the Interior), provide a certification of Tribal enrollment by the Secretary of the Interior, acting through the Bureau of Indian Affairs (BIA) (Certification: Form BIA–4432 Category A—Members of Federally-Recognized Indian Tribes, Bands or Communities or Category D—Alaska Native).

B. Submission Dates and Address

Applications for the FY 2017 LRP will be accepted and evaluated monthly beginning January 15, 2017 and will continue to be accepted each month thereafter until all funds are exhausted for FY 2017. Subsequent monthly deadline dates are scheduled for Friday of the second full week of each month until August 15, 2017.

Applications shall be considered as meeting the deadline if they are either:

(1) Received on or before the deadline date; or

(2) Received after the deadline date, but has a legible postmark dated on or before the deadline date. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks are not acceptable as proof of timely mailing).

Applications submitted after the monthly closing date will be held for consideration in the next monthly funding cycle. Applicants who do not receive funding by September 30, 2017, will be notified in writing.

Application documents should be sent to: IHS Loan Repayment Program, 5600 Fishers Lane, Mail Stop: OHR (11E53A), Rockville, Maryland 20857.

C. Intergovernmental Review

This program is not subject to review under Executive Order 12372.

D. Funding Restrictions

Not applicable.

E. Other Submission Requirements

New applicants are responsible for using the online application. Applicants requesting a contract extension must do so in writing by January 1, 2017 to ensure the highest possibility of being funded a contract extension.

V. Application Review Information

A. Criteria

The IHS has identified the positions in each Indian health program for which there is a need or vacancy and ranked those positions in order of priority by developing discipline-specific prioritized lists of sites. Ranking criteria for these sites may include the following:

(1) Historically critical shortages caused by frequent staff turnover;

(2) Current unmatched vacancies in a health profession discipline;

(3) Projected vacancies in a health profession discipline;

(4) Ensuring that the staffing needs of Indian health programs administered by an Indian Tribe or Tribal health organization or urban Indian organization receive consideration on an equal basis with programs that are administered directly by the Service; and

(5) Giving priority to vacancies in Indian health programs that have a need for health professionals to provide health care services as a result of individuals having breached LRP contracts entered into under this section.

Consistent with this priority ranking, in determining applications to be approved and contracts to accept, the IHS will give priority to applications made by American Indians and Alaska Natives and to individuals recruited through the efforts of Indian Tribes or Tribal or Indian organizations.

B. Review and Selection Process

Loan repayment awards will be made only to those individuals serving at facilities which have a site score of 70 or above through March 1, 2017, if funding is available.

One or all of the following factors may be applicable to an applicant, and the applicant who has the most of these factors, all other criteria being equal, will be selected.

(1) An applicant's length of current employment in the IHS, Tribal, or urban program.

(2) Availability for service earlier than other applicants (first come, first served).

(3) Date the individual's application was received.

C. Anticipated Announcement and Award Dates

Not applicable.

VI. Award Administration Information

A. Award Notices

Notice of awards will be mailed on the last working day of each month.

Once the applicant is approved for participation in the LRP, the applicant will receive confirmation of his/her loan repayment award and the duty site at which he/she will serve his/her loan repayment obligation.

B. Administrative and National Policy Requirements

Applicants may sign contractual agreements with the Secretary for two years. The IHS may repay all, or a portion, of the applicant's health profession educational loans (undergraduate and graduate) for tuition expenses and reasonable educational and living expenses in amounts up to $20,000 per year for each year of contracted service. Payments will be made annually to the participant for the purpose of repaying his/her outstanding health profession educational loans. Payment of health profession education loans will be made to the participant within 120 days, from the date the contract becomes effective. The effective date of the contract is calculated from the date it is signed by the Secretary or his/her delegate, or the IHS, Tribal, urban, or Buy Indian health center entry-on-duty date, whichever is more recent.

In addition to the loan payment, participants are provided tax assistance payments in an amount not less than 20 percent and not more than 39 percent of the participant's total amount of loan repayments made for the taxable year involved. The loan repayments and the tax assistance payments are taxable income and will be reported to the Internal Revenue Service (IRS). The tax assistance payment will be paid to the IRS directly on the participant's behalf. LRP award recipients should be aware that the IRS may place them in a higher tax bracket than they would otherwise have been prior to their award.

C. Contract Extensions

Any individual who enters this program and satisfactorily completes his or her obligated period of service may apply to extend his/her contract on a year-by-year basis, as determined by the IHS. Participants extending their contracts may receive up to the maximum amount of $20,000 per year plus an additional 20 percent for Federal withholding.

VII. Agency Contact

Please address inquiries to Ms. Jacqueline K. Santiago, Chief, IHS Loan Repayment Program, 5600 Fishers Lane, Mail Stop: OHR (11E53A), Rockville, Maryland 20857, Telephone: 301/443–3396 [between 8:00 a.m. and 5:00 p.m. (Eastern Standard Time) Monday through Friday, except Federal holidays].

VIII. Other Information

IHS area offices and service units that are financially able are authorized to provide additional funding to make awards to applicants in the LRP, but not to exceed the maximum allowable amount authorized by statute per year plus tax assistance. All additional funding must be made in accordance with the priority system outlined below. Health professions given priority for selection above the $20,000 threshold are those identified as meeting the criteria in 25 U.S.C. 1616a(g)(2)(A) which provides that the Secretary shall consider the extent to which each such determination:

(i) Affects the ability of the Secretary to maximize the number of contracts that can be provided under the LRP from the amounts appropriated for such contracts;

(ii) Provides an incentive to serve in Indian health programs with the greatest shortages of health professionals; and

(iii) Provides an incentive with respect to the health professional involved remaining in an Indian health program with such a health professional shortage, and continuing to provide primary health services, after the completion of the period of obligated service under the LRP.

Contracts may be awarded to those who are available for service no later than September 30, 2017 and must be in compliance with 25 U.S.C. 1616a and subject to the availability of appropriations. In order to ensure compliance with the statutes, area offices or service units providing additional funding under this section are responsible for notifying the LRP of such payments before funding is offered to the LRP participant.

Should an IHS area office contribute to the LRP, those funds will be used for only those sites located in that area. Those sites will retain their relative ranking from the national site-ranking list. For example, the Albuquerque Area Office identifies supplemental monies for dentists. Only the dental positions within the Albuquerque Area will be funded with the supplemental monies consistent with the national ranking and site index within that area.

Should an IHS service unit contribute to the LRP, those funds will be used for only those sites located in that service unit. Those sites will retain their relative ranking from the national HPSA score site-ranking list.

Dated: January 4, 2017.

Elizabeth A. Fowler,

Deputy Director for Management Operations, Indian Health Service.

[FR Doc. 2017–00436 Filed 1–10–17; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Cancer Institute Clinical Trials and Translational Research Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting will also be videocast and can be accessed from the NIH Videocasting and Podcasting Web site (*http://videocast.nih.gov/*).

Name of Committee: National Cancer Institute Clinical Trials and Translational Research Advisory Committee.

Date: March 8, 2017.

Time: 8:00 a.m. to 3:00 p.m.

Agenda: Strategic Discussion of NCI's Clinical and Translational Research Programs.

Place: National Institutes of Health, Building 31, C-Wing, 6th Floor, Conference Rooms 9 and 10, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Sheila A. Prindiville, MD, MPH Director, Coordinating Center for Clinical Trials, National Institutes of Health, National Cancer Institute, Coordinating Center for Clinical Trials, 9609 Medical Center Drive, Room 6W136, Rockville, MD 20850, 240–276–6173, *prindivs@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/ctac/ctac.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 5, 2017.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–00297 Filed 1–10–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Fogarty International Center; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Fogarty International Center Advisory Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The 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: Fogarty International Center Advisory Board.

Date: February 6–7, 2017.

Closed: February 6, 2017, 1:00 p.m. to 5:00 p.m.

Agenda: Second level review of grant applications.

Place: National Institutes of Health, Stone House, Building 16, Conference Room, Bethesda, MD 20892.

Open: February 7, 2017, 9:00 a.m. to 3:00 p.m.

Agenda: Update and discussion of current and planned FIC activities.

Place: National Institutes of Health, Stone House, Building 16, Conference Room, Bethesda, MD 20892.

Contact Person: Kristen Weymouth, Executive Secretary, Fogarty International Center, National Institutes of Health, 31 Center Drive, Room B2C02, Bethesda, MD 20892, (301) 496–1415, *weymouthk@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.fic.nih.gov/About/Advisory/Pages/default.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.106, Minority International Research Training Grant in the Biomedical and Behavioral Sciences; 93.154, Special International Postdoctoral Research Program in Acquired Immunodeficiency Syndrome; 93.168, International Cooperative Biodiversity Groups Program; 93.934, Fogarty International Research Collaboration Award; 93.989, Senior International Fellowship Awards Program, National Institutes of Health HHS)

Dated: January 6, 2017.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–00457 Filed 1–10–17; 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: Cardiovascular and Respiratory Sciences Integrated Review Group; Electrical Signaling, Ion Transport, and Arrhythmias Study Section.

Date: February 3, 2017.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Delfina Santa Monica Hotel, 530 West Pico Boulevard, Santa Monica, CA 90405.

Contact Person: Chee Lim, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4128, Bethesda, MD 20892, 301–435–1850, *limc4@csr.nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Cardiovascular Differentiation and Development Study Section.

Date: February 8, 2017.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Sara Ahlgren, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, RM 4136, Bethesda, MD 20817–7814, 301–435–0904, *sara.ahlgren@nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Integrative Nutrition and Metabolic Processes Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Marriott At Metro Center, 775 12th Street NW., Washington, DC 20005.

Contact Person: Gregory S. Shelness, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6156, Bethesda, MD 20892–7892, 301–755–4335, *greg.shelness@nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Respiratory Integrative Biology and Translational Research Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Baltimore Marriott Waterfront, 700 Aliceanna Street, Baltimore, MD 21202.

Contact Person: Bradley Nuss, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC7814, Bethesda, MD 20892, 301–451–8754, *nussb@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review

Group; Clinical Neuroimmunology and Brain Tumors Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westgate Hotel, 1055 Second Avenue, San Diego, CA 92101.

Contact Person: Wei-Qin Zhao, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181, MSC 7846, Bethesda, MD 20892–7846, 301–435–1236, *zhaow@csr.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Kidney Molecular Biology and Genitourinary Organ Development.

Date: February 9, 2017.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Washington National Airport, 1489 Jefferson Davis Hwy, Arlington, VA 22202.

Contact Person: Ganesan Ramesh, Ph.D., Center for Scientific Review, National Institutes of Health, 6701 Rockledge Dr., Room 2182 MSC 7818, Bethesda, MD 20892, *ganesan.ramesh@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Hypertension and Microcirculation.

Date: February 9, 2017.

Time: 8:00 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: Katherine M. Malinda, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4140, MSC 7814, Bethesda, MD 20892, 301–435–0912, *Katherine_Malinda@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Developmental Brain Disorders Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westgate Hotel, 1055 Second Avenue, San Diego, CA.

Contact Person: Pat Manos, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, 301–408–9866, *manospa@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Development—1 Study Section.

Date: February 9, 2017.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.

Contact Person: Jonathan Arias, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892, (301) 435–2406, *ariasj@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Nanotechnology Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington DC, Dupont Circle, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: James J Li, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, 301–806–8065, *lijames@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Intercellular Interactions Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn Bethesda, 7301 Waverly Street, Bethesda, MD 20814.

Contact Person: Wallace Ip, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7840, Bethesda, MD 20892, 301–435–1191, *ipws@mail.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function B Study Section.

Date: February 9, 2017.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: New Orleans Marriott Downtown, 859 Convention Center Blvd., New Orleans, LA 70130.

Contact Person: C–L Albert Wang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4146, MSC 7806, Bethesda, MD 20892, 301–435–1016, *wangca@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Language and Communication Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Solamar, 435 6th Avenue, San Diego, CA 92104.

Contact Person: Wind Cowles, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 3172, Bethesda, MD 20892, *cowleshw@csr.nih.gov.*

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Skeletal Biology Structure and Regeneration Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.

Contact Person: Yanming Bi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, 301–451–0996, *ybi@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Clinical and Integrative Diabetes and Obesity Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Mayflower Hotel, 1127 Connecticut Avenue NW., Washington, DC 20036.

Contact Person: Hui Chen, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 701 Rockledge Drive, Bethesda, MD 20892, 301–435–1044, *chenhui@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Addiction Risks and Mechanisms Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Palomar, 2121 P Street NW., Washington, DC 20037.

Contact Person: Kristen Prentice, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3112, MSC 7808, Bethesda, MD 20892, (301) 496–0726, *prenticekj@mail.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Health Disparities and Equity Promotion Study Section.

Date: February 9–10, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

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: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Synapses, Cytoskeleton and Trafficking Study Section.

Date: February 9–10, 2017.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington DC, Dupont Circle, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: Christine A Piggee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4186, MSC 7850, Bethesda, MD 20892, 301–435–0657, *christine.piggee@nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Prokaryotic Cell and Molecular Biology Study Section.

Date: February 9–10, 2017.

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 (Virtual Meeting).

Contact Person: Dominique Lorang-Leins, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Room 5108, MSC 7766, Bethesda, MD 20892, 301.326.9721, *Lorangd@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR15–306: Lymphatics in Health and Disease in the Digestive System, Kidney and Urinary Tract.

Date: February 9, 2017.

Time: 2:00 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: Jianxin Hu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2156, Bethesda, MD 20892, 301–827–4417, *jianxinh@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 5, 2017.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–00456 Filed 1–10–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; 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 Child Health and Human Development Special Emphasis Panel.

Date: February 14, 2017.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Rockledge 6710B, 6710B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Sherry L. Dupere, Ph.D., Chief, Scientific Review Branch Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH 6100 Executive Boulevard, Room 5B01 Bethesda, MD 20892–7510, 301–451–3415, *duperes@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: January 5, 2017.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–00459 Filed 1–10–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 Neurological Disorders and Stroke; Neurological Sciences and Disorders A.

Date: February 20, 2017.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Natalia Strunnikova, Ph.D., Scientific Review Officer, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–0288, *Natalia.strunnikova@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 6, 2017.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–00460 Filed 1–10–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Peer Review Meeting.

Date: February 3, 2017.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Jay R. Radke, Ph.D., AIDS Review Branch, Scientific Review Program, Division of Extramural Activities, Room #3G11B, National Institutes of Health, NIAID, 5601 Fishers Lane MSC–9823, Bethesda, MD 20892–9823, (240) 669–5046, *jay.radke@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 6, 2017.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–00458 Filed 1–10–17; 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: Cardiovascular and Respiratory Sciences Integrated Review Group; Lung Injury, Repair, and Remodeling Study Section.
Date: February 6–7, 2017.
Time: 8:00 a.m. to 5:00 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: Ghenima Dirami, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7814, Bethesda, MD 20892, 240–498–7546, *diramig@csr.nih.gov*.

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Cardiac Contractility, Hypertrophy, and Failure Study Section.
Date: February 6–7, 2017.
Time: 8:00 a.m. to 4:00 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: Abdelouahab Aitouche, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4222, MSC 7814, Bethesda, MD 20892, 301–435–2365, *aitouchea@csr.nih.gov*.

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Social Psychology, Personality and Interpersonal Processes Study Section.
Date: February 6–7, 2017.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Sheraton Delfina Santa Monica Hotel, 530 West Pico Boulevard, Santa Monica, CA 90405.
Contact Person: Marc Boulay, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3110, MSC 7808, Bethesda, MD 20892, (301) 300–6541, *boulaymg@csr.nih.gov*.

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Developmental Therapeutics Study Section.
Date: February 6–7, 2017.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.
Contact Person: Sharon K Gubanich, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, (301) 408–9512, *gubanics@csr.nih.gov*.

Name of Committee: Cell Biology Integrated Review Group; Membrane Biology and Protein Processing Study Section.
Date: February 6–7, 2017.
Time: 8:00 a.m. to 1:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Renaissance Washington DC, Dupont Circle, 1143 New Hampshire Avenue NW., Washington, DC 20037.
Contact Person: Janet M Larkin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5142, MSC 7840, Bethesda, MD 20892, 301–806–2765, *larkinja@csr.nih.gov*.

Name of Committee: Oncology 1—Basic Translational Integrated Review Group; Molecular Oncogenesis Study Section.
Date: February 6–7, 2017.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Renaissance Long Beach Hotel, 111 East Ocean Blvd., Long Beach, CA 90802.
Contact Person: Nywana Sizemore, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6204, MSC 7804, Bethesda, MD 20892, 301–435–1718, *sizemoren@csr.nih.gov*.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Molecular Genetics A Study Section.
Date: February 6–7, 2017.
Time: 8:30 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Renaissance M Street Hotel, 1143 New Hampshire Avenue NW., Washington, DC 20037.
Contact Person: Michael M. Sveda, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1114, MSC 7890, Bethesda, MD 20892, 301–435–3565, *svedam@csr.nih.gov*.

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Skeletal Muscle and Exercise Physiology Study Section.
Date: February 7–8, 2017.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Torrance Marriott Redondo Beach, 3635 Fashion Way, Torrance, CA 90503.
Contact Person: Richard Ingraham, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4116, MSC 7814, Bethesda, MD 20892, 301–496–8551, *ingrahamrh@mail.nih.gov*.

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Behavioral Genetics and Epidemiology Study Section.
Date: February 7, 2017.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Handlery Union Square Hotel, 351 Geary Street, San Francisco, CA 94102.
Contact Person: George Vogler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3140, MSC 7770, Bethesda, MD 20892, (301) 237–2693, *voglergp@csr.nih.gov*,

Name of Committee: Interdisciplinary Molecular Sciences and Training Integrated Review Group; Enabling Bioanalytical and Imaging Technologies Study Section.
Date: February 7–8, 2017.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Residence Inn Washington, DC Downtown, 1199 Vermont Avenue NW., Washington, DC 20005.
Contact Person: Kenneth Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3218, MSC 7717, Bethesda, MD 20892, 301–435–0229, *kenneth.ryan@nih.hhs.gov*.

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Pathobiology of Kidney Disease Study Section.
Date: February 7–8, 2017.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Atul Sahai, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2188, MSC 7818, Bethesda, MD 20892, 301–435–1198, *sahaia@csr.nih.gov*.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Sensorimotor Integration Study Section.
Date: February 7–8, 2017.
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; PAR 16–278: Stimulating Innovations in Intervention Research for Cancer Prevention and Control.

Date: February 7, 2017.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westgate Hotel, 1055 Second Avenue, San Diego, CA 92101.

Contact Person: Lee S Mann, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7848, Bethesda, MD 20892, 301–435–0677, *mannl@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Modeling and Analysis of Biological Systems Study Section.

Date: February 8–9, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Craig Giroux, Ph.D., Scientific Review Officer, BST IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5150, Bethesda, MD 20892, 301–435–2204, *girouxcn@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Molecular and Cellular Endocrinology Study Section.

Date: February 8–9, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

Contact Person: Elaine Sierra-Rivera, Ph.D., Scientific Review Officer, EMNR IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6182 MSC 7892, Bethesda, MD 20892, 301 435–2514, *riverase@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Synthetic and Biological Chemistry B Study Section.

Date: February 8–9, 2017.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: New Orleans Marriott Downtown, 859 Convention Center Blvd., New Orleans, LA 70130.

Contact Person: Michael Eissenstat, Ph.D., Scientific Review Officer, BCMB IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, 301–435–1722, *eissenstatma@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Biomedical Imaging Technology A Study Section.

Date: February 8–9, 2017.

Time: 8:00 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.

Contact Person: Ruth Grossman, DDS., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5215, Bethesda, MD 20892, (301) 435–2409, *grossmanrs@mail.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function D Study Section.

Date: February 8, 2017.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Plaza Hotel, 10 Thomas Circle NW., Washington, DC 20005.

Contact Person: James W Mack, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4154, MSC 7806, Bethesda, MD 20892, (301) 435–2037, *mackj2@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Genomics, Computational Biology and Technology Study Section.

Date: February 8–9, 2017.

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: Baishali Maskeri, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–827–2864, *maskerib@mail.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 5, 2017.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–00296 Filed 1–10–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Prevention; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given for the meeting of the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Prevention National Advisory Council (CSAP NAC) on February 1, 2017.

The Council was established to advise the Secretary, Department of Health and Human Services (HHS); the Administrator, SAMHSA; and Center Director, CSAP concerning matters relating to the activities carried out by and through the Center and the policies respecting such activities.

The meeting will be open to the public and will include the discussion of the substance use prevention workforce and the changing landscape of prevention. The meeting will also include updates on CSAP program developments.

The meeting will be held in Rockville, Maryland. Attendance by the public will be limited to the space available. Interested persons may present data, information, or views, orally or in writing, on issues pending before the Council. Written submissions should be forwarded to the contact person on or before one week prior to the meeting. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations are encouraged to notify the contact on or before one week prior to the meeting. Five minutes maximum will be allotted for each presentation.

To attend onsite, submit written or brief oral comments, or request special accommodations for persons with disabilities, please register at the SAMHSA Committees' Web site, *http://nac.samhsa.gov/Registration/meetingsRegistration.aspx,* or communicate with the CSAP Council's Designated Federal Officer (see contact information below).

Substantive program information may be obtained after the meeting by accessing the SAMHSA Committee Web site, *http://nac.samhsa.gov/,* or by contacting the Designated Federal Officer.

Committee Name: Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Prevention National Advisory Council.

Date/Time/Type: February 1, 2017, from 9:30 a.m. to 4:30 p.m. EST: (OPEN).

Place: SAMHSA, 5600 Fishers Lane, Room 5A02 (lobby level), Rockville, MD 20857, Adobe Connect webcast: *https://samhsa-csap.adobeconnect.com/nac/.*

Contact: Matthew J. Aumen, Designated Federal Officer, SAMHSA CSAP NAC, 5600 Fishers Lane, Rockville, MD 20857, Telephone: 240–276–2440, Fax: 301–480–8480, Email: *matthew.aumen@samhsa.hhs.gov.*

Carlos Castillo,

Committee Management Officer, SAMHSA.

[FR Doc. 2017–00396 Filed 1–10–17; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6000–FA–08]

Announcement of Funding Awards; Rural Capacity Building for Community Development and Affordable Housing Program; Fiscal Year (FY) 2016

AGENCY: Office of the Principal Deputy Assistant Secretary for Community Planning and Development, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the FY 2016 Notice of Funding Availability (NOFA) for the Rural Capacity Building for Community Development and Affordable Housing Program. This announcement contains the names and addresses of the award recipients under said NOFA.

FOR FURTHER INFORMATION CONTACT: Steven K. Washington, Director, Office of Policy Development and Coordination, Office of Community Planning and Development, U.S. Department of Housing and Urban Development, 451 7th Street SW., Room 7140, Washington, DC 20410, or email *capacitybuilding@hud.gov.* Telephone number (202) 402–4142 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: As authorized by the Consolidated Appropriations Act, 2016 (Pub. L. 114–113, approved December 18, 2015, the purpose of the Rural Capacity Building for Community Development and Affordable Housing program is to fund capacity building activities performed by national rural housing organizations. Through this program, grants are made to eligible organizations to then provide training, education, support and advice to enhance the technical and administrative capabilities of rural housing development organizations, Community Development Corporations (CDCs), Community Housing Development Organizations (CHDOs), local governments and Indian tribes. Eligible organizations are defined in the NOFA as a national, non-profit entity or consortium that has on-going experience in rural housing in five or more HUD regions.

Grants may be used by eligible organizations (grantees) to assist rural organizations to improve their capacity to participate in local, regional and State planning processes such as those for the Consolidated Plan, fair housing plan and the Continuum of Care for homeless assistance. Grantees will also help rural community organizations to build their capacity to evaluate performance, work broadly with the community, cooperatively plan for the use of available resources, and to link plans with neighboring communities in order to foster regional planning. Eligible activities to accomplish these purposes include making loans, pass-through grants, development assistance, predevelopment assistance, or other financial assistance to rural housing organizations, CDCs, CHDOs, local governments, and Indian tribes. Community development and affordable housing activities must benefit low-income and low- and moderate-income families and persons, for both housing and economic development activities. Finally, other activities as determined by the grantees in consultation with the HUD Secretary or his or her designee, may be allowed.

The FY 2016 awards announced in this Notice were selected for funding in a NOFA competition posted on the *http://www.grants.gov* Web site on July 15, 2016 for $5,000,000. Applications were received by the deadline from twelve organizations and eight of those applications passed the initial threshold review. Those eight applications were reviewed using criteria identified in the FY2016 NOFA, with a minimum score of 75 required for funding consideration. Six of the eight applications exceeded the minimum score and were selected for funding as outlined in Appendix A.

Dated: January 4, 2017.

Harriet Tregoning,

Principal Deputy Assistant Secretary for Community Planning and Development.

Appendix A

FY2016 RURAL CAPACITY BUILDING FOR COMMUNITY DEVELOPMENT AND AFFORDABLE HOUSING AWARDS

Applicant name	Contact	Award amount
Rural Community Assistance Corp	Stanley Keasling, Chief Executive Director, 3120 Freeboard Drive, Suite 201, Sacramento, CA 95691–5010.	$1,174,365
National Association for Latino Community Asset Builders.	Noel Poyo, Executive Director, 5404 Wurzbach Road, San Antonio, TX 78238	1,000,000
Minnesota Housing Partnership	Rosemary Fagrelius, Housing Development Director, 2446 University Avenue West, Suite 140, Saint Paul, MN 55114.	978,791
Housing Assistance Council	Moises Loza, Executive Director,1025 Vermont Ave. NW., Washington, DC 20005	778,923
Collaborative Solutions, Inc	Russell Bennett, Executive Director, P.O. Box 130159, Birmingham, AL 35213–0159.	567,921
Economic Consultants for Housing Opportunities, Inc.	Linda Brockway, President, 6810 S. Cedar St., Suite #15, Lansing, MI 48911–6909	500,000

[FR Doc. 2017–00432 Filed 1–10–17; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–ES–2016–N222; FVHC98310503020–XXX–FF05E1NY00]

Proposed Settlement Agreement Under Environmental Protection Statutes

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of proposed settlement; request for public comments.

SUMMARY: Notice is hereby given that the Department of the Interior, U.S. Fish and Wildlife Service (DOI), together with the State of New York Department of Environmental Conservation (DEC), reached agreement on a proposed settlement with Atlantic Richfield Company regarding natural resource

damages arising from environmental contamination at the Sinclair Refinery Superfund Site, located in Allegany County, New York. The settlement will resolve claims under the Comprehensive Environmental Response, Compensation, and Liability Act; the Oil Pollution Act; the Clean Water Act; and applicable State law.

DATES: Comments must be submitted by February 10, 2017.

ADDRESSES: *Document availability:* A copy of the proposed settlement may be obtained from Amy Roe, USFWS Biologist, by mail to the U.S. Fish and Wildlife Service, New York Field Office, 3817 Luker Road, Cortland, NY 13045; via email to *amy_roe@fws.gov;* or via telephone at 607–753–9334.

Comment submission: Comments should be addressed to Amy Roe at the contact information listed above and should reference the Sinclair Refinery Superfund Site.

DOI response to comments: DOI's response to any comments received will be available for public inspection at *https://www.fws.gov/northeast/nyfo/ec/nrda.htm.*

FOR FURTHER INFORMATION CONTACT: Direct technical questions to Amy Roe (see **ADDRESSES**). For legal questions, contact Mark Barash, via mail to the Office of the Solicitor, U.S. Department of the Interior, Suite 612, 1 Gateway Center, 300 Washington Street, Newton, MA 02458; via email to *mark.barash@sol.doi.gov;* or via telephone at 617–527–2103.

SUPPLEMENTARY INFORMATION: This proposed settlement with Atlantic Richfield Company regarding natural resource damages arising from environmental contamination at the Sinclair Refinery Superfund Site, located in Allegany County, NY, will resolve claims in accordance with section 122(j) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9622(j); CERCLA), and Executive Order 12580 (52 FR 2923; January 29, 1987). The settling party to this settlement is Atlantic Richfield Company. The settlement includes a covenant not to sue the settling party pursuant to section 107(a)(1)(C) of CERCLA, 42 U.S.C. 9607(a)(1)(C); the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.;* and the natural resource damages provisions of the Clean Water Act, 33 U.S.C. 1321(f)(4).

The settlement will require Atlantic Richfield Company to pay a total of $275,000. DOI and DEC will receive $9,000 and $1,500, respectively, to reimburse assessment costs. The rest of the money, $264,500, will fund projects to restore, rehabilitate, replace, and/or acquire the equivalent of the natural resources injured at the site, including the costs of restoration planning and oversight activities. In exchange, DOI and DEC will provide the settling party a covenant not to sue. The settlement has been approved by the Environmental and Natural Resources Division of the United States Department of Justice.

For 30 days following the date of publication of this notice (see **DATES**), DOI will receive written comments relating to the settlement (section XI of the proposed settlement). DOI and DEC will consider all comments received and may modify or withdraw their consent to settlement if comments received disclose facts or considerations that indicate that the settlement is inappropriate, improper, or inadequate.

Written comments that we receive become part of the public record associated with this action. 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 request in your comment that we withhold your personal identifying information from public review, we cannot guarantee we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Dated: December 28, 2016.

Deborah Rocque,

Acting Regional Director, Northeast Region, U.S. Fish and Wildlife Service.

[FR Doc. 2017–00416 Filed 1–10–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2016–N167; 1265–0000–10135–S3]

Marianas Trench Marine National Monument, Commonwealth of the Northern Mariana Islands; Completion of the Northern Islands Submerged Lands Transfer to the Commonwealth of the Northern Mariana Islands

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of our finding of no significant impact (FONSI) and final environmental assessment (Final EA) for the Marianas Trench Marine National Monument (Monument) Northern Islands Submerged Lands (submerged lands) Transfer to the Commonwealth of the Northern Mariana Islands (CNMI). The FONSI documents our decision to implement Alternative 2, as it is described in the Final EA, resulting in the Department of the Interior (DOI) conveying title to certain submerged lands within the Monument from the United States to the CNMI Government through a Patent, under the authority of the Territorial Submerged Lands Act (TSLA), as amended, 48 U.S.C. 1705, *et seq.* The effective date of the submerged lands transfer was December 21, 2016, the day the Patent was signed by the Governor of the CNMI.

DATES: The Service's Regional Director, Pacific Region, signed the FONSI on September 15, 2016, and the conveyance was effective December 21, 2016.

ADDRESSES: You may download the FONSI, Final EA, and related documents from our Web site *https://www.fws.gov/marianastrenchmarinemonument/,* and view copies of them in person at the libraries listed under **SUPPLEMENTARY INFORMATION**.

You may direct questions to the Service regarding the submerged lands transfer by any one of the following methods.

Email: fw1_sltransfer_cnmi@fws.gov. Include ''Submerged Lands Transfer'' in the subject line of the message.

Fax: Attn: Charles Houghten, 503–231–6161.

U.S. Mail: U.S. Fish and Wildlife Service, Pacific Region, Attn: Charles Houghten, Chief, Lands Division, 911 NE 11th Ave., Portland, OR 97232.

FOR FURTHER INFORMATION CONTACT: Charles Houghten, 503–231–6207 (phone).

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we are announcing the completion of our Final EA, FONSI, Memorandum of Agreement (MOA), and Patent, developed in cooperation with the National Oceanic and Atmospheric Administration (NOAA) and the CNMI Government. Copies of the documents are available on the Monument's Web site: *https://www.fws.gov/refuge/mariana_trench_marine_national_monument/.*

The Final EA and FONSI were developed in compliance with the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*); NEPA Regulations (40 CFR parts 1500–1508); other Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

The subject of our Final EA and FONSI is the submerged lands adjacent to the islands of Farallon de Pajaros (Uracas), Maug, and Asuncion permanently covered by tidal waters up to the mean low water line and extending three miles seaward from the mean high tide line. The submerged lands are among some of the most biologically diverse in the Western Pacific Ocean, with relatively pristine coral reef ecosystems that have been proclaimed objects of scientific interest and reserved for their protection as part of the Islands Unit of the Monument by Presidential Proclamation (PP) 8335 of January 6, 2009.

The submerged lands were excepted from transfer by operation of law (TSLA) to the CNMI Government by PP 9077 of January 15, 2014. PP 9077 also stated that it did not affect the authority of the Secretary of the Interior under the TSLA to convey the excepted submerged lands to CNMI after an agreement has been entered for coordination of management that ensures the protection of the Monument within the excepted area. We developed the agreement (Memorandum of Agreement or MOA) in cooperation with the CNMI Government, DOI, and the Department of Commerce (DOC) as part of our conveyance process and Draft and Final EA.

Submerged Lands Conveyance Process

Draft and Final EA

We released our Draft EA to the public for a 30-day comment period announced in the **Federal Register** (81 FR 26825) on May 4, 2016. We identified two alternatives in the Draft EA and conducted a thorough analysis of their impacts on the human environment. We received comments during the May–June 2016 public comment period; substantive comments and our responses are provided in the Final EA. Comments concerning technical or minor edits were incorporated where relevant into the Final EA.

Alternatives/Selected Alternative

Alternative 1 was the Current Land Status Alternative (No Action); under it, DOI would not convey the submerged lands, including associated mineral rights to CNMI, and the Service and NOAA would continue to coordinate management of the submerged lands and associated waters, including fishery-related activities, in consultation with the CNMI Government.

We selected Alternative 2 for implementation in our Finding of No Significant Impact, signed by the Service's Regional Director for the Pacific Region on September 15, 2016. Under this alternative (the Northern Islands Submerged Lands Conveyance Alternative), the parties would sign the MOA, and DOI would convey the submerged lands, including mineral rights, to the CNMI Government through the Patent with a reserved conservation easement.

Memorandum of Agreement

The MOA was signed by the CNMI Government, DOI, and the Department of Commerce (DOC), on September 22, 2016. The MOA identifies the roles and responsibilities of the CNMI Government, DOI, and DOC, for ensuring the protection of and coordinating the management of the conveyed submerged lands and associated waters. Under the MOA, the Service and NOAA are managing the conveyed submerged lands for the benefit of the CNMI people and in consultation with the CNMI Government.

The MOA provides for the CNMI Government to assume primary responsibility for managing the submerged lands and associated waters, consistent with the purposes and requirements of PP 8335 and PP 9077, by notifying DOI and DOC of its desire to do so. CNMI's management would include the benthic and living marine resources of the associated water column, and subterranean of the submerged lands and the associated mineral rights within. The MOA became effective upon conveyance of the submerged lands, consistent with the requirements of PP 9077. A copy of the MOA is available in the Final EA.

Congressional Review and Patent

Completing the Draft EA and public comment period, and the Final EA, FONSI, MOA, and Patent, were milestone accomplishments in our conveyance process. After the public comment period ended for the Draft EA, we initiated the Congressional Review (CR) period for the proposed conveyance, in accordance with the process required by subsection 1(c) of the TSLA. The CR period was 60 legislative days, which was initiated by the Secretary of the Interior by describing our proposal in letters to the House of Representatives Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, dated June 17, 2016. The CR period was completed on November 14, 2016, thereafter we moved forward with completing the conveyance.

Interior Secretary Sally Jewell executed a Patent conveying the submerged lands from the United States to the CNMI Government on November 29, 2016. Governor Ralph Torres (CNMI) accepted and signed the patent on December 21, 2016. The Patent reserves an easement to ensure that the submerged lands and associated resources conveyed to the CNMI Government are managed and maintained for the protection of the Monument or other federal conservation status, unless such conservation status is withdrawn by an Act of Congress. A copy of the Patent is available in an appendix in the Final EA.

Public Availability of Documents

A copy of the Final EA/FONSI, which includes copies of the MOA and Patent, are available at the following libraries and through sources identified under **ADDRESSES**.

- Joeten-Kiyu Public Library, Insåtto Street, Susupe, Sa'ipan, MP, 96950–1092.
- Tini'an Municipal Public Library, Riverside Drive, Tinian, MP 96952.
- Antonio Camacho Atalig Memorial Library, Rota Northern Marianas Campus, Tatachog Village, Rota, MP.

Robyn Thorson,

Regional Director, Pacific Region, Portland, Oregon.

[FR Doc. 2017–00404 Filed 1–10–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FW–R7–MM–2017–N002]; [FXES111607MRG00–178–FF07CAMM00]

Proposed Information Collection; Incidental Take of Marine Mammals During Specified Oil and Gas Industry Activities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent

burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on March 31, 2017. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: To ensure that we are able to consider your comments on this IC, we must receive them by March 13, 2017.

ADDRESSES: Send your comments on the IC to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or *tina_campbell@fws.gov* (email). Please include ''1018–0070'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Tina Campbell at *tina_campbell@fws.gov* (email) or 703–358–2676 (telephone).

SUPPLEMENTARY INFORMATION:

I. Abstract

This information collection includes requirements associated with specified oil and gas industry activities and their incidental taking of polar bears (*Ursus maritimus)* and Pacific walruses (*Odobenus rosmarus divergens)* in the Beaufort and Chukchi Seas. The Marine Mammal Protection Act (MMPA) of 1972, as amended (16 U.S.C. 1361 *et seq.*), imposed, with certain exceptions, a moratorium on the taking of marine mammals. Section 101(a)(5)(A) of the MMPA directs the Secretary of the Interior to allow, upon request by citizens of the United States, the taking of small numbers of marine mammals incidental to specified activities (other than commercial fishing) if the Secretary makes certain findings and prescribes specific regulations that, among other things, establish permissible methods of taking.

Applicants seeking to conduct activities must request a Letter of Authorization (LOA) for the specific activity and submit monitoring reports of polar bear and Pacific walrus observations and a final summary report of the monitoring and the impacts of the activity upon polar bears and Pacific walruses to the Secretary. This is a nonform collection. Regulations at 50 CFR 18.27 outline the procedures and requirements for submitting a request. Specific regulations governing authorized activities in the Beaufort Sea are in 50 CFR 18, subpart J. Regulations governing authorized activities in the Chukchi Sea are in 50 CFR 18, subpart I. These regulations provide the applicant with a detailed description of information that we need to evaluate the proposed activity and determine whether or not to issue specific regulations and, subsequently, LOAs. We use the information to verify the findings required to issue incidental take regulations, to decide if we should issue an LOA, and, if issued, what conditions should be in the LOA. In addition, we analyze the information to determine impacts to polar bears and Pacific walruses and the availability of those marine mammals for subsistence purposes of Alaska Natives.

Holders of an LOA seeking to carry out onshore activities in known or suspected polar bear denning habitat during the denning season, must make efforts to locate occupied polar bear dens within and near proposed areas of operation. They may use any appropriate tool, such as, forward-looking infrared (FLIR) imagery and/or polar bear scent-trained dogs in concert with denning habitat maps along the Alaskan coast. In accordance with 50 CFR 18.118(a)(6)(ii)(A) and 18.128(a)(2)(ii), LOA holders must report all observed or suspected polar bear dens to us prior to the initiation of activities. We use this information to determine the appropriate terms and conditions to be used in an individual LOA in order to minimize potential impacts and disturbance to polar bears.

II. Data

OMB Control Number: 1018–0070.

Title: Incidental Take of Marine Mammals during Specified Oil and Gas Industry Activities, 50 CFR 18.27 and 50 CFR 18, Subparts I and J.

Service Form Number: None.

Type of Request: Extension of a previously approved collection.

Description of Respondents: Oil and gas industry companies.

Respondent's Obligation: Required to obtain or retain a benefit (incidental take regulations and/or a Letter of Authorization (LOA)).

Frequency of Collection: On occasion.

Estimated Number of Respondents: 25.

Activity	Number of responses	Completion time per response (hours)	Total annual burden hours
Application for procedural regulations	2	150	300
LOA requests	25	24	600
Onsite monitoring and observation reports	300	1.5	450
Final monitoring report	25	10	250
Polar bear den detection survey and report	4	50	200
Totals	356	.....	1,800

III. Comments

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- 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.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. 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 6, 2017.

Tina A. Campbell,

Chief, Division of Policy, Performance, and Management Programs, U.S. Fish and Wildlife Service.

[FR Doc. 2017–00462 Filed 1–10–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[GX170A030AD0100]

Agency Information Collection Activities: Request for Comments

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of a new information collection, Ecosystems Program Stakeholder Satisfaction Survey.

SUMMARY: We (the U.S. Geological Survey) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC.

DATES: To ensure that your comments are considered, we must receive them on or before March 13, 2017.

ADDRESSES: You may submit comments on this information collection to the Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive, MS 807, Reston, VA 20192 (mail); (703) 648–7197 (fax); or *gs-info_collections@usgs.gov* (email). Please reference 'Information Collection 1028—NEW, Ecosystems Program Stakeholder Satisfaction Survey' in all correspondence.

FOR FURTHER INFORMATION CONTACT: Linn Kwan, Senior Program Officer, Tel. 703.648.4494 or *Email-lkwan@usgs.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The survey will be sent to USGS Ecosystems Mission Area stakeholders/partners to provide respondents the opportunity to share their comments, insights and satisfaction of USGS Ecosystems research products, training, and technical assistance. The survey results will be compiled and reported in three new performance measures that are being proposed for FY2018–2022. The survey is voluntary and anonymous. The respondents' identities will only be known if they chose to share that information in the response.

II. Data

OMB Control Number: 1028—NEW.

Title: Ecosystems Program Stakeholder Satisfaction Survey.

Type of Request: New information collection.

Affected Public: USGS partners at other DOI bureaus, Federal and State agencies, Tribes and Non-governmental Organizations.

Respondent's Obligation: None, participation is voluntary.

Frequency of Collection: Information will be collected once at the end of each fiscal year.

Estimated Annual Number of Respondents: 150

Estimated Total Number of Annual Responses: 120

Estimated Time per Response: 10 minutes or less to complete the survey.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: None.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number and current expiration date.

III. Request for Comments

We are soliciting comments as to: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, usefulness, and clarity of the information to be collected; and (d) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your personal mailing address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment, including your personally identifiable information, may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public view, we cannot guarantee that we will be able to do so.

John Thompson,

Deputy Chief, CRU.

[FR Doc. 2017–00444 Filed 1–10–17; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

Protocol for Categorical Exclusions Supplementing the Council on Environmental Quality Regulations Implementing the Procedural Provisions of the National Environmental Policy Act for Certain National Indian Gaming Commission Actions and Activities

AGENCY: The National Indian Gaming Commission, Department of the Interior.

ACTION: Notice of proposed action and request for comments.

SUMMARY: The National Indian Gaming Commission (NIGC or ''the Commission'') is amending its protocol for categorical exclusions under the National Environmental Policy Act of 1969 (NEPA), as amended, Executive Order 11514, as amended, and Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508) for certain NIGC actions.

DATES: Comments and related material must be post marked no later than 60 days after publication of this notice.

ADDRESSES: Please submit your comments by only one of the following means: (1) By mail to: NIGC Attn: Andrew Mendoza, Staff Attorney, C/O Department of the Interior, 1849 C Street NW., Mailstop #1621, Washington, DC 20240; (2) by facsimile to: (202) 632–7066; (3) by email to: *andrew_mendoza@nigc.gov.*

FOR FURTHER INFORMATION CONTACT: Andrew Mendoza, Staff Attorney at the National Indian Gaming Commission: 202–632–7003 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Comments Invited

The NIGC encourages interested persons to submit written comments. Persons submitting information concerning the Protocol should include their name, address, and other appropriate contact information. You may submit your information by one of the means listed under **ADDRESSES**. If you submit information by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit information by mail and would like to know it was received, please enclose a stamped, self-addressed postcard or envelope. The NIGC will consider all comments received during the comment period.

II. Background

On December 4, 2009, the Commission published a draft NEPA manual in the **Federal Register** (74 FR 63765). The purpose of the manual was to establish the Commission's NEPA-related policies and procedures and to integrate environmental considerations into the Commission's decision-making processes. The draft manual identified one type of major federal action performed under the Indian Gaming Regulatory Act (IGRA) that triggered NEPA review, specifically, the approval of contracts for the management of Indian gaming facilities pursuant to 25 U.S.C. 2711. In addition to identifying major federal actions applicable to the Commission, the draft manual also established the Commission's NEPA-related roles and responsibilities and created a framework for the preparation of NEPA documentation appropriate for each level of environmental review. The draft manual also identified three categories of actions taken by the NIGC that are categorically excluded from further NEPA review. Categorical exclusions (CATEX) are actions that do not normally require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS), absent extraordinary circumstances.

On May 22, 2012, after reviewing the comments submitted on the draft NEPA manual, the Commission published a Protocol for Categorical Exclusions Supplementing the Council on Environmental Quality Regulations Implementing the Procedural Provisions of the National Environmental Policy Act for Certain National Indian Gaming Commissions Actions and Activities (77 FR 30315) and requested comments by June 30, 2012. This publication formally adopted two of the three categorical exclusions listed in the draft NEPA manual.

In 2015, after evaluating its past environmental reviews for management contract approvals and the comments received on the 2009 draft NEPA manual, the Commission decided to revisit its policies and procedures for implementing NEPA. To obtain updated views from the regulated community, the Commission held several consultation sessions over a two-year period with tribal nations and solicited comments regarding the scope and extent of its NEPA responsibilities. Following consultation, the Commission evaluated the newly submitted comments in conjunction with those received in response to the 2009 draft manual and decided to amend the 2012 Protocol to include a third CATEX for Management Contract and Agreement Review Activities. This CATEX will apply to certain management contract approvals that are not associated with an application to take land into trust and do not provide for construction or expansion of existing structures. In identifying this category of actions, the NIGC relied on its past experience, several environmental professionals' opinions and comparisons with other Federal agency actions that are categorically excluded.

The Commission hereby adopts the amended protocol set forth below for determining whether a categorical exclusion applies to particular action as well as the categories of actions the Commission has determined are eligible for categorical exclusions.

A copy of this **Federal Register** publication, as well as the administrative record for the newly established categorical exclusion, is available at *http://www.nigc.gov.* A copy of the **Federal Register** publication is available at *http://www.regulations.gov.*

Regulatory Flexibility Act: This Protocol will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

This Protocol is not a major rule under 5. U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This Protocol does not have an annual effect on the economy of $100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions, and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

The Commission, as an independent regulatory agency within the Department of the Interior, is exempt from compliance with the Unfunded Mandates Reform Act. 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that this Protocol does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of General Counsel has determined that the Protocol does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

National Environmental Policy Act

This Protocol supplements CEQ regulations and provides guidance to NIGC employees regarding procedural requirements for the application of NEPA provisions to certain NIGC actions. The CEQ does not direct agencies to prepare a NEPA analysis or document before establishing agency procedures for implementing NEPA.

For the reasons set out in the preamble, the National Indian Gaming Commission establishes the following Protocol:

Protocol for Categorical Exclusions (CATEX) of Certain Actions

The use of a CATEX can only be applied to an action if all of the following criteria are met:

1. The responsible NIGC official must determine that the entirety of the NIGC action is encompassed by one of the listed CATEXs.

2. The responsible NIGC official must determine that the action has not been segmented in order for the NIGC action to meet the definition of an action that can qualify for a CATEX. Segmentation occurs when an action is broken into smaller parts in an effort to avoid properly documenting impacts associated with the complete action. Segmentation also occurs when the NIGC action is too narrowly defined and the potential impacts are minimized in order to avoid a higher level of NEPA documentation. Connected and cumulative actions must be considered (*see* 40 CFR 1508.25).

3. The responsible NIGC official must determine if the NIGC action will involve any extraordinary circumstances that would prevent the use of a categorical exclusion.

Categorical Exclusions

The NIGC, based on past experience with similar actions, has determined that the following types of actions are categorically excluded and do not require the preparation of an EA or EIS because they will not individually or cumulatively result in a significant impact on the human environment. These types of federal actions meet the criteria established in 40 CFR 1508.4.

Category 1—Administrative and Routine Office Activities:

A. Normal personnel, fiscal, and administrative activities involving

personnel (recruiting, hiring, detailing, processing, paying, supervising and records keeping).

B. Preparation of administrative or personnel-related studies, reports, or investigations.

C. Routine procurement of goods and services to support operations and infrastructure, including routine utility services and contracts, conducted in accordance with applicable procurement regulations, executive orders, and policies (*e.g.* Executive Order 13101).

D. Normal administrative office functions (record keeping; inspecting, examining, and auditing papers, books, and records; processing correspondence; developing and approving budgets; setting fee payments; responding to request for information).

E. Routine activities and operations conducted on or in an existing structure that are within the scope and compatibility of the present functional use of the building, will not result in a substantial increase in waste discharge to the environment, will not result in substantially different waste discharges from current or previous activities, and will not result in emissions that exceed established permit limits, if any. In these cases, a Record of Environmental Consideration (REC), documentation is required.

F. NIGC training in classrooms, meeting rooms, gaming facilities, or via the internet.

Category 2—Regulation, Monitoring and Oversight of Indian Gaming Activities:

A. Promulgation or publication of regulations, procedures, manuals, and guidance documents.

B. Support of compliance and enforcement functions by conducting compliance training for tribal gaming regulators and managers in classrooms, meeting rooms, gaming facilities, or via the internet.

C. Preparing and issuing subpoenas, holding hearings, and taking depositions for informational gathering purposes, not associated with administrative enforcement actions.

Category 3—Management Contract and Agreement Review Activities:

A. Approval or disapproval of management contracts, management contract amendments and collateral agreements that meet the following criteria: (1) Are not associated with an application to take land into trust; (2) does not provide for construction or expansion of existing structures; (3) ensures compliance with all federal, state, local and tribal environmental laws (*e.g.,* Clean Air Act, Clean Water Act, Endangered Species Act, National Historic Preservation Act, etc.), regulations, and permit requirements; and (4) ensures adequate provision of utilities, law enforcement, fire protection, and other emergency service coverage without effects on neighboring areas.

B. Conducting background investigations in connection with a management contract or management contract amendment.

Extraordinary Circumstances

Actions that can normally be categorically excluded may not qualify for a CATEX because an extraordinary circumstance exists (*see* 40 CFR 1508.4). If the proposed action has one or more of the following conditions, extraordinary circumstances exist and the action cannot be categorically excluded:

A. The proposed action/project would threaten a violation of applicable federal, state, local or tribal statutory, regulatory, or permit requirements with regard to public health and safety.

B. The proposed action/project has effects on the environment that involve risks that are highly uncertain, unique, or are scientifically controversial.

C. The proposed action/project violates one or more federal, tribal, state, or local environmental laws, regulations, or permit requirements.

D. The proposed action/project has an adverse effect on a property or structure eligible for listing or listed on the National Register of Historical Places, including the degradation, loss, or destruction of (1) scientific, cultural, or historical resources protected by the National Historic Preservation Act of 1966, as amended; (2) on World Heritage properties; or (3) other significant scientific, cultural, or historical resources.

E. The proposed action/project has adverse effects on natural, ecological, or scenic resources of federal, tribal, state and/or local significance. These resources include: (1) Resources protected by Coastal Zone Management Act (CZMA); (2) resources protected by the Fish and Wildlife Coordination Act; (3) prime, unique, tribal, state or locally important farmlands; (4) known cultural or archaeological resources; (5) park lands; (6) federal or state listed wild or scenic rivers; and/or (7) other ecologically critical areas.

F. The proposed action/project is related to other actions that may, when considered cumulatively, have significant adverse effects.

G. The proposed action/project may adversely affect (1) a federal or state listed endangered, threatened, or candidate species; or (2) designated or proposed critical habitat under the Endangered Species Act (ESA).

H. The proposed action/project has effects which will impact floodplains and/or wetlands on Federal property.

I. The proposed action/project has effects that will cause a criteria pollutant listed under the Clean Air Act to exceed the threshold level of one or more of the National Ambient Air Quality Standards for the surrounding geographical area.

J. The proposed action/project has effects that may cause disproportionately high adverse environmental or health impacts specific to children, minorities, or low-income populations.

K. The proposed action/project is likely to have adverse effects on migratory bird populations.

L. The proposed action/project has the potential to disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases.

M. The proposed action/project has effects that are highly controversial on environmental grounds.

Categorical Exclusion Documentation

The purpose of categorical exclusions is to reduce paperwork and delay. The NIGC is not required to repeatedly document actions that qualify for a categorical exclusion and do not involve an extraordinary circumstance (*see* 40 CFR 1500.4(p)). The NIGC will document its decision to treat a particular action as categorically excluded from further NEPA review, when the CATEX applied specifically requires the preparation of a REC. In those cases, a REC will include:

A. A complete description of the proposed action/project;

B. The CATEX relied upon, including a brief discussion of why there are no extraordinary circumstances;

C. Supplemental documentation that supports the conclusions in the narrative. Examples include exhibit(s) showing boundaries of historical or archeological site(s) previously identified near the proposed project, documentation from the U.S. Fish and Wildlife Service noting that no endangered species or habitat is present near the proposed project, evidence that the proposed project site is located outside any non-attainment area(s), etc. In some cases, a ''no effect'' determination from the State Historic Preservation Office or Tribal Historic Preservation Office may be required;

D. The following statement: *I certify that, to the best of my knowledge, the*

information provided is the best available information and is accurate;

E. A signature from an environmental professional with a signature block that includes the professional's credentials.

Dated: December 22, 2016.

Jonodev Chaudhuri,

Chairman.

Kathryn Isom-Clause,

Vice-Chair.

Sequoyah Simermeyer,

Commissioner.

[FR Doc. 2017–00364 Filed 1–10–17; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–22604; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before December 10, 2016, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by January 26, 2017.

ADDRESSES: Comments may be sent via U.S. Postal Service to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before December 10, 2016. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

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.

ARIZONA

Cochise County

Mountain View Officers' Club, Kilbourn Ave., Ft. Huachuca, SG100000549

Maricopa County

Peoria High School Old Main, 11200 N. 83rd Ave., Peoria, SG100000551

Pima County

Brown, Grace and Elliot, House, (Single Family Residential Architecture of Josias Joesler and John and Helen Murphey MPS MPS), 5025 N. Camino Escuela, Tucson, MP100000550

ARKANSAS

Garland County

Aristocrat Motor Inn, 240 Central Ave., Hot Springs, SG100000552

Hot Spring County

Lake Catherine State Park Prisoner of War Structures, 1200 Catherine Park Rd., Hot Springs vicinity, SG100000553

Mississippi County

Minaret Manor, 844 W. Semmes, Osceola, SG100000554

Monroe County

Brinkley Concrete Streets, Ash St, between Main St. & New York Ave. & New York Ave. between Ash & Lynn Sts., Brinkley, SG100000555

Ouachita County

St. John's Episcopal Church, 117 Harrison St., Camden, SG100000556

Pulaski County

Darragh Building, 1403 E. 6th Ave., Little Rock, SG100000557

Sebastian County

First Evangelical Lutheran Church, 1115 N. D St., Fort Smith, SG100000558

DISTRICT OF COLUMBIA

District of Columbia

Chilchester Arms Apartments, (Apartment Buildings in Washington, DC, MPS MPS), 1388 Tuckerman St. NW., Washington, MP100000559

IDAHO

Blaine County

Hailey Methodist Episcopal Church, 200 2nd Ave. S., Hailey, SG100000560

ILLINOIS

Cook County

Carling Hotel, (Residential Hotels in Chicago, 1910–1930 MPS), 1512 N. LaSalle St., Chicago, MP100000563

IOWA

Muscatine County

McColm, Laura Musser, Historic District, 1314 Mulberry Ave., Muscatine, SG100000562

Polk County

Home Federal Savings and Loan Association of Des Moines Building, 601 Grand Ave., Des Moines, SG100000561

MINNESOTA

Brown County

District No. 50 School, 20837 US 14, Milford Township, SG100000564

Hubbard County

Consolidated School District No. 22, 25895 Cty. Rd. 9, Helga Township, SG100000565

MISSOURI

Pulaski County

Devil's Elbow Historic District, (Route 66 in Missouri MPS MPS), 12175, 12177, 12198 Timber Rd., 21050, 21104, 21141, 21150 Teardrop Rd., Devil's Elbow, MP100000566

Piney Beach, (Route 66 in Missouri MPS MPS), 1280 Tank Ln., Hooker, MP100000567

OHIO

Hamilton County

Brunswick—Balke—Collender Building, 130–132 E. 6th St., Cincinnati, SG100000568

Reakirt Building, 126–128 E. 6th St., Cincinnati, SG100000569

First National Bank Building, 105 E. 4th St., Cincinnati, SG100000570

SOUTH CAROLINA

Richland County

Olympia Union Hall, 119 S. Parker St, Columbia, SG100000571

WEST VIRGINIA

Cabell County

Memphis Tennessee Garrison House, 1701 10th Ave., Huntington, SG100000573

Jefferson County

Feagans' Mill Complex, 28 Feagans' Mill Ln., Charles Town vicinity, SG100000572

WISCONSIN

Marathon County

Marathon Shoe Company East Side Plant, 1418 N. 1st St., Wausau, SG100000574

Vernon County

Harris, George and Mable, Round Barn, S1123 Harris Rd., Forest, SG100000575

A request for removal has been made for the following resource(s):

ARKANSAS

Conway County

Cove Creek Bridge, AR 124, Martinville vicinity, OT04000499

Lawrence County

US 63 Black River Bridge, (Historic Bridges of Arkansas MPS MPS), US 63, Black Rock, OT00000631

Little River County

S.S.P. Mills and Son Building, (Railroad Era Resources of Southwest Arkansas MPS MPS), Jct. of Texarkana Ave. and Main St., NW corner, Wilton, OT96000631

Marion County

Bruno School Building, (Public Schools in the Ozarks MPS MPS), Co. Rd. 9, Bruno, OT92001112

Mississippi County

Mississippi County Jail, (Osceola MRA MPS), 300 S. Poplar St., Osceola, OT87001356

Additional documentation has been received for the following resource(s):

ARKANSAS

Benton County

Bella Vista Water Tank, (Benton County MRA MPS), Jct. of Suits Us Dr. and Pumpkin Hollow Rd., Bella Vista vicinity, AD92000985

Faulkner County

Conway Commercial Historic District, Roughly bounded by Main St on the S, Harkrider St and Spencer St on the E, just S of Mill St to the N, and Locust St, Conway, AD10000779

KENTUCKY

Logan County

Russellville Historic District, Roughly bounded by 2nd, 9th, Caldwell, and Nashville Sts., Russellville, AD76000919

WASHINGTON

Lewis County

Jackson, John R., House, At Mary's Corner, 11 mi. S of Chehalis on Jackson Hwy., Chehalis vicinity, AD74001968

Authority: 60.13 of 36 CFR Part 60.

Dated: December 19, 2016.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

[FR Doc. 2017–00347 Filed 1–10–17; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX066A0067F 178S180110; S2D2D SS08011000 SX066A00 33F 17XS501520]

Notice of Proposed Information Collection; Request for Comments for 1029–0024

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

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSMRE) is announcing its intention to request renewed approval for the collection of information for the Procedures and Criteria for Approval or Disapproval of State Program Submissions.

DATES: Comments on the proposed information collection must be received by March 13, 2017, to be assured of consideration.

ADDRESSES: Mail comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 203—SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request contact John Trelease at (202) 208–2783, or via email at *jtrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8 (d)]. OSMRE will be requesting that OMB extend its approval for the collection of information for 30 CFR part 732.

OSMRE has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden or respondents. OSMRE will request a 3-year term of approval for these information collection activities.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for part 732 is 1029–0024, and may be found in OSMRE's regulations at 30 CFR 732.10.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSMRE's submission of the information collection request to OMB.

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.

This notice provides the public with 60 days in which to comment on the following information collection activity:

Title: 30 CFR part 732—Procedures and Criteria for Approval or Disapproval of State Program Submissions.

OMB Control Number: 1029–0024.

Summary: Part 732 establishes the procedures and criteria for approval and disapproval of State program submissions. The information submitted is used to evaluate whether State regulatory authorities are meeting the provisions of their approved programs.

Bureau Form Number: None.

Frequency of Collection: Once and annually.

Description of Respondents: 24 State and 4 Tribal regulatory authorities.

Total Annual Responses: 33.

Total Annual Burden Hours: 4,765.

Dated: January 6, 2017.

John A. Trelease,

Acting Chief, Division of Regulatory Support.

[FR Doc. 2017–00402 Filed 1–10–17; 8:45 am]

BILLING CODE 4310–05–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1013]

Certain Potassium Chloride Powder Products; Commission Determination Not To Review an Initial Determination Granting Joint Motion To Terminate the Investigation Based Upon Settlement; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 10) of the presiding administrative law judge (''ALJ'') granting a joint motion to terminate the investigation based upon settlement. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–4716. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted Investigation No. 337–TA–1013 on July 27, 2016, based on a complaint filed by Complainants Lehigh Valley Technologies, Inc. of Allentown, Pennsylvania; Endo Global Ventures of Hamilton, Bermuda; Endo Ventures Limited, of Dublin, Ireland; and Generics Bidco I, LLC (d/b/a Qualitest Pharmaceuticals and Par Pharmaceutical) of Huntsville, Alabama (collectively, ''Complainants''). *See* 81 FR 49263 (July 27, 2016). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), based upon the importation into the United States, or the sale of certain potassium chloride powder products by reason of false advertising, the threat or effect of which is to destroy or substantially injure an industry in the United States. *See id.* The notice of investigation identified Viva Pharmaceutical Inc. of Richmond, British Columbia, Canada; Virtus Pharmaceuticals, LLC of Tampa, Florida; and Virtus Pharmaceuticals OPCO II, LLC, of Nashville, Tennessee (collectively, ''Respondents'') as respondents in this investigation. *See id.* The Office of Unfair Import Investigations is also a party to this investigation. *See id.*

On November 18, 2016, Complainants and Respondents (collectively, ''the Private Parties'') filed a joint motion to terminate the investigation based upon settlement (''Joint Motion''). On November 30, 2016, the Commission Investigative Attorney filed a response in support of the Joint Motion.

On December 19, 2016, the ALJ issued a corrected initial determination (''ID'') (Order No. 10) granting the Joint Motion. As noted in the ID, the Private Parties ''state[d] that 'there are no other agreements, written or oral, express or implied between Complainants and Respondents concerning the subject matter of this Investigation' other than the documents submitted with the Joint Motion.'' *See* ID at 1–2. The ALJ further noted that the Private ''Parties have attached both public and confidential versions of their Settlement Agreement'' to the Joint Motion. *See id.* at 4. The ALJ also considered the public interest under Commission Rule 210.50(b)(2), 19 CFR 210.50(b)(2) and determined that termination was not contrary to the public interest. *See id.*

No party has filed a petition for review of the subject ID.

The Commission has determined not to review the subject ID. The investigation is terminated.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: January 6, 2017.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2017–00424 Filed 1–10–17; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Notice of Publication of Petitions for Duty Suspensions and Reductions and Opportunity To Comment on Petitions

AGENCY: United States International Trade Commission.

ACTION: Notice of publication on the Commission's Web site of petitions for duty suspensions and reductions and request for comments on the petitions filed.

SUMMARY: As required by the American Manufacturing Competitiveness Act of 2016, the Commission has published on its Web site the petitions for duty suspensions and reductions that were timely filed and contain the required information, and the Commission is requesting members of the public to submit comments to the Commission on the petitions published no later than the close of business February 24, 2017.

DATES: January 11, 2017: Date of publication on the Commission's Web site of petitions for duty suspensions and reductions and opening date for filing comments concerning those petitions. February 24, 2017, 5:15 p.m., EST: Closing date and time for the submission of comments concerning the petitions for duty suspensions and reductions published on the Commission's Web site. Comments must be submitted in electronic form via the Commission's secure web portal. The Commission will not accept comments submitted in paper or in any other form or format.

ADDRESSES: All Commission offices are located in the United States International Trade Commission Building, 500 E Street SW., Washington, DC. The public file for this proceeding may be viewed on the Commission's Miscellaneous Tariff Bill Petition System (MTBPS) at *https://www.usitc.gov/mtbps.*

FOR FURTHER INFORMATION CONTACT: For general inquiries, contact Jennifer Rohrbach at *mtbinfo@usitc.gov.* For filing inquiries, contact the Office of Secretary, Docket Services division, U.S. International Trade Commission, telephone (202) 205–3238.

The media should contact Peg O'Laughlin, Public Affairs Officer (202–205–1819 or *margaret.olaughlin@usitc.gov*). General information concerning the Commission may be obtained by accessing its internet server (*https://www.usitc.gov*).

Background: The American Manufacturing Competitiveness Act of 2016 (the Act), (Public Law 114–159, May 20, 2016), 19 U.S.C. 1332 note, establishes a new process for the submission and consideration of requests for temporary duty suspensions and reductions. Section 3(b)(1) of the Act requires that the Commission initiate the process by publishing a notice requesting members of the public who can demonstrate that they are likely beneficiaries of duty suspensions or reductions to submit petitions and Commission disclosure forms to the Commission. As required by the Act, the Commission published that notice in the **Federal Register** on October 14, 2016 (81 FR 71114), with all such petitions to be submitted no later than the close of business on December 12, 2016. Section 3(b)(3)(A) of the Act requires that the Commission, no later than 30 days after the expiration of the period for filing petitions, that is, by January 11, 2017, publish on its Web site the petitions received that contain the information required by the Act. Section 3(b)(3)(B) of the Act requires that the Commission, at the same time, publish a notice requesting members of the public to submit comments to the Commission on the petitions published. Such comments must be submitted to

the Commission during the 45-day period beginning on the date of publication of the notice—in this case, by February 24, 2017.

Following conclusion of the period for filing comments, the Commission will, as required by sections 3(b)(3)(C) and (E) of the Act, submit preliminary and final reports to the House Committee on Ways and Means and the Senate Committee on Finance (Committees) on the petitions received. The Commission will submit its reports in June and August 2017, respectively. The reports are to include the Commission's analysis and recommendations regarding the petitions, including whether there is domestic production of the article, whether the estimated loss in revenues due to the duty suspension or reduction does not exceed $500,000, and whether the duty suspension or reduction will be available to any person importing the article. The Commission is required to classify the petitions into categories based on whether (1) the petition meets the requirements for inclusion in a miscellaneous tariff bill; (2) the Commission recommends inclusion in such a bill with specified technical changes, changes in product scope, or adjustment in the amount of duty reduction; (3) the Commission recommends against inclusion in a bill because the petition does not meet the petitioning requirements or the petitioner is not a likely beneficiary; and (4) the Commission otherwise recommends not including the petition. The Committees and the Congress will make the final decision regarding the imported articles to be included in a bill.

Section 3(c) of the Act also requires the U.S. Department of Commerce (Commerce), with input from U.S. Customs and Border Protection (CBP) and other Federal agencies, to submit a report to the Commission and to the Committees. This report is to include information related to domestic production and technical changes that are necessary for purposes of administration when articles are presented for importation.

Procedures for filing a Comment: The Commission has promulgated rules of practice and procedure that address, inter alia, the submission of comments on the petitions filed. The rules, in the form of an interim rule, are published at 19 CFR part 220 (81 FR 67144, Sept. 30, 2016)—see in particular 19 CFR 220.10. The rules are also posted on the Commission's Web site along with other materials, including a handbook, designed to assist the public in filing petitions and comments—see *https://www.usitc.gov/mtbps.*

Who may file. Comments may be filed by any member of the public. The Commission is particularly interested in receiving comments from domestic producers with respect to whether they produce an article that is identical to, like, or directly competitive with an article that is the subject of a petition for a duty suspension or reduction, and if they do, whether they object to such a duty suspension or reduction. The Commission is also interested in receiving comments from individuals and entities who believe they would be a likely beneficiary of a particular duty suspension or reduction, or who, having been named in the petition or another comment as a likely beneficiary, wish to state that they would not be a likely beneficiary of a particular duty suspension or reduction. The statute defines ''likely beneficiary'' to mean ''an individual or entity likely to utilize, or benefit directly from the utilization of, an article that is the subject of a petition for a duty suspension or reduction.''

Petitioning parties may also submit comments. However, any such comments must not amend or seek to amend a petition that the submitter previously filed, and the Commission will not consider any comments from a petitioner to such effect.

Method for filing. Comments concerning petitions for duty suspensions and reductions may be filed only electronically via the Commission's designated secure MTBPS web portal and in the format designated by the Commission in that portal. The portal may be accessed through the Commission's Web site at *https://www.usitc.gov* under ''Miscellaneous Tariff Bill Information.'' The portal contains a series of prompts and links that will assist persons in providing the required information. The Commission will not accept comments submitted in paper or in any other form or format. Comments must contain all information required in the portal in order to be considered properly filed. Comments, including any attachments thereto, must otherwise comply with the Commission's rules and Handbook on MTB Filing Procedures. Persons seeking to comment on more than one petition must submit a separate comment for each petition.

Persons filing comments should be aware that they must be prepared to complete their entire comment when they enter the portal. The portal will not allow them to edit, amend, or complete the comment at a later time. Accordingly, they should have all the information in hand that they will need to complete their comment at the time they enter the portal. The types of information that a person submitting a comment may need are listed in the Commission's Before You File a Comment guide, which is also located on the Commission's Web site at *https://www.usitc.gov/mtbps.*

Time for filing. To be considered, comments must be filed no earlier than the publication date of this notice in the **Federal Register** and no later than the close of business (5:15 p.m. EST) on February 24, 2017. The Commission will not accept comments filed after that time and date.

Amendment and withdrawal of comments. The Commission's secure web portal will not allow a person who has formally submitted a comment to amend that comment. Instead, that person must withdraw the original comment and file a new comment that incorporates the changes. The new comment must be filed within the 45-day period designated for submitting comments (*i.e.,* before 5:15 p.m. EST on February 24, 2017). Comments may not be withdrawn or amended after the close of the 45-day period for filing comments.

Comments containing confidential business information. The portal will permit persons submitting comments to claim that certain information should be treated either as confidential business information or as information protected from disclosure under the Privacy Act. However, because of the portal's design, the portal instructs that such information not be included in attachments to comments. Persons who include confidential business information and information protected under the Privacy Act in attachments to their comments will be presumed to have waived any privilege and the information will be disclosed to the public when the comments and attachments are posted on the Commission's Web site. See further information below on possible disclosure of confidential business information.

Confidential Business Information. The Commission will not release information which the Commission considers to be confidential business information within the meaning of § 201.6(a) of its Rules of Practice and Procedure (19 CFR 201.6) unless the party submitting the confidential business information had notice, at the time of submission, that such information would be released by the Commission, or such party subsequently consents to the release of the information.

Confidential business information submitted to the Commission in comments may be disclosed to and/or used by (1) the Commission in calculating the estimated revenue loss required under the Act, which may be based in whole or in part on the estimated values of imports submitted in comments (as well as by petitioners in their petitions); or (2) the Commission, its employees, and contract personnel (a) in processing petitions and comments and preparing reports under the American Manufacturing Competitiveness Act of 2016 or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (3) Commerce for use in preparing its report to the Commission and the Committees, and the U.S. Department of Agriculture and CBP for use in providing information for that report; or (4) U.S. government employees and contract personnel, solely for cybersecurity purposes, subject to the requirement that all contract personnel will sign appropriate nondisclosure agreements.

By order of the Commission.

Issued: January 3, 2017.

Katherine M. Hiner,

Acting Supervisory Attorney.

[FR Doc. 2017–00062 Filed 1–10–17; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–1034]

Certain Flash Memory Devices and Components Thereof; Institution of Investigation

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 6, 2016, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Memory Technologies, LLC of Las Vegas, Nevada. An amended complaint was filed on December 12, 2016. The amended 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 flash memory devices and components thereof by reason of infringement of certain claims of U.S. Patent No. RE45,542 (''the '542 patent''); U.S. Patent No. RE45,486 (''the '486 patent''); U.S. Patent No. 7,565,469 (''the '469 patent''); U.S. Patent No. 9,063,850 (''the '850 patent''); and U.S. Patent No. 8,307,180 (''the '180 patent''). The amended complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The amended 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 *https://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

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 (2016).

Scope of Investigation: Having considered the amended complaint, the U.S. International Trade Commission, on January 5, 2017, *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 flash memory devices and components thereof by reason of infringement of one or more of claim 38 of the '542 patent; claims 6, 9, 10, 22, 23, 26, and 27 of the '486 patent; claim 19 of the '469 patent; claim 10 of the '850 patent; and claims 17–19, 21, 22, and 27 of the '180 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to Commission Rule 210.50(b)(1), 19 CFR 210.50(b)(1), the presiding Administrative Law Judge shall take evidence or other information and hear arguments from the parties or other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. 1337(d)(1), (f)(1), (g)(1);

(3) 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 complainant is:

Memory Technologies, LLC, 6787 W. Tropicana Avenue, Suite 238, Las Vegas, NV 89103

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the amended complaint is to be served:

SanDisk LLC, 951 SanDisk Drive, Milpitas, CA 95035

Western Digital Corporation, 3355 Michelson Drive, Suite 100, Irvine, CA 92612

Western Digital Technologies, Inc., 951 SanDisk Drive, Milpitas, CA 95035

SanDisk Limited, 8F Nisso 15 Bldg. 2–17–19 Shin-Yokohama, Kohoku-ku, Yokohama, Japan 222–0033

SanDisk Storage Malaysia Sdn. Bhd., Plot 18, Lorong Jelawat 4, Kawasan, Perindustrian, Seberang Jaya, 13700 Perai, Penang, Malaysia

SanDisk SemiConductor (Shanghai) Co., Ltd., No. 388, Jiang Chuan East Road, Minhang District, Shanghai 200241, China

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the amended 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 amended complaint and the notice of investigation. Extensions of time for submitting responses to the amended complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the amended complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the amended 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 amended 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.

Issued: January 5, 2017.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2017–00423 Filed 1–10–17; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—PXI Systems Alliance, Inc.

Notice is hereby given that, on December 15, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), PXI Systems Alliance, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Ranatec Instrument AB, Molndal, SWEDEN; and Signadyne, Castelldefels, Barcelona, SPAIN, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PXI Systems Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

On November 22, 2000, PXI Systems Alliance, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 8, 2001 (66 FR 13971).

The last notification was filed with the Department on September 30, 2016. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on November 3, 2016 (81 FR 76628).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2017–00363 Filed 1–10–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Petroleum Environmental Research Forum Project No. 2014–10, Direct Monitoring of Flare Combustion Efficiency

Notice is hereby given that, on December 7, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Petroleum Environmental Research Forum Project No. 2014–10, Direct Monitoring of Flare Combustion Efficiency (''PERF Project No. 2014–10'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, BP Exploration Operating Company Limited, Sunbury-on-Thames, UNITED KINGDOM, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PERF Project No. 2014–10 intends to file additional written notifications disclosing all changes in membership.

On February 18, 2016, PERF Project No. 2014–10 filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 17, 2016 (81 FR 14486).

The last notification was filed with the Department on September 1, 2016. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 13, 2016 (81 FR 70704).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2017–00351 Filed 1–10–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research And Production Act of 1993—Cooperative Research Group on Ros-Industrial Consortium—Americas

Notice is hereby given that, on November 30, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on ROS-Industrial Consortium—Americas (''RIC—Americas'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, GKN Aerospace North America, Inc., Hazelwood, MO; and Intelligrated, St. Louis, MO, have been added as parties to this venture.

Also, HDT Robotics, Inc., Fredericksburg, VA; University of Texas at Arlington, Arlington, TX; and Flextronics, San Jose, CA, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and RIC-Americas intends to file additional written notifications disclosing all changes in membership or planned activities.

On April 30, 2014, RIC-Americas filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 9, 2014 (79 FR 32999).

The last notification was filed with the Department on August 29, 2016. A notice was published in the **Federal**

Register pursuant to Section 6(b) of the Act October 13, 2016 (81 FR 70705).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2017–00353 Filed 1–10–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ASTM International Standards

Notice is hereby given that, on December 6, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ASTM International (''ASTM'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASTM has provided an updated list of current, ongoing ASTM standards activities originating between September 2016 and December 2016 designated as Work Items. A complete listing of ASTM Work Items, along with a brief description of each, is available at *http://www.astm.org.*

On September 15, 2004, ASTM filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 10, 2004 (69 FR 65226).

The last notification was filed with the Department on September 12, 2016. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on November 15, 2016 (81 FR 80087).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2017–00354 Filed 1–10–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ODPI, Inc.

Notice is hereby given that, on December 14, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ODPi, Inc. (''ODPi'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, China Mobile Communication Company, Ltd., Beijing, PEOPLE'S REPUBLIC OF CHINA, has been added as a party to this venture.

Also, Telstra, Melbourne, Victoria, AUSTRALIA, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and ODPi intends to file additional written notifications disclosing all changes in membership.

On November 23, 2015, ODPi filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 23, 2015 (80 FR 79930).

The last notification was filed with the Department on September 26, 2016. A notice was published in the **Federal Register** pursuant to Section 6(h) of the Act on November 3, 2016 (81 FR 76627).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2017–00352 Filed 1–10–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Interchangeable Virtual Instruments Foundation, Inc.

Notice is hereby given that, on December 15, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Interchangeable Virtual Instruments Foundation, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Chyng Hong Electronics, Ltd., Taichung City, TAIWAN, has been added as a party to this venture.

Also, Kepco, Inc., Flushing, NY; and Gigatronics, San Ramon, CA, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Interchangeable Virtual Instruments Foundation, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 29, 2001, Interchangeable Virtual Instruments Foundation, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 30, 2001 (66 FR 39336).

The last notification was filed with the Department on April 28, 2016. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 9, 2016 (81 FR 37215).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2017–00356 Filed 1–10–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—American Society Of Mechanical Engineers

Notice is hereby given that, on November 14, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), the American Society of Mechanical Engineers (''ASME'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, since May 27, 2016, ASME has published two new standards, revised four consensus committee charters, added one consensus committee charter, disbanded one consensus committee, initiated three new standards activities, and has withdrawn two standards activities within the general nature and scope of ASME's standards development activities, as specified in the original notification. More detail regarding these changes can be found at *http://www.asme.org.*

On September 15, 2004, ASME filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 13, 2004 (69 FR 60895).

The last notification with the Attorney General was filed on May 31, 2016. A notice was filed in the **Federal Register** on July 6, 2016 (81 FR 44048).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2017–00355 Filed 1–10–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Disability Employment Initiative Evaluation

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Disability Employment Policy (ODEP) sponsored information collection request (ICR) proposal titled, ''Disability Employment Initiative Evaluation,'' 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.*). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before February 10, 2017.

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=201610-1230-001* (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 (this is not a toll-free number) or by email at *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–ODEP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (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: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks PRA authority for the information collection requirements to conduct an evaluation of the Disability Employment Initiative (DEI). The DEI was designed to improve educational, training and employment opportunities and outcomes of youth and adults with disabilities by refining and expanding already identified successful public workforce strategies; improving coordination and collaboration among employment and training and asset development programs implemented at state and local levels; and build effective community partnerships that leverage public and private resources better to serve individuals with disabilities and improve employment outcomes. The study will use two distinct quasi-experimental design study designs to determine the impact of DEI interventions on participant outcomes. Information will be collected through annual site visits, a participant tracking system, and a survey.

This proposed 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 if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. For additional information, see the related notices published in the **Federal Register** on January 12, 2016 (81 FR 1446), May 26, 2016 (81 FR 36350), and September 16, 2106 (81 FR 63807).

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 thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB ICR Reference Number 201609–1230–001. 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–ODEP.

Title of Collection: Disability Employment Initiative Evaluation.

OMB ICR Reference Number: 201610–1230–001.

Affected Public: Individuals or Households; State, Local, and Tribal Governments; Private Sector—businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 5,719.

Total Estimated Number of Responses: 5719.

Total Estimated Annual Time Burden: 901 hours.

Total Estimated Annual Other Costs Burden: $0.

Seleda M. Perryman,

Acting Departmental Clearance Officer.

[FR Doc. 2017–00451 Filed 1–10–17; 8:45 am]

BILLING CODE 4510–FK–P

NATIONAL SCIENCE FOUNDATION

RIN 3145–AA58

Notice on Penalty Inflation Adjustments for Civil Monetary Penalties

AGENCY: National Science Foundation.

ACTION: Notice announcing updated penalty inflation adjustments for civil monetary penalties for 2017.

SUMMARY: The National Science Foundation (NSF or Foundation) is providing notice of its adjusted maximum civil monetary penalties, effective January 15, 2017. These adjustments are required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act).

FOR FURTHER INFORMATION CONTACT: Bijan Gilanshah, Assistant General Counsel, Office of the General Counsel, National Science Foundation, 4201 Wilson Boulevard, Room 1265, Arlington, Virginia 22230, 703–292–8060.

SUPPLEMENTARY INFORMATION: On June 27, 2016, NSF published an interim final rule amending its regulations to adjust, for inflation, the maximum civil monetary penalties that may be imposed for violations of the Antarctic Conservation Act of 1978 (ACA), as amended, 16 U.S.C. 2401 *et seq.,* and the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801, *et seq.* These adjustments are required by the 2015 Act (Sec. 701 of Pub. L. 114–74). The 2015 Act also requires agencies to make subsequent annual adjustments for inflation. Pursuant to OMB guidance dated December 16, 2016, the cost-of-living adjustment multiplier for 2017 is 1.01636. Accordingly, the 2017 annual inflation adjustments for the maximum penalties under the ACA are $16,516 ($16250 × 1.01636) for violations and $27,950 ($27500 × 1.01636) for knowing violations of the ACA. Finally, the 2017 annual inflation adjustment for the maximum penalty for violations under PFCRA is $10957 ($10781 × 1.01636).

Dated: January 6, 2017.

Suzanne Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2017–00412 Filed 1–10–17; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Licensing Support System Advisory Review Panel

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of renewal of the Charter of the Licensing Support Network Advisory Review Panel (LSNARP).

SUMMARY: The Licensing Support System Advisory Review Panel was established by the U.S. Nuclear Regulatory Commission (NRC) as a Federal Advisory Committee in 1989. Its purpose was to provide advice on the fundamental issues of design and development of an electronic information management system to be used to store and retrieve documents relating to the licensing of a geologic repository for the disposal of high-level radioactive waste, and on the operation and maintenance of the system. This electronic information management system was known as the Licensing Support System (LSS). In November 1998, the Commission approved amendments to title 10 of the *Code of Federal Regulations* part 2 that renamed the Licensing Support System Advisory Review Panel as the Licensing Support Network Advisory Review Panel. The Licensing Support Network (LSN) was shut down in 2011 and the document collection was submitted to the Office of the Secretary. The document collection was made publically available in the NRC's ADAMS system in August 2016 and contains over 3.69 million documents associated the proposed high-level waste facility at Yucca Mountain.

Membership on the Panel will continue to be drawn from those whose interests that could be affected by the use of the LSN document collection, including the Department of Energy, the NRC, the State of Nevada, the National Congress of American Indians, affected units of local governments in Nevada, the Nevada Nuclear Waste Task Force, and nuclear industry groups. Federal agencies with expertise and experience in electronic information management systems may also participate on the Panel.

The NRC has determined that renewal of the charter for the LSNARP until January 5, 2019, is in the public interest in connection with duties imposed on the Commission by law. This action is being taken in accordance with the Federal Advisory Committee Act after consultation with the Committee Management Secretariat, General Services Administration.

FOR FURTHER INFORMATION CONTACT: Andrew L. Bates, Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; Telephone 301 415–1963.

Dated at Rockville, Maryland, this 5th day of January 2017.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 2017–00440 Filed 1–10–17; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–044; NRC–2010–0361]

Toshiba Corporation, Advanced Boiling-Water Reactor; Design Certification

AGENCY: Nuclear Regulatory Commission.

ACTION: Application for design certification renewal; withdrawal and closure of docket.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is closing the NRC's docket for the Advanced Boiling-Water Reactor (ABWR) design certification renewal application submitted by Toshiba Corporation. Toshiba Corporation has withdrawn its application to renew the ABWR design certification rule.

DATES: The effective date of the closure of the NRC's docket for Toshiba Corporation's renewal of the ABWR design certification rule is January 11, 2017.

ADDRESSES: Please refer to Docket ID NRC–2010–0361 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2010–0361. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; 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 obtain publicly-available documents online in the ADAMS Public Documents collection 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 (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room 01–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Getachew Tesfaye, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–8013; email: *Getachew.Tesfaye@nrc.gov.*

SUPPLEMENTARY INFORMATION: A notice of receipt and availability of the ABWR renewal application submitted by Toshiba Corporation was previously published in the **Federal Register** on November 24, 2010 (75 FR 71744). On December 23, 2010 (75 FR 80854), a subsequent notice was published in the **Federal Register** announcing the acceptance of the renewal application in accordance with the requirements contained in 10 CFR part 52, ''Licenses, Certifications and Approvals for Nuclear Power Plants.'' The NRC docket number established for this application is 52–044.

By letter dated April 29, 2015 (ADAMS Accession No. ML15110A121), the NRC issued a request for additional information (RAI). On May 25, 2015 (ADAMS Accession No. ML15154A547), Toshiba responded to the RAI requesting postponement of further review of the application until July 1, 2016. By the letter dated December 1, 2015 (ADAMS Accession No. ML15215A318), the NRC accepted Toshiba's request to postpone the NRC review. By letter dated June 9, 2016 (ADAMS Accession No. ML16173A310), Toshiba announced its withdrawal of the application to renew the ABWR design certification from the docket.

The NRC notes that this action does not affect the existing NRC docket (52–045) for the ABWR design certification rule renewal application filed by GE-Hitachi Nuclear Energy 76 FR 9612 (February 18, 2011).

Dated at Rockville, Maryland, this 30th day of December 2016.

For the Nuclear Regulatory Commission.

Francis M. Akstulewicz,

Director, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2017–00438 Filed 1–10–17; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0062]

Information Collection: NRC Form 327, Special Nuclear Material (SNM) and Source Material (SM) Physical Inventory Summary Report, and NUREG/BR–0096, Instructions and Guidance for Completing Physical Inventory

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''NRC Form 327, Special Nuclear Material (SNM) and Source Material (SM) Physical Inventory Summary Report, and NUREG/BR–0096, Instructions and Guidance for Completing Physical Inventory.''

DATES: Submit comments by February 10, 2017.

ADDRESSES: Submit comments directly to the OMB reviewer at: Vlad Dorjets, Desk Officer, Office of Information and Regulatory Affairs (OMB 3150–0139), NEOB–10202, Office of Management and Budget, Washington, DC 20503; telephone: 202–395–7315, email: *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2016–0062 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0062. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2016–0062 on this Web site.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection 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.* A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No(s). ML082620258 and ML17005A225. The supporting statement is available in ADAMS under Accession No. ML16340B551.

• *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.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@NRC.GOV.*

B. Submitting Comments

Please include Docket ID NRC–2016–0062 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *http://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently

submitted a request for renewal of an existing collection of information to OMB for review entitled, ''NRC Form 327, Special Nuclear Material (SNM) and Source Material (SM) Physical Inventory Summary Report, and NUREG/BR–0096, Instructions and Guidance for Completing Physical Inventory.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on September 22, 2016 (81 FR 65412).

1. *The title of the information collection:* NRC Form 327, ''Special Nuclear Material (SNM) and Source Material (SM) Physical Inventory Summary Report, and NUREG/BR–0096, Instructions and Guidance for Completing Physical Inventory''
2. *OMB approval number:* 3150–0139.
3. *Type of submission:* Extension.
4. *The form number if applicable:* NRC Form 327.
5. *How often the collection is required or requested:* Certain licensees possessing strategic SNM are required to report inventories every six months. Licensees possessing SNM of moderate strategic significance must report every nine months. Licensees possessing SNM of low strategic significance must report annually, except one licensee must report its dynamic inventories every two months and a static inventory on an annual basis.
6. *Who will be required or asked to respond:* Fuel facility licensees possessing SNM, *i.e.,* enriched uranium, plutonium or U–233.
7. *The estimated number of annual responses:* 26.
8. *The estimated number of annual respondents:* 6.
9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 104 hours (4 hours per response × 26 responses).
10. *Abstract:* NRC Form 327 is submitted by certain fuel facility licensees to account for SNM. The data is used by NRC to assess licensee material control and accounting programs and to confirm the absence of (or detect the occurrence of) SNM theft or diversion. NUREG/BR–0096 provides guidance and instructions for completing the form in accordance with the requirements appropriate for a particular licensee.

Dated at Rockville, Maryland, this 5th day of January 2016.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2017–00320 Filed 1–10–17; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2016–76; CP2016–78]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 13, 2017.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2016–76; *Filing Title:* Notice of United States Postal Service of Amendment to Priority Mail Express Contract 31, with Portions Filed Under Seal; *Filing Acceptance Date:* January 5, 2017; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Katalin K. Clendenin; *Comments Due:* January 13, 2017.

2. *Docket No(s).:* CP2016–78; *Filing Title:* Notice of United States Postal Service of Amendment to Priority Mail Contract 179, with Portions Filed Under Seal; *Filing Acceptance Date:* January 5, 2017; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Katalin K. Clendenin; *Comments Due:* January 13, 2017.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2017–00406 Filed 1–10–17; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79742; File No. SR–NYSEArca–2016–173]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to the Listing and Trading of the Shares of the United States 3x Oil Fund and United States − 3x Short Oil Fund Under NYSE Arca Equities Rule 8.200

January 5, 2017.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 23, 2016, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the shares of the following under NYSE Arca Equities Rule 8.200, Commentary .02 (''Trust Issued Receipts''): United States 3x Oil Fund and United States − 3x Short Oil Fund. 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares (''Shares'') of the following under NYSE Arca Equities Rule 8.200, Commentary .02, which governs the listing and trading of Trust Issued Receipts: United States 3x Oil Fund and United States − 3x Short Oil Fund (each a ''Fund'' and, collectively, the ''Funds'').[4]

Each Fund is a series of the USCF Funds Trust (the ''Trust''), a Delaware statutory trust.[5] The Trust and the Funds are managed and controlled by United States Commodity Funds LLC (''USCF''). USCF is registered as a commodity pool operator (''CPO'') with the Commodity Futures Trading Commission (''CFTC'') and is a member of the National Futures Association (''NFA'').[6]

In its capacity as the Custodian for the Funds, Brown Brothers Harriman & Co. (the ''Custodian'') may hold the Funds' Treasuries, cash and/or cash equivalents pursuant to a custodial agreement. Brown Brothers Harriman & Co. is also the registrar and transfer agent for the shares. In addition, in its capacity as Administrator for the Funds, Brown Brothers Harriman & Co. (the ''Administrator'') performs certain administrative and accounting services for the Funds and prepares certain Commission, NFA and CFTC reports on behalf of the Funds. ALPS Fund Services, Inc. is the ''Marketing Agent'' for the Funds.

United States 3x Oil Fund

According to the Registration Statement, the investment objective of the Fund will be for the daily changes in percentage terms of its Shares' per Share net asset value (''NAV'') to reflect three times (3x) the daily change in percentage terms of the price of a specified short-term futures contract on light, sweet crude oil (the ''Benchmark Oil Futures Contract'') less the Fund's expenses. To achieve this objective, USCF will endeavor to have the notional value of the Fund's aggregate exposure to the Benchmark Oil Futures Contract at the close of each trading day approximately equal to 300% of the Fund's NAV. The Fund will seek a return that is 300% of the return of the Benchmark Oil Futures Contract for a single day and does not seek to achieve its stated investment objective over a period of time greater than one day.[7]

The Benchmark Oil Futures Contract is the futures contract on light, sweet crude oil as traded on the New York Mercantile Exchange (the ''NYMEX'', which is part of the CME Group, Inc. (''CME'')) that is the near month contract to expire, except when the near month contract is within two weeks of expiration, in which case it will be measured by the futures contract that is the next month contract to expire.

The Fund will seek to achieve its investment objective by primarily investing in futures contracts for light, sweet crude oil that are traded on the NYMEX, ICE Futures-U.S. or other U.S. and foreign exchanges (collectively, ''Oil Futures Contracts'').

The Fund will, to a lesser extent and in view of regulatory requirements and/or market conditions:

(i) Next invest in (a) cleared swap transactions based on the Benchmark Futures Contract, (b) non-exchange traded (''over-the-counter'' or ''OTC''), negotiated swap contracts that are valued based on the Benchmark Futures Contract, and (c) forward contracts for oil;

[4] Commentary .02 to NYSE Arca Equities Rule 8.200 applies to Trust Issued Receipts that invest in ''Financial Instruments.'' The term ''Financial Instruments,'' as defined in Commentary .02(b)(4) to NYSE Arca Equities Rule 8.200, means any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars, and floors; and swap agreements.

[5] The Trust is registered under the Securities Act of 1933. the Trust filed with the Commission a registration statement on Form S–1 under the Securities Act of 1933 (15 U.S.C. 77a) (''Securities Act'') relating to the United States 3x Oil Fund (File No. 333–214825) and the United States 3x Short Oil Fund (File No. 333–214881) (each a ''Registration Statement'' and, collectively, ''Registration Statements'') on November 29, 2016 and December 2, 2016, respectively. The description of the operation of the Trust and the Funds herein is based, in part, on the Registration Statements.

[6] The Commission has previously approved listing of Trust Issued Receipts based on oil on the American Stock Exchange (now known as NYSE MKT LLC) and NYSE Arca. *See, e.g.,* Securities Exchange Act Release Nos. 53582 (March 31, 2006), 71 FR 17510 (April 6, 2006) (SR–Amex–2005–127) (order approving listing and trading of shares of United States Oil Fund, LP); 57188 (January 23, 2008), 73 FR 5607 (January 30, 2008) (SR–Amex–2007–70) (order approving listing and trading of shares of United States Heating Oil Fund, LP and United States Gasoline Fund, LP); 61881 (April 9, 2010), 75 FR 20028 (April 16, 2010) (SR–NYSEArca–2010–14) (order approving listing and trading of shares of United States Brent Oil Fund, LP); and 62527 (July 19, 2010), 75 FR 43606 (July 26, 2010) (order approving listing and trading of shares of United States Commodity Index Fund).

[7] According to the Registration Statement, the pursuit of daily leveraged investment goals means that the return of the Fund for a period longer than a full trading day may have no resemblance to 300% of the return of the Benchmark Oil Futures Contract for a period of longer than a full trading day because the aggregate return of the Fund is the product of the series of each trading day's daily returns.

(ii) followed by investments in futures contracts for other types of crude oil, diesel-heating oil, gasoline, natural gas, and other petroleum-based fuels, each of which are traded on the NYMEX, ICE Futures U.S. or other U.S. and foreign exchanges as well as cleared swap transactions and OTC swap contracts valued based on the foregoing; and

(iii) finally, invest in exchange-traded cash settled options on Oil Futures Contracts.

All such other investments are referred to as ''Other Oil-Related Investments'' and, together with Oil Futures Contracts, are ''Oil Interests.''

For the Fund to maintain a consistent 300% return versus the Benchmark Oil Futures Contract, the Fund's holdings must be rebalanced on a daily basis by buying additional Oil Interests or selling Oil Interests that it holds.

The Fund anticipates that, to the extent it invests in Oil Futures Contracts other than the Benchmark Oil Futures Contract or Other Oil-Related Investments, it will enter into various non-exchange-traded derivative contracts, including swaps and/or forward contracts, to hedge the short-term price movements of such Oil Futures Contracts (to the extent necessary) and Other Oil-Related Investments against the current Benchmark Oil Futures Contract. For example, if the Fund invested in diesel-heating oil futures contracts, it may also enter into a swap or forward contract that is valued based on the difference between the diesel-heating oil futures contract and the Benchmark Oil Futures Contract.

USCF currently anticipates that regulatory requirements such as accountability levels or position limits, and market conditions including those allowing the Fund to obtain greater liquidity or to execute transactions with more favorable pricing, could cause the Fund to invest in Other Oil-Related Investments.

The Fund will support its investments by holding the amounts of its margin, collateral and other requirements relating to these obligations in short-term obligations of the United States of two years or less (''Treasuries''), cash, and cash equivalents. The Fund may invest in money market funds, as well as Treasuries with a maturity date of two years or less, as an investment for assets not used for margin or collateral in the Oil Interests. The majority of the Fund's assets will be held in Treasuries, cash and/or cash equivalents with the Custodian.

The Fund will seek to invest in a combination of Oil Interests such that the daily changes in its NAV, measured in percentage terms, less the Fund's expenses, will track three times (3x) the daily changes in the price of the Benchmark Oil Futures Contract, also measured in percentage terms. As a specific benchmark, USCF will endeavor to place the Fund's trades in Oil Interests and otherwise manage the Fund's investments so that the difference between ''A'' and ''B'' will be plus/minus 0.30 percent (0.30%) of ''B'', where:

- A is the average daily percentage change in the Fund's per Share NAV for any period of thirty (30) successive valuation days, *i.e.,* any New York Stock Exchange (''NYSE'') trading day as of which the Fund calculates its per Share NAV, less the Fund's expenses; and
- B is three times the average daily percentage change in the price of the Benchmark Oil Futures Contract over the same period.

According to the Registration Statement, the design of the Fund's Benchmark Oil Futures Contract is such that every month it begins by using the near month contract to expire until the near month contract is within two weeks of expiration, when, over a four day period, it transitions to the next month contract to expire as its benchmark contract and keeps that contract as its benchmark until it becomes the near month contract and close to expiration. In the event of a crude oil futures market where near month contracts trade at a higher price than next month to expire contracts (''backwardation''), then, absent the impact of the overall movement in crude oil prices, the value of the benchmark contract would tend to rise as it approaches expiration. Conversely, in the event of a crude oil futures market where near month contracts trade at a lower price than next month contracts (''contango''), then, absent the impact of the overall movement in crude oil prices, the value of the benchmark contract would tend to decline as it approaches expiration.

According to the Registration Statement, USCF believes that market arbitrage opportunities will cause daily changes in the Fund's Share price on the Exchange on a percentage basis, to closely track the daily changes in the Fund's per Share NAV on a percentage basis.

According to the Registration Statement, the Fund has not limited the size of its offering and is committed to utilizing substantially all of its proceeds to purchase Oil Futures Contracts and Other Oil-Related Investments. If the Fund encounters accountability levels, position limits, or price fluctuation limits for Oil Futures Contracts on the NYMEX or ICE Futures U.S., it may then, if permitted under applicable regulatory requirements, purchase Oil Futures Contracts on other exchanges that trade listed crude oil futures or invest in Other Oil-Related Investments to meet its investment objective.

The Fund will invest in Oil Interests to the fullest extent possible without being unable to satisfy its current or potential margin or collateral obligations with respect to its investments in Oil Interests. In pursuing this objective, the primary focus of USCF will be the investment in futures contracts and the management of the Fund's investments in Treasuries, cash and/or cash equivalents for margining purposes and as collateral.

On each day during the four-day period, USCF anticipates it will ''roll'' the Fund's positions in Oil Interests by closing, or selling, a percentage of the Fund's positions in Oil Interests and reinvesting the proceeds from closing those positions in new Oil Interests that reflect the change in the Benchmark Oil Futures Contract.

Approximately 15% to 90% of the Fund's assets will be committed as margin for commodity futures contracts. However, from time to time, the percentage of assets committed as margin may be substantially more, or less, than such range. Ongoing margin and collateral payments will generally be required for both exchange-traded and OTC contracts based on changes in the value of the Oil Interests.

United States 3x Short Oil Fund

According to the Fund's Registration Statement, the investment objective of the Fund will be for the daily changes in percentage terms of its shares' per share net asset value (''NAV'') to reflect three times the inverse (−3x) of the daily change in percentage terms of the price of the Benchmark Oil Futures Contract, less the Fund's expenses. To achieve this objective, USCF will endeavor to have the notional value of the Fund's aggregate short exposure to the Benchmark Oil Futures Contract at the close of each trading day approximately equal to the 300% of the Fund's NAV. The Fund will seek a return that is −300% of the return of the Benchmark Oil Futures Contract for a single day and does not seek to achieve its stated investment objective over a period of time greater than one day.[8]

[8] According to the Registration Statement, the pursuit of daily leveraged investment goals means that the return of the Fund for a period longer than a full trading day may have no resemblance to −300% of the return of the Benchmark Oil Futures

Continued

The Fund will seek to achieve its investment objective by primarily investing in futures contracts for light, sweet crude oil that are traded on the NYMEX, ICE Futures U.S. or other U.S. and foreign exchanges (collectively, ''Oil Futures Contracts'').

The Fund will, to a lesser extent and in view of regulatory requirements and/or market conditions:

(i) Next invest in (a) cleared swap transactions based on the Benchmark Futures Contract, (b) OTC negotiated swap contracts that are valued based on the Benchmark Futures Contract, and (c) forward contracts for oil;

(ii) followed by investments in futures contracts for other types of crude oil, diesel-heating oil, gasoline, natural gas, and other petroleum-based fuels, each of which that are traded on the NYMEX, ICE Futures U.S. or other U.S. and foreign exchanges and as well cleared swap transactions and OTC swap contracts valued based on the foregoing; and

(iii) finally, invest in exchange-traded cash settled options on Oil Futures Contracts.

For the Fund to maintain a consistent −300% return versus the Benchmark Oil Futures Contract, the Fund's holdings must be rebalanced on a daily basis by buying additional Oil Interests or selling Oil Interests that it holds.

The Fund anticipates that to the extent it invests in Oil Futures Contracts other than and the Benchmark Oil Futures Contract or Other Oil-Related Investments, it will enter into various non-exchange-traded derivative contracts, including swaps and/or forward contracts, to hedge the short-term price movements of such Oil Futures Contracts (to the extent necessary) and Other Oil-Related Investments against the current Benchmark Oil Futures Contract. For example, if the Fund invested in diesel-heating oil futures contracts, it may also enter into a swap or forward contract that is valued based on the difference between the diesel-heating oil futures contract and the Benchmark Oil Futures Contract.

USCF currently anticipates that regulatory requirements such as accountability levels or position limits, and market conditions including those allowing the Fund to obtain greater liquidity or to execute transactions with more favorable pricing, could cause the Fund to invest in Other Oil-Related Investments.

The Fund will support its investments by holding the amounts of its margin, collateral and other requirements relating to these obligations in Treasuries, cash, and cash equivalents. The Fund may invest in money market funds, as well as Treasuries with a maturity date of two years or less, as an investment for assets not used for margin or collateral in the Oil Interests. The majority of the Fund's assets will be held in Treasuries, cash and/or cash equivalents with the Custodian.

The Fund will seek to invest in a combination of Oil Interests such that the daily changes in its NAV, measured in percentage terms, less the Fund's expenses, will track three times the inverse (−3x) of the daily changes in the price of the Benchmark Oil Futures Contract, also measured in percentage terms. As a specific benchmark, USCF will endeavor to place the Fund's trades in Oil Interests and otherwise manage the Fund's investments so that the difference between ''A'' and ''B'' will be plus/minus 0.30 percent (0.30%) of ''B'', where:

- A is the average daily percentage change in the Fund's per Share NAV for any period of thirty (30) successive valuation days, *i.e.,* any NYSE trading day as of which the Fund calculates its per Share NAV, less the Fund's expenses; and
- B is three times the inverse of the average daily percentage change in the price of the Benchmark Oil Futures Contract over the same period.

The design of the Fund's Benchmark Oil Futures Contract is such that every month it begins by using the near month contract to expire until the near month contract is within two months of expiration, when, over a four-day period, it transitions to the next month contract to expire as its benchmark contract and keeps that contract as its benchmark until it becomes the near month contract and close to expiration. In the event of a crude oil futures market where the near month contracts trade at a higher price than next month to expire contracts (''backwardation''), then, absent the impact of the overall movement in crude oil prices, the value of the benchmark contract would tend to rise as it approaches expiration. Conversely, in the event of a crude oil futures market where near month contracts trade at a lower price than next month contracts (''contango''), then, absent the impact of the overall movement in crude oil prices, the value of the benchmark contract would tend to decline as it approaches expiration.

USCF believes that market arbitrage opportunities will cause daily changes in the Fund's Share price on the Exchange on a percentage basis, to closely track the daily changes in the Fund's per Share NAV on a percentage basis.

According to the Registration Statement, the Fund has not limited the size of its offering and is committed to utilizing substantially all of its proceeds to purchase Oil Futures Contracts and Other Oil-Related Investments. If the Fund encounters accountability levels, position limits, or price fluctuation limits for Oil Futures Contracts on the NYMEX or ICE Futures, it may then, if permitted under applicable regulatory requirements, purchase Oil Futures Contracts on other exchanges that trade listed crude oil futures or invest in Other Oil-Related Investments to meet its investment objective.

The Fund will invest in Oil Interests to the fullest extent possible without being unable to satisfy its current or potential margin or collateral obligations with respect to its investments in Oil Interests. In pursuing this objective, the primary focus of USCF is the investment in futures contracts and the management of the Fund's investments in Treasuries, cash and/or cash equivalents for margining purposes and as collateral.

On each day during the four-day period, USCF anticipates it will ''roll'' the Fund's positions in Oil Interests by closing, or selling, a percentage of the Fund's positions in Oil Interests and reinvesting the proceeds from closing those positions in new Oil Interests that reflect the change in the Benchmark Oil Futures Contract.

Approximately 15% to 90% of the Fund's assets will be committed as margin for commodity futures contracts. However, from time to time, the percentage of assets committed as margin may be substantially more, or less, than such range. Ongoing margin and collateral payments will generally be required for both exchange-traded and OTC contracts based on changes in the value of the Oil Interests.

Net Asset Value

According to the Registration Statements, each Fund's per Share NAV will be calculated by taking the current market value of its total assets; subtracting any liabilities; and dividing that total by the total number of outstanding Shares.

The Administrator intends to calculate the NAV of each Fund once each NYSE trading day. The NAV for a normal trading day will be released after 4:00 p.m. Eastern time. Trading during the Exchange's Core Trading Session typically closes at 4:00 p.m. Eastern time. The Administrator will use the

Contract for a period of longer than a full trading day because the aggregate return of the Fund is the product of the series of each trading day's daily returns.

NYMEX closing price (determined at the earlier of the close of the NYMEX or 2:30 p.m. Eastern time) for the contracts traded on the NYMEX, but calculate or determine the value of all investments of each Fund using market quotations, if available, or other information customarily used to determine the fair value of such investments as of the earlier of the close of the NYSE Arca or 4:00 p.m. Eastern time. Other information customarily used in determining fair value includes information consisting of market data in the relevant market supplied by one or more third parties including, without limitation, relevant rates, prices, yields, yield curves, volatilities, spreads, correlations or other market data in the relevant market; or information of the types described above from internal sources if that information is of the same type used by a Fund in the regular course of business for the valuation of similar transactions. The information may include costs of funding, to the extent costs of funding are not and would not be a component of the other information being utilized. Third parties supplying quotations or market data may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors, brokers and other sources of market information. Money market funds will be valued at NAV.

Indicative Fund Value

In addition, in order to provide updated information relating to a Fund for use by investors and market professionals, the Exchange will calculate and disseminate throughout the Exchange's Core Trading Session of 9:30 a.m. Eastern time to 4:00 p.m. Eastern time on each trading day an updated ''Indicative Fund Value'' (''IFV''). The IFV will be calculated by using the prior day's closing NAV per Share of a Fund as a base and updating that value throughout the trading day to reflect changes in the most recently reported trade price for the active light, sweet Oil Futures Contract on the NYMEX.

The IFV will be disseminated on a per Share basis for each Fund every 15 seconds during the Exchange's Core Trading Session. The normal trading hours of the NYMEX are 9:00 a.m. Eastern time to 2:30 p.m. Eastern time. There will be a gap in time at the end of each day during which a Fund's Shares are traded on the NYSE Arca, but real-time NYMEX trading prices for oil futures contracts traded on the NYMEX are not available. During such gaps in time, the IFV will be calculated based on the end of day price of such Oil Futures Contracts from the NYMEX's immediately preceding trading session. In addition, other Oil Futures Contracts, Other Oil-Related Investments and Treasuries held by a Fund will be valued by the Administrator, using rates and points received from client-approved third party vendors and advisor quotes. These investments will not be included in the IFV.

Creation and Redemption of Shares

According to the Registration Statements, each Fund intends to create and redeem Shares in one or more ''Creation Baskets'' or ''Redemption Baskets'' of 50,000 Shares. The creation and redemption of baskets will be made only in exchange for delivery to a Fund or the distribution by a Fund of the amount of Treasuries and/or cash represented by the baskets being created or redeemed, the amount of which will be equal to the combined NAV of the number of Shares of a Fund included in the baskets being created or redeemed determined as of 4:00 p.m. Eastern time on the day the order to create or redeem baskets is properly received.

Authorized Participants will be the only persons that may place orders to create and redeem baskets. Authorized Participants must be (1) registered broker-dealers or other securities market participants, such as banks and other financial institutions, that are not required to register as broker-dealers to engage in securities transactions described below, and (2) Depository Trust Company (''DTC'') Participants.

Creation Procedures

On any business day, an Authorized Participant may place an order with the Marketing Agent to create one or more baskets. For purposes of processing purchase and redemption orders, a ''business day'' means any day other than a day when NYSE or any futures exchange upon which a Benchmark Oil Futures Contract is traded is closed for regular trading. Purchase orders must be placed by 12:00 p.m. Eastern time or the close of regular trading on NYSE Arca, whichever is earlier. The day on which the Marketing Agent receives a valid purchase order is referred to as the purchase order date.

By placing a purchase order, an Authorized Participant agrees to (1) deposit Treasuries, cash, or a combination of Treasuries and cash with the Custodian of a Fund, and (2) if required by USCF in its sole discretion, enter into or arrange for a block trade, an exchange for physical or exchange for swap, or any other OTC transaction (through itself or a designated acceptable broker) with a Fund for the purchase of a number and type of futures contracts at the closing settlement price for such contracts on the purchase order date. If an Authorized Participant fails to consummate (1) and (2), the order shall be cancelled.

Determination of Required Deposits

The total deposit required to create each basket (''Creation Basket Deposit'') is the amount of Treasuries and/or cash that is in the same proportion to the total assets of a Fund (net of estimated accrued but unpaid fees, expenses and other liabilities) on the purchase order date as the number of Shares to be created under the purchase order is in proportion to the total number of Shares outstanding on the purchase order date. The Marketing Agent will publish an estimate of the Creation Basket Deposit requirements at the beginning of each business day.

Delivery of Required Deposits

An Authorized Participant who places a purchase order will be responsible for transferring to a Fund's account with the Custodian the required amount of Treasuries and/or cash by noon Eastern time on the third business day following the purchase order date. Upon receipt of the deposit amount, the Administrator will direct DTC to credit the number of baskets ordered to the Authorized Participant's DTC account on the third business day following the purchase order date.

Redemption Procedures

According to the Registration Statement, the procedures by which an Authorized Participant will be able to redeem one or more baskets will mirror the procedures for the creation of baskets. On any business day, an Authorized Participant may place an order with the Marketing Agent to redeem one or more baskets. Redemption orders must be placed by 12:00 p.m. Eastern time or the close of regular trading on NYSE Arca, whichever is earlier. A redemption order so received will be effective on the date it is received in satisfactory form by the Marketing Agent (''Redemption Order Date''). An Authorized Participant may not withdraw a redemption order.

Determination of Redemption Distribution

The redemption distribution from a Fund will consist of a transfer to the redeeming Authorized Participant of an amount of Treasuries and/or cash that is in the same proportion to the total assets of a Fund (net of estimated accrued but unpaid fees, expenses and other

liabilities) on the date the order to redeem is properly received as the number of Shares to be redeemed under the redemption order is in proportion to the total number of Shares outstanding on the date the order is received. The Marketing Agent will publish an estimate of the redemption distribution per basket as of the beginning of each business day.

Suspension or Rejection of Redemption Orders

USCF may, in its discretion, suspend the right of redemption, or postpone the redemption settlement date, (1) for any period during which NYSE Arca or any of the futures exchanges upon which a Benchmark Oil Futures Contract is traded is closed other than customary weekend or holiday closings, or trading on NYSE Arca or such futures exchanges is suspended or restricted, (2) for any period during which an emergency exists as a result of which delivery, disposal or evaluation of Treasuries is not reasonably practicable, or (3) for such other period as USCF determines to be necessary for the protection of the shareholders. For example, USCF may determine that it is necessary to suspend redemptions to allow for the orderly liquidation of a Fund's assets at an appropriate value to fund a redemption. If USCF has difficulty liquidating a Fund's positions, *e.g.,* because of a market disruption event in the futures markets or an unanticipated delay in the liquidation of a position in an over the counter contract, it may be appropriate to suspend redemptions until such time as such circumstances are rectified.

Availability of Information

The NAV for the Funds' Shares will be disseminated daily to all market participants at the same time. The Exchange will make available on its Web site daily trading volume of each of the Shares, closing prices of such Shares, and number of Shares outstanding. The intraday, closing prices, and settlement prices of the Oil Futures Contracts will be readily available from the applicable futures exchange Web sites, automated quotation systems, published or other public sources, or major market data vendors.

Complete real-time data for the Oil Futures Contracts is available by subscription through on-line information services. ICE Futures U.S. and NYMEX also provide delayed futures information on current and past trading sessions and market news free of charge on their respective Web sites. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association (''CTA''). The IFV will be available through on-line information services.

In addition, the Funds' Web site, *www.uscfinvestments.com,* will display the applicable end of day closing NAV. The daily holdings of each Fund will be available on the Funds' Web site. Each Fund's total portfolio composition will be disclosed each business day that the NYSE Arca is open for trading, on the Funds' Web site. The Web site disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the composite value of the total portfolio, (ii) the name, percentage weighting, and value of Oil Interests, (iii) the name and value of each Treasury security and cash equivalent, and (iv) the amount of cash held in each Fund's portfolio. The Funds' Web site will be publicly accessible at no charge.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of a Fund.[9] Trading in Shares of a Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares of a Fund inadvisable.

The Exchange may halt trading during the day in which an interruption to the dissemination of the IFV or the value of the Benchmark Oil Futures Contract occurs. If the interruption to the dissemination of the IFV, or the value of the Benchmark Oil Futures Contract persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. E.T. in accordance with NYSE Arca Equities Rule 7.34 (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.200. The trading of the Shares will be subject to NYSE Arca Equities Rule 8.200, Commentary .02(e), which sets forth certain restrictions on Equity Trading Permit (''ETP'') Holders acting as registered Market Makers in Trust Issued Receipts to facilitate surveillance. The Exchange represents that, for initial and/or continued listing, the Funds will be in compliance with Rule 10A–3 [10] under the Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[11] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares of the Funds in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will

[9] *See* NYSE Arca Equities Rule 7.12.

[10] 17 CFR 240.10A–3.

[11] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

communicate as needed regarding trading in the Shares and certain Oil Futures Contracts with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and certain Oil Futures Contracts from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and certain Oil Futures Contracts from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement (''CSSA'').[12]

Not more than 10% of the net assets of a Fund in the aggregate invested in futures contracts shall consist of futures contracts whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolios, or (b) limitations on portfolio holdings or reference assets shall constitute continued listing requirements for listing the Shares on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by a Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Equities Rule 5.5(m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) The risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated IFV will not be calculated or publicly disseminated; (2) the procedures for purchases and redemptions of Shares in Creation Baskets and Redemption Baskets (and that Shares are not individually redeemable); (3) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (4) how information regarding the IFV is disseminated; (5) that a static IFV will be disseminated, between the close of trading on the CME and the close of the NYSE Arca Core Trading Session; (6) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (7) trading information.

In addition, the Information Bulletin will advise ETP Holders, prior to the commencement of trading, of the prospectus delivery requirements applicable to a Fund. The Exchange notes that investors purchasing Shares directly from a Fund will receive a prospectus. ETP Holders purchasing Shares from a Fund for resale to investors will deliver a prospectus to such investors. The Information Bulletin will also discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. In addition, the Information Bulletin will reference that a Fund is subject to various fees and expenses described in the Registration Statement. The Information Bulletin will also reference that the CFTC has regulatory jurisdiction over the trading of Oil Futures Contracts traded on U.S. markets.

The Information Bulletin will also disclose the trading hours of the Shares and that the NAV for the Shares will be calculated after 4:00 p.m. E.T. each trading day. The Information Bulletin will disclose that information about the Shares will be publicly available on the Funds' Web site.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[13] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.200. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares of the Funds in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, and certain Oil Futures Contracts with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and certain Oil Futures Contracts from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and certain Oil Futures Contracts from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Not more than 10% of the net assets of a Fund in the aggregate invested in futures contracts shall consist of futures contracts whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. The Exchange will make available on its Web site daily trading volume of each of the Shares, closing prices of such Shares, and number of Shares outstanding. The intraday, closing prices, and settlement prices of the Oil Futures Contracts will be readily available from the applicable exchange Web site, automated quotation systems, published or other public sources, or on-line information services.

Complete real-time data for the Oil Futures Contracts is available by subscription from on-line information services. ICE Futures U.S. and NYMEX also provide delayed futures information on current and past trading sessions and market news free of charge on their Web sites. Information regarding exchange-traded cash-settled options and cleared swap contracts will be available from the applicable exchanges and major market data vendors. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. In addition, the Funds' Web site, will display the applicable end of day closing NAV. Each Fund's total portfolio composition will be disclosed each business day that the NYSE Arca is open for trading, on the Funds' Web site. The Web site disclosure of portfolio

[12] For a list of the current members of ISG, *see www.isgportal.org*. The Exchange notes that not all components of the Funds may trade on markets that are members of ISG or with which the Exchange has in place a CSSA,

[13] 15 U.S.C. 78f(b)(5).

holdings will be made daily and will include, as applicable, (i) the composite value of the total portfolio, (ii) the name, percentage weighting, and value of each Benchmark Oil Futures Contract, (iii) the name and value of each Treasury security and cash equivalent, and (iv) the amount of cash held in each Fund's portfolio.

Moreover, prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of a Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of additional types of Trust Issued Receipts based on oil prices that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of additional types of Trust Issued Receipts based on oil prices and that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (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 such proposed rule change; or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2016–173 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2016–173. 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 will also 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–2016–173 and should be submitted on or before February 1, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–00366 Filed 1–10–17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79746; File No. SR–DTC–2016–014]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified by Amendment No. 1, Regarding the Update of Its Corporate Action Service for the Processing of Redemptions Events and the Transition to International Organization for Standardization 20022 Messaging for Corporate Action Announcements

January 5, 2017.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'') and Rule 19b–4[2] thereunder, notice is hereby given that on December 22, 2016, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by DTC. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(4) thereunder.[4] On January 4, 2017, DTC filed Amendment No. 1 to the proposed rule change.[5] The proposed rule change was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

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[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4).

[5] In Amendment No. 1, DTC modified the Implementation Date section to correctly describe the effective date of the filing as January 1, 2017. DTC did not propose any other changes to the filing in Amendment No. 1.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change by DTC would revise its Procedures[6] set forth in the Guide to: (1) Update its corporate action service by transitioning corporate action[7] functions on its Participant Terminal System (''PTS'') and its Participant Browser Service (''PBS'') systems[8] for the processing of Redemptions to its Corporate Action Web (''CA Web'') system; (2) reflect the transition from DTC's proprietary Computer-to-Computer Facility (''CCF'')[9] files to International Organization for Standardization (''ISO'') 20022 messaging to communicate corporate action announcements (''Announcements''); (3) establish the start date (''Fee Start Date'') for the fee associated with CCF Reorganization Announcement files and the dates for the retirement of all CCF Announcement files; and (4) make other ministerial changes as more fully described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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. DTC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change by DTC would revise its Procedures set forth in the Guide to: (1) Update its corporate action service by transitioning corporate action functions on its PTS and PBS systems for the processing of Redemptions events to CA Web; (2) reflect the transition from DTC's proprietary CCF files to ISO 20022 messaging to communicate Announcements; (3) establish the Fee Start Date associated with CCF Reorganizations Announcement files, and the dates for the retirement of CCF files for all Announcements; and (4) make other ministerial changes as more fully described below.

(i) Background

Beginning in 2011, DTC has filed a series of rule changes to update its corporate action services by migrating the corporate action functions for Distributions from PTS/PBS to CA Web, a then new browser user interface,[10] and to implement ISO 20022 messaging to replace DTC's CCF Announcement files.[11] After a Participant testing phase, PTS/PBS functions for Distributions were retired in 2015, and the use of CA Web for processing Distributions became mandatory for all Participants.[12]

(ii) Transition to CA Web for Redemptions

With this proposed rule change, DTC would transition PTS/PBS functions for Redemptions to CA Web,[13] and update the Guide to add the appropriate references. The proposed rule change would establish a parallel testing period for CA Web Redemptions functions beginning in Q4 of 2016 which would conclude in Q1 of 2017, at which time Redemptions activity within the following PTS and corresponding PBS functions would be retired and transitioned to CA Web: ADJI (Adjustment Inquiries), RIPS (Reorganization Inquiry for Participants), and SDAR Dept. R (Same Day Allocation Reporting).[14] DTC has been communicating this change to Participants through weekly CA Web review sessions, Important Notices, and industry outreach.[15]

(iii) CCF Files and ISO 20022

Since 2011, DTC has been encouraging Participants to migrate from CCF Announcement files to ISO 20022 messaging[16] by providing parallel production testing access, an online learning center, hosting ISO specific monthly calls and offering a dedicated mailbox for client inquiries. Certain Participants nonetheless had asked whether DTC could continue supporting CCF Files while they migrated to ISO 20022 messaging, and indicated that they were willing to pay for the continued use of the CCF Files.

In response to these Participant requests, on December 24, 2015, DTC filed a rule change postponing the date for the retirement of CCF Announcement files for Distributions, Redemptions, and Reorganizations, and, in order to encourage the transition to ISO 20022, implementing, in phases, a fee (''CCF File Fee'') for Participants that have not migrated to ISO 20022 messaging and continue to receive the

[6] Each capitalized term not otherwise defined herein has its respective meaning as set forth in the Rules, By-Laws and Organization Certificate of DTC (''DTC Rules''), *available at http://www.dtcc.com/legal/rules-and-procedures.aspx* in the Redemptions Service Guide (''Guide''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Redemptions.pdf?la=en;* and in the Guide to the 2016 DTC Fee Schedule (''Fee Schedule''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/fee-guides/dtcfee guide.pdf?la=en.*

[7] DTC offers an array of services for processing corporate action events. The services fall into three categories of corporate action events: (i) Distributions, such as cash and stock dividends, principal and interest, and capital gain distributions (collectively, ''Distributions''); (ii) redemptions such as full and partial calls, final paydowns, and maturities (collectively, ''Redemptions''); and (iii) reorganizations, which include both mandatory and voluntary reorganizations such as exchange offers, conversions, Dutch auctions, mergers, puts, reverse stock splits, tender offers, and warrant exercises (collectively, ''Reorganizations'').

[8] PTS and PBS are user interfaces for DTC's Settlement and Asset Services functions. PTS is mainframe-based and PBS is web-based with a mainframe back-end. Participants may use either PTS or PBS, as they are functionally equivalent. References to a particular PTS function in this rule filing include the corresponding PBS function.

[9] CCF is a transmission system for input and output based on various protocols between the mainframe computer facility of a user of DTC's services and DTC's mainframe computer facility.

[10] *See* Securities Exchange Act Release No. 68114 (October 26, 2012); 77 FR 66497 (November 5, 2012) (SR–DTC–2012–08).

[11] *See* Securities Exchange Act Release No. 63886 (February 10, 2011), 76 FR 9070 (February 16, 2011) (SR–DTC–2011–02); Securities Exchange Act Release No. 68114 (October 26, 2012), 77 FR 66497 (November 5, 2011) (SR–DTC–2012–08).

[12] *See* Securities Exchange Act Release No. 73864 (December 17, 2014); 79 FR 77063 (December 23, 2014) (SR–DTC–2014–12).

[13] In PTS/PBS, corporate actions are announced using DTC proprietary codes to signify event types. CA Web replaces DTC's proprietary codes with market standard language. For example, a cash dividend payment that PTS/PBS identifies as a ''08'' function code is identified in CA Web as a ''Cash Dividend'' event. Additionally, CA Web incorporates the entire lifecycle of an event into one platform with a unique corporate action identifier that follows the event through its lifecycle. CA Web gives Participants the ability to customize screen displays and offers flexible methods for event search, neither of which is available in the PTS/PBS systems.

[14] *See* PTS/PBS Function Guides, *available at http://www.dtcc.com/matching-settlement-and-asset-services/edl-ptspbs-function-guides.*

[15] *See* Important Notice B 3253–16 (April 25, 2016); SIFMA Corporate Actions Section Newsletter (June 2015), *available at http://www.sifma.org/uploadedfiles/societies/sifma_corporate_actions_section/cas-newsletter-june2015.pdf?n=65777.*

[16] ISO 20022 is a business-model-based standard for the development of messages for the international financial services industry and can support different messaging syntaxes. It provides the financial industry with a common language to capture business transactions and associated message flows. The use of ISO 20022 messaging improves transparency and adds efficiency in Announcements and the processing of corporate actions. In contrast, CCF files use DTC proprietary functions and activity codes that differ from the market standard. With ISO 20022 messaging, Announcements are event based and identified by a unique corporate action ID. ISO 20022 messages provide more data elements than the CCF files and they are available in near real time throughout the day.

CCF Announcement files.[17] The CCF File Fee is $50,000 per event group, per twelve month period. Pursuant to that rule change, the CCF File Fee for Distributions Announcements became effective on January 1, 2016, and the CCF File Fee for Redemptions Announcements became effective on July 1, 2016. The rule change did not provide a CCF Fee Start Date for Reorganizations Announcements.

This proposed rule change would amend the Fee Schedule to reflect a Fee Start Date of January 1, 2018 for Reorganizations Announcements. In addition, the proposed rule change would provide for the retirement of all corporate action CCF files for Announcements in accordance with the schedule below. DTC has communicated with its Participants about the retirement of CCF Announcement files for corporate action events through several DTC Important Notices, industry conferences and monthly industry calls.[18]

The retirement of CCF Announcement files would be implemented in the following phases:

Announcements CCF files	Fee start date	CCF file retirement date
Distributions	January 1, 2016	January 1, 2017.
Redemptions	July 1, 2016	July 1, 2017.
Reorganizations	January 1, 2018	December 31, 2018.

Finally, in order to align the Guide to Participants' use of ISO 20022 messaging for Redemptions Announcements, the Guide would be updated to add the appropriate references to ISO 20022.

(iv) Ministerial Changes

The proposed rule change would update the Guide to make ministerial updates to reflect current terminology and practice, and to remove references to outdated functions which had been replaced, as set forth below. The Guide would be updated to:

(1) Remove references to the functions of PTS that had been replaced by other functions over the past several years: Completion Flash (RIPS provides the same functionality), SDAL (replaced by SDAR), ACLP (replaced by RIPS), PTSI (replaced by dtcc.com and REOG (Reorganization Selection Menu)), and the PTS Network (replaced by RIPS).

(2) Remove references to the use of PTS Printers, PTS tickets, and PTS Flash. Similar functionality is available electronically on PTS/PBS, and would be available on CA Web.[19]

(3) Remove references to the PTS Manual, which has been superseded.[20]

(4) Remove reference to hard copy monthly bills. Hardcopy bills for corporate actions services were discontinued several years ago. Bills are sent via email and are available on iBill on the DTCC Portal.[21]

(5) Remove the provision that states that the Guide does not cover procedures relating to maturities and redemptions of commercial paper (''CP'') as it is no longer accurate. Currently, DTC does announce CP maturities, and therefore the Guide is applicable.

(6) Remove references to Next Day Funds Settlement (''NDFS'') service and related processes, which were superseded by DTC's Same Day Funds Settlement (''SDFS'') Service.[22] NDFS and SDFS ran concurrently until 1996.

(7) Replace references to Reorganization Notice (REORGN) CCF File, which had been replaced with the REOGN2 CCF File.

(8) In the section under the heading About Charge-Backs and Adjustments, replace the statement ''After crediting you with a redemption payment, DTC occasionally determines that this credit was improper due to an issuer's default on the payment, an error on the part of DTC, or some other reason'' with ''DTC does not credit proceeds to Participants until it is funded by the issuer/agent. Occasionally, it is determined that the proceeds credited were incorrect.'' to reflect the fact that DTC does not credit redemption proceeds to Participants until DTC is funded by the issuer/agent.

(9) In the section under the heading Reorg Deposit Service, correct the statement that DTC's Reorg Deposits Service allows Participants to deposit Eligible Securities ''that are undergoing or have undergone within the last two years, redemptions, maturity or mandatory reorganization maturity processing'' to (a) reflect that the Reorg Deposits Service accepts deposits of Eligible Securities that have undergone such processing at any point in time, and (b) remove the reference to ''mandatory reorganization maturity processing'' as it is duplicative of ''maturity''.

(10) Move screenshots of the ''Impartial Lottery Method for Allocating Called Securities'' and related images to Appendix A.

(11) Remove duplicative text.

(12) Update the text to reflect book-entry and FAST inventory, in addition to physical certificates.

(13) Clarify and streamline the text to improve readability.

(14) Add the title of the Guide and update the 'Important Legal Information' to align with other DTC service guides.

(15) Add background information on Redemptions services.

(16) Correct spelling, grammatical and typographical errors throughout.

(17) Update other text, including address, phone numbers, Web site information, and methods of delivering information.

Implementation Date

The proposed rule change would take effect on January 1, 2017.

2. Statutory Basis

DTC believes that the proposed rule change is consistent with the requirements of Section 17A(b)(3)(F) of the Act.[23]

Section 17A(b)(3)(F) of the Act requires, *inter alia,* that the DTC Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.[24] DTC believes that the proposed rule change would (a) promote efficiencies with a newer and

[17] *See* Securities Exchange Act Release No. 76811 (December 31, 2015), 81 FR 826 (January 7, 2016) (SR–DTC–2015–013).

[18] *See* Important Notice B3089–16 (April 1, 2016), *available at http://www.dtcc.com/~/media/Files/pdf/2016/4/1/3089-16.pdf.*

[19] *See* Important Notice B5007–09 (April 27, 2009), *available at http://www.dtcc.com/~/media/Files/pdf/2009/4/27/5007-09.pdf; see* Important Notice B7046–10 (August 6, 2010), *available at http://www.dtcc.com/~/media/Files/pdf/2010/8/2/7046-10.pdf.*

[20] *See* Securities Exchange Act Release No. 44719 (August 17, 2001), 66 FR 44656 (August 24, 2001) (SR–DTC–2001–01).

[21] *See* Important Notice B7586–10 (November 8, 2010), *available at www.dtcc.com/~/media/Files/pdf/2010/11/8/7586-10.pdf.*

[22] *See* Securities Exchange Act Release Nos. 24689 (July 9, 1987), 52 FR 26613 (SR–DTC–87–04) (order granting temporary approval to DTC's SDFS settlement service); 26051 (August 31, 1988), 53 FR 34853 (SR–DTC–88–06) (order granting permanent approval of DTC's SDFS settlement service).

[23] 15 U.S.C. 78q–1(b)(3)(F).

[24] *Id.*

more flexible interface for Participants to access Redemptions services, process their Redemptions allocations, and view event information, replacing the less efficient PTS/PBS interface for Redemptions with CA Web, and (b) provide clarity to Participants by updating and streamlining the Guide to better reflect DTC's Redemptions services and practices, including the migration to ISO 20022 messaging and the transition to CA Web, and by making ministerial updates and corrections. Therefore, by promoting efficiencies for Participants' processing of Redemptions at DTC, and updating the Guide to reflect the current state of DTC's services in this regard, the proposed rule change promotes the prompt and accurate clearance and settlement of securities transactions consistent with the requirements of the Act, in particular Section 17A(b)(3)(F), cited above.

In addition, by establishing the Fee Start Date for the Reorganizations CCF File Fee and the retirement dates for CCF files for Distributions, Redemptions, and Reorganizations Announcements, the proposed rule change would require Participants to complete their transition to ISO 20022 messaging by a date certain. ISO 20022 messaging provides Participants with (a) more data fields than are in CCF files, increasing transparency about the events being announced, and (b) near real-time industry standard messaging, which is not available for CCF files, providing consistency for Participants and accelerating the flow of information, therefore increasing efficiency. Ultimately, DTC expects that Participants would better process their announcements, instructions, entitlements and allocations, promoting the prompt and accurate clearance and settlement of securities transactions consistent with the requirements of the Act, in particular Section 17A(b)(3)(F), cited above.

(B) Clearing Agency's Statement on Burden on Competition

DTC does not believe that the proposed rule change would have any impact on competition, because the transition from PTS/PBS functions for the processing of Redemptions to CA Web would only enhance and simplify a current service and process, and the retirement of the CCF Announcement files would remove an outdated process and replace it with an improved standard of messaging. Both the CA Web and ISO 20022 messaging would be available to Participants without additional costs. In addition, since Participants have been aware of these forthcoming changes, and any related operational impact on their systems, for several years, DTC believes that, they have had sufficient time to mitigate any implementation costs.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not been solicited or received. DTC will notify the Commission of any written comments received by DTC.

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) [25] of the Act and subparagraph (f)(4) of Rule 19b–4 [26] thereunder. 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 1, 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–DTC–2016–2016–014 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–DTC–2016–014. 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 DTC and on DTCC's Web site (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2016–014 and should be submitted on or before February 1, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–00369 Filed 1–10–17; 8:45 am]

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[25] 15 U.S.C. 78s(b)(3)(A).

[26] 17 CFR 240.19b–4(f)(4).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79743; File No. SR–C2–2016–021]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Order Approving a Proposed Rule Change Relating to Opening and Closing Rotations for Series Trading on the Exchange

January 5, 2017.

I. Introduction

On November 4, 2016, C2 Options Exchange, Incorporated (''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend its rules relating to the opening and closing of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

series for trading on the Exchange. The Commission published the proposed rule change for comment in the **Federal Register** on November 21, 2016.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

C2 proposes to amend its rules relating to the opening and closing of series for trading on the Exchange. Rule 6.11 describes the process that the automated trading system used by the Exchange for the trading of options contracts (the ''System'') uses to open series on the Exchange each trading day. The Exchange may also use this process for closing series or opening series after a trading halt. The Exchange is proposing various changes to reorganize and simplify the rule and to more accurately reflect current System functionality.[4]

According to the Exchange, the System generally processes the opening of each series in four stages: [5]

(1) *Pre-Opening Period:* During the pre-opening period, the System accepts orders and quotes and disseminates messages that contain information based on resting orders and quotes in the book, which may include the expected opening price (''EOP''), expected opening size (''EOS''), any reason why a series may not open, and imbalance information, including the size and side of an imbalance (collectively, ''expected opening information'' or ''EOIs'').

(2) *Initiation of the Opening Rotation:* The System then initiates the opening rotation procedure and distributes a ''Rotation Notice'' to market participants.

(3) *Opening Rotation Period:* During the opening rotation period, the System matches and executes orders and quotes against each other to establish an opening Exchange best bid and offer (''BBO'') and trade price for each series while continuing to disseminate EOIs.

(4) *Opening of Trading:* The System then opens series for trading, subject to the satisfaction of certain conditions.

According to C2, the proposed rule change is designed to more clearly organize Rule 6.11 in this sequential order and makes the additional specific changes discussed in more detail below.

Pre-Opening Period

Rule 6.11(a) currently provides that the System accepts orders and quotes for a period of time before the opening of trading in the underlying security or, in the case of index options, prior to 8:30 a.m.[6] The Exchange proposes to amend Rule 6.11(a) to provide that the pre-opening period will begin no later than 15 minutes prior to the expected initiation of an opening rotation and no earlier than 2:00 a.m.[7]

Under the proposal, the Exchange generally will not restrict the size or origin code of orders that may be submitted during the pre-opening period. Therefore, the proposed rule change amends Rule 6.11(a)(1) to delete the provision that requires the Exchange to designate on a class-by-class basis the eligible order size, eligible order type, and eligible order origin code which the System will accept.[8] Additionally, the proposed rule change clarifies that the System will accept all quotes and all order types during the pre-opening period except for immediate-or-cancel, fill-or-kill, intermarket sweep orders, and Market-Maker trade prevention orders.[9]

The proposed rule change amends Rule 6.11(a)(2) in several ways. First, it defines EOIs and specifies the timing of their dissemination. EOIs contain information based on resting orders and quotes in the Book, including the EOP, the EOS, any reason why a series may not open pursuant to paragraph (d) of Rule 6.11,[10] and any imbalance information, including the size and side of the imbalance. EOIs will be disseminated to all market participants that have elected to receive them beginning at a time determined by the Exchange, which will be no earlier than three hours prior to the expected initiation of an opening rotation for a series. The System will then disseminate EOIs at regular intervals of time, or less frequently if there are no updates since the previously disseminated EOI.[11]

The proposed rule change further modifies Rule 6.11(a)(2) to redefine the terms EOP and EOS and address when that information will be disseminated. Currently, Rule 6.11(a)(2) states that the EOP is the price at which the greatest number of orders and quotes in the book are expected to trade and provides that an EOP will only be calculated if (a) there are market orders in the book, or the book is crossed or locked and (b) at least one quote is present. The proposed rule change revises this language to state that the EOP is the price at which any opening trade is expected to execute and adds that the EOS is the size of any expected opening trade. The proposed rule change further states the System will only disseminate EOP and EOS messages if the width between the highest quote bid and lowest quote offer on the Exchange or disseminated by other exchanges is no wider than the ''Opening Exchange Prescribed Width range'' or ''OEPW range'' (as described below).[12]

Opening Rotation Initiation and Notice

Rule 6.11(b) currently provides that, unless unusual circumstances exist, at a randomly selected time within a number of seconds after the opening trade and/or the opening quote is disseminated in the market for the underlying security[13] (or after 8:30 a.m. for index options), the System initiates the opening rotation procedure and sends a notice (''Rotation Notice'') to market participants.

The Exchange proposes to amend Rule 6.11(b) to provide that the System will initiate the opening rotation procedure and send out a Rotation Notice on a class-by-class basis as follows:

- With respect to equity and ETP options, after the opening trade or the opening quote is disseminated in the market for the underlying security, or at 8:30 a.m. for classes determined by the Exchange (including over-the-counter equity classes); or
- with respect to index options, at 8:30 a.m., or at the later of 8:30 a.m. and the time the Exchange receives a

[3] *See* Securities Exchange Act Release No. 79315 (November 15, 2016), 81 FR 83313 (''Notice'').

[4] *See id.* at 83313.

[5] *See id.*

[6] All times set forth in Rule 6.11 are central time. *See id.* at 83313, n.3. In addition, since the System begins the pre-opening period at the same time for each class within each type of option (equity, index and exchange-traded products (''ETPs'')), the proposed rule change deletes the provision of the current rule that says the Exchange will determine the time on a class-by-class basis. *See id.* at 83313.

[7] The Exchange notes that the pre-opening period currently begins at approximately 6:30 a.m. *See id.* at 83313, n.4.

[8] *See id.* at 83313.

[9] *See id.* at 83313–14 for a discussion of these order types, which are defined in Rule 6.10.

[10] Proposed paragraph (d) of Rule 6.11 sets forth certain opening conditions, which are discussed in greater detail below.

[11] *See* Notice, *supra* note 3, at 83314.

[12] *See id.* at 83313–14, for more detailed discussion of these changes to the pre-opening period. According to the Exchange, the OEPW range is a price protection measure intended to prevent orders from executing at extreme prices on the open. *See id.* at 83317.

[13] The ''market for the underlying security'' is currently the primary listing market, the primary volume market (defined as the market with the most liquidity in that underlying security for the previous two calendar months), or the first market to open the underlying security. Since the Exchange does not designate the primary volume market as the market for the underlying security for any class, the proposed rule change deletes that option. The proposed rule change also changes the term ''market'' to ''exchange'' and clarifies that the Exchange determines on a class-by-class basis which market is the market for the underlying security. *See id.* at 83314, n.8.

disseminated index value for classes determined by the Exchange.[14]

Opening Rotation Period

Rule 6.11(c) provides that after the Rotation Notice is sent, the System enters into a rotation period, during which the opening price is established for each series. The proposed rule change reorganizes paragraph (c) to more clearly demarcate and further describe (1) when the opening rotation period begins, (2) what happens during the period, (3) the handling of EOIs during the period, and (4) when the period ends.[15]

During the opening rotation period, the System establishes the opening trade price and the opening BBO by matching and executing resting orders and quotes against each other. The proposed rule change modifies the definition of the opening trade price of a series to be the ''market-clearing'' price, which is the single price at which the largest number of contracts in the book can execute, leaving bids and offers that cannot trade with each other.[16] The proposed rule change also states that all orders (except complex orders) and quotes in a series in the book prior to the opening rotation period participate in the opening rotation for a series. The Exchange notes that contingency orders that participate in the opening rotation may execute during the opening rotation period only if their contingencies are triggered.[17]

The proposed rule change clarifies that the System will continue to disseminate EOIs (not just the EOP and EOS) during the opening rotation period, which may be disseminated at more frequent intervals closer to the opening.[18] In addition, the proposed rule change updates the description of the length of the opening rotation period and adds detail to the description of how the System processes series to open following the opening rotation period. Specifically, current subparagraph (c)(2) states that the System will process the series of a class in a random order and the series will begin opening after a period following the Rotation Notice, which period may not exceed sixty seconds and will be established on a class-by-class basis by the Exchange.[19] Proposed subparagraph (c)(3) retains that process, but clarifies that C2 will determine the length and number of these intervals for all classes.[20]

Opening Quote and Trade Price

In its filing, the Exchange represented that, pursuant to the Options Price Reporting Authority (''OPRA'') Plan, once a series opens, the System disseminates all quote and trade price information to OPRA, including opening quote and trade price information.[21] Accordingly, the Exchange proposes to delete text in current paragraph (d) of Rule 6.11 stating that the opening price is determined by series and that C2 disseminates opening quote and trade information through OPRA, because the Exchange already disseminates such information pursuant to the OPRA Plan, and therefore believes that this provision is unnecessarily repetitive.[22] Despite the deletion of that language from the rule concerning reporting data through OPRA, the Exchange is not proposing a substantive change to reporting this information through OPRA.

Opening Conditions

Current Rule 6.11(e) provides that the System will not open a series if one of a number of specified conditions is met, including the absence of a quote or if the opening price would not be within an acceptable range, or if the opening trade would be at a price that is not the national best bid or offer (''NBBO'') or would leave a market order imbalance.[23] Current Rule 6.11(f) describes what happens when each of these conditions is present, including matching orders and quotes to the extent possible or exposing marketable orders at the NBBO under certain conditions. The proposed rule change would amend the opening conditions as follows:

(1) If there are no quotes on the Exchange or disseminated from at least one away exchange present in the series, the System will not open the series;

(2) if the width between the best quote bid and best quote offer, which may consist of Market-Makers quotes or bids and offers disseminated from an away exchange, is wider than an acceptable opening price range (as determined by the Exchange on a class-by-class and premium basis) (the OEPW range)[24] and there are orders or quotes marketable against each other or that lock or cross the OEPW range, the System will not open the series. However, if the opening quote width is no wider than the intraday acceptable price range for the series (''IEPW range'') and there are no orders or quotes marketable against each other or that lock or cross the OEPW range, the System will open the series. If the opening quote width is wider than the IEPW range, the System will not open the series. If the opening quote for a series consists solely of bids and offers disseminated from an away exchange(s), the System will open the series by matching orders and quotes to the extent they can trade and will report the opening trade, if any, at the opening trade price. The System will then expose any remaining marketable buy (sell) orders at the widest offer (bid) point of the OEPW range or NBO (NBB), whichever is lower (higher).

(3) if the opening trade price would be outside the OEPW range or the NBBO, the System will open the series by matching orders and quotes to the extent they can trade and will report the opening trade, if any, at an opening trade price not outside either the OEPW range or NBBO. The System will then expose any remaining marketable buy (sell) orders at the widest offer (bid) point of the OEPW range or NBO (NBB), whichever is lower (higher);

(4) if the opening trade would leave a market order imbalance, the System will open the series by matching orders and quotes to the extent they can trade and will report the opening trade, if any, at the opening trade price. The System will then expose any remaining marketable buy (sell) orders at the widest offer (bid) point of the OEPW range or NBO (NBB), whichever is lower (higher); or

(5) if the opening quote bid (offer) or the NBB (NBO) crosses the opening

[14] *See id.* at 83314–15 (providing detailed description of the Exchange's changes to initiating the opening rotation).

[15] *See* proposed Rule 6.11(c); *see also* Notice, *supra* note 3, at 83315.

[16] *See* Notice, *supra* note 3, at at 83315. If there are multiple prices at which the same number of contracts would clear, the System will use the price at or nearest to the midpoint of the range consisting of the higher of the opening NBB and widest bid point of the OEPW range, and the lower of the opening NBO and widest offer point of the OEPW range. *See id.*

[17] *See id.* Further, the Exchange notes that the proposed rule change moves the rule provision regarding the priority order of orders and quotes during this matching process from current subparagraph (g)(1) to proposed subparagraph (c)(1)(C). The System prioritizes orders in the following order: (1) Market orders, (2) limit orders and quotes whose prices are better than the opening price, and (3) resting orders and quotes at the opening price. The proposed rule change also notes that contingency orders are prioritized as set forth in Rule 6.12(c). *See id.* at 83315, n.11, and accompanying text.

[18] *See id.* at 83315.

[19] *See id.* at 83315–16.

[20] According to the Exchange, currently, the Exchange has set the period of time that must pass before the System begins processing series to open at one second, and the Exchange has set the number of intervals to one and the length of that interval to one second. As a result, the opening rotation period currently lasts one to two seconds. *See* Regulatory Circular RG11–008; *see also* Notice, *supra* note 3, at 83316, n.12.

[21] *See* Notice, *supra* note 3, at 83316.

[22] *See id.*

[23] *See id.*

[24] Current OEPW settings are set forth in Regulatory Circular RG14–020. *See* Notice, *supra* note 3, at 83316, n.14.

quote offer (bid) or the NBO (NBB) by more than an amount determined by the Exchange on a class-by-class and premium basis, the System will not open the series.[25] If the opening quote bid (offer) or NBO (NBO) crosses the opening quote offer (bid) or NBO (NBB) by no more than the specified amount, the System will open the series by matching orders and quotes to the extent they can trade and will report the opening trade, if any, at the opening trade price. The System will then expose any remaining marketable buy (sell) orders at the widest offer (bid) point of the OEPW range or NBO (NBB), whichever is lower (higher). If the best away market bid and offer are inverted by no more than the specified amount, there is a marketable order on each side of the series, and the System opens the series, the System will expose the order on the side with the larger size and route for execution the order on the side with the smaller size to an away exchange that is at the NBBO.[26]

In addition, the proposed rule change moves provisions related to the exposure of orders at the open from current subparagraph (g)(2) and Interpretation and Policy .04 to proposed paragraph (d) to eliminate duplicative language and to include all provisions regarding the opening exposure process in one place.[27] The proposed rule change provides that the exposure of orders pursuant to proposed paragraph (d) will be conducted via the Hybird Agency Liaison (''HAL'') pursuant to Rule 6.18. Because the Exchange no longer uses a matching period for HAL opening auctions and just uses an exposure period (which may not exceed 1.5 seconds), it proposes to delete the provision regarding the matching period, among other changes.[28]

The Exchange also proposes to add to paragraph (d) that if the System does not open a series pursuant to paragraph (d), notwithstanding proposed paragraph (c) (which states the opening rotation period may not last more than 60 seconds), the opening rotation period continues (including the dissemination of EOIs) until the condition causing the delay is satisfied or the Exchange otherwise determines it is necessary to open a series in accordance with proposed paragraph (e).[29]

Exchange Determinations

Current Rule 6.11 provides in various places, including paragraphs (b)(2) and (h), that a senior Exchange official in the Help Desk may determine whether to modify the opening procedures when they deem necessary. The Exchange proposes to delete paragraph (b)(2) and centralize references to the Help Desk in one paragraph (retitled from (h) to (e)). The proposed rule change lists examples of actions the Help Desk may take in the interests of commencing or maintaining a fair and orderly market, in the event of unusual market conditions, or in the public interest, including delaying or compelling the opening of any series in any options class, and modifying timers or settings described in Rule 6.11. The proposed rule change adds that the Exchange will make and maintain records to document all determinations to deviate from the standard manner of the opening procedure, and periodically review these determinations.[30]

The Exchange also proposes to amend Interpretation and Policy .02, which states all pronouncements regarding determinations by the Exchange pursuant to Rule 6.11 and the Interpretations and Policies thereunder will be announced via Regulatory Circular with appropriate advanced notice to ensure participants are aware of these determinations and have sufficient time to make any necessary changes in response to the determinations. The proposed rule change adds that notice of determinations with respect to the opening process may be made ''as otherwise provided,'' which recognizes that some parts of Rule 6.11 provide that certain notifications will be made in a different manner (for example, via electronic message rather than via Regulatory Circular).[31]

Non-Substantive Changes

The proposed rule change also amends current Rule 6.11(i) and proposed Rule 6.11(f) to indicate that the procedure described in Rule 6.11 may be used to reopen a series, in addition to a class, after a trading halt to address a potential situation in which only certain series are subjected to halt. The proposed rule change also adds detail regarding notice of use of this opening procedure following a trading halt and clarifies that the procedure would be the same, though depending on facts and circumstances, there may be no pre-opening period or a shorter pre-opening period. Proposed paragraph (f) further states the Exchange will announce the reopening of a class or series after a trading halt as soon as practicable via electronic message to Participants that request to receive such messages.[32]

The Exchange proposes to amend Interpretation and Policy .01, which states the Exchange may determine on a class-by-class basis which electronic algorithm from Rule 6.12 applies to the class during rotations. The proposed rule change makes the electronic algorithm that applies to a class intraday the default algorithm during rotations, but continues to leave the Exchange flexibility to apply a different algorithm to a class during rotations if it deems such action to be necessary or appropriate.[33]

Finally, the proposed rule change makes numerous non-substantive and clerical changes throughout Rule 6.11 (and its Interpretations and Policies), including adding or amending headings and defined terms, updating cross-references, adding introductory and clarifying language, using consistent language and punctuation, and replacing terms such as ''option series'' with series in recognition of the fact that C2 only trades options.[34]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act,[35] and the rules and regulations thereunder applicable to a national securities exchange.[36] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[37] which requires, among other things, that a

[25] Currently, this amount is $0.25 for options with prices less than $3.00 and $0.50 for options with prices of $3.00 or more. *See* Regulatory Circular RG10–005; *see also* Notice, *supra* note 3, at 83317, n.17.

[26] *See* Notice, *supra* note 3, at 83317.

[27] *See id.* at 83317.

[28] *See id.* at 83317–18.

[29] Current Rule 6.11(j) and proposed Rule 6.11(g) provide that the opening procedures described in the rule may also be used to conduct a closing rotation after the close of a trading session for series that open pursuant to Rule 6.11. The proposed rule change makes non-substantive changes to proposed paragraph (g) to more clearly and simply state the potential applicability of the opening procedures to a closing rotation for series that open pursuant to Rule 6.11 and to include additional detail regarding the notification to Participants regarding the decision to conduct a closing rotation. *See id.* at 83318, n.20.

[30] *See id.* at 83318.

[31] *See id.*

[32] *See id.* C2 also notes that the Exchange may reopen a class after a trading halt as otherwise set forth in the Rules, including Rule 6.32. *See id.* at n.21.

[33] *See id.* at 83318.

[34] *See id.*

[35] 15 U.S.C. 78f.

[36] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[37] 15 U.S.C. 78f(b)(5).

national securities exchange have rules 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.

In particular, the proposed rule change reorganizes and attempts to clarify the description of the opening (and sometimes closing) procedures, deletes text that the Exchange believes is either obsolete or unnecessary, removes certain discretion for the Exchange to make determinations under the rule on a class-by-class basis where C2 no longer needs that discretion, and is intended to promote greater consistency across Rule 6.11. The Commission notes that these changes may offer market participants a better understanding of how the Exchange's opening (and sometimes closing) procedures operate. To the extent the changes achieve that goal, they may promote transparency, reduce the potential for investor confusion, and assist market participants in deciding whether to participate in C2's trading rotations and, if they do participate, have confidence and certainty as to how their orders will be processed by the C2 System.

The Commission believes that the proposed rule change is designed to promote just and equitable principles of trade by seeking to ensure that series open in a fair and orderly manner with sufficient liquidity and opportunities for execution at prices that are determined by market forces. In particular, the Exchange notes that the proposed rule change is designed to ensure that market participants are aware of the circumstances under which the System may not open a series.[38] The proposed rule change also sets out the circumstances when the Exchange may exercise discretion under the rule and strives to narrow that discretion within certain established parameters.[39] The proposed rule change further requires the Exchange to document and periodically review Exchange decisions made under the rule to deviate from the standard opening procedures, and stipulates that the Help Desk can so deviate in response to unusual market conditions with specific regard to the public interest.[40] In this manner, such Exchange determinations made by high-level senior Exchange personnel under the rule should be limited, transparent, and made with due regard to the Exchange's obligations under the Act.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[41] that the proposed rule change (SR–C2–2016–021) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–00367 Filed 1–10–17; 8:45 am]

BILLING CODE 8011–01–P

[38] *See* Notice, *supra* note 3, at 83319.

[39] Exchange determinations, including the establishment of parameters governing the opening process, will be set forth in Regulatory Circulars (or as otherwise specified by the Exchange under the proposed rule). On account of the critical importance of this information to investors' understanding of how the Exchange's System operates, C2 should ensure that such information is prominently displayed, readily searchable and retrievable, up-to-date, and comprehensive.

[40] *See* proposed Rule 6.11(e); *see also* Notice, *supra* note 3, at 83318.

[41] 15 U.S.C. 78s(b)(2).

[42] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79745; File No. SR–CBOE–2016–094]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

January 5, 2017.

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 December 23, 2016, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule. Specifically, the Exchange proposes to waive transaction fees incurred from certain transactions executed in compression forums.

SEC Rule 15c3–1 (Net Capital Requirements for Brokers or Dealers) (''Net Capital Rules'') requires every registered broker-dealer [sic] maintain certain specified minimum levels of capital.[3] The Net Capital Rules are designed to protect securities customers, counterparties, and creditors by requiring broker-dealers to have sufficient liquid resources on hand, at all times, to meet their financial obligations. Notably, hedged positions, including offsetting futures and options contract positions, result in certain net capital requirement reductions under the Net Capital Rules.[4]

All Options Clearing Corporation (''OCC'') clearing members are subject to the Net Capital Rules. However, a subset

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.15c3–1.

[4] In addition, the Net Capital Rules permit various offsets under which a percentage of an option position's gain at any one valuation point is allowed to offset another position's loss at the same valuation point (*e.g.,* vertical spreads).

of clearing members are subsidiaries of U.S. bank holding companies, which, due to their affiliations with their parent U.S. bank holding companies, must comply with additional bank regulatory capital requirements pursuant to rulemaking required under the Dodd-Frank Wall Street Reform and Consumer Protection Act.[5] Pursuant to this mandate, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation approved a comprehensive regulatory capital framework for subsidiaries of U.S. bank holding company clearing firms.[6] Generally, these rules impose higher minimum capital requirements, more restrictive capital eligibility standards, and higher asset risk weights than were previously mandated for clearing members that are subsidiaries of U.S. bank holding companies under the Net Capital Rules. Furthermore, the rules do not permit deductions for hedged securities or offsetting options positions.[7] Rather, capital charges under these standards are based on the aggregate notional value of short positions regardless of offsets. As a result, clearing Trading Permit Holders (''TPHs'') generally must hold substantially more bank regulatory capital than would otherwise be required under the Net Capital Rules. The impact of these regulatory capital rules are compounded in the SPX options market due to the large notional value of SPX contracts.

The Exchange believes these regulatory capital requirements could impede efficient use of capital and undermine the critical liquidity role that Market-Makers play in the SPX options market by limiting the amount of capital clearing TPHs can allocate to clearing member transactions. Specifically, the rules may cause clearing TPHs to impose stricter position limits on their clearing members. These stricter position limits may impact the liquidity Market-Makers might supply in the SPX market, and this impact may be compounded when a clearing TPH has multiple Market-Maker client accounts, each having largely risk-neutral portfolio holdings.[8]

Currently, TPHs may reduce open interest in SPX options for regulatory capital purposes by simply trading out of positions at the end of each month as they would trade any open position. The Exchange currently waives transaction fees incurred as a result of transactions that compress or reduce certain open positions.[9] However, the Exchange believes wide-scale reduction of open interest in SPX options in such a manner is burdensome and inefficient. Accordingly, the Exchange recently adopted a procedure to facilitate these types of transactions on the Exchange to allow TPHs seeking to close positions in SPX options to more easily identify counterparty interest and efficiently conduct closing transactions in SPX options on the Exchange in ''compression forums'' without interfering with normal SPX trading.[10] In general, under this new process, each month, TPHs may submit to the Exchange lists of open SPX positions (these positions are referred to in Rule 6.56 as ''compression-list positions'') they wish to close against opposing (long/short) positions of other TPHs. The Exchange would then aggregate these positions into a single list to allow TPHs to more easily identify those positions with counterparty interest on the Exchange. The Exchange will then provide a forum on the Exchange's trading floor during which TPHs could conduct closing-only transactions in series of SPX options. The Exchange will hold compression forums on the last three trading days of each calendar month.

To encourage TPHs to submit compression-list positions in advance of monthly compression forums and compress these positions during compression forums, the Exchange proposes to rebate all transaction fees for closing transactions involving SPX and SPXW compression-list positions executed in a compression forum (pursuant to Rule 6.56).[11] The Exchange believes compression of these positions would improve market liquidity by freeing capital currently tied up in positions for which there is a minimal chance that a significant loss would occur. The Exchange further believes advanced submission of compression-list positions to the Exchange will allow TPHs to more easily identify counterparty interest and efficiently conduct closing transactions of these positions during compression forums. The Exchange notes the submission of compression-list positions is completely voluntary, open to all TPHs with open positions in SPX, and does not require a TPH to trade any compression-list position or participate in a compression forum. To receive a rebate, a TPH must submit to the Exchange a rebate request with supporting documentation within three business days of the transactions.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[12] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[13] requirements that the rules of an exchange be 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

[5] H.R. 4173 (amending section 3(a) of the Securities Exchange Act of 1934 (the ''Act'') (15 U.S.C. 78c(a))).

[6] 12 CFR 50; 79 FR 61440 (Liquidity Coverage Ratio: Liquidity Risk Measurement Standards).

[7] Many options strategies, including relatively simple strategies often used by retail customers and more sophisticated strategies used by market-makers and institutions, are risk-limited strategies or options spread strategies that employ offsets or hedges to achieve certain investment outcomes. Such strategies typically involve the purchase and sale of multiple options (and may be coupled with purchases or sales of the underlying assets), executed simultaneously as part of the same strategy. In many cases, the potential market exposure of these strategies is limited and defined. Whereas regulatory capital requirements have historically reflected the risk-limited nature of carrying offsetting positions, these positions may now be subject to large regulatory capital requirements. Various factors, including administration costs; transaction fees; and limited market demand or counterparty interest, however, discourage market participants from closing these positions even though many market participants likely would prefer to close the positions rather than carry them to expiration.

[8] Several TPHs have indicated to the Exchange that these rules could hamper their ability to provide consistent liquidity in the SPX options market unless they reduce their positions in SPX by the end of the year.

[9] *See* CBOE Fees Schedule, Footnote 41 (The Exchange rebates transaction fees if a transaction (i) involves a complex order with at least five (5) different series in S&P 500 Index (SPX) options, SPX Weeklys (SPXW) options or p.m.-settled SPX options (SPXPM), (ii) is a closing-only transaction or, if the transaction involves a Firm order (origin code ''F''), is an opening transaction executed to facilitate a compression of option positions for a market-maker or joint-back office (JBO) account executed as a cross pursuant to and in accordance with CBOE Rule 6.74(b) or (d); (iii) is a position with a required capital charge equal to the minimum capital charge under OCC rules RBH calculator or is a position comprised of option series with a delta of ten or less; and (iv) is entered on any of the final three (3) trading days of any calendar month. To receive this rebate, a rebate request with supporting documentation must be submitted to the Exchange within three business days of the transactions.); *see also* Securities Exchange Act Release Nos. 79279 (November 10, 2016), 81 FR 81200 (November 17, 2016) (SR–CBOE–2016–074) and 76842 (January 6, 2016), 81 FR 1455 (January 12, 2016) (SR–CBOE–2015–117).

[10] *See* Rule 6.56; *see also* Securities Exchange Act Release No. 79610 (December 20, 2016) (SR–CBOE–2016–090).

[11] A rebate of transaction fees would include the transaction fee assessed along with any other surcharges assessed per contract (*e.g.,* the Index License Surcharge).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

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. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[14] which requires Exchange rules to provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

In particular, the Exchange believes rebating transaction fees to TPHs that submit compression-list positions to the Exchange in advance is reasonable and not unfairly discriminatory because it encourages TPHs to submit to the Exchange these positions in advance of compression forums. The Exchange may then aggregate these positions, which will allow TPHs to more easily identify counterparty interest and increase opportunities for TPHs to ultimately close these positions during a compression forum. The Exchange believes compression of these positions would improve market liquidity by freeing capital currently tied up in positions for which there is a minimal chance that a significant loss would occur. All TPHs may submit compression-list positions, are subject to the same submission deadline, and may participate in compression forums.

The Exchange believes rebating transaction fees for transactions closing compression-list positions during compression forums is reasonable, equitable and not unfairly discriminatory because compression forums will provide an opportunity for TPHs to efficiently conduct closing transactions of these positions. These positions would result in extremely large bank capital requirements for Clearing TPHs even though there is minimal change [sic] for large losses to occur. Additionally, these positions have little or no economic benefit to the TPHs that hold these positions, who would likely prefer to close them but for the associated transaction fees. The fee rebate therefore allows TPHs to close out of these positions that are needlessly burdensome on themselves and Clearing TPHs.

The Exchange believes it is reasonable and not unfairly discriminatory to limit the rebate to transactions that close compression-list positions, which must either have a required capital charge equal to the minimum capital charge pursuant to the RBH calculator in OCC's rules or a delta of ten or less, because these criteria identify option positions that are truly out-of-the-money or spread positions that are essentially riskless strategies. Particularly, the Exchange notes theoretically riskless positions can be identified when the required capital charge equals the minimum capital charge under OCC's RBH calculator. Transactions comprised of option series with a delta of no greater than 10 would indicate an option position that is, by definition, out-of-the-money.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to limit the rebate to SPX options (including SPXW) because only SPX options may be traded in compression forums. SPX has a substantially higher notional value than other options classes. As such, open interest in SPX has a much greater effect on a bank's regulatory capital requirements. Compressing riskless SPX option positions therefore has a greater impact on reducing a bank regulatory capital requirement.

The Exchange believes it is reasonable to limit the rebate of transactions fees to closing-only transactions, [sic] only closing transactions are permitted during compression forums. If a transaction were to open interest, it would defeat the purpose of the proposed rebate, which is to encourage the closing of positions creating high bank regulatory capital requirements for positions that are of low economic benefit and risk and could otherwise be offset. The Exchange notes it already waives transaction fees for compression of certain eligible SPX positions.[15]

The Exchange believes requiring TPHs to submit a request for a rebate within three business days of the transactions clarifies the manner in which the rebate can be accomplished in a timely manner and will eliminate any confusion and provide a clear procedure for applicants to get a rebate for their compression transactions, removing impediments to and perfecting the mechanism of a free and open market. Additionally, the Exchange notes such requirement will apply to all TPHs and is similar to the current requirement for requesting a rebate of transaction fees for compression of certain eligible SPX positions.[16]

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change will impose any burden on intramarket competition not necessary or appropriate in furtherance of the Act because it applies to all TPHs in the same manner with positions that meet the eligible criteria. The proposed rule change would encourage closing of positions that needlessly result in burdensome capital requirements. Closing of the positions would alleviate the capital requirement constraints on TPHs and improve overall market liquidity by freeing capital currently tied up in certain out-of-the-money and riskless SPX positions. The proposed rule change also encourages TPHs to submit to the Exchange in advance a list of these positions, which will allow TPHs to more easily identify counterparty interest and increase opportunities for to efficiently conduct closing transactions of these positions during compression forums.

The Exchange does not believe the proposed rule change will impose any burden on intermarket competition not necessary or appropriate in furtherance of the purposes of the Act because the proposed rule change applies only to the trading of SPX options, which are exclusively-listed on CBOE. To the extent the proposed rule change makes the Exchange a more attractive marketplace for market participants at other exchanges, such market participants are welcome to become CBOE market participants.

Furthermore, as stated above, submission of lists of positions for compression is completely voluntary, open to all TPHs, and non-binding, in that submission of a list does not require a TPH to trade any position or even represent any position in a trading crowd. Lists of positions will be made available to all TPHs and contain very limited information regarding open interest in positions in SPX. The list will simply alert TPHs to certain SPX positions that other TPHs are interested in closing at the end of each calendar month.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)

[14] 15 U.S.C. 78f(b)(4).

[15] *See supra* note 9.

[16] *Id.*

of the Act [17] and paragraph (f) of Rule 19b–4 [18] thereunder. 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 will institute proceedings to determine whether the proposed rule change 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–CBOE–2016–094 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2016–094. 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–CBOE–2016–094 and should be submitted on or before February 1, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017–00368 Filed 1–10–17; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f).

[19] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 9849]

E.O. 13224 Designation of Ali Damush, aka Ali Daghmoush, aka Ali Dagmoush, aka Ali Daamoush, aka Ali Dagmush, aka Shiekh Ali Musa Da'amoush as a Specially Designated Global Terrorist

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the person known as Ali Damush, also known as Ali Daghmoush, also known as Ali Dagmoush, also known as Ali Daamoush, also known as Ali Dagmush, also known as Shiekh Ali Musa Da'amoush committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order. This notice shall be published in the **Federal Register**.

Dated: December 20, 2016.

John F. Kerry,

Secretary of State.

[FR Doc. 2017–00442 Filed 1–10–17; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2017–01]

Petition for Exemption; Summary of Petition Received; The Boeing Company

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14, Code of Federal Regulations (14 CFR). The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of the FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATE: Comments on this petition must identify the petition docket number involved and must be received on or before January 23, 2017.

ADDRESSES: You may send comments identified by docket number FAA–2016–9340 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments digitally.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the

individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mike Collins, ANM–112, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, WA 98057–3356, email *michael.collins@faa.gov,* phone (425) 227–2689.

This notice is published pursuant to 14 CFR 11.85.

Issued in Renton, WA, on January 5, 2017.

Victor Wicklund,

Manager, Transport Standards Staff.

PETITION FOR EXEMPTION

Docket No.: FAA–2016–9340

Petitioner: The Boeing Company

Sections of 14 CFR Affected: 25.981(a)(3) and 25.901(c)

Description of Relief Sought: Relief from the requirements of fuel tank electrostatics protection for the fuel quantity indication system (FQIS) for the first 36 Boeing 737–8/–9 (737 MAX) model airplanes produced (line numbers 1 through 36).

[FR Doc. 2017–00394 Filed 1–10–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Tax Exempt Entity Leasing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning tax exempt entity leasing.

DATES: Written comments should be received on or before March 13, 2017 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6528, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Tax-Exempt Entity Leasing.

OMB Number: 1545–0923.

Regulation Project Number: TD 8033.

Abstract: These regulations provide guidance to persons executing lease agreements involving tax-exempt entities under 168(h) of the Internal Revenue Code. The regulations are necessary to implement congressionally enacted legislation and elections for certain previously tax-exempt organizations and certain tax-exempt controlled entities.

Current Actions: There are no changes to these existing regulations.

Type of Review: Extension of OMB approval.

Affected Public: Not-for-profit institutions and state, local or tribal governments.

Estimated Number of Respondents: 6,000.

Estimated Time per Respondent: 30 minutes.

Estimate Total Annual Burden Hours: 3,000.

The following paragraph applies to all of the collections of information covered by this notice:

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

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

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: December 28, 2016.

R. Joseph Durbala,

Tax Analyst, IRS.

[FR Doc. 2017–00331 Filed 1–10–17; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request on Information Collection Tools Relating to Qualitative Feedback on Agency Service Delivery

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning the collection of qualitative feedback on agency service delivery.

DATES: Written comments should be received on or before March 13, 2017 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6528, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the collection tools should be directed to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202)317–5746, or through the internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION: Currently, the IRS is seeking comments concerning the following information collection

tools, reporting, and record-keeping requirements:

Title: Collection of Qualitative Feedback on Agency Service Delivery

OMB Number: 1545–2256.

Form Number: N/A.

Abstract: Executive Order 12862 directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. Executive Order 13571 expands on this concept to include recent developments in private sector advances in internet customer service technologies. In order to work continuously to ensure that our online products and services are effective and meet our customers' needs, The Internal Revenue Service (hereafter ''the Agency'') seeks to obtain OMB approval of a generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery. By routine customer feedback we mean information that focuses on the awareness, understanding, attitudes, preferences, or experiences of customers or other stakeholders relating to existing or future services or products, but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

Current Actions: Extension of currently approved collection.

Type of Review: Extension request.

Affected Public: This collection of information is necessary to enable the Agency to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with the Agency's programs. 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. It will also allow feedback to contribute directly to the improvement of program management.

Estimated Number of Respondents: 1,000,050.

Estimated Time per Respondent: 1 hr., 18 min.

Estimated Total Annual Burden Hours: 266,680.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: December 28, 2016.

R. Joseph Durbala,

Tax Analyst, IRS.

[FR Doc. 2017–00335 Filed 1–10–17; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request on Capitalization of Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning TD 8584, capitalization of interest.

DATES: Written comments should be received on or before March 13, 2017 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6528, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to R. Joseph Durbala (202) 317–5746, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington DC 20224, or through the internet, at *RJoseph.Durbala@irs.gov.*

Title: Capitalization of Interest.

OMB Number: 1545–1265.

*Regulation Project Numb*er: TD 8584

Abstract: Internal Revenue Code section 263A(f) requires taxpayers to estimate the length of the production period and total cost of tangible personal property to determine if Interest capitalization is required. This regulation requires taxpayers to maintain contemporaneous written records of production period estimates, to file a ruling request to segregate activities in applying the interest capitalization rules, and to request the consent of the Commissioner to change their methods of accounting for the capitalization of interest.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved approval.

Affected Public: Individuals or households, and business or other for-profit organizations.

Estimated Number of Respondents: 500,050.

Estimated Time per Respondent: 14 Minutes.

*Estimated Total Annual Burden Hour*s: 116,767 Hours.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

(b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: December 28, 2016.

R. Joseph Durbala,

Tax Analyst, IRS.

[FR Doc. 2017–00332 Filed 1–10–17; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 211

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 211, Application for Reward for Original Information.

DATES: Written comments should be received on or before March 13, 2017 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6528, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington DC 20224, or through the internet, at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Form 211, Application for Reward for Original Information.

OMB Number: 1545–0409.

Form Number: Form 211.

Abstract: Form 211 is the official application form used by persons requesting rewards for submitting information concerning alleged violations of the tax laws by other persons. Such rewards are authorized by Internal Revenue Code section 7623. The data is used to determine and pay rewards to those persons who voluntarily submit information.

Current Actions: There are no changes being made to form 211 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Responses: 20,000.

Estimated Time per Response: 45 minutes.

Estimated Total Annual Burden Hours: 15,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: December 28, 2016.

R. Joseph Durbala,

Tax Analyst, IRS.

[FR Doc. 2017–00336 Filed 1–10–17; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Notice of Availability of a Record of Decision (ROD) for the Reconfiguration of VA Black Hills Health Care System (BHHCS)

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice of Availability.

SUMMARY: VA announces the availability of the ROD for the Reconfiguration of VA Black Hills Health Care System (BHHCS). The ROD states the decision to implement VA's preferred alternative as described in the Final EIS. Environmental consequences of the action are discussed in the ROD, along with the required minimization and mitigation measures.

DATES: The ROD is effective January 11, 2017.

ADDRESSES: The ROD may be viewed online at *www.blackhills.va.gov/vablackhillsfuture/.* Copies of the ROD are also available in the following public locations: Hot Springs; Rapid City Downtown; Sturgis; Chadron; Alliance; Lied Scottsbluff; and Pierre (Rawlins Municipal) public libraries, as well as in Pine Ridge at the Oglala Lakota College Pine Ridge Center library on the high school campus.

FOR FURTHER INFORMATION CONTACT: Staff Assistant to the Director, VA Black Hills Health Care System, 113 Comanche Road, Fort Meade, SD 57741, or by email to *vablackhillsfuture@va.gov.*

SUPPLEMENTARY INFORMATION: VA BHHCS provides health care to approximately 19,000 Veterans over 100,000 square miles in western South Dakota (SD), northwestern Nebraska (NE), and eastern Wyoming (WY). VA BHHCS consists of two medical centers at Fort Meade and Hot Springs, eight community-based outpatient clinics (CBOC), and six Compensated Work Therapy locations. VA BHHCS has identified a need to reconfigure the health care services to ensure it continues to provide high quality, safe, and accessible health care services across its service area. The existing locations and facilities constrain the quality of care, range of services, and access to care that VA offers in the catchment area. The Hot Springs campus includes buildings constructed in 1907 as part of the Battle Mountain Branch of the National Home for Disabled Volunteer Soldiers. The Battle Mountain Sanitarium was recognized as a National Historic Landmark in 2011.

Pursuant to NEPA, VA has identified and analyzed potential environmental

impacts for a range of alternatives to the Proposed Action. These include seven alternatives, including the No Action Alternative, as well as a supplement to five of the alternatives for re-use of part or all of the existing Hot Springs campus. The alternatives propose different locations and combinations of facilities serving as a community-based outpatient clinic (CBOC), a multi-specialty outpatient clinic (MSOC), and a residential rehabilitation treatment program (RRTP) facility; expanding, renovating, or vacating existing facilities; reusing of part or all of the existing facilities; and taking no action. The new preferred Alternative, referred to as A–2 plus G in the Final EIS, is a hybrid of Alternatives A and C plus Supplemental Alternative G evaluated in the Draft EIS. It was identified by consulting parties during the public comment period on the Draft EIS and includes renovating Building 12 on the existing Hot Springs campus to operate as a CBOC, that would include Dialysis, a new MSOC (replacing the existing leased CBOC), and a 100-bed RRTP in Rapid City.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert A. McDonald, Secretary, Department of Veterans Affairs, approved this document on January 4, 2017, for publication.

Dated: January 4, 2017.

Jeffrey Martin,

Office Program Manager, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2017–00278 Filed 1–10–17; 8:45 am]

BILLING CODE 8320–01–P

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Part II

Environmental Protection Agency

40 CFR Part 320

Financial Responsibility Requirements; Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 320

[EPA–HQ–SFUND–2015–0781; FRL–9953–75–OLEM]

RIN 2050–AG61

Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing requirements under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for demonstrating financial responsibility. This proposed rule would create a new Part in the CERCLA regulations to require financial responsibility under CERCLA § 108(b), define requirements for demonstration of financial responsibility, define requirements for maintenance of financial responsibility instruments, and establish criteria for owners and operators to be released from financial responsibility requirements. In addition, this proposal would establish specific financial responsibility requirements applicable to certain classes of mines and associated mineral processing facilities within the hardrock mining industry. EPA expects this proposed rule will, when made final, increase the likelihood that owners and operators will provide funds necessary to address the CERCLA liabilities at their facilities, thus preventing owners or operators from shifting the burden of cleanup to other parties, including the taxpayer. In addition, EPA expects that by adjusting the amount of financial responsibility to account for environmentally safer practices, it would provide an incentive for implementation of sound practices at hardrock mining facilities and thereby decrease the need for future CERCLA actions.

DATES: Comments must be received on or before March 13, 2017. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before February 10, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–SFUND–2015–0781, at *http://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets*.

FOR FURTHER INFORMATION CONTACT: For more information contact Barbara Foster, Program Implementation and Information Division, Office of Resource Conservation and Recovery, Mail Code 5303P, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone (703) 308–7057; (email) *Foster.Barbara@epa.gov*; or Michael Pease, Program Implementation and Information Division, Office of Resource Conservation and Recovery, Mail Code 5303P, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone (703) 308–0008; or (email) *Pease.Michael@epa.gov*.

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I. Executive Summary

A. Purpose of the Regulatory Action

Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, directs EPA to develop regulations that require classes of facilities to establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. When releases of hazardous substances occur, or when a threat of release of hazardous substances must be averted, a Superfund response action may be necessary. Since the Superfund tax has expired, EPA's Superfund appropriation is increasingly funded by the general revenues. Therefore, the costs of such response actions can fall to the taxpayer if parties responsible for the release or potential release of hazardous substances are unable to assume the costs. In addition, the likelihood of a CERCLA response action being needed, as well as the costs of such a response action, are likely to be higher where protective management practices were not utilized during facility operations. This proposed rule is intended to address both concerns. By assuring that owners and operators establish financial responsibility consistent with the risks associated with the production, transportation, treatment, storage, and disposal of hazardous substances at their facilities, this proposed rule would increase the likelihood that owners and operators will provide funds necessary to address the CERCLA liabilities at their facilities, thus preventing the burden from shifting to the taxpayer or to other parties. In addition, this proposed rule would provide an incentive for implementation of sound practices at hardrock mining facilities that would decrease the need for future CERCLA actions.

B. Summary of the Major Provisions of the Regulatory Action

EPA identified hardrock mining as the classes for which it would first develop financial responsibility requirements in a **Federal Register** notice dated July 28, 2009 (2009 *Priority* Notice).[1] In that notice, EPA provided a general definition of ''hardrock mining'' [2] and has refined that general definition for purposes of this proposal. This proposed rule would apply to certain classes of facilities that engage in the extraction, beneficiation, and processing of metals, (*e.g.*, copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (*e.g.*, asbestos, phosphate rock, and sulfur).[3]

The proposed rule would require owners and operators subject to the rule to demonstrate and to maintain financial responsibility consistent with the degree and duration of risk associated with the treatment, production, transportation, storage and disposal of hazardous substances at their facilities. The Agency is proposing that current owners and operators of facilities subject to the rule be required to demonstrate financial responsibility to cover the three types of costs associated with releases and potential releases of hazardous substances from their facilities, including response costs, health assessment costs, and natural resource damages. These are the same types of costs that CERCLA makes specified parties, including current owners or operators, liable for under CERCLA § 107. Thus, by requiring current owners or operators of facilities that manage hazardous substances to set aside funds for cleanup (or otherwise demonstrate their ability to pay for it), EPA expects this proposed rule would increase the likelihood that owners or operators subject to the rule will be able to pay the costs associated with releases or potential releases of hazardous substances from their facilities for which they are responsible, in the event a CERCLA cleanup becomes necessary.

The proposal would establish a process for owners and operators subject to the proposed rule to identify a financial responsibility amount for their sites, to demonstrate evidence of financial responsibility, and to maintain the required amount of financial responsibility until the requirement for financial responsibility for the site is released by EPA. The proposed rule would promote efficiency and accuracy of information collected by requiring electronic submission of information. Further, the proposal would encourage public participation in the effective implementation of the rule by requiring owners or operators to post information related to their compliance with the financial responsibility requirements of this rule on their company Web sites.

The proposal includes a formula by which EPA expects facilities to calculate an amount of financial responsibility. The formula is also structured to allow facilities, upon certain showings, to reduce that calculated amount to account for the current conditions of their sites. EPA expects that many, if not most, facilities, will be able to adjust the amount required based on the calculation. By requiring an amount of financial responsibility consistent with the degree and duration of risk at the site, while allowing for adjustments as a result of environmentally-protective practices, the proposed rule should create economic incentives for owners and operators to employ environmentally sound practices. In turn, EPA expects that the proposed rule would ultimately have the effect of decreasing Superfund liabilities because it would create incentives for owners and operators to minimize the risk associated with their facilities thereby lowering their financial responsibility amounts. This is also consistent with CERCLA's overarching goal of encouraging potentially responsible parties to increase the level of care with which they manage the hazardous substances at their sites. Similarly, the proposed rule would provide for the release of the owner and operator's financial responsibility requirements when EPA makes a determination that the risks from the facility are minimal. This provision would encourage protective and responsible closure and cleanup of their facilities.

The proposed rule also would establish conditions for payment of funds from the financial responsibility instruments. Under the proposed rule, financial responsibility instruments could be used to pay a party that has sought reimbursement through the courts for costs; to pay as specified in a settlement with the Federal Government, or to pay into a trust fund established by the owner or operator pursuant to a Federal Government administrative order under CERCLA § 106(a). EPA has thus sought to ensure

[1] *Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements,* 74 FR 37213, July 27, 2009.

[2] Id. at 37213.

[3] The details on the facilities that would be subject to this proposed rule are provided in Subpart H of this preamble.

that its proposed CERCLA § 108(b) instruments would complement the current Superfund framework for obtaining cleanup and reimbursement from those parties responsible for contamination.

C. Costs and Benefits of the Regulatory Action

1. Introduction

EPA assessed the industrial and social costs as well as benefits of the regulatory options of the proposed rule. The details of the analysis are presented in the Regulatory Impact Analysis (RIA), which can be accessed in the docket supporting this rulemaking (Docket No. EPA–HQ–SFUND–2015–0781). This preamble provides an overview of the methodology that EPA applied in the RIA and the key results including the identification and characterization of the potentially regulated universe; the projected economic impacts from industry and society standpoints; and potential social welfare benefits of the proposed rule. Detailed discussions of the uncertainties and limitations of the analysis are provided in the RIA.

2. Characterization of Baseline Affected Entities

Hardrock mining is the extraction and beneficiation of rock and other materials from the earth that contain a target metallic or non-fuel non-metallic mineral. Mineral processing separates and refines mineral concentrates to extract the target material.[4] In order to establish the universe of facilities likely to be subject to this proposed rule, EPA primarily relied on July 2015 data from the U.S. Mine Safety and Health Administration (MSHA) Mine Data Retrieval System (MDRS) accessed on July 2015,[5] U.S. Energy Information Administration (EIA) (2015),[6] and the 2015 U.S. Geological Survey (USGS) Mineral Commodity Summaries (MCSs).[7]

From a list of potentially regulated facilities, EPA excluded 35,103 coal mining operations. EPA also removed 44,845 mines associated with 59 non-fuel hardrock commodities to conform with the scope of those classes of facilities identified in the 2009 Priority Notice.[8] Furthermore, EPA removed an additional 4,548 mines classified as abandoned (non-currently operating) sites by MHSA. From the remaining 354 facilities, EPA identified and removed classes of facilities that may present a lower level of risk of injury than other facilities within the 2009 Priority Notice universe. These facilities are mines engaged solely in exploration projects, placer mines that do not use hazardous substances to extract ore, and mining operations of less than five acres that are not located within a mile of other mining activities. In addition, mineral processors with less than five acres of disturbed surface impoundment and waste pile disturbed acres would not be subject to the proposed rule. Overall, EPA removed 133 facilities in these classes, leaving 221 facilities in what is referred to here as the ''included universe.''

EPA believes that 221 facilities (208 active and thirteen intermittent or temporarily idled) will currently be subject to this rule. The Agency acknowledges that the population of mines and mineral processors that are operating at any given point in time can fluctuate significantly due to fluctuating commodity prices, other business-related factors, mining and processing technical operations issues, and weather conditions. As such, EPA may not have accurately identified all facilities that would be subjected to the rule. Thus, the Agency requests comments on the included universe.

The most common activities at these facilities are surface mining (88), underground mining (56), and processing (68).[9] Geographically, the potentially regulated universe spans over 38 states, mostly concentrated in the western states. The states with the most potentially regulated facilities are Nevada (45), Arizona (21), and Minnesota (14). The potentially regulated universe currently mines 33 commodities, although the scope of the rule is not limited to the 33 commodities currently mined at the potentially regulated facilities. The most common commodities mined in the potentially regulated universe are Gold (70), Copper (25), and Iron Ore (17). A wide range of NAICS codes (approximately 45 types) are represented by the owners of the facilities in the potentially regulated universe, the most common of which are 212221: Gold Ore Mining (18), 213114: Supporting Activities for Metal Mining (10), and 212234: Copper Ore and Nickel Ore Mining (8). However, there were twelve owners for which no NAICS code could be identified.

3. Cost of the Proposed Rule

This rule includes two proposed Options for use of a financial test—the no financial test option (Option 1), and the financial test option (Option 2). Option 1 requires all owners and operators to acquire third-party financial instruments to demonstrate financial responsibilities. Alternatively, under Option 2 the owner or operator could qualify to self-insure (or use the corporate guarantee) by passing the proposed financial test. Owners or operators unable to qualify for the Option 2 financial test must acquire a third-party instrument or a trust fund to comply with the rule. EPA's RIA assessed the costs associated with obtaining third-party instruments under the two options, as well as costs associated with the reporting and recordkeeping requirements of the rule. These costs represent the primary economic impacts of the proposed rule to the regulated industry.

To assess the cost, EPA developed and implemented a multi-dimensional analysis that involves: (1) An estimation of the owner or operator's financial responsibility obligations under baseline scenario; (2) estimation of the price of third-party instruments; and (3) assessment of the industrial (*i.e.*, cost imposed on the regulated industry), and social costs (*i.e.*, costs from the standpoint of society) associated with obtaining financial assurance. In addition, EPA's analysis also examined the extent to which the rule shifts the burden of financing potential Superfund cleanups and related expenditures away from the taxpayer and toward the regulated owners or operators. This section provides an overview of the methodology EPA used to assess the industrial and social costs, and intra-industry transfers (*i.e.*, payment between two industries). This section also discusses the transfer of cost from the government (taxpayer) to the regulated industry.

a. Industry Compliance Costs

As described earlier in this preamble, EPA identified 221 facilities owned by 121 ultimate parent companies that would be subject to the rule. To estimate

[4] *Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements.* 74 FR 37213, July 28, 2009.

[5] MDRS data are available at: *http://www.msha.gov/drs/drshome.htm* and Mines Data Set, *http://www.msha.gov/OpenGovernmentData/OGIMSHA.asp.*

[6] U.S. Energy Information Administration. 2015. *2014 Domestic Uranium Production Report.* Washington, DC. April. Available at: *http://www.eia.gov/uranium/production/annual/pdf/dupr.pdf.*

[7] MCS can be accessed at *http://minerals.usgs.gov/minerals/pubs/mcs.*

[8] U.S. EPA. 2009. *Mining Classes Not Included in Identified Hardrock Mining Classes of Facilities.* Available online at: *http://www.regulations.gov/contentStreamer?documentId=EPA-HQ-SFUND-2009-0265-0033&disposition=attachment&contentType=pdf.*

[9] Many of the 184 facilities conduct multiple activities, causing the total number of facilities to be less than the summation of all activities practiced.

the impact of acquiring financial assurance, EPA collected facility-specific data (*e.g.*, mine site features, acreage, and meteorological data) and company-level financial information. However, this effort rendered facility-specific data for only 49 facilities, and financial information for 21 publically traded firms. Thus, EPA's assessment of compliance costs relied on this subset of mining/mineral processing facilities and related owner companies for which detailed technical data was obtained (herein referred to as the ''modeled universe''). EPA extrapolated the results of the analysis of this subset of facilities to the full universe of facilities covered by the rule. EPA requests comments on using the modeled universe to estimate the overall industrial compliance costs.

The compliance costs of acquiring third-party financial instruments depends on the financial responsibility amounts the instrument covers. Thus, EPA first estimated the baseline financial responsibility amounts for facilities in the modeled universe. EPA used a financial responsibility formula that the Agency developed for facilities to calculate their financial responsibility amount on a national basis. As described in Section VI.D.4. of this preamble, the proposed formula consists of three key components that capture the potential costs associated with release of hazardous substances at hardrock mining facilities. These include the response component; health assessment component; and natural resources damages.

For the response component, EPA estimated the financial responsibility amounts for each facility for twelve categories of response activities that EPA has undertaken at hardrock mining sites. These include categories for types of engineering costs (*e.g.*, capital cost to construct source control for an open pit); operation and maintenance (O&M) costs (*e.g.*, interim, short-term, and long-term O&M); and long-term water treatment costs. EPA aggregated the twelve response categories and adjusted the amount to account for other costs related to response activities that may be experienced by the Agency including mobilization/demobilization; engineering design and redesign; contingency; contractor profit and overhead; contractor liability insurance; payment and performance bonds; and Agency direct and indirect costs. EPA also applied locality adjustment factors to account for regional variation in labor and material costs. EPA then combined the aggregated financial responsibility estimates for the response component with the health assessment and natural resource damages components to arrive at the maximum financial responsibility amount for each facility. EPA applied a proposed multiplier to obtain the financial responsibility amount for natural resource damages and a fixed financial responsibility amount for health assessment.[10]

The proposed rule is also structured to provide reductions in the financial responsibility amount required at a facility for risk-reducing practices, including controls established in compliance with Federal and state reclamation and closure programs. For the purpose of the RIA, EPA adjusted the maximum financial responsibility amount for owners and operators, where EPA identified risk-reducing practices in enforceable documents backed by financial bonding. In applying the reductions, EPA assumed that identified risk-reducing practices would fully meet EPA's proposed criteria. As such, for qualified facilities, EPA applied full reductions in the financial responsibility amount for the relevant response categories. EPA acknowledges this assumption simplifies the construct of the proposed rule's requirements for reductions.

Table X–1 presents the adjusted baseline financial responsibility estimates for future CERCLA liability of owners and operators in the modeled universe. The table also provides the extrapolation of results from the modeled universe to the full universe. As shown in the table, Column C presents the median financial responsibility amount of the modeled universe by facility types. EPA used these median values to estimate the financial responsibility amounts of the full universe. Column D presents the financial responsibility amount for the full universe, which was calculated by multiplying the total number of mines in the full universe (Column A) by the median financial responsibility amount calculated for modeled universe.

TABLE X–1—EXTRAPOLATION FR FROM THE MODELED UNIVERSE TO THE POTENTIALLY REGULATED UNIVERSE

Facility type	Potentially regulated universe (n=221) (A)	Modeled universe (n=49) (B)	Modeled universe facility FR—Median ($2015 millions) (C)	Potentially regulated universe total FR amount across facilities, median-based extrapolation ($2015 millions) (D) = A * C
Brine Extraction/Processing	6	(none; assume equal to ISR)	$1	$8
In-situ recovery	8	3	1	10
Processor/Refiner	33	1	76	2,496
Surface Mine	62	25	48	2,961
Surface Mine/Processing	27	13	28	766
Surface Mine/Processing/Primary Smelter	2	(none; assume equal to surface mine/processing).	28	57
Surface/Underground mine	1	(none; assume equal to surface mine).	48	48
Underground Mine	53	5	5	284
Underground Mine/Processing	6	2	29	172
Primary Smelter	23	(none; approximated separately)	11	263
All Facilities	221	49	37	7,064

Note: This exhibit presents extrapolation based on median values of financial responsibility amounts for the modeled universe.

[10] 13.4 percent of the response costs estimated for each site. For health assessment costs, EPA estimated a fixed financial responsibility amount of $550,000 per facility based upon health assessment cost information obtained from the Agency for Toxic Substances and Disease Registry (ATSDR).

As shown in the table, the estimated financial responsibility amount for the regulated industry is $7.1 billion. EPA assumed this amount represents the baseline financial responsibility amount of the regulated industry, for which owners and operators must demonstrate financial assurance under the proposed rule by procuring third-party financial instruments, or through self-insurance (or corporate guarantee).

EPA estimated the compliance costs to industry assuring payment of financial responsibility amounts by focusing on the 21 owners and operators of 38 mining facilities [11] in the modeled universe [12] for which detailed financial data is publically available. EPA conducted the cost analysis in two primary steps: (1) EPA first subjected the modeled universe to the two regulatory options (with or without financial test) to identify entities that may be required to acquire third-party instruments; and (2) for entities unable to self-insure, EPA estimated the compliance cost of obtaining third-party financial responsibility instruments.

To determine whether owners and operators pass the financial test, EPA compared the relevant financial characteristics of each company to the financial test described in § 320.43 of the preamble. Consistent with the proposed test, EPA's analysis allowed owners and operators to self-insure their entire obligation if they hold at least one long-term corporate credit rating equal to or higher than A− as issued by S&P or another equivalent rating agency. Furthermore, EPA also allowed self-insurance of up to one-half of an owner or operator's obligation if it holds at least one long-term credit rating of BBB+ or BBB. EPA assumed owners and operators that pass the test would elect to self-insure either the full or one-half of their obligations. For these facilities, EPA assumed compliance costs associated with acquiring third-party instruments would be zero, and that the owner or operator would only incur compliance costs associated with the reporting and recordkeeping requirements of the proposed rule.

For owners or operators that did not pass the financial test, and for the regulatory option where the financial test is precluded (Option 1), EPA estimated the costs of obtaining third-party financial responsibility instruments. For each facility, EPA modeled separately the costs of three representative financial instruments, which included letter of credit, trust fund, and insurance.[13] EPA assumed owners and operators would choose the instrument option with the lowest cost. Overall, the pricing of the instruments is case-specific, and informed by several parameters. Specifically, the factor considered included the baseline financial responsibility level determined by the formula, the financial health of the owner or operator (credit rating and default probability), the corresponding fee structure of the specific financial instrument, and the project's risk profile (probability and timing of costs associated with the facility's CERCLA liabilities). In estimating the cost of the instruments, EPA also assumed that no market capacity constraints exist for the issuance of third-party instruments sufficient to cover the financial responsibility amounts estimated earlier in this discussion.

The actual compliance cost incurred by industry in securing these instruments comes from the transactional costs (*e.g.*, the fees and commissions paid to financial institutions) and the net cost of acquiring capital to fund the purchase of financial instruments. EPA did not attempt to predict whether the funds come from internal sources or from debt or equity markets. Regardless of the sources of funding, EPA assumed the net cost to the owner or operator of acquiring funds is the weighted average cost of capital (WACC).[14] EPA collected firm specific WACCs from each company's Web site.

EPA assumed owners and operators would need to acquire funding to purchase financial instruments every three years [15] (as required by the rule) until released from their obligations. Thus, EPA annualized the compliance cost using a seven percent discount rate over the life of the mine. To investigate the sensitivity of results, EPA also applied a three percent discount rate. In addition, EPA assumed a period of analysis from 2021 to end of mine life (capped at 2055). The start date is based on a year before the end of the four-year implementation schedule of the rule, which represents the year mines will start to incur significant costs. The end date is mainly based on the end of mining operations. However, where EPA could not identify the end date for mining operations, EPA capped the analysis at 2055, which represents the ninetieth percentile of mine lives in the modeled universe. Furthermore, EPA also assumed that the owner and operator would be released from their financial responsibility obligations when the facility ceases its operation. However, under the proposed rule owners and operators may not be released of their obligations until EPA makes a determination.

Table X–2 summarizes the average annualized compliance costs for the two regulatory options, as a percentage of the financial responsibility amounts of owners and operators in the modeled universe. The annualized costs are categorized based on the credit worthiness of the firms in the modeled universe. Entities with a stronger financial profile (Category 1) were simulated to experience an annual cost as low as 1.1 percent of the financial responsibility amount. Similarly, poorly rated entities (Category 4) would experience annual costs as high as four percent. Overall, on a weighted average basis, annualized compliance costs as a percentage of the financial responsibility amount equal approximately 2.3 to 2.4 percent.

TABLE X–2—INSTRUMENT PRICING OUTCOMES

Company category	Average annualized cost as percentage of financial responsibility amounts	Percent of companies in category
BBB	1.1 to 1.7	26.3
BB	2.5	26.3

[11] The identified owner/operator companies of the 49 facilities in the modeled universe were matched to S&P's financial database. This crosswalk identified the owner/operator companies of 40 facilities in S&P financial database. Two of these facilities have entered bankruptcy and therefore did not have the necessary recent financial data to be included in the analysis.

[12] It is important to distinguish between the mine facilities, to which the financial responsibility amount applies, and the owner/operator company that is obligated to fund, or secure, this financial responsibility amount. One owner/operator may have this obligation for more than one mine.

[13] EPA limited the analysis to three instruments because it believed that these reasonably represent the ranges of costs for the other instruments allowed by the rule.

[14] WACC is defined as the average cost of obtaining capital in the debt and equity markets.

[15] The proposed rule would require facilities to update financial responsibility amount calculations every three years, and maintain financial assurance consistent with the revised financial responsibility amount.

TABLE X–2—INSTRUMENT PRICING OUTCOMES—Continued

Company category	Average annualized cost as percentage of financial responsibility amounts	Percent of companies in category
B	2.4	36.8
CCC	4.0	10.5

Note:
1. Pricing categories based on credit ratings and other financial metrics. Ranges of costs are presented for Option 2 (low) and Option 1 (high).
2. This exhibit presents costs discounted using a 7 percent social discount rate. Supplementary results discounted using a 3 percent social discount rate are presented in Appendix E of the RIA.

EPA applied these weighted average percentages to extrapolate results to the entire universe. Table X–3 presents the calculation of annualized compliance costs for the full universe under the two regulatory options. As shown in the table, Column A lists the aggregated financial responsibility amount covered by third-party instruments by mine type under the proposed financial test regulatory option, while Column B lists the financial responsibility amounts under the no-test option. Columns C and D calculate the annualized acquisition costs for each facility type by multiplying the aggregate financial responsibility amounts under each regulatory option with the respective weighted average annualized costs generated for the model universe, as shown in Table X–3. The extrapolation calculation assumes that the full universe of owners and operators would have similar financial characteristics as the modeled universe. Similarly, for the financial test option, EPA assumed that a similar proportion of owners and operators would pass the financial test in both the full universe and in the modeled universe. EPA acknowledges that there are uncertainties with this supposition, and request comments from the public.

TABLE X–3—CALCULATION OF ANNUALIZED COMPLIANCE COST

[$ million]

Facility type	FR amount covered by third party (Option 1) ($2015 millions) (A)	FR amount covered by third party (Option 2) ($2015 millions) (B)	Annualized cost of third-party FR instruments—Option 1 ($ millions) (C) = 2.4 * (A)	Annualized cost of third-party FR instruments—Option 2 ($ millions) (D) = 2.3 * (A)
Brine Extraction/Processing	$8	$5	$0.2	$0.1
In-situ recovery	10	7	0.2	0.2
Processor/Refiner	2,496	1,747	60	39
Surface Mine	2,961	2,073	72	47
Surface Mine/Processing	766	536	18	12
Surface Mine/Processing/Primary Smelter	57	40	1	1
Surface/Underground Mine	48	33	1	1
Underground Mine	284	199	7	4
Underground Mine/Processing	172	120	4	3
Primary Smelter	263	184	6	4
All Facilities	7,064	4,944	171	111

Note: This table presents costs discounted using a 7 percent social discount rate. Supplementary results discounted using a 3 percent social discount rate are presented in Appendix E of the RIA.

As shown in the table, under the baseline scenario, the total financial obligation amount for the potentially regulated universe is approximately $7.1 billion. Under the financial test, the amount of financial obligations covered through third-party instruments is $4.9 billion, whereas for the no-financial test option, the entire baseline financial responsibility amounts would be covered by third-party instruments. In addition, the annualized industry compliance costs to secure the third-party instruments under the no-financial test option is $171 million, whereas annualized costs are $111 million for the financial test option. The difference between the two regulatory options is approximately 35 percent. These values represent the range of potential incremental costs of the proposed rule to industry.

In addition, EPA's compliance cost estimate also included the administrative reporting and recordkeeping costs to industry associated with the proposed rule for the potentially regulated universe. These costs consist of labor, O&M, and capital costs and include the costs of reading the regulations; submitting initial facility information to EPA and to the public; calculating financial responsibility amounts; choosing a financial responsibility instrument; acquiring and maintaining a financial responsibility instrument, recalculating financial responsibility amounts to reflect any changes in facility operations; and any requirements that apply to the owners and operators upon the transfer of a facility, owner or operator default, a CERCLA claim against any of the owners and operators, or release of the owners and operators from the regulations. The labor costs are estimated on an annual basis, as of the first year of compliance. Table X–4 presents the annualized administrative cost of the rule under the two options using a seven percent social discount rate.

TABLE X–4—ANNUALIZED ADMINISTRATIVE COSTS

Option 1 (No test)	Option 2 (Financial test)
$225,302	$269,038

Note: This exhibit presents costs discounted using a 7 percent social discount rate. Supplementary results discounted using a 3 percent social discount rate are presented in Appendix E.

b. Social Cost and Intra-Industry Transfers

The annualized compliance costs calculated and presented in Table X–3 and X–4 represent industry costs, *i.e.,* costs imposed on owners and operators. However, much of the costs borne by the owners and operators represent a transfer [16] to financial firms that provide financial responsibility instruments. In the context of this rule, the net incremental costs of acquiring capital to secure financial instruments (*i.e.*, insurance) are treated as a transfer. Table X–5 presents the intra-industry transfers of the rule. The RIA estimated the intra-industry transfer amount by tabulating the net acquisition cost of capital excluding transactional costs that are considered social costs.

Some portion of the industry cost is also a social cost,[17] that is, a cost on society as a whole, rather than just the regulated entities. These costs reflect the value of the real resources (*e.g.*, labor and capital) needed to comply with the rule. These costs include: (1) The fees and commissions paid to financial institutions to obtain financial instruments; and (2) the administrative costs incurred in complying with reporting and recording keeping requirements of the proposed rule. Table X–5 presents the social cost of the rule. EPA estimated the social costs associated with acquiring instruments by taking the difference between the industrial costs less the intra-industry transfers. The table summarizes the annualized social costs and intra-industry transfers using seven percent discount rates.

TABLE X–5—SUMMARY OF SOCIAL COSTS AND INTRA-INDUSTRY TRANSFERS

Outcome	Option 1: No financial test			Option 2: Proposed financial test		
	Annualized cost of third-party FR instruments ($ millions)	Transfer from mining industry to others ($ millions)	Annualized social cost ($ millions)	Annualized cost of third-party FR instruments ($ millions)	Transfer from mining industry to others ($ millions)	Annualized social cost ($ millions)
Annualized Amount	171	127	44	111	81	30
Administrative Cost to Industry	N/A	N/A	$0.2	N/A	N/A	$0.3
Total Social Costs and Transfers	N/A	$127	$44	N/A	$81	$30

Note: This exhibit presents costs discounted using a 7 percent social discount rate. Supplementary results discounted using a 3 percent social discount rate are presented in Appendix E.

Under proposed Option 1, of the $174 million cost to industry, the annualized intra-industry transfer is estimated to be $127 million. Thus, the social cost amounts to $44 million. Option 2 engenders slightly lower social costs at $30 million. As shown in the table, the administrative costs related to the reporting and recordkeeping requirements of the rule are approximately $0.3 million under the two regulatory options.

c. Government Costs and Risk Transfers

The primary effect of this proposed rule is to transfer the risk associated with CERCLA liabilities from the taxpayer to the private sector. Table X–6 presents the estimated magnitude of this shift of potential CERCLA liabilities across the baseline and regulatory scenario. For the purposes of estimating changes in government burden due to the rule, EPA calculated the government burden assuming that financial responsibility amounts are representative of costs associated with future CERCLA cleanups. In the baseline, the Government is burdened with the CERCLA cost if an owner or operator defaults, as no third-party instruments will be in place. For the baseline, EPA estimated, the government burden rate using the firm exit rate derived from the Census Bureau's Business Dynamics Statistics (BDS).[18] This represents a (high-end) estimate that assumes exiting firms fail to meet any of their CERCLA obligations. Under proposed Option 2, government costs were calculated based on estimated probabilities of default for firms in the modeled universe. Under this option, if a company passes the financial test but later files for bankruptcy and defaults on its financial responsibility obligations, EPA assumed that taxpayers would assume these obligations. Under proposed Option 1, there are no government costs, as no company may self-insure.

EXHIBIT X–6—SUMMARY OF POTENTIAL GOVERNMENT COSTS

Cost category	Baseline	Option 1: No financial test	Option 2: Proposed financial test
Industry Liabilities ($2015 Millions)			
CERCLA FR Amount Insured through Third-Party Instruments	N/A	$7,064	$4,944

[16] Transfer payments are monetary payments from one group to another that do not affect total resources available to society.

[17] The value of real resources—land, labor, energy and so forth—needed to comply with the regulations.

[18] The BDS provides the number of firms operating and number of firm exits each year in the mining sector. Firm exits identify when all establishments of a firm cease operations for reasons other than reorganization, merger, or acquisition. Because of the ''corporate veil'' enjoyed by legal subsidiaries, this analysis uses a facility-based failure rate to model government costs in the baseline due to owner/operator failure. Compared to other measures of failure or default, the BDS firm exit rate also captures both private and public companies.

EXHIBIT X–6—SUMMARY OF POTENTIAL GOVERNMENT COSTS—Continued

Cost category	Baseline	Option 1: No financial test	Option 2: Proposed financial test
CERCLA FR Amount Self-Insured	7,064	0	2,120
Expected Government Costs ($2015 Millions)			
Government Burden Rate	7.5%	N/A	0.7%
Government Cost	527	0	16
Decrease in Expected Government Costs ($2015 Millions)			
Expected Transfers from Government to Industry		527	511

As shown in Table X–6, under the baseline scenario, the potential liability transfer from private parties to government is $527 million over the period of analysis (*i.e.*, 34 years). Under the financial test option, the potential burden to taxpayer is reduced to $16 million. For the no-financial test option, the potential CERCLA liabilities are fully internalized by the regulated community.

4. Economic Impact Analysis

EPA assessed the economic impacts of the proposed rule in two areas: (1) An assessment of the impact of compliance costs on the modeled universe, based on the comparison of compliance costs with relevant financial characteristics of the owner and operator; and (2) an assessment of the potential for employment impacts at the national level of the proposed rule. The following sections summarize the methods and findings for these analyses.

a. Screening Analysis for Potentially Significant Economic Impacts

EPA assessed the economic impacts of the proposed regulatory options relying on the modeled universe for which detailed financial data are available. EPA assessed the impacts using two financial characteristics of the owner and operator: (1) A screening-level assessment which compares the annualized industrial costs to the firms' revenue; and (2) an alternative assessment that utilizes the firms' operating cash flow.

For the 21 firms in the modeled universe, the annual revenues range from approximately $300 million to over $60 billion. Their annual cash flow from operations (cash flow associated with their primary business activity) ranges from $800,000 to over $3 billion. Relative to the companies' revenues, the per-company annualized costs of financial responsibility range from zero percent to 1.1 percent, with the majority of companies (20 of 21) falling between zero and 1 percent. Relative to operating cash flow, the range of annualized financial responsibility cost percentages is wider: From zero to over 160 percent (the latter is for the company whose operating cash flow is under $1 million). Approximately eighty percent of all companies experience impacts that are under one percent of operating cash flow and approximately 95 percent of companies experience impacts under ten percent.

Due to limitation in financial data, EPA did not expand the screening analysis to the full universe of regulated facilities. EPA acknowledges that the results generated based on the modeled universe may not be reflective of the impacts on the entire industry.

b. Employment Impact Analysis

EPA routinely assesses the employment impacts of economically significant regulations. Executive Order 13563, ''Improving Regulation and Regulatory Review,'' states, ''Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.'' In general, the national employment effects of environmental regulation are complex and multi-faceted and very likely involve both negative and positive effects. Neoclassical theory of production and factor demand provides a constructive framework for understanding and conducting employment impacts analysis of environmental regulations. It describes how firms adjust their demand for inputs, such as labor, in response to changes in economic conditions.[19] Theory predicts that regulated firms will respond to regulation by adjusting input demands and output. The theory suggests the direction of the total impact of a regulation on the demand for labor in the regulated sector is indeterminate.[20]

EPA did not have sufficient data to model and quantify the potential changes in mines' employment levels as a result of the proposed regulation. Analysis provided by the U.S. Geological Survey (USGS) suggests that ''the primary metals industry and the nonmetallic minerals products industry are fundamentally cyclical.'' The industries are affected both by the domestic business cycle and the global economic environment. Composite indices constructed by USGS suggest that the industry experienced significantly decreased activity surrounding the Great Recession. In 2014, the most recent year analyzed by USGS, industry growth rates were positive.[21]

5. Benefits of the Rule

This section provides an overview of the methodology EPA used to assess or identify benefits of the proposal. EPA expects the CERCLA § 108(b) financial responsibility provisions to yield social welfare benefits because of reductions in overall mining facility environmental obligations and an increase in the proportion of those obligations borne by the private sector through financial responsibility instruments.

Identified benefits of the proposed rule include a reduction in costs the government must bear to fulfill cleanup obligations, improved environmental practices at mining sites, avoided impacts to impaired waters, and faster cleanups. The reduction in the cost to

[19] For an overview of textbook discussions of the neoclassical theory of production and factor demand, see, for example, Layard and Walters, *Microeconomic Theory* (1978), chapter 9 ''The Derived Demand for Factors''.

[20] For theoretic frameworks that conceptualize and incorporate the impacts of regulation, see Berman and Bui, 2001 or Deschenes, 2012, 2014).

[21] *See: U.S. Geological Survey, Mineral Commodity Summaries,* 2015, pp. 4, 7. The USGS generates composite indexes for primary metals and separately for nonmetallic mineral products. Their indices are intended to measure economic activity in these industries using production, employment, and shipments data.

government is the only benefit that can be measured with sufficient accuracy to allow for a quantitative assessment. A qualitative benefit assessment of the proposed rule was performed utilizing literature on related topics, such as the effect of environmental liabilities disclosure on financial markets. The benefits of the proposed rule are as follows:

a. Reduced Costs to Government

The establishment of financial responsibility requirements for potential CERCLA § 108(b) liabilities will reduce the costs incurred by the Government to finance remediation expenditures for companies that are unable to meet cleanup obligations. Section 7 of the RIA considered government costs associated with potentially responsible parties' (PRP) defaults on CERCLA § 108(b) liabilities at mining facilities, including response costs, natural resource damages, and health assessment costs. Without the rule, EPA estimated that the Government would potentially incur a total cost of $527 million (over the 34-year period of analysis) for the cost categories described earlier. Under the proposed financial test option, the Government would incur an estimated $16 million in costs, whereas for the no-test option, the taxpayer's burden would be reduced to zero. Thus, the analysis concluded that the public, through the Government, would experience a cost savings from $511 million to $527 million over 34 years because of the proposed rule.

b. Improvement in Environmental Performance

Financial responsibility requirements may provide an incentive for regulated entities to minimize future environmental obligations. When regulated entities rely on a letter of credit, insurance policy, or other third-party instrument to meet financial responsibility requirements, the issuer will have an incentive to require sound environmental management as a condition for providing access to these instruments.

To the extent that the proposed rule leads to improvements in facilities' environmental performance, the rule may reduce acid mine drainage and other discharges into waterways caused by mining activities. Waterways identified as impaired waters by section 303(d) of the Clean Water Act (CWA) and waters identified as wild and scenic rivers under the 1968 Wild and Scenic Rivers Act may benefit the most from improved environmental performance. Adverse impacts to waterbodies may be reduced or avoided in accordance with improvements in the environmental performance of mines. To gauge the potential magnitude of the benefits associated with avoided environmental impacts, EPA identified the number of sites in the potentially regulated universe that are located near CWA impaired waters or wild and scenic rivers. Of the 221 facilities in the potentially regulated universe, EPA identified the status of waterways adjacent to 172 facilities. Overall, EPA believes that the magnitude of these benefits in the context of the proposed rule is contingent upon changes in behavior among regulated entities to reduce the environmental risk.

c. Speed of Site Cleanups

Under the financial responsibility requirements outlined in the proposed rule, the cleanup of sites owned by companies in default could begin more rapidly than under the baseline. Because funding for site remediation would be secured prior to a firm's insolvency, the initiation of cleanup would not be delayed by EPA budget constraints. Expedited cleanups would benefit human health and ecosystems as exposure to harmful contaminants may decline.

II. Authority

EPA is issuing these proposed regulations under the authority of sections 101, 104, 108 and 115 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C §§ 9601, 9604, 9608 and 9615, and Executive Order 12580. 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

III. Background Information

A. Overview of CERCLA § 108(b) and other CERCLA Provisions

CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), establishes a comprehensive environmental response and cleanup program. Generally, CERCLA authorizes EPA [22] to undertake removal or remedial actions in response to any release or threatened release into the environment of ''hazardous substances'' or, in some circumstances, any other ''pollutant or contaminant.'' As defined in CERCLA § 101, removal actions include actions to ''prevent, minimize, or mitigate damage to the public health or welfare or to the environment,'' and remedial actions are ''actions consistent with [a] permanent remedy[.]'' Remedial and removal actions are jointly referred to as ''response actions.'' CERCLA § 111 also established the Superfund Trust Fund (the Fund) to finance response actions undertaken by EPA. In addition, CERCLA § 106 gives EPA [23] authority to compel action by liable parties in response to a release or threatened release of a hazardous substance that may pose an ''imminent and substantial endangerment'' to public health or welfare or the environment.

CERCLA § 107 imposes liability for response costs on a variety of parties, including certain past owners and operators, current owners and operators, and certain transporters of hazardous substances. Such parties are liable for any costs of removal or remedial action incurred by the Federal Government, so long as the costs incurred are ''not inconsistent with the national contingency plan,'' (NCP).[24] CERCLA § 107 also imposes liability for natural resource damages and health assessment costs.[25] In accordance with CERCLA, in 1990 EPA issued the current version of the NCP.[26] These regulations provide the organizational structure and procedures for preparing for, and responding to, discharges of oil and releases of hazardous substances, pollutants, and contaminants. The NCP is codified at 40 CFR part 300. Among other provisions, the NCP provides procedures for hazardous substance response including site evaluation, removal actions, remedial investigation/feasibility studies (RI/FS), remedy selection, remedial design/remedial action (RD/RA), and operation and maintenance.[27] The NCP also designates Federal, state, and tribal trustees for natural resource damages, and identifies their responsibilities under the NCP.[28]

CERCLA § 108(b) generally requires that EPA develop regulations requiring owners and operators of facilities to establish evidence of financial responsibility, and provides for publication of a ''Priority Notice'' identifying the classes of facilities for which EPA would first develop requirements. Paragraph (b)(1) also directs that priority in the development of requirements shall be accorded to those classes of facilities, owners, and operators that present the highest level of risk of injury. This proposed rule for

[22] Although Congress conferred the authority for administering CERCLA on the President, most of that authority has since been delegated to EPA. *See* Exec. Order No. 12580, 52 FR 2923 (Jan. 23, 1987).

[23] 1 CERCLA §§ 106 and 122 authority is also delegated to other Federal agencies in certain circumstances. *See* Exec. Order No. 13016, 61 FR 45871 (Aug. 28, 1996).

[24] *See* CERCLA § 107 (a)(4)(A).

[25] *See* CERCLA § 107 (a)(4)(C)–(D).

[26] *See* 55 FR 8666, March 8, 1990.

[27] *See* 40 CFR 300, Subpart E.

[28] *See* 40 CFR 300, Subpart G.

hardrock mining facilities prioritizes among the classes of facilities in that sector, and proposes financial responsibility requirements for those hardrock mining facilities that EPA has identified as presenting the highest level of risk of injury. More details on this analysis are provided in section VI.D.1.A of this preamble.

Under CERCLA § 108(b), classes of facilities must establish and maintain evidence of financial responsibility ''consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.'' [29] CERCLA § 108(b)(2) directs that the level of financial responsibility shall be initially established, and, when necessary, adjusted to protect against the level of risk that EPA in its discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction. EPA discusses its interpretation of these provisions in section VI.D.4. of this preamble.

CERCLA § 108(b) also discusses particular instruments for EPA to consider in its regulations. Specifically, paragraph (b)(2) states that financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. Paragraph (b)(2) further authorizes the President to specify policy or other contractual terms, conditions, or defenses that are necessary, or that are unacceptable in establishing evidence of financial responsibility. Paragraph (b)(2) also requires EPA to cooperate with and seek the advice of the commercial insurance industry to the maximum extent practicable when developing financial responsibility requirements. Paragraph (b)(4) provides direction on how the CERCLA § 108(b) instruments are to address multiple owners and operators at a single facility. Section VI.C. of this preamble discusses each of these financial responsibility instruments in detail.

CERCLA § 108(b)(3) requires that regulations promulgated under CERCLA § 108(b) incrementally impose financial responsibility requirements as quickly as can reasonably be achieved, but in no event more than four years after the date of promulgation. Section VI.A.1. of this preamble discusses how EPA intends to phase in the CERCLA § 108(b) requirements in accordance with this provision.

CERCLA § 108(c) also includes a ''direct action'' provision, under which CERCLA claims can be brought directly against an insurer or other entity issuing an instrument pursuant to the CERCLA § 108(b) regulations. CERCLA § 108(c)(2) provides that any claim authorized by CERCLA § 107 or § 111 may be asserted directly against any guarantor providing evidence of financial responsibility under CERCLA § 108(b) if the person liable under CERCLA § 107 is: (1) In bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or (2) likely to be solvent at the time of judgment but over whom jurisdiction in the Federal courts cannot be reached with reasonable diligence. EPA discusses the direct action provision and other ways that it envisions the instruments provided pursuant to the CERCLA § 108(b) program may pay out and otherwise support cleanup efforts in section VI.B.5. of this preamble.

CERCLA § 114(d) is an express preemption provision addressing state, tribal, and local financial responsibility requirements. This provision states:

> Except as provided in this subchapter, no owner or operator of a . . . facility who establishes and maintains evidence of financial responsibility in accordance with this subchapter shall be required under any State or local law, rule or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such . . . facility. Evidence of compliance with the financial responsibility requirements of this subchapter shall be accepted by a State in lieu of any other requirement of financial responsibility imposed by such State in connection with liability for the release of a hazardous substance from such . . . facility.[30]

Many states already have financial responsibility requirements applicable to some of the hardrock mining facilities that would be subject to this proposed rule. Thus, in developing this proposal, EPA had to carefully consider the effects of its CERCLA § 108(b) rules on other programs to avoid any unanticipated consequences. The Agency's conclusions regarding the relationship of CERCLA § 108(b) requirements to financial responsibility requirements under other laws is discussed in Section V. of this preamble.

B. Recent Litigation under CERCLA § 108(b)

On March 11, 2008, Sierra Club, Great Basin Resource Watch, Amigos Bravos, and Idaho Conservation League filed a suit against former EPA Administrator Stephen Johnson and former Secretary of the U.S. Department of Transportation Mary E. Peters, in the U.S. District Court for the Northern District of California. Sierra Club, et al. v. Johnson, No. 08- 01409 (N. D. Cal.). On February 25, 2009, that court ordered EPA to publish the 2009 *Priority Notice* required by CERCLA § 108(b)(1) later that year. The 2009 *Priority Notice* is described in more detail in section III.C. The court later dismissed the remaining claims.

EPA issued the Advance Notice of Proposed Rulemaking discussed in section III.D. in early 2010, and continued to work on this proposed rule for the next several years. Dissatisfied with the pace of EPA's progress, however, in August 2014, the groups Idaho Conservation League, Earthworks, Sierra Club, Amigos Bravos, Great Basin Resource Watch, and Communities for a Better Environment filed a new lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit, for a writ of mandamus requiring issuance of CERCLA § 108(b) financial assurance rules for the hardrock mining industry and for three other industries—chemical manufacturing; petroleum and coal products manufacturing; and electric power generation, transmission, and distribution.[31] Companies and organizations representing business interests in the hardrock mining and other sectors also sought to intervene in the case.

Following oral argument, the court issued an Order in May 2015 requiring the parties to submit, among other things, supplemental submissions addressing a schedule for further administrative proceedings under CERCLA § 108(b). The Court's May 19, 2015 Order further encouraged the parties to confer regarding a schedule and, if possible, to submit a jointly agreed upon proposal. Petitioners and EPA were able to reach agreement on a schedule. The parties requested an Order from the court with a schedule calling for the Agency to sign for publication in the **Federal Register** a proposed rule for the hardrock mining industry by December 1, 2016, and a final rule by December 1, 2017.

On January 29, 2016, the court granted the joint motion and issued an Order that mirrored the submitted

[29] Executive Order 12580 delegates the responsibility to develop these requirements to the Administrator of EPA for non-transportation related facilities. 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

[30] 42 U.S.C. 9614(d).

[31] *See In re: Idaho Conservation League,* et al., No. 14–1149.

schedule in substance. The court Order can be found in the docket for this proposed rule (Docket No. EPA–HQ–SFUND–2015–0781). The signing of this proposed rule for publication by December 1, 2016 will satisfy one component of the court order.

C. Hardrock Mining 2009 Priority Notice

As described earlier in this preamble, CERCLA § 108(b)(1) requires the President to identify those classes of facilities for which requirements will be first developed and to publish notice of such identification in the **Federal Register**. That paragraph also directs that priority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators that present the highest level of risk of injury. As discussed in section III.C., EPA published a **Federal Register** notice entitled ''Identification of Priority Classes of Facilities for Development of Section 108(b) Financial Responsibility Requirements.'' [32] EPA chose to evaluate indicators of risk and its related effects to inform its decision on the classes of facilities for which it would first develop requirements.[33] EPA specifically pointed to eight factors that it considered,[34] and stated that its review of those factors and the associated information in the docket led the Agency to conclude that hardrock mining facilities present the type of risk that, in light of its then-current evaluation, justified them being the first for which EPA issued CERCLA § 108(b) requirements.[35] The 2009 *Priority Notice* and supporting documentation have been included in the docket for this proposal (Docket No. EPA–HQ–SFUND–2015–0781) .

The 2009 *Priority Notice* also provided a working definition of ''hardrock mining,'' namely, ''facilities which extract, beneficiate, or process metals . . . and non-metallic, non-fuel minerals.'' [36] EPA generally explained the processes that constitute extraction, beneficiation, and processing, and how those processes relate to one another and how they differ.[37] EPA explained that because of their interrelationships, EPA was identifying them as a group, yet the distinctions between them made it appropriate to consider such operations as encompassing multiple ''classes'' of facilities.[38]

It is important to recognize the necessary, but limited, role of the 2009 *Priority Notice.* The 2009 *Priority Notice* directly satisfied the notice requirement in CERCLA § 108(b)(1), by identifying where EPA would start in its development of requirements. The 2009 *Priority Notice* did not, however, serve to comprehensively analyze the universe of hardrock mining facilities that would necessarily be covered by a proposed or final CERCLA § 108(b) rule. As EPA stated in the notice, ''[a]dditional research, outreach to stakeholders, proposed regulations, review of public comments, and finalization of those regulations are needed before hardrock mining facilities are subject to any financial assurance requirements.'' [39] Nor did that notice purport to identify which ''classes of facilities, owners and operators . . . present the highest level of risk of injury'' as required by CERCLA § 108(b)(1). The initial identification of hardrock mining facilities provided in the 2009 *Priority Notice* included classes of facilities of varying degrees of risk of injury, and EPA has identified in this proposed rule what it believes are the classes of facilities that present the highest risk from among the classes of facilities identified in the *Priority Notice.*

D. Additional Classes Advance Notice of Proposed Rulemaking

The 2009 *Priority Notice* described in section III.C. stated EPA's view that classes of facilities outside of the hardrock mining industry may warrant the development of financial responsibility requirements.[40] The Agency committed to gather and analyze data on additional classes of facilities and consider them for possible regulation.

On January 6, 2010, EPA published an Advanced Notice of Proposed Rulemaking (2010 ANPR) [41], in which the Agency identified three additional industrial sectors for the development of a proposed regulation—the Chemical Manufacturing industry (NAICS 325), the Petroleum and Coal Products Manufacturing industry (NAICS 324), and the Electric Power Generation, Transmission, and Distribution industry (NAICS 2211). Th 2010 ANPR did not set requirements for any of these three sectors. However, for transparency and completeness, this preamble includes information on the development of the 2010 ANPR, the litigation related to these sectors, and the companion notice on these sectors.

In the 2010 ANPR, EPA requested public comment on whether to propose a regulation under CERCLA § 108(b) for any class or classes, or the industry as a whole, including information demonstrating why such financial responsibility requirements would not be appropriate for those particular classes. In addition, the Agency requested information related to the industry categories discussed in the notice, including data on facility operations, information on past and expected future environmental responses, use of financial instruments by the industry categories, existing financial responsibility requirements, and other information the Agency might consider in setting financial responsibility amounts. Finally, EPA requested information from the insurance and the financial sectors related to instrument implementation and availability, and potential instrument conditions.

As noted earlier, the *In re: Idaho Conservation League* case also involved EPA's actions on these sectors as well. The same order addressing the CERCLA § 108(b) hardrock mining rule also required the Agency to sign for publication in the **Federal Register** a decision on whether to issue a notice of proposed rulemaking for these additional sectors by December 1, 2016. EPA has developed that notice as required by the court order. That notice appears elsewhere in this **Federal Register**.

EPA received comments on the 2010 ANPR, which can be found in the docket for that notice (Docket ID No. EPA–HQ–SFUND–2009–0834). EPA considered those comments as part of its decision whether to proceed with issuing proposed rules for the additional sectors, as described in the companion noticed issued by the Agency. EPA intends the future rulemaking processes for these sectors to be the venue through which the public can engage with EPA on issues related to those sectors. In this proposed rule for hardrock mining, EPA is not seeking, nor will it respond to, comments on issues relating only to sectors outside of hardrock mining, including its determinations on whether to proceed with the rulemakings for those other sectors.

[32] *See* 74 FR 37213 (July 28, 2009)

[33] *See* Id. at 37214

[34] These eight factors were: (1) Annual amounts of hazardous substances released to the environment; (2) the number of facilities in active operation and production; (3) the physical size of the operation; (4) the extent of environmental contamination; (5) the number of sites on the CERCLA site inventory (including both NPL sites and non-NPL sites); (6) government expenditures; (7) projected clean-up expenditures; and (8) corporate structure and bankruptcy potential (see 74 FR 37214, July 28, 2009).

[35] Id.

[36] Id.

[37] Id. at 37214–15

[38] Id. at 37214

[39] Id. at 37214, n. 5.

[40] Id. at 37218.

[41] *See* 75 FR 816.

E. Market Capacity Study

In accordance with an instruction regarding the CERCLA § 108(b) proposed rule in the Conference Committee Report for the Consolidated Appropriations Act (2016), EPA conducted a study of the market capacity regarding the necessary instruments (surety bonds, letters of credit, insurance and trusts) for meeting any new CERCLA § 108(b) financial responsibility requirements and post the study on the Agency's website ninety days prior to this proposed rulemaking. The Agency also provided an explanation of how the CERCLA § 108(b) rule will avoid requiring financial responsibility obligations that are duplicative of those already required by other Federal agencies as of the time it was released to the public. EPA also included the Market Capacity Study in the docket for this proposal.

The Market Capacity Study assessed the likely availability of financial responsibility instruments and the capacity of third-party markets to underwrite financial responsibility requirements for responsible parties subject to CERCLA § 108(b). The study relies on a substantial amount of quantitative and qualitative data in the public domain from readily referenced industry sources, as well as information gained in meetings held during 2015 and 2016 with instrument providers regarding factors that may affect instrument availability.

The Agency's evaluation further focuses on characterizing that portion of the commercial insurance and surety markets that specifically underwrite environmental liability coverage as a way to gauge future capacity. The results of the research suggest that sufficient capacity likely will be available to cover the financial responsibility obligations called for under CERCLA § 108(b), but caution that this capacity will be highly dependent upon the overall amount of financial responsibility that the market will need to accommodate. Overall capacity may also be influenced by: (1) The diversity of instruments allowed, (2) whether the rule allows insurance and surety markets to form risk retention groups (RRGs), and (3) whether the proposed rule permits the use of a financial test. All such features, if included in the rule, could help to relieve pressure on third-party surety markets and ensure greater market capacity.

In consideration of these market issues, the rule as currently proposed includes a number of specific features to help ensure that the capacity of the market for financial responsibility instruments will be sufficient to meet demand subsequent to promulgation. First, preliminary results from draft regulatory impact analyses reveal estimates of total demand for instruments to be below that of the Agency's estimate of overall capacity. The proposal also offers further flexibility by permitting owners and operators to use a variety of alternative instruments to meet the requirements of the rule. Further, RRGs are not prohibited under the proposed provision for insurance, and the Agency is taking comment on their potential permissibility for the final rule. Lastly, as discussed in detail in VI.C.9 of this preamble, EPA has co-proposed options regarding the availability of a financial test and corporate guarantee mechanism. Under Option 1 (EPA's preferred option), use of a financial test and corporate guarantee would not be allowed. However, under Option 2, use of a financial test and corporate guarantee would be allowed, thus those instruments would be available as well if Option 2 were to be adopted in the final rule.

Given the number of unknown factors, the ultimate availability of CERCLA § 108(b) financial responsibility instruments cannot be predicted with certainty until the final rule has been promulgated. At that time, the available instruments will be determined, and the market will have an opportunity to respond.

F. Approach to Developing This Proposed Rule

This is the first EPA proposed rule under the authority of CERCLA § 108(b). As a result, this proposed rule would establish a financial responsibility program under CERCLA § 108(b), in addition to imposing requirements specific to the hardrock mining industry. EPA anticipates that core financial responsibility program requirements established under this proposal, such as procedures for establishing financial responsibility, public involvement, recordkeeping and reporting, establishing and maintaining instruments, and the wording of some of the instruments would apply to hardrock mining facilities subject to this rule and to classes of facilities subject to further rules promulgated under CERCLA § 108(b) authority. EPA therefore solicits comments on these provisions from all interested parties, including representatives of industries other than the hardrock mining industry.

Other requirements of this proposed rule would likely apply only to the hardrock mining facilities for which they were designed. For example, the financial responsibility formula proposed in this rule was designed for use by hardrock mining facilities. A method for determining financial responsibility amounts would be identified for future industry sectors in future proposed rulemakings. EPA intends that the provisions of this rule be severable. In the event that any individual provision or part of this rule is invalidated, EPA intends that this would not render the entire rule invalid, and that any individual provisions that can continue to operate will be left in place.

Development of these regulations has proven to be a complex and unique task for EPA, and the Agency has explored a number of options for key components of the proposed rule. Thus, while the Agency is proposing an approach for implementing CERCLA § 108(b), the Agency also has attempted to present a broad range of options and is seeking comment on a variety of issues throughout the preamble. Because this proposed rule represents the initial steps in development of a CERCLA § 108(b) program, EPA is particularly interested in receiving information from a broad range of parties with suggestions for improving EPA's proposed new CERCLA § 108(b) program.

IV. Major Issues in the Development of the Proposed Rule

This proposed rule is the first to be issued by EPA under the authority of CERCLA § 108(b).[42] In developing this proposal, EPA has given significant consideration to a number of issues. In this preamble section, EPA discusses those issues and its proposed approaches to them. EPA expended considerable effort over several years before deciding how to structure this proposal, and the various options included throughout reflect varying ways that EPA is considering reconciling the policy purposes of the CERCLA § 108(b) rule in light of the information before the Agency and the general statutory direction. EPA explains these considerations in the more detailed discussions of the various provisions in later sections of this preamble. In general, however, this proposed rule would establish requirements for financial responsibility applicable to certain facilities within the hardrock mining industry. Owners and operators of facilities subject to this rule would be required to demonstrate financial responsibility to cover costs

[42] Regulations were promulgated by the Coast Guard under § 108(a) (insert cite).

associated with liabilities identified in CERCLA § 107, that is, for response costs, health assessment costs, and natural resource damage costs.

A. Relationship to Existing Superfund Processes

The proposed rule would not establish any regime regulating the conduct of hardrock mining and mineral processing activities. Instead, EPA intends for CERCLA § 108(b) requirements to apply alongside other programs that directly regulate the operation of hardrock mines. Nor does the proposed rule modify the existing Superfund enforcement authorities, including those to gather information, identify responsible parties, effect cleanup (especially through EPA's enforcement first policy), assess penalties, or provide for citizen suits. Instead, the proposal is designed to complement and support those existing processes. The impact of this proposal on existing processes would be to increase the likelihood that parties have funds to conduct cleanup; increase the likelihood of successful recovery of costs under CERCLA, including claims brought under CERCLA §§ 107 or 113(f) from the parties providing the financial responsibility instruments, increase the likelihood that funds will be available for owners and operators to settle their Superfund liabilities with the Federal Government, and provide an instrument that may be used by an owner or operator, to assure work required under a CERCLA § 106 unilateral administrative order by EPA and other Federal agencies.

Set within the context of CERCLA's response program, CERCLA § 108(b) establishes a broad authority for EPA to promulgate requirements that classes of facilities establish and maintain evidence of financial responsibility consistent with the risk associated with various hazardous substance management activities. CERCLA as a whole is generally designed to ensure that, ultimately, risks to human health and the environment are addressed by those responsible for contamination in the first instance (commonly called the ''polluter pays'' principle). The CERCLA § 108(b) requirements can complement this goal in two particular ways. First, the rules should help assure that businesses make financial arrangements to address risks from the hazardous substances at their sites in the event that a CERCLA cleanup ultimately becomes necessary. The rules can thus promote the polluter pays principle underlying the CERCLA scheme. Second, CERCLA § 108(b) rules should serve to create effective incentives for regulated entities to manage the hazardous substances present at their facilities more carefully and thereby minimize the threats of future releases. These sorts of measures directly promote protection of human health and the environment by preventing the environmental harm caused by releases, and by creating a culture of responsible behavior among the regulated community that will minimize the need for future Superfund actions.

B. Liabilities Covered

CERCLA § 108(b) does not provide specific direction on the types of liabilities that the regulations for facilities are to cover. Paragraph (a)(1) of § 108 requires evidence of financial responsibility for *vessels* explicitly ''to cover the liability prescribed under paragraph (1) of section 107(a).'' By contrast, CERCLA § 108(b)(1) provides only that classes of *facilities* establish and maintain evidence of financial responsibility ''consistent with the degree and duration of risk'' associated with various aspects of hazardous substance management. Thus CERCLA § 108(b) does not include the same direct cross-reference to the categories of liabilities under CERCLA § 107 that it does for vessels. Therefore, in developing this proposal EPA considered whether it was appropriate to require evidence of financial responsibility for all types of CERCLA liabilities, only a subset of those liabilities (for example, only for potential response costs), or even extend the instruments beyond the categories included in CERCLA § 107 (for example, for personal injury costs). EPA is today proposing to make the instruments available for all types of CERCLA liabilities enumerated in CERCLA § 107. EPA believes that this approach furthers both policy objectives described earlier, by helping to ensure adequate funding for all types of potential CERCLA liabilities at regulated facilities, and by encouraging owners and operators to take into account the full breadth of potential CERCLA liability when structuring their operations, thereby minimizing those risks in the first instance. Thus, the instruments provided under this proposed rule would be available to pay costs incurred by a government or private party for response costs, natural resource damage costs, and health assessment costs.[43]

Finally, EPA has not identified a basis for it to exclude any of these particular types of costs based upon the data EPA has gathered in preparing this proposal. All three types of CERCLA § 107 costs have been incurred by hardrock mining facilities as EPA has documented elsewhere in this preamble. (*see* Section VI.F.3.).

C. Universe Covered

Under this proposal, requirements would apply to owners and operators of mining facilities that fall within the classes described in the 2009 *Priority Notice* except for three classes that EPA has identified as presenting a lower level of risk of injury—mines conducting only placer mining activities, mines conducting only exploration activities, and mines with less than five disturbed acres that are not located within one mile of another area of mine disturbance that occurred in the prior ten year period. In addition, requirements under this proposal would apply to owners or operators of mineral processing facilities identified in the 2009 *Priority Notice* with less than five disturbed acres of waste pile and surface impoundment. Other mineral processing facilities identified in the 2009 *Priority Notice* would not be subject to the proposed rule. Further, the proposed rule would apply only to facilities that are authorized to operate, or should be authorized to operate, on the effective date of the rule. The applicability of this rule is described further in section VI.A.1. of this preamble.

D. Notification Requirement

The proposal would require owners and operators subject to the rule to notify EPA that they are subject to the rule and intend to comply, and to provide basic facility information, within thirty days of the effective date of the final rule. Those owners and operators would then be required to identify a CERCLA § 108(b) financial responsibility amount for their facility, and to submit evidence of financial responsibility to EPA.

E. Determining the Financial Responsibility Amount for Hardrock Mining Facilities

The rule proposes a hardrock mining financial responsibility formula for determining a financial responsibility amount for response costs, health assessment costs, and natural resource damages. The formula, and EPA's approach and methodology for developing the formula, are described in detail in section VI.D.4. of this preamble. In summary, the proposed formula is designed to reflect the relative risk to human health and the environment, of facility practices for managing hazardous substances, including reductions in risk that may

[43] *See* 42 U.S.C. 9607(a)(4)(A)–(D).

result from compliance with other regulatory requirements or other facility practices. The formula assigns values for a facility based on facility and unit characteristics (*e.g.,* open pits, waste rock, tailings, heap leach, process ponds, water management, and operations, maintenance, and monitoring). These values correspond to calculated cost levels, and the formula then aggregates these cost levels to establish the facility-wide financial responsibility amount. The formula is not intended to establish any CERCLA liability or define a particular remedy for a unit or facility. Rather, the purpose of the formula is simply to establish an amount of financial responsibility that reflects the costs that might be expected to result, if a Superfund action should ultimately be required at the site, based on the information EPA has compiled on a national basis in the record for this proposal. Any remedy decisions will continue to be developed on a site-specific basis through standard CERCLA processes, including the processes in the NCP. Because the CERCLA § 108(b) cost estimate is necessarily developed in the absence of any site-specific remedy selection, EPA cannot ensure that the particular costs the formula assigns for a particular feature will necessarily ultimately be identical to the actual costs for cleaning up that site feature. Therefore, although the formula employs an aggregation of individual costs to obtain an overall amount for the facility, the individual cost components are not themselves intended to represent any sub-limits within the actual financial responsibility instrument. In other words, the total amount of funds would be available for any future Superfund action anywhere across the facility, and would not be tied to particular site features. Moreover, to impose sub-limits based on the particular values for the formula subcomponents has the potential to result in partial over- and under-funding of unit- and site-specific remedies in the future, once a CERCLA remedy is defined and claims are made against the instrument. In addition, making those claims would potentially require protracted negotiations over which response costs are ultimately payable from the instrument. Such a situation would hinder, instead of support, CERCLA cleanups.

Once the amount is ascertained through the formula, owners and operators would then be required to obtain an acceptable financial responsibility instrument for that amount, submit evidence of the instrument to the Agency, and make information about the instrument available to the public. EPA is not proposing to require a preliminary review and approval of the application of the formula to the facility's features, nor prior review and approval of the financial responsibility instrument, prior to it becoming effective. The Agency may choose to review and verify the adequacy of a financial responsibility amount, or the terms of the instrument provided to EPA under CERCLA § 108(b), at a facility at any time. If EPA determines the financial responsibility amount submitted by the owner or operator to be inadequate, EPA may choose to initiate enforcement proceedings.

The Agency considered an alternative approach to establishing a CERCLA § 108(b) cost estimate that more closely resembles more traditional financial responsibility programs developed to complement a permit-based regulatory program. Financial responsibility requirements under many other programs [44] are typically components of an overarching regulatory program, such as a permit program, and are designed to assure compliance with the requirements of that program. CERCLA § 108(b) requirements in contrast, are freestanding in that they are not directly associated with regulatory program requirements with which an owner and operator must comply, or with a remedy that has been selected that an owner and operator must implement. Under the ''closure plan'' alternative EPA considered, the Agency would first identify a set of technical engineering requirements for a facility subject to CERCLA § 108(b) requirements that could be consolidated into a complete facility closure, and in turn could be used as the basis for calculating an amount that ultimately would need to be assured for under CERCLA § 108(b). In effect, the ''closure plan'' would have had to include the engineering controls necessary to compete a CERCLA-style clean up at a facility where the owner or operator had walked away and failed to complete reclamation and closure activities. The plan itself would not be intended to be enforceable, but would only have served as a method to calculate the amount of financial responsibility that would be required under CERCLA § 108(b), using site-specific information. Based on the closure plan, EPA would then have calculated the amount of financial responsibility necessary under CERCLA § 108(b), after taking into account other Federal and/or state engineering controls and associated financial responsibility requirements. This could integrate CERCLA § 108(b) requirements into the existing Federal and state financial responsibility requirements applicable at hardrock mining facilities, and allow for more consistency among financial responsibility requirements nationally, as the CERCLA § 108(b) amount would in concept, fill in any gaps EPA identified under other programs.

However, EPA soon recognized that there may be problems adopting such an approach. First, selection of a particular response under CERCLA is determined in accordance with the NCP, but after a release or threatened release is identified, and on a case-by-case basis. By contrast, a permit program has the advantage of identifying the appropriate engineering controls for closure before they become necessary, through the permit process. EPA was unable to identify a basis to specify a site-specific set of engineering controls for a site-specific cost estimate, without going through a process similar to applying the NCP at each facility. Such an approach would present a significant regulatory burden on the Agency. First, it would necessitate a case-by-case evaluation of each facility to determine the appropriate engineering controls that CERCLA might require, and then the Agency would need to compare that set of controls to any applicable regulatory requirements, such as state or Federal reclamation requirements. Second, it would be difficult for EPA to create a CERCLA § 108(b) financial responsibility instrument that would be written to cover only the particular ''gaps'' the Agency sought to cover for each engineering requirement at a facility without having the instrument overlap with other requirements given that some closure programs conduct activities that reduce CERCLA risks. This would present problems those presented by sub-limits on instruments (discussed earlier). EPA has other important concerns with such an approach aside from these implementation concerns. EPA has policy concerns about overseeing other Federal and state programs' financial responsibility requirements for adequacy, given other authorities' expertise with mining regulation. Based on these considerations, EPA is proposing the formula approach in this rule. EPA solicits comment on the proposed approach.

It should be noted that, as mentioned in section III.F. of this preamble, the financial responsibility formula developed for this proposed rule is

[44] *See* summaries of state financial responsibility programs in the docket for this rulemaking (EPA–HQ–SFUND–2015–0781).

specific to the hardrock mining industry, and is not designed for use in future rulemakings under CERCLA § 108(b). In future rulemakings under CERCLA § 108(b), EPA will evaluate how to determine financial responsibility amounts for each particular rule, and will propose an appropriate methodology.

F. Available Instruments

The proposed rule considers the use of all financial responsibility instruments identified in CERCLA § 108(b)(2) of the statute, that is, insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. The proposal includes a trust fund as an available form of qualifying as a self-insurer. The proposed rule would allow owners and operators to demonstrate the financial responsibility amount required at a facility using one or a combination of these instruments. In addition, the proposed rule would allow the owner or operator to demonstrate financial responsibility for multiple facilities using a single instrument.

The Agency is proposing two approaches for qualifying as a self-insurer through a financial test instrument for self-insurance. Under Option 1, EPA would not include a financial test as a form of self-insurance. EPA prefers this option because it believes the weight of the evidence supports more secure forms of financial responsibility. With respect to Option 2, EPA would include a stringent credit rating-based financial test to cover all or partial costs of a facility's obligations, depending on the owner or operator's credit rating. Under Option 2, the owner or operator could use the financial test itself, or the test may be used by a corporate parent, a firm owned by the same parent corporation as the owner or operator, or a firm with a substantial business relationship with the owner or operator, to demonstrate financial responsibility for the owner or operator through a corporate guarantee. The proposed approaches are discussed in section VI.C.4. of this preamble.

The proposed rule includes wording for the financial responsibility instruments. The instruments would be required to conform to this wording. This simplifies administration of the rule. The proposed financial responsibility instruments are designed to pay costs under CERCLA for which the owner or operator is responsible at the facility. Depending on the requirements of the instrument provider, both the owner and operator may or may not be named on the financial responsibility instrument, but all instruments must be available to pay for costs of either party.

The financial responsibility instruments proposed are designed to pay for CERCLA response costs, health assessment costs, and natural resource damages under three scenarios in addition to, and independent of, the direct action scenario provided in CERCLA § 108(c). First, the instruments are designed to pay the party obtaining the judgment after a court finding of CERCLA liability against any owner or operator covered by the instrument. In this case, the instrument would pay any party obtaining a judgment.

Second, the instruments are designed to pay upon settlement of CERCLA liability with the United States, into an account designated under the settlement. This could include a CERCLA special account under CERCLA § 122, in which those funds can be used for carrying out the settlement at the site, or into the Superfund. In situations where a facility is in bankruptcy or jurisdiction over the owner or operator is not available and a direct action is brought against the instrument provider under CERCLA § 108(c), the instrument would be available to pay in settlement of the owner or operator's CERCLA liabilities upon settlement with the instrument provider, standing in the shoes of the owner or operator.

Finally, the instruments are designed to pay in certain limited administrative order situations under CERCLA § 106; that is, where the financial responsibility instrument is named in an administrative order and a trust fund is established pursuant to the order, the funds would be available to be paid into that trust fund if performance at the facility as required by the order had not occurred.

V. Relationship of CERCLA § 108(b) to Other Federal Laws, and to State and Tribal Laws

In considering options for this proposed rule, EPA examined how CERCLA § 108(b) may relate to other financial responsibility authorities currently implemented by EPA and from closure and reclamation programs implemented by other Federal agencies and by states and tribes. EPA has concluded that CERCLA § 108(b) requirements apply in addition to requirements under other Federal law. EPA also believes that preemption of state reclamation bonding programs is not intended by CERCLA, nor necessary or appropriate. Thus, EPA expects CERCLA § 108(b) to effectively complement, not duplicate or disrupt, those programs.

CERCLA § 108(b) Applies To Address CERCLA Liabilities at Facilities in Addition to Other Federal Financial Responsibility Requirements

CERCLA authorizes EPA to issue financial assurance requirements to cover CERCLA liabilities, whether or not a facility is subject to financial responsibility requirements under another Federal law. Thus, CERCLA § 108(b) requirements apply even where a hardrock mine or mineral processor may be subject to, for example, Federal reclamation bonding requirements. This interpretation gives full effect to CERCLA § 108(b) and carries out its purpose in ensuring that facilities that manage CERCLA hazardous substances make arrangements to cover any CERCLA liabilities that may arise.

This approach is fully consistent with the plain language of the statute. CERCLA § 108(b)(1) addresses other Federal law only in a very limited way. It states that the requirements under that section are to be ''for facilities *in addition to* those under [RCRA] Subtitle C . . . and other federal law.'' The section does not further elaborate on what ''in addition to'' means. EPA reads this provision in a most straightforward way: Requirements in this proposed rule are quite literally ''in addition to'' whatever financial responsibility requirements may be imposed under other Federal laws for other purposes. EPA does not, for instance, see this reference to other Federal law as any limitation on the applicability of the section. Indeed, the phrase ''in *addition* to'' is inconsistent with the notion that other Federal law is to be a *limitation* on the scope of CERCLA § 108(b)'s applicability. By contrast, when Congress intended to insert limitations based on other Federal law into CERCLA, it clearly stated them as such. *See, e.g.,* CERCLA § 101(22)(C) (definition of release ''excludes . . . (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under § 170 of such Act. . . .); 101(39) (''The term 'brownfield site' does not include'' facilities to which permits have been issued under RCRA, the Clean Water Act, the Toxic Substances Control Act, or the Safe Drinking Water Act; or facilities subject to RCRA corrective action, RCRA closure, or TSCA clean up obligations). Nor would reading this reference as a limitation on the scope of CERCLA § 108(b) make much practical sense, as

the need for a CERCLA response may arise regardless of whether another Federal law already applies.

EPA's intent in this proposal, consistent with its interpretation described earlier, is to apply CERCLA § 108(b) to address potential CERCLA risks at a facility, even when that facility is subject to regulation and/or financial responsibility requirements under other Federal law, such as mine reclamation bonding requirements required by Bureau of Land Management (BLM) or the U.S. Forest Service (USFS). As explained elsewhere, these proposed regulations are not designed to ensure compliance with technical engineering requirements imposed through a permit, or to ensure proper closure or reclamation of an operating mine. Instead, EPA has structured these rules to address the CERCLA liabilities at a regulated facility, and to create incentive for practices that will prevent the need for future CERCLA responses.

Provision of a Financial Responsibility Instrument Under CERCLA § 108(b) Does Not Preempt State Mine Bonding Regulations Under CERCLA § 114(d)

EPA has also considered, in developing the proposed CERCLA § 108(b) regulations for hardrock mining classes, what effect, if any, compliance with the Federal requirements would have under CERCLA § 114(d), an express preemption provision relating to specific state financial responsibility requirements. Many states have mine financial responsibility requirements. EPA compiled summaries of all 50 states' mine bonding requirements to get a general understanding of the types of requirements applicable under other programs. These summaries are also available in the docket. EPA's general understanding of state mining programs indicates that those programs vary, and that states use mine permitting authorities to enforce compliance with state mining regulations. Some states may address different risks, or address risks in a different manner from those for which EPA's proposed Financial Responsibility Formula is designed to account. In developing the proposed rule, the Agency sought the input of several states with significant mining regulatory programs on the state preemption question. EPA received responses from Alaska, Arizona, Colorado, and New Mexico. The comment letters also are included in the docket for this proposal.

EPA does not intend its CERCLA § 108(b) regulations to result in widespread displacement of those programs, nor does EPA believe that such preemption is intended by CERCLA, necessary, or appropriate.

EPA does not believe that CERCLA § 114(d) [45] gives a broad preemptive effect to EPA's CERCLA § 108(b) financial responsibility regulations, over state reclamation bonding requirements generally.[46] This follows from consideration of the structure and language of the statute and case law. First, both CERCLA §§ 108(b) and 114 are expressly focused on hazardous substances, the risks they present, and financial responsibility associated with liability stemming from their release or threatened release. Consistent with this, as described in section V.B. of this preamble, EPA has interpreted the scope of CERCLA § 108(b)'s mandate for evidence of financial responsibility to reflect the types of costs for which parties may be liable under CERCLA § 107 that result from releases or threatened releases of hazardous substances. As the state commenters have made clear, many state reclamation bonding regimes are not similarly limited to CERCLA hazardous substances or their release. For example, the New Mexico Environment Department stated that reclamation under the state Mining Act is a goal in itself, which may or may not be connected with the release of hazardous substances in a particular instance.

Second, CERCLA § 114 taken as a whole makes clear that states are not prohibited from requiring reclamation bonding. The section begins with a general disclaimer of preemptive effect in paragraph (a), specifically directing that ''nothing in this chapter'' ''be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.'' This reflects Congressional intent that preemption of state law requirements should be minimized. Moreover, CERCLA § 114(d)'s preemptive effect is qualified—''except as provided in this subchapter''—a reference that logically encompasses the limitations on preemption outlined in paragraph (a). Taken together, these references quite naturally preserve state mine bonding requirements as ''additional requirements'' to the extent that they may also address the release of hazardous substances.

Third, many state requirements serve significantly different purposes from any final CERCLA § 108(b) regulations, and for this reason alone those state requirements should not be considered to be ''in connection with liability for the release of hazardous substances'' within the meaning of CERCLA § 114(d). As discussed, the CERCLA § 108(b) regulations being proposed today are intended to address facilities' potential for releases or threatened releases that result in CERCLA liability. By contrast, many mine bonding programs are designed to ensure that a facility can comply with otherwise-applicable regulatory requirements, that may or may not be connected with (or may be only partially connected with) hazardous substance releases or threatened releases. See ALASKA STATUTE § 27.19.040(a), Reclamation Financial Assurance (requiring financial responsibility to ensure performance of a reclamation plan); ARIZ. REV. STAT. § 27–971(B)(11), Submission and contents of reclamation plan (financial responsibility is required to ensure completion of all activities in the approved reclamation plan for mining units); CAL. PUB. RES. CODE § 2773.1(a), Reclamation of Mined Lands and the Conduct of Surface Mining Operations (financial responsibility is required to ensure the completion of the lead agency-approved reclamation plan); 2 COLO CODE REGS. § 407–1 R. 4.2.1(1), Adequacy of Financial Warranties (For mining operations, financial responsibility is required to ensure the fulfillment of the requirements of the reclamation plan that is attached to the reclamation permit application); FLA. ADMIN. CODE ANN. r. 62C–16.0075(5)(f), Financial Responsibility (required to demonstrate financial responsibility in order to cover reclamation through the initial revegetation of the reclaimed area); IDAHO ADMIN. CODE r.20.03.02.070(01), Reclamation Plan

[45] CERCLA § 114 states, in relevant part:

(a) Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

. . .

(d) Except as provided in this subchapter, no owner or operator of a . . . facility who establishes and maintains evidence of financial responsibility in accordance with this subchapter shall be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such . . . facility. Evidence of compliance with the financial responsibility requirements of this subchapter shall be accepted by a State in lieu of any other requirement of financial responsibility imposed by such State in connection with liability for the release of a hazardous substance from such . . . facility.

[46] By this discussion, EPA is providing its general views on the preemption issue for transparency and to obtain public comment. It is the courts that would make any final determinations about the preemptive effect of CERCLA 108(b) regulations at any particular facility. These determinations would necessarily be based on case-by-case evaluations.

Approval Required and IDAHO ADMIN. CODE r.20.03.02.071(01), Permanent Closure Plan Approval Required (Financial responsibility is required to ensure that all reclamation activities included in an approved reclamation plan and that all closure activities in an approved permanent closure plan are completed for surface mining operations and cyanidation facilities, respectively); MINN. R. 6130.6000 Subp. 1–Subp. 2, Performance Bonds (Financial responsibility also may be required to cover the estimated cost of ''satisfactorily accomplishing reclamation of all lands disturbed and unreclaimed up to the date of annual [financial responsibility] review.''); NEV. ADMIN. CODE ch. 519A.350(1), General requirements (Financial responsibility is required to ensure that reclamation activities in the approved reclamation plan will be completed); N.M. STAT § 69–36–11, Existing mining operations; closeout plan required (Financial responsibility under NMMA is required to assure reclamation or ''closeout.''); UT CODE ANN. 40–8–4(13)(a), Definitions (Financial responsibility is required to assure reclamation of affected lands); WASH. REV. CODE § 78.44.087(1)(a), Performance security required (Financial responsibility is required for reclamation of affected surface mining lands).

Fourth, it makes sound policy sense for CERCLA § 114(d) to be read to allow these programs to apply in tandem. EPA cannot write its national CERCLA § 108(b) requirements to simultaneously correspond to 50 different states' reclamation requirements. These requirements can vary substantially, and particular requirements may have only a limited relationship to liability for the release of hazardous substances.[47]

VI. Section-by-Section Analysis

A. Subpart A—General Facility Requirements

1. Purpose and Scope (§ 320.1) and Applicability (§ 320.2)

This proposed rule would establish financial responsibility requirements under CERCLA applicable to current owners and operators of hardrock mining facilities that are authorized to operate or should be authorized to operate, that is, owners and operators that are required to obtain authorization to operate and have done so, as well as those who are required to obtain authorization to operate and have failed to do so. The proposed rule would not apply to owners or operators of past hardrock mining facilities, such as abandoned mines, nor would it apply to former owners or operators of mines that are covered by the rule. The financial responsibility requirements for those current owners or operators would extend to all potential CERCLA liabilities at the facility, based on current conditions at the site. This approach balances the dual goals of providing funds to address CERCLA liabilities at their sites, and of creating incentives for sound practices that will minimize the likelihood of a need for a future CERCLA response.

In developing this proposed rule, EPA considered whether to propose conditions applicable to all owners and operators, past and present, of facilities covered by the rule, or whether to limit the rule to current owners and operators. EPA also considered whether CERCLA § 108(b) requirements could be applied to abandoned facilities. Although CERCLA § 108(b) could potentially be interpreted to cover such owners, operators and facilities, EPA is proposing requirements applicable only to current owners and operators of currently authorized to operate facilities for a number of reasons.

The plain language of CERCLA § 108(b) is ambiguous on the owners, operators and facilities to which it is intended to apply. The section uses the terms ''owner'' and ''operator'' and ''facility'' repeatedly, but says nothing about whether these terms could include *past* owners and operators, or owners or operators of former facilities.

Looking at the statute more broadly, however, indicates that it is appropriate to adopt a narrower interpretation than the bare terms in CERCLA § 108(b) would suggest. First, reading CERCLA § 108(b) as applying to current owners and operators of currently-active or –idled facilities comports with CERCLA § 108 when read as a whole. CERCLA § 108 requires evidence of financial responsibility for three different types of facilities: vessels under CERCLA § 108(a), motor carriers under CERCLA § 108(b)(5), and other facilities under CERCLA § 108(b). The provisions applicable to vessels and motor carriers logically apply to current owners and operators of existing vessels and motor carriers. For example, CERCLA § 108(a) refers, as does CERCLA § 108(b), to ''owners'' and ''operators'' of ''vessels'' without qualification. However, logically only current owners and operators of existing vessels are able to ''use[] any port or place within the United States'' as required by CERCLA § 108(a), and only those entities and vessels would be subject to the remedies available to the Secretaries of the Treasury and Transportation in CERCLA §§ 108(a)(2) and (3). Indeed, the U.S. Coast Guard's CERCLA § 108(a) regulations apply only to current owners and operators of vessels used or capable of being used as a means of transportation on the water. *See* 33 CFR §§ 138.12 and 138.20. DOT's motor carrier financial responsibility requirements also only apply prospectively.

Current owners and operators are the primary actors at facilities and as such would be able to evaluate the applicability of the rules and apply the formula to the features present. EPA anticipates that requiring entities that may no longer have the legal rights to access a facility to evaluate it for purposes of determining whether they are subject to the rule and if so, the appropriate amount of financial responsibility, would be difficult in many cases. Thus EPA intends for this proposal to be focused upon an easily-identified, particular subset of parties that has control over and are thus in the best position to control and address hazardous substance management activities. Such incentives would not exist in the case of owners and operators that no longer have activities at the site. Nor does EPA expect that applying the rules to such former owners would further a primary goal of financial responsibility, that is, to develop incentives for good practices.

Similar reasoning leads EPA to propose applying the CERCLA § 108(b) requirements only to currently-active or currently-idled facilities. These facilities are readily identifiable and because they are ongoing concerns, are more likely to be able to obtain the kind of financial responsibility necessary under the regulation, and to further the dual goals of CERCLA § 108(b) regulations. By contrast, EPA is concerned that a rule applicable to facilities that are not currently active or currently idled would be very difficult to implement, and has the potential to divert significant resources from existing Superfund priorities with minimal benefit to the program. Therefore, EPA believes that attempting to regulate and oversee CERCLA § 108(b) requirements for this vast universe of facilities would impose a tremendous administrative burden on the Superfund program, with the likelihood of very little return. EPA

[47] EPA also notes that concerns about duplication are separately addressed in CERCLA's prohibition on double recovery in CERCLA § 114(b). That section allows for harmonizing recoveries where claims could also be brought under other state causes of action. This helps provide assurance, for example, that reclamation requirements that may otherwise be similar to CERCLA response actions and compensable through a CERCLA 108(b) financial responsibility instrument would not be unfairly paid twice.

believes that the Superfund and existing enforcement processes are significantly better suited for use at sites that are not currently active or currently idled to effect cleanup directly. Thus, EPA expects that the approach in this proposed rule would maximize the effectiveness of CERCLA § 108(b) requirements.

EPA has sought to complement CERCLA's liability provisions by requiring owners and operators subject to the rule, to provide assurance against all potential risks associated with hazardous substance management at their facility. In this way EPA's proposed approach thus also is intended to support CERCLA's broad remedial purposes, while accounting for the differences between CERCLA § 108(b)'s regulatory program and CERCLA's liability and enforcement provisions.

As discussed in further detail in following sections of this preamble, requirements for financial responsibility under CERCLA § 108(b) do not affect the liability of any parties potentially responsible for CERCLA costs. This would include that of any former owners and operators. The existing CERCLA processes for enforcement, contribution, cost recovery, and assignment of liability are unaffected by CERCLA § 108(b) financial responsibility requirements, and are available to ensure that responsible parties pay the costs associated with releases or threatened releases of hazardous substances. In fact, while not required by the proposed rule itself, EPA believes that requiring current owners and operators to demonstrate CERCLA § 108(b) financial responsibility may have the salutatory effect of inducing those subject to the rule to seek out any other parties who may be liable for contamination at their facility in order to obtain their assistance with cleanup. The result could be a potential reduction in threats to human health and the environment at the site which could in turn result in a reduced CERCLA § 108(b) financial responsibility amount. Given the practical difficulties of imposing CERCLA § 108(b) financial responsibility requirements upon past owners and operators, EPA expects that those existing processes are the appropriate means for parties to divide liabilities amongst themselves.

Exemption for States and the Federal Government

The proposed rule at § 320.1(c) would exempt states and the Federal Government from the requirements of part 320. This provision is modeled on a similar, long-standing exemption in EPA's regulations for RCRA Subtitle C hazardous waste treatment, storage, and disposal facilities.[48] In EPA's view, the Federal and state governments have adequate resources and taxing authority to ensure that they will be able to pay for any CERCLA § 107 costs that may arise at facilities where they are owners or operators. Local governments, however, are not exempt. As EPA explained in 1980, local governments can and do become insolvent, and if small enough, may not be able to cover their liabilities. EPA requests comment on this exemption.

Non-Transportation-Related Facilities

E.O. 12580 delegates the responsibility for developing regulations under CERCLA § 108(b) for non-transportation-related facilities to EPA. Responsibility for developing regulations for transportation-related facilities is delegated to the Department of Transportation. Thus, transportation-related facilities at hardrock mining sites would not be subject to requirements under this proposed rule. The Agency anticipates that jurisdictional issues between EPA and the Department of Transportation will be worked out in implementation. EPA solicits comment on this approach.

2. Definitions (§ 320.2)

The Agency is proposing the following definitions for use in Part 320:

Hardrock Mining Facility means a hardrock mine, as defined in subpart H of part 320, and/or a mineral processor, as defined in subpart H part 320.

Administrator means the EPA Administrator, or designee thereof.

3. Availability of Information; Confidential Business Information (§ 320.4)

Section 2.203(b) of this chapter provides procedures through which any person submitting information to EPA in accordance with this Part may assert a claim of business confidentiality covering part or all of that information. Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in Part 2, Subpart B, of this chapter. However, if no such claim accompanies the information when it is received by EPA, it may be made available to the public without further notice to the person submitting it.

This rule proposes an option to require owners or operators to post on their company website all information submitted to EPA that is not identified as confidential business information (CBI). EPA anticipates that owners or operators will claim some of the information submissions required under this rule as CBI. However, the Agency believes that there are categories of information required that will not be CBI including, but not limited to, identification of the type of financial responsibility instrument used, the amount of financial responsibility required at a facility, the facility contact information, failure of instrument providers, an owner or operator entering bankruptcy, claims made against the owner or operator, or an owner or operator's request for release from financial responsibility requirements. To facilitate implementation of this proposed rule, the Agency is considering making Class Determinations for certain types of CBI information. EPA solicits comment on the types of information that owners or operators anticipate would be CBI, and on the value of CBI Class Determinations.

4. Initial Notification Requirement (§ 320.5)

EPA is proposing to require owners or operators subject to the requirements of this rule to submit a notification form to EPA. Owners or operators authorized to operate on the promulgation date of this rule would be required to submit the initial notification form within thirty days of the effective date of the final rule. Owners or operators that become authorized to operate after the effective date of the final rule would be required to submit the notification form and comply with the requirements of this proposed rule prior to beginning operations

The notification form is specified in proposed § 320.5. Owners or operators would be required to provide, at a minimum, the following information: (1) The name, mailing address, and location of the facility, (2) the facility's EPA ID number, if one has been previously issued, (3) the name and contact information for a contact person for financial responsibility issues, (4) the land type on which the facility is located, (5) owner and operator information, (6) and information about the activities conducted at the facility.

Within thirty days of receiving the notification form, EPA would issue an EPA identification number to the facility, if the facility has not yet received one.

The requirement for this notification form would serve several purposes important to the implementation of financial responsibility requirements under this proposed rule. First, it would

[48] *See* 45 FR 33198–99 (May 19, 1980); 45 FR 33262 (May 19, 1980).

allow EPA to identify the universe of facilities subject to the rule. In addition, it would assure that all facilities subject to the rule receive an EPA identification number, which will allow EPA to track financial responsibility implementation information. Finally, it would provide EPA information about the facility that EPA anticipates will be important for effective rule implementation. The Agency solicits comment on this proposed notification requirement, on the proposed notification form, and on the timeframe for notification.

5. Information Submission Requirements (§ 320.6)

This proposed rule would require that owners or operators of facilities subject to the rule submit information to EPA. The Agency believes that submission of the information proposed in this rule would be needed for effective implementation of CERCLA § 108(b) requirements. By requiring the owner or operator to submit information about the facility to EPA, these requirements would better enable the Agency to ensure full compliance with the requirements for financial responsibility throughout the time the facility is subject to those requirements.

Under § 320.5, owners and operators would be required to submit an initial notification form. The form would provide EPA basic information about the facility. The form can be found in Appendix A of Part 320. EPA solicits comment on the information required in the form.

Owners or operators would further be required to submit evidence of financial responsibility. The precise submittal requirements for each financial instrument are described in subpart C. Generally, owners or operators demonstrating financial responsibility using a surety bond would be required to submit the surety bond to EPA. Owners or operators using a letter of credit would be required to submit the letter of credit to EPA unless it is held by a trustee, as provided in § 320.40, in which case they would be required to submit a certified copy. Owners or operators using insurance would be required to submit the endorsement. Owners or operators using a trust agreement (either a stand-alone trust or a stand-by trust established for use with another instrument) would be required to provide a duplicate original. If the final rule allows for the use of a financial test and corporate guarantee, owners or operators using the corporate guarantee would be required to submit a signed corporate guarantee, as well as a letter from the Chief Financial Officer (CFO letter), audited financial statements, and agreed upon procedures report, as required in § 320.44. Finally, owners or operators using the financial test, if allowed in the final rule, would be required to submit the CFO letter, audited financial statements, and agreed upon procedures report, as required in § 320.43. In the case of the corporate guarantee and the financial test, the CFO letter, auditors report, and agreed upon procedures report would be required to be updated annually.

This proposal also requires information submission to assure proper maintenance of financial responsibility. The precise submittal requirements for each of the following are described in § 320.65. These requirements include a requirement to update financial responsibility amount calculations every three years, at a minimum, and to notify EPA of changes in the information on the facility's initial notification form, facility transfer, claims filed against the instrument or owner or operator, intent to close the facility, failure of an instrument provider, instrument provider intent to cancel, and owner or operator bankruptcy.

Owners or operators are also required to submit information that may vary according to facility class. These requirements will be specified in the relevant Subparts to 40 CFR part 320, but for clarity, those submission requirements are also incorporated into the general information submission requirement in proposed § 320.6. Thus, for example, owners and operators of hardrock mining facilities must calculate a financial responsibility amount for their facilities using the formula in § 320.66, and § 320.67 requires submission of information to support that calculation, including data inputs to the proposed formula to determine a financial responsibility amount, and documentation supporting all data inputs and assumptions. Under proposed § 320.6, this information must be submitted to EPA.

The Agency solicits comment on these information submission requirements including comments on the need for these requirements and suggestions for additional information that should be required under this rule.

6. Requirement for Electronic Submission of Information (§ 320.7)

This proposed rule includes information submission requirements throughout the financial responsibility process. These information submission requirements include: (1) Initial notification, (2) demonstration of financial responsibility, (3) notifications pursuant to financial responsibility maintenance, (4) submission of a financial responsibility amount and support for the amount, and (5) request for release from financial responsibility. The Agency is proposing to require that the submissions under this rule be in electronic format.

a. Benefits of Electronic Reporting

Adopting electronic information submission across its programs will benefit the Agency, owners and operators, and the general public. Electronic information submission will save Agency resources and improve data quality by reducing the need for manual data entry, and will help the Agency manage environmental programs more efficiently and effectively. EPA also expects electronic information submission to promote public participation by facilitating EPA's ability to make information submitted more readily accessible to interested parties. In this respect, electronic reporting can work in concert with another requirement in the proposed rule—that owners and operators have a publicly-accessible Web site (*see* Section VI.A.8. of this preamble). In addition, electronic information submission will reduce the time needed for owners and operators to submit information by eliminating the need to print or mail forms, eliminate mailing or courier fees, and allow members of the regulated community to obtain information about the status of their submissions without requesting such information from EPA by phone or mail.

Use of electronic forms should also facilitate the effective submission of required information. Owners and operators may benefit through integration of data entry error prevention and compliance assistance into the reporting tool. Namely, electronic systems can provide automatic data quality checks, such as for improperly formatted addresses, math errors, or significant changes in cost estimates, and flag these for correction, if needed, before submission. A system can also provide automated reminders and prompts (*e.g.,* when annual updates are due) to owners and operators, and pre-populate forms with information from prior reports. EPA does not expect that these or other tools that could be built into such a system would guarantee compliance or be a substitute for an owner or operator's own compliance assessment, since they cannot account for every site-specific situation, but EPA expects that such tools will make it easier for owners and operators to comply with the rules. It can also facilitate communication between EPA, owners and operators,

and instrument providers to immediately address data quality issues and to provide compliance assistance or take other action when potential problems are identified. Finally, the system may also provide a way for entities to maintain records supporting financial responsibility compliance, such as cost estimate documents.

This approach is also consistent with the Agency's 2013 E-Reporting Policy Statement for EPA Regulations, which reflects that, in developing new regulations, EPA will assume that reporting will be electronic and not paper-based.[49] As described by this policy, e-reporting is not simply a regulated entity e-mailing an electronic copy of a document (*e.g.,* a PDF file) to the government, but a system in which an electronic tool guides the regulated entity through the reporting process, often with built-in compliance assistance and data quality checks. This policy embraces the Digital Government Strategy issued by the White House on May 23, 2012,[50] which calls for EPA to continue evolving its reporting systems to take advantage of new technology and improve transparency for all of its stakeholders.

Electronic reporting also is a key component of the Next Generation Compliance Strategy.[51] EPA's Next Generation Compliance Strategy is an integrated strategy to improve regulations with new monitoring and information technology and expanded transparency.[52] It is designed to motivate the regulated community to increase compliance, inform the public about performance, and help ensure the public has access to information about their communities that allows them to more fully engage in environmental protection efforts.

b. Financial Responsibility Portal

To realize these benefits, EPA is considering development of a Financial Responsibility Portal to collect information relevant to the rule and to serve as an electronic tool that guides owners and operators through the reporting and submission processes with built-in compliance assistance and data quality checks. EPA envisions that this system would be a component of EPA's Central Data Exchange,[53] or an equivalent technical architecture. If the Financial Assurance Portal is created using Central Data Exchange, owners and operators will be required to establish an account with Central Data Exchange in order to use the system. Any electronic reporting system will comply with subpart D of EPA's Cross-Media Electronic Reporting Regulation (CROMERR).[54] CROMERR sets performance-based, technology-neutral standards for receiving electronic reports from facilities regulated under EPA programs to protect users and their data.

EPA envisions that users would access the portal through a Web form based on Extensible Mark-up Language (XML). EPA expects that XML schemas and stylesheets, when combined with XML enabled browsers, data bases, and other applications are currently the method of choice for conducting data exchange using the Internet to transfer and manipulate data.[55] The Agency is seeking comment on using an XML format, or if another type of electronic format, such as an Electronic Data Interchange (EDI) would be preferable. EPA also requests comment on the estimated burden reduction if EPA developed an option to submit information electronically using a system-to-system based approach using Extensible Mark-up Language (XML) through EPA's Central Data Exchange.

Once the Financial Assurance Portal is developed, EPA is proposing to require that regulated facilities electronically submit the following categories of information through the portal: (1) Initial notification form required under § 320.5, (2) submission of URL where CERCLA § 108(b) information will be available, (3) financial responsibility formula data (upload documentation), (4) financial responsibility instrument evidence, (5) notification of change in financial responsibility amount, (6) notification of change in instrument, (7) notification of claim filed against the instrument or owner or operator, (8) notification of closure, (9) request for release from financial responsibility; and (10) notice of owner or operator bankruptcy. In addition, EPA is proposing to provide for both paper and electronic submission of the following notices from instrument providers: (1) Notice of cancellation (by provider), and (2) notice of provider incapacity. Within these categories, EPA expects that certain types of information will need to be submitted using different types of electronic means, which are discussed in detail in later sections.

In order to gain the full benefits of electronic reporting, obtaining as much information as possible in an electronic format is preferable. At the same time, the Agency is considering whether some of the information submission requirements of this proposed rule may not be appropriate for electronic information submission. For example, some of the information submission requirements proposed in this rule will result in more frequent submissions to EPA than will others. An example of submissions that EPA expects to occur more frequently relate to facility conditions—every facility will have to notify the Agency, and the notification form will have to be updated to reflect changed facility conditions. On the other hand, other requirements may be less frequent. For example, EPA's analysis of instrument providers (conducted for purposes of evaluating provider qualifications) indicates that failures are relatively uncommon. Thus, it is possible that few owners or operators will have to submit notification of instrument provider failure. Where infrequent submissions are likely, EPA expects that developing an electronic form for that submission may not have significant benefits. In addition, there may be specific types of documents (*e.g.,* cost estimate data, certain types of financial responsibility instruments that may require wet ink signatures) that cannot be submitted electronically. The Agency solicits comment on types of information that are inappropriate for electronic submission, including the reason they may not be appropriate, and the burden to the regulated community if electronic submission of such information were to be required. EPA also asks for comment on which types of information commenters believe should be highest priority for EPA development of electronic submission tools.

As EPA develops its data system, it is considering technical issues associated with its development as described later in this section. EPA solicits comment on how an electronic submission system can be constructed to appropriately capture submission of the categories of information that EPA proposes to

[49] *See* E-Reporting Policy Statement for EPA Regulations (September 30, 2013), *http://www.epa.gov/sites/production/files/2016-03/documents/epa-ereporting-policy-statement-2013-09-30.pdf.*

[50] *http://www.whitehouse.gov/sites/default/files/omb/egov/digital-govemment/digital-govemment-strategy.pdf.*

[51] *See http://www.epa.gov/compliance/next-generation-compliance-strategic-plan-2014-2017.*

[52] *See http://www2.epa.gov/compliance/next-generation-compliance.*

[53] CDX is EPA's electronic system for environmental data exchange to the Agency. CDX also provides the capability for submitters to access their data through the use of Web services. CDX enables EPA to work with stakeholders, including governments, regulated industries, and the public, to enable streamlined, electronic submission of data via the Internet. For more information about CDX, go to *http://epa.gov/cdx.*

[54] *see* 40 CFR part 3.

[55] EPA states a similar expectation in the Final Rule for Hazardous Waste Manifest Revisions—Standards and Procedures for Electronic Manifests (79 FR 7517, Aug. 6, 2004).

require. Specifically, EPA requests comment on whether specific technical requirements are called for to support data submission of the following categories of information: (1) The development of a financial responsibility amount, (2) evidence of financial responsibility, (3) updates to the facility's financial responsibility information, (4) notice of closure of the facility, and (5) submission of instruments and cancellations, including how to account for the acceptance of originally signed financial responsibility documents. EPA is also seeking comment on the feasibility and utility of developing tools within the system that would assist users in complying with reporting requirements, such as the use of decision-trees to determine if an entity is regulated, checklists to ensure the proper form/documents are submitted, or reminders when reports or updated documents are due.

c. Anticipated Format of Submissions

The electronic system envisioned by EPA would have both mandatory and optional data entry fields. Submissions will not be processed until each of the mandatory fields have data entered, ensuring complete data entry before final submission. Data entry fields are expected to be a variety of drop down lists, number fields, calendars, and open test fields depending on the information that is required. For example, the type of activities occurring at the facility could be chosen from a drop down list, and the date of a facility's last financial responsibility amount calculation or financial test submission could be chosen from a calendar.

EPA expects these types of controls on data input can result in reduced errors. In turn this should provide efficiencies by substantially decreasing the time needed for EPA to review and process the submissions, and the time needed for the submitter to correct deficiencies. As discussed earlier, EPA is considering the ability to duplicate previous submissions when seeking to update or renew information. This will simplify future submissions to only those fields that require updates. To address the issue of CBI (described in § 320.4) the Agency envisions establishing a database that tags information as public or confidential upon receipt. This would allow the system to then auto-populate an EPA webpage to provide information not identified as CBI to the public. EPA solicits comment on this approach.

As discussed earlier, EPA would like to make it possible for users to enter some types of information through electronic forms available in the Portal. For example, EPA intends that the following information would be entered into the Financial Assurance Portal using smart forms with data-entry boxes that specify the exact information needed: (1) Initial notification; (2) website URL; (3) amount of financial responsibility required; (4) amount of financial responsibility secured; (5) type of instrument; and, if the financial test is used, credit rating, tangible net worth, and assets in the United States; and (6) instrument provider information (*e.g.,* name, address, etc.).

EPA intends other submissions to be accomplished through forms with electronic signatures and verification: (1) Financial responsibility instruments, (2) certain information demonstrating passage of the financial test, (3) notice of a change in financial status if using the financial test, (4) notice of cancellation of a financial assurance instrument, (5) notice of a claim against the instrument, (6) notice of bankruptcy; (7) notice of a change in instrument, (8) notification of change in the amount of financial responsibility required, and (9) notice of incapacity of the instrument provider. Where an electronic signature is required, the proposal requires that the signature be a legally valid and enforceable signature under applicable EPA and other Federal requirements pertaining to electronic signatures.

EPA also expects that the user will need to upload other information from outside the system. EPA expects that this information will need to meet certain document requirements (*e.g.,* downloadable, not encrypted, printable, searchable, etc.). For this category of documents, owners and operators would be required to produce duplicate originals of certain electronic filings upon request by EPA. EPA expects that the following information, if applicable, may fall into this category: (1) Information supporting the financial responsibility amount determination, (2) information to support a financial test showing, for example financial statements; the CFO letter; a CPA audit of financial information; and an agreed-upon procedures document; (3) annual updates on trust properties and (4) evidence of financial responsibility; and (5) PDF copies of instruments that cannot be submitted electronically.

The Agency solicits comment on these expectations for information submission format.

d. Access to the System

EPA envisions that owners or operators will receive a password and/or user identification number to access the portal when they notify EPA that they are a regulated entity. The system will then assist owners or operators in obtaining a unique user identification number, similar to the electronic interface that EPA has recently made available for states and the regulated community to use to electronically submit RCRA Site Identification (Site ID) forms, which are used by facilities to notify regulators that they are involved in RCRA waste activities. EPA intends to establish an electronic notification form for owners or operators to comply with proposed § 320.5. EPA solicits comment on whether instrument providers should be given access to the Financial Assurance Portal in order to submit notices to EPA and to owners and operators as required under this rule (*e.g.,* notice of cancellation). EPA solicits comment from instrument providers specifically, on whether they would use the electronic system described to file their notices electronically.

e. Beginning Electronic Reporting Once Portal Developed

Because the Agency anticipates that the Financial Assurance Portal will not be available to receive submissions when this rule is made final, the Agency is proposing that owners or operators be required to initially submit information in paper format until the electronic capability is available. Thus, EPA is proposing to identify an electronic filing compliance date in § 320.7(a). Because that date is not currently known, EPA is proposing to announce that date in the **Federal Register**at least sixty days in advance. The Agency is further proposing that after that compliance date, owners or operators would be required to submit information electronically unless they apply for and receive a waiver from electronic reporting requirements under § 320.7(d). This waiver provision is discussed in more detail later in this section. The Agency solicits comment on this approach.

EPA is considering an alternative approach under which electronic reporting would be phased in over the four-year compliance timeframe. EPA would require the initial notification to be submitted electronically, but would roll out other electronic forms as parts of the rule become effective or required (*e.g.,* the full amount of financial responsibility is not required until four years after the rule is promulgated). This will give EPA time to complete and fully test a number of the electronic documents prior to requiring their use. The disadvantage of this option is the increased burden to industry of having to print and mail paper documents,

along with the Agency's burden of manually entering data into its data system. EPA is considering whether such phasing may help ensure the system is working effectively and efficiently. Under this option, EPA would similarly identify an electronic filing compliance date for each phase in future **Federal Register** notices in a similar manner as described in the proposed option described earlier. Also similarly to the proposed option, the facility would be required to submit information in paper format until electronic submittals are possible for submission of the facility's information, and electronic filing would be subject to waiver.

f. Proposed Waivers

As part of the proposal for mandatory electronic reporting, the proposed rule would provide two options through which the Administrator could waive the requirement for electronic submission. EPA recognizes that there may be some circumstances where it may be necessary to provide for paper reporting of information otherwise required electronically, *e.g.,* in areas that lack sufficient broadband access, during large-scale national disasters (*e.g.,* hurricanes) or prolonged electronic reporting system outages, or to accommodate the religious practices of individuals that choose not to use certain technologies (*e.g.,* computers, electricity) in accordance with their religion. The Agency solicits comment on situations where flexibility might be required, and on what types of waivers should be provided under this rule.

EPA has included both a general waiver provision and an emergency waiver provision in the proposed rule. A general waiver could be granted to owners or operators that cannot comply with the requirement for electronic submission. The owner or operator would be required to submit a request for a general waiver to the Administrator at least thirty days in advance of the date the information is due to EPA. The Administrator could grant a general waiver upon a finding that: (1) The owner or operator is unable to gain access to a system allowing electronic reporting because it is located in an area with insufficient broadband access, or (2) religious practices of the owner or operator prohibit the use of necessary technologies. A general waiver could be granted for one year, and the owner or operator would be able to reapply annually.

In addition, the Administrator could grant a waiver of the requirements for electronic submission in emergency situations. To obtain an emergency waiver, the owner or operator would be required to submit a request within ten days of the date the information is due to EPA. The request for an emergency waiver must describe the conditions that prevent electronic submission of information and must be accompanied by a paper copy of the information due. The Administrator may grant an emergency waiver upon a finding that the owner or operator was unable to comply with the requirement for electronic information submission due to: (1) A large-scale national disaster (*e.g.,* hurricane), (2) a prolonged electronic reporting system outage, or (3) a prolonged outage of the owner's and operator's computer system. The Agency solicits comment on the adequacy of these waiver provisions.

7. Recordkeeping Requirements (§ 320.8)

EPA is proposing that owners or operators be required to develop and maintain a facility record that includes information documenting compliance with the financial responsibility requirements of this proposed rule. The facility record must include at least all information required to be submitted to EPA under this Part, comments received from the public, and all notifications received from EPA related to the financial responsibility obligations of the facility. The rule would require owners or operators to maintain this information until three years after the Agency releases the owner or operator from the requirement for financial responsibility. EPA solicits comment on these recordkeeping requirements.

8. Requirements for Public Notice (§ 320.9)

EPA is proposing requirements for public notice for owners and operators subject to CERCLA § 108(b) requirements. This approach will add the benefit of transparency to implementation of CERCLA § 108(b) requirements. In addition, these proposed requirements are consistent with EPA's commitment to assuring that the public is aware of EPA's Superfund activities at sites, even when there may not be an active Superfund action underway.[56] EPA believes that the proposed requirements for public notice would enhance the implementation of the proposed rule in two respects.

First, such public notice would help to ensure that the financial responsibility formula is applied as intended, so that the resulting financial responsibility level reflects the degree and duration of risk at the facility. As discussed in the financial responsibility formula section of this preamble, § 320.63, the financial responsibility formula is intended to be implemented by owners or operators, rather than by EPA. While EPA expects that in the vast majority of cases the financial responsibility formula will be applied accurately, EPA believes that providing information to the public can enhance the incentives for owners and operators to fully comply with regulatory requirements. The reliance on public notice as an incentive for compliance under this proposal is consistent with the 2010 guidance issued by the Office of Management and Budget (OMB), where that office recognized that the public disclosure of information is an increasingly common and important regulatory tool.[57]

Second, the proposed rules are structured to support CERCLA responses undertaken by the Federal Government, states, and private parties—a structure that is consistent with the CERCLA scheme. EPA is proposing to require owners and operators to make readily available to the public information about the levels of financial responsibility, information on claims made, and information that may relate to the continued validity of the instruments—for example, any notices of instrument cancellation by providers. EPA believes that ready access to this information will help ensure that parties with CERCLA claims, and parties potentially impacted by the CERCLA claims of others, will have the opportunity to monitor changes in the facility's financial responsibility.

EPA is today proposing two approaches for public notice procedures. Under the first approach, the owner or operator would be required to maintain a web site to convey information regarding its compliance with the requirements of proposed part 320. Under the second, EPA would provide information to the public on the Agency's Web site.

Under the first approach, owners and operators would be required to post information on a Web site created and maintained by the owner and operator. EPA is considering this approach because, as those generating the information, owners and operators are in the best position to track information about their facilities. In addition,

[56] *See* Superfund Community Involvement Handbook, 2005 page 5.

[57] *See* United States Office of Management and Budget. *Sharing Data While Protecting Privacy.* Memorandum from Jeffrey D. Zeints and Cass R. Sunstein. November 3, 2010. Available at: *https://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-02.pdf*

requiring owners and operators to update information related to their financial responsibility requirements would eliminate lag times between when the information is submitted to EPA and when EPA can make that information publicly available. Thus, EPA expects that requiring owners and operators to create and maintain their own Web sites may be an efficient way to ensure timely dissemination of information related to CERCLA § 108(b) financial responsibility.

The owner or operator would be required to establish a Web site titled ''CERCLA § 108(b) Financial Responsibility Information'' within sixty days of the date it first becomes subject to CERCLA § 108(b) requirements to and provide EPA with the URL of the location on its company Web site where it will make information available to the public about the implementation of financial responsibility requirements at the facility.

EPA would be required, within thirty days of receiving the URL, to post on its Web site the facility name, company EPA identification number, and the URL where information will be made available to the public by the owner or operator.

The proposed rule would then require the owner or operator to provide information on its company Web site beginning ninety days after the date it becomes subject to requirements under CERCLA § 108(b). The initial posting of information must include the name and contact information for a person that can provide the public information about the facility's CERCLA § 108(b) requirements. In addition to this information, the rule would require the owner or operator to make public at least the following information: (1) Any information that the owner or operator is required to submit to EPA under this proposed rule, and (2) notifications from EPA to the owner or operator .

This approach would also establish conditions for maintenance of the information on the company Web site. For example, § 320.9(e) would require that the information be posted in a location where a visitor to the Web site would reasonably expect to see announcement of issues related to compliance with requirements of CERCLA. In addition, that section would require that the owner or operator assure freely available access to the information, and that the access not be obstructed by complex access processes or passwords. The Agency believes these requirements are necessary to assure meaningful access to information.

To assure that current information is made available to the public, this approach would require the owner or operator to post all information submitted to EPA within thirty days of its submission. Thus, for example, the rule would require the owner or operator to submit to EPA the Initial Notification Form required under § 320.5 within thirty days of the promulgation date of this rule, and to post that form on the company's Web site within thirty days of submitting it to EPA. By requiring that the owner or operator post information submitted to EPA, the proposed rule will require that the Web site information be updated at key financial responsibility implementation points including: (1) When the level of financial responsibility required at the facility is initially determined and when it changes, (2) upon application for release from financial responsibility requirements, (3) when a claim is made on the instrument, (4) upon receiving notification of cancellation of an instrument, (5) upon transfer of ownership of the facility, and (6) upon submitting notice to a regulator of closure of the facility. The Agency believes that this approach will allow the public or claimants the opportunity to follow the implementation of financial responsibility requirements and the facility and be aware of changes that occur.

Under the second approach proposed in this rule, the owner or operator would not be required to post information on a Web site; rather, EPA would make the required information available to the public on the Agency's Web site.

EPA solicits comment on these approaches to providing notice to the public regarding the CERCLA § 108(b) financial responsibility at a facility. EPA particularly solicits comment on whether the owner or operator should be required to post information, what information would be of most benefit to the public in the implementation of CERCLA § 108(b) financial responsibility, and how the information would be used for that purpose.

Class Determinations for Confidential Business Information

As discussed in section VI.A.3. of this preamble, some information that owners and operators would be required to submit under this proposed rule may be claimed as CBI. This proposal would not require or allow posting of CBI. However, the Agency expects that much of the information submitted to EPA under the proposal would not be CBI, and could be made available. EPA is considering issuing a Class Determination under 40 CFR 2.207 notifying parties how it intends to treat information submitted under this rule. The purpose of a Determination is to state the Agency's position regarding the manner in which information within a class will be treated when information received by the Agency shares characteristics and necessarily results in identical treatment of the information. EPA expects that a Class Determination would clarify the Agency position on what does and does not constitute CBI under this rule. The Agency solicits comment on this approach. In particular, the Agency requests information regarding what the information that would be required under this proposed rule might owners or operators consider to be CBI.

Finally, EPA notes that it is planning to develop a Financial Responsibility Portal to receive and track financial responsibility information. Ultimately, when developed and populated, the goal is for that system to auto-populate an Agency public database and make available to the public information submitted under this rule. EPA solicits comment on whether, when the EPA public database becomes available, the requirement for the owner or operator to maintain a Web site should continue if that requirement is adopted in the final rule.

B. Subpart B—General Financial Responsibility Requirements

This proposed rule is designed to set up a regulatory program for multiple classes of facilities. Thus, the proposed rule includes several basic provisions that are intended to be used in conjunction with the class-specific requirements in Subparts D–Z.

These requirements are intended to guide the regulated community through the general requirements to establish the required evidence of financial responsibility, and also provide requirements that EPA anticipates will be applicable to multiple facility classes.

1. Applicable Financial Responsibility Amounts and Procedures for Establishing Financial Responsibility (§ 320.20 and § 320.21)

EPA has included a general requirement that owners and operators calculate a current amount of financial responsibility at their facilities in accordance with this part. Because this proposed rule also includes requirements for hardrock mining classes, proposed § 320.20 includes a cross reference to Table A–1 in § 320.2, which identifies the class-specific

requirements applicable to hardrock mining facilities. Those class-specific requirements are found in subpart H, where the Financial Responsibility Formula developed for those facilities is proposed. Upon addition of future classes to the CERCLA § 108(b) program, EPA anticipates that additional cross references will be added to Table A–1.

Each instrument included in the proposed rule has its own particular supporting information. The specific instruments proposed in this rule are further discussed in section VI.C.1. of this preamble.

2. Maintenance of Instruments (§ 320.22)

The proposed rule would require the owner or operator to recalculate the financial responsibility level three years after the date the facility is required to provide the full amount of financial responsibility at its facility under § 320.61, every three years thereafter, and within sixty days after every successful claim against a CERCLA § 108(b) financial responsibility instrument. The recalculation must use the most current facility information available. The owner or operator must submit the revised financial responsibility amount to EPA, along with supporting documentation.

Whenever the required financial responsibility amount changes, the owner or operator would be required to compare the new amount with the value of the financial responsibility instrument(s). If the resulting amount of financial responsibility required is greater than the amount of financial responsibility provided by the current CERCLA § 108(b) financial responsibility instrument(s), the owner or operator, within sixty days after the change in the required financial responsibility amount, would be required to increase the value of the instrument(s), or obtain a new instrument(s), in accordance with Subpart C, so that the value of the instrument(s) is at least equal to the newly required financial responsibility amount. This proposed provision ensures that adjustments to the required level are made promptly.

Conversely, if the resulting amount of financial responsibility required is less than the amount of financial responsibility provided by the current CERCLA § 108(b) financial responsibility instrument(s), the owner or operator may send a written request to the Regional Administrator to lower the required financial responsibility amount at the facility. The request must include updated information to support the revised financial responsibility amount as required in § 320.22. The amount of financial responsibility required at the facility would be reduced to the recalculated amount only with written approval by the Administrator.

This provision would ensure that the owner or operator first receive approval from EPA that the financial responsibility may be lowered, which provides a check against improper implementation of the requirements. Furthermore, under the proposed wording of the trust agreement, EPA would need to provide notification to the trustee that funds may be released (*see* § 320.50(a)).

This proposed requirement is intended to ensure that the amount of financial responsibility at the facility continues to reflect the level of risk at the facility. EPA recognizes that facility conditions and operations may change over time, or that new information may be available that may affect the amount of financial responsibility required. EPA thus is proposing a three-year periodic recalculation of the required financial responsibility amount to ensure the amount reflects the current risk at the facility. EPA expects that three years was a frequent enough requirement to provide current information while not overly burdening owners, operators and EPA with a more frequent implementation of the recalculation requirements. EPA requests comment on requiring recalculation of the amount of financial responsibility every three years.

Furthermore, EPA recognized that claims against the instrument may be successfully made that would correspondingly reduce the amount of financial responsibility at the facility. In some cases, the claims may be the result of responses that lower the risk at the facility. However, this is not expected to always be the case. Accordingly, EPA believes it is necessary for owners and operators to recalculate the required amount of financial responsibility after successful claims against the CERCLA § 108(b) financial responsibility instruments in order to compare the new required amount to the remaining financial responsibility at the facility.

3. Incapacity of Owners or Operators, Guarantors, or Financial Institutions; or Instrument Cancellation (§ 320.23)

Under this proposed rule, an owner or operator would be required to notify the Administrator by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 U.S.C. (Bankruptcy), naming the owner or operator as debtor, within ten days after commencement of the proceeding. [Option 2 only: A guarantor of a corporate guarantee would be required to make such a notification if he is named as debtor, as required under the terms of the corporate guarantee. Those requirements are discussed in section VI.C.5. of this preamble.]

This provision is modeled after a similar requirement in the requirements for hazardous waste treatment, storage, and disposal facilities at 40 CFR part 264 and 265. EPA believes it is important for EPA to be made aware of the owner or operator entering bankruptcy, as that event may have implications for the owner's or operator's ability to meet financial obligations under CERCLA. Likewise, EPA believes it is important for the Agency to be aware of situations where a guarantor of a corporate guarantee is entering bankruptcy as it may have implications for the guarantor's ability to meet financial obligations under the guarantee.

An owner or operator who demonstrates CERCLA § 108(b) financial responsibility for CERCLA liabilities by obtaining a trust fund, surety bond, letter of credit, or insurance policy would be deemed to be without the required financial responsibility in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing the surety bond, letter of credit, or insurance policy to issue such instruments. The owner or operator would be required to provide other evidence of financial responsibility within sixty days after such an event. This provision is also modeled on existing RCRA Subtitle C requirements. As with those regulations, EPA expects that this requirement will make clear what must be done by the owner or operator when the institution providing trustee services or issuing a bond, letter of credit, or insurance policy goes bankrupt or loses its authority to act as a trustee or issue such instruments.

4. Notification of Claims Brought Against Owners, Operators, or Guarantors (§ 320.24)

The owner or operator would be required to notify the Regional Administrator by certified mail, within ten days of a CERCLA claim being filed against the owner or operator or financial responsibility guarantor. The proposed rule also requires that this notification include certain key information: a copy of any papers filed by the claimant with a court, or other information allowing the Regional Administrator to identify the court, case

name and number, and parties. This notification requirement would apply to owners or operators regardless of the instrument they have elected to use. This proposed notification requirement is important because EPA will not, in many cases, be involved in the claims process against a financial responsibility instrument. It is appropriate for EPA to monitor potential claims because claims made may affect the adequacy of the instrument provided under the regulations, because those claims may reduce the amount available to below that which is required for that facility class. In addition, EPA is also proposing these requirements to apprise the Agency of potential issues at a site that could ultimately lead to EPA or another governmental agency having to take a response at the facility. This provision thus helps the CERCLA § 108(b) requirements support the broader CERCLA response program.

5. General Provisions on Instrument Payment

In this section of the preamble EPA discusses generally the key payment methods that are associated with each instrument. Proposed Subpart B does not contain corresponding language. Instead, this is contained in Subpart C of the proposed regulations, in the required wording of each instrument. Instead of addressing these considerations multiple times, however, EPA is presenting its approach to these common provisions once in this section of this preamble.

Under this proposed rule, the funds from all types of financial responsibility instruments except the financial test would be available under three circumstances and also under direct action scenarios. In essence, EPA has sought to allow for maximum flexibility in how the instruments pay out through the payment terms. EPA believes this approach will help integrate the operation of the CERCLA § 108(b) instruments into the various CERCLA enforcement and cleanup processes and therefore will efficiently support the goal of ensuring that funds be made available for the payment of CERCLA response costs, health assessment costs, and natural resource damages.

It is EPA's intent that each payment term as well as direct action be available independently of one another, and claimants may use any or any combination of the terms as the circumstances dictate. Similarly, use of one payment term by a particular claimant would not prevent its reuse or use of another payment term by another claimant. Again, this is to maximize flexibility in the manner in which the instruments can be payable, to promote the goal of ensuring cleanup while avoiding unnecessary litigation over whether the instruments are in fact payable. EPA seeks comment on these proposed payment terms.

a. Payment of an Unsatisfied CERCLA Judgment

Under this proposed rule, the financial responsibility instruments would be available to pay a final judgment from a Federal court awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility against any of the current owner or operators for which payment as required by the judgment has not otherwise been made within thirty days. This is intended to cover all types of CERCLA actions, including those under CERCLA §§ 107 or 113(f). This is also intended to cover judgments in favor of both governmental claimants (*e.g.,* EPA or another Federal agency, a state, or an Indian tribe) as well as private claimants. EPA solicits comments on this approach.

EPA is requiring that the claim be reduced to a final judgment under this payment term for two reasons. First, this provision provides court oversight to ensure the validity of the claims. This is important because EPA or another regulatory agency may not be directly involved in a particular cleanup. Second, the requirement to present a valid final court judgment may help alleviate concerns of potential instrument providers about instruments that could pay to multiple potential claimants. In discussions with representatives of the financial industry, certain representatives expressed concern that the availability of the instruments to multiple claimants would either: (1) Raise the risk to the instrument provider of fraudulent claims, or (2) increase the potential claims management and investigation costs of determining which claims are valid. While the preferred option of several representatives of the financial community was to have EPA specified as the beneficiary of the instrument, EPA had concerns with such an option in the context of CERCLA § 108(b) (see, for example, discussion in Section VI.C.1. of this preamble in the section titled ''*two letter of credit constructions*''). Representatives did, however, express greater comfort at a court having first ordered payment as that would limit the prospect for fraudulent or specious claims against the instruments. Further, having an objective documentary payment trigger limits the amount of due diligence required on the part of the instrument provider.

This payment provision also requires that the party may only make a claim if they have not recovered or been paid the funds from any other source. This is intended to provide further assurance to providers and current owners and operators that the claims are valid and that the claimant is not being paid twice for the same costs or damages.

It should be noted that EPA does not intend for this provision to displace the standard manner in which CERCLA claims are brought and resolved outside of the CERCLA § 108(b) instrument. Claims can continue to be asserted against the owner and/or operator in the first instance, and EPA expects that in most instances, the owner or operator would pay the claim itself, without resort to the instrument.[58] Indeed, EPA expects owners and operators to continue to do so to the extent they are able, in order to avoid the costs incurred in drawing upon the instrument which in many cases would result in the provider seeking to recoup those costs from the owner or operator. For example, were a successful third-party CERCLA claimant to make a draw on a CERCLA § 108(b) letter of credit, the owner or operator would be obligated to pay the financial institution that issued the letter of credit for the amount paid under the instrument. Owners or operators also have an obligation to reimburse the issuer of a surety bond for payment made in accordance with the terms of the bond. The surety bond issuer's right to reimbursement helps to ensure that it is the owner or operator rather than the issuer of the surety bond that ultimately bears the cost of fulfilling the CERCLA obligations owed to the claimant. However, should the owner or operator fail to satisfy the final judgment, the instruments are structured to become available to the claimant within thirty days. EPA identified this time period based upon current EPA settlement practice which typically provides thirty days for performance to occur. EPA believes it provides adequate time for payment to occur while not providing more time than under a settlement scenario which may create a disincentive to settle. In this role, the financial responsibility instruments serve as a backstop to help assure that recovery will be successful.

[58] Similarly, provision of financial responsibility under CERCLA § 108(b) by an owner or operator would not affect a party's ability to make CERCLA claims against other potentially responsible parties at a site.

b. Payment for a CERCLA Settlement With the Federal Government

Under this proposal, the financial responsibility instruments also would be available to pay for a CERCLA settlement with agencies of the Federal Government, including but not limited to administrative settlements and consent decrees. Specifically, the instruments provide for payment to the Administrator or another authorized Federal agency if payment has not been made as required by a CERCLA settlement associated with the facility with a current owner or operator. EPA's current CERCLA model settlements often include a financial responsibility component to ensure that funds are available, should the respondent fail to perform. EPA expects that future settlements could rely on an owner or operator's CERCLA § 108(b) instrument for this purpose if the settling parties agreed to employ the instrument in this manner. EPA expects to review and, if necessary, modify its existing models to account for the possibility that CERCLA § 108(b) instruments could be used to assure the work required by future settlements. Additionally, some settlements are structured on a ''cash out'' basis, where the respondent is not doing work, but is instead resolving liability as a lump-sum payment to the United States. EPA's intent is for this payment term to function in any of these settlement scenarios. Such payments, in the case of settlements with EPA, would be expected to be made into the Superfund and/or a CERCLA special account.[59] For settlements with other Federal government agencies acting pursuant to delegated CERCLA authority, such as the Bureau of Land Management, the payments would be made pursuant to the terms of the settlement.

Again, EPA does not intend for this provision to displace the standard manner in which CERCLA claims are brought and resolved outside of the CERCLA § 108(b) instrument. Federal agency claims may continue to be asserted against the owner and/or operator, where appropriate, and the parties would remain free to settle those claims as they determine appropriate under the circumstances. EPA expects that in most instances, the owner or operator would make the payment required in the settlement directly, in order to avoid the costs incurred in drawing upon the instrument which may result in the owner or operator incurring costs as discussed earlier. However, should the owner or operator fail to make payment as provided in a settlement, the instruments are structured to become available for payment to (an) authorized Federal government agency(ies).

EPA is proposing including this term for several reasons. First, the Agency intends to make express provision for settlement accomplished under direct Federal oversight to assure that any necessary response actions are completed in a manner that protects human health and the environment. Such a provision would provide the flexibility for payment into special accounts under CERCLA § 122(b)(3), when appropriate as determined in the particular settlement, in order to provide an avenue for settlement funds to be used at a particular site. This provision also would allow for money recovered by the Federal Government to be deposited back into the Superfund Trust Fund under 26 U.S.C. 9507(b). EPA expects that this payment term would therefore provide a further incentive for owners and operators to undertake necessary CERCLA response actions at their sites or otherwise settle their liabilities without protracted litigation, even where their ability to pay for such a settlement would otherwise be limited. In this role, the instruments would help promote the goal of CERCLA § 108(b) to support CERCLA's ''polluter pays'' principle.

As noted earlier, this payment term is independent of other payment terms. Thus for example, in the absence of any settlement, the instruments could be made available upon obtaining a CERCLA judgment. Similarly, this would not affect settlements between non-Federal parties and owners and operators. Such settlements could also proceed under the payment term discussed in the previous subsection, but would require court approval and reduction to a CERCLA judgment for costs. EPA solicits comment on this approach.

c. Payment Into a Trust Fund Established Under a Unilateral Administrative Order

This proposal would also allow the financial responsibility instruments to pay into a trust fund established pursuant to a unilateral administrative order under CERCLA § 106(a) under certain circumstances. Specifically, under the proposal, the Administrator or another Federal agency may make a claim against the instrument requesting payment into a trust fund established pursuant to a CERCLA unilateral administrative order issued to a current owner or operator if performance at the facility as required by the order had not occurred. The proposed rules also provide that the Administrator or another Federal agency may only make the claim against the instrument if the owner or operator has provided a written statement that the instrument may be used to assure the performance of the work required in the order.

These provisions of the proposed rule are intended to complement existing EPA model orders. Under EPA's existing models, EPA requires recipients to provide evidence of financial responsibility to ensure that funds will be available to complete the work, should the recipient fail to perform as required under the unilateral administrative order. In essence, the owner or operator chooses the instrument to comply with the financial responsibility provisions of the order. EPA expects to review and, if necessary, modify its existing model administrative orders to account for the possibility that CERCLA § 108(b) instruments could be used to assure the work required by future unilateral administrative orders. EPA believes that this approach would provide owners and operators the maximum amount of flexibility to use the CERCLA § 108(b) instrument, should they become subject to a unilateral administrative order.

d. Payment Through the Direct Action Provision

Finally, CERCLA § 108(c)(2) contains a ''direct action'' provision, under which claims can be brought against the guarantor, instead of against the owner or operator, as in the case of the other payment triggers discussed earlier. CERCLA § 108(c)(2) generally provides that any claim authorized by CERCLA §§ 107 or 111 may be asserted directly against the provider of the financial responsibility instrument in situations where the owner or operator is in bankruptcy or is unavailable. In addition, CERCLA § 108(d)(1) generally provides that the total liability of any guarantor in a direct action suit is limited to the aggregate amount of the monetary limits of the policy of insurance, guarantee, surety bond, letter of credit, or similar instrument obtained from the guarantor by the person subject to liability.

The proposed CERCLA § 108(b) instruments are intended to account for direct actions authorized by these provisions. Where an owner or operator is bankrupt or unavailable, there is uncertainty around a claimant's ability to obtain a judgment. Thus, the ability

[59] EPA retains money received through settlements with potentially responsible parties in site-specific ''special accounts'' to conduct planned future cleanup work at a site based on the terms of a settlement agreement. These special accounts are sub-accounts within the Superfund.

to take direct action against the financial responsibility instrument may be critical for assuring that funds will be made available for necessary cleanup.

The direct action provisions of the statute received attention during meetings EPA held with representatives of financial institutions that provide financial instruments or services being considered for use in the proposed rule. Information on these meetings is available in the docket for this proposed rule (Docket No. EPA–HQ–SFUND–2015–0781). Specifically, EPA asked representatives how the direct action provision may affect their willingness to provide instruments for the CERCLA § 108(b) rule. Financial industry representatives indicated that providers' willingness to issue instruments was impacted by the availability of direct action and the potential scope of claimants, although to varying degrees across the instruments. With the exception of insurance providers, financial instrument providers expressed some degree of aversion to the direct action provision.

Representatives of the insurance industry informed the Agency that the industry is familiar with direct action because it is required under some state insurance laws. Insurance providers indicated that direct action would not generally have an effect on market participation.

Representatives from the surety industry had a mixed reception to the direct action provision. Sureties typically have some ability to step into the shoes of the owner or operator to perform or fulfill the obligation insured by the bond. Sureties have experience stepping into the shoes of an owner or operator and thus had some level of comfort in assuming the owner or operator's responsibilities in negotiating a settlement for CERCLA response costs, health assessment costs, and natural resource damages on behalf of the facility. However, surety representatives were concerned about the risk of direct action attracting class action suits and suits from environmental groups who did not have valid claims. The representatives also communicated concern over legal fees incurred in responding to numerous invalid suits.

Members of the banking community who issue or are expert in letters of credit or serve as trustees expressed great concern about the direct action provision. Letter of credit specialists asserted that direct action would be out of the realm of the typical responsibilities of a bank providing letters of credit. In fact, EPA was told that banks in their role as issuers of letters of credit can only be subject to suit if they do not complete the obligation to pay according to the specifications of the letter of credit.

Banking institutions that serve as trustees expressed that trust institutions would not participate in a program where the institution can be subject to any liability. Trustees also communicated that there is a distinction between a trust and the trustee—the trust itself holds the financial assurance, whereas the trustee executes the trust agreement in order to manage the instrument. Following this argument trustees suggested that the trust itself might qualify as a CERCLA ''guarantor'' and therefore direct action could be applied against the trust itself. Trustees stated that the possibility of liability on the trust institution would greatly and negatively impact their participation in providing trustee services to facilities subject to the proposed rule.

While the ability to bring a direct action against a guarantor is created by the statute itself, EPA has nonetheless sought to address the major issues raised by the financial community to the extent possible, in development of the proposed rules. EPA has included language in the instruments that mirror the terms of the direct action provision, specifically referring to claims authorized by CERCLA §§ 107 or 111.

EPA has also sought to lessen the perceived barriers for participation of banks issuing letters of credit and trustee institutions acting as guarantors. Specifically, EPA is proposing two structures for use of a letter of credit—first a letter of credit payable directly to claimants, and second a letter of credit held and managed by a trust fund. The owner or operator could choose either option. In the second arrangement the trustee would have direct access to draw on the letter of credit to satisfy the claims. EPA intends for this arrangement to address concerns about direct action claims for letters of credit, because claimants would bring those claims to the trust fund holding the letter of credit, instead of the letter of credit provider. In addition, EPA has structured the trust fund instrument with the express intent that direct action would be taken against the trust fund itself, not the trustee. This is intended to address concerns about potential trustee liability from their role as trustee under the trust agreement. Section 3 of the proposed trust agreement states explicitly that the trust Grantor and Trustee do not intend for the Trustee to qualify as a ''guarantor'' as that term is used in CERCLA §§ 101(13) and 108(c)(2), and therefore intend that the Trustee will not be subject to a direct action by Trustee's agreement to act as Trustee for the trust fund. The proposed trust agreement further states that the Grantor and Trustee intend for the trust fund to qualify as a ''guarantor'' as that term is used in CERCLA §§ 101(13) and 108(c)(2), and therefore intend that only the trust fund will be subject to any direct action brought pursuant to CERCLA § 108(c)(2). The trust agreement provides further that any claim authorized by §§ 107 or 111 of CERCLA may be asserted directly against the trust fund as provided by CERCLA § 108(c)(2) subject to the limitations in CERCLA § 108(d). Stand-alone, funded trusts are structured similarly. The proposed structure of the trust fund is discussed in more detail in VI.C.6 of this preamble. EPA seeks comment on the effectiveness of this structure for the proposed trust and letter of credit to increase the likelihood that a bank or trustee institution will issue letters of credit or agree to be a trustee under the proposed regulations.

EPA recognizes that the direct action provision is an important and potentially unfamiliar feature to potential instrument providers, and the Agency requests comment on how its function in practice may affect the availability of instruments.

6. Facility Transfer (§ 320.25)

This proposed rule would require that the owner or operator subject to the rule maintain financial responsibility in accordance with part 320 upon transfer of ownership, in whole or in part, to a new owner, or upon transfer of operations to a new operator, until the Administrator releases the previous owner or operator. EPA would provide a release to the former owner or operator upon the new owner or operator's demonstration of financial responsibility in accordance with this proposed rule.

These requirements assure continuity of financial responsibility coverage and prevent circumvention of the requirements by changes in facility ownership or operation. The Administrator's release of the old owner and operator would not affect the old owner's and operator's liability under CERCLA, only their responsibility to maintain financial responsibility for the facility under Part 320. EPA solicits comment on these requirements.

7. Notification of Cessation of Operations (§ 320.26)

Section 320.26 requires a facility owner or operator to notify the Administrator thirty days prior to either the date the facility will no longer be authorized to operate or the date the owner or operator is required under

another applicable regulatory program to notify the relevant regulatory authority that the facility is ceasing operations, whichever is earlier. This requirement provides EPA notice of upcoming changes at the facility that will likely affect the level of required financial responsibility under CERCLA § 108(b). EPA solicits comment on this requirement.

The proposed rule provides that CERCLA § 108(b) requirements continue until EPA releases the owner or operator from such obligations. Thus, closure of a facility would not, in and of itself, trigger release from requirements under proposed part 320. Owners or operators of closed facilities would be required to maintain financial responsibility instruments until CERCLA § 108(b) obligations are released by EPA. In developing this proposed rule, the Agency has considered whether some financial responsibility instruments might be better suited than others where the owner or operator no longer is operating the facility. For example, EPA has considered whether owners or operators should be able to continue to use a financial test to provide financial responsibility where they are no longer operating the facility, or whether financial responsibility should be converted to a trust instrument at facilities where obligations continue after the facility ceases operation. EPA has not identified any reasons to restrict the options for instruments, and is therefore proposing that the same instruments available to owners and operators of operating facilities would continue to be available to owners and operators of facilities that cease operation. However, EPA solicits comment on the reliability of instruments where an owner or operator is no longer operating a site.

8. Release From Financial Responsibility Requirements (§ 320.27)

Under this proposed rule, owners or operators and operators subject to CERCLA § 108(b) requirements under part 320 would remain subject to those requirements until released by EPA. Thus, those obligations would continue regardless of the operating status of the facility.

Proposed § 320.25 discussed earlier provides for release of the owner or operator from its obligations under part 320 upon transfer of ownership of the facility, or transfer of operations of the facility, where the new owner or operator provides evidence of financial responsibility that satisfies the requirements of this proposed rule. Where release from the regulations is not accompanied by a transfer of the regulatory obligation to maintain CERCLA § 108(b) financial responsibility, EPA is proposing a different process that reflects the final nature of the determination. EPA also explains the importance of this determination in its discussion of the public involvement requirements in proposed § 320.9.

Proposed § 320.27 provides that the owner or operator may petition to be released from its CERCLA § 108(b) obligations by submitting a request to the Administrator. The request must include evidence demonstrating that the degree and duration of risk associated with the production, transportation, treatment, storage and disposal of hazardous substances is minimal. The opportunity provided in § 320.27 is not intended to provide for adjustments of financial responsibility levels, but is intended to be limited to decisions to release the owner or operator from CERCLA § 108(b) requirements. Thus, owners or operators that cannot demonstrate minimal levels of risk at the facility would not be eligible to petition the Agency under this provision. A demonstration of minimal levels of risk at the facility is important because following the owner's and operator's release from the CERCLA § 108(b) requirements financial responsibility would not be available if needed at a later date. Upon receiving such request, proposed § 320.27 provides that the Administrator would evaluate facility information, including the information submitted by the owner or operator, regarding the degree and duration of risk associated with the production, transportation, treatment, storage, and disposal of hazardous substances at the facility, and make a determination regarding the owner or operator's request.[60]

If the Administrator determines that the degree and duration of risk associated with the production, transportation, treatment, storage, and disposal of hazardous substances at the facility is minimal, and that the facility should therefore be released from CERCLA § 108(b) requirements, the Administrator would follow the procedures described in § 320.9 to involve the public in the decision. Under those procedures, EPA would post the draft decision on the Agency's Web site, provide the public opportunity to comment on the decision, and post the Agency's final decision, and response to comments received, on the EPA Web site.[61]

If, on the other hand, the Administrator determines that the degree and duration of risk associated with the production, transportation, treatment, storage, and disposal of hazardous substances is not minimal, the Administrator would not release the owner or operator from the requirement to maintain financial responsibility in accordance with this part. Section 320.9 provides that upon a finding that the owner or operator should not be released from financial responsibility requirements, the Administrator would provide notice of the Agency's final decision, and response to comments received, and will provide the owner or operator with written notice of its decision. EPA is considering whether to make these available through EPA's Web site, or alternatively through traditional **Federal Register** notices. EPA solicits comment on this approach, and method of public notice.

The Agency is proposing not to initiate a public involvement process in cases where the Agency decides to deny the request of the owner or operator to release its financial responsibility obligation. In these cases, the obligation to maintain financial responsibility continues, and thus continues to be available should CERCLA liabilities arise. Thus, EPA does not see any benefit for public comment in these situations. EPA solicits comment on this approach.

EPA is proposing a site-by-site evaluation of facility risk for decisions to release an owner or operator from CERCLA § 108(b) requirements for a number of reasons. First and foremost, EPA has not identified a set of circumstances that if followed, would allow it to determine on a national basis that every facility across the country would demonstrate a minimal degree and duration of risk. Moreover, EPA has substantial experience making individualized determinations of site risk, as this practice is consistent with EPA's practice under the Superfund program, for example, in selecting remedies under the NCP. EPA solicits comment on the proposed approach to releasing owners or operators from CERCLA § 108(b) financial responsibility requirements.

The proposed rule also provides that owners or operators may petition the Administrator for a renewed determination regarding its continued

[60] Note that the proposed rule does not limit the ability of the Administrator to take other measures (for example, under the authority of CERCLA § 104) if appropriate, to obtain relevant information.

[61] It should be noted that any release from CERCRA § 108(b) obligations does not affect the ability of the Federal Government to make a CERCLA claim.

requirement to maintain financial responsibility. The Administrator will consider a petition for a renewed determination only when it presents new and relevant information not previously considered by the Administrator.

While beyond the scope of this rulemaking, EPA notes in the interest of transparency that EPA and the owner or operator might, in some cases, elect to enter into a CERCLA settlement regarding the facility. The work provided for in such a settlement, depending upon its scope, may provide the basis for a renewed determination by the agency that results in a release from part 320.

Finally, EPA recognizes that in some instances, facilities may be located in locations under the jurisdiction, custody or control of another Federal agency. In that instance, EPA will work with the other agencies to gather the necessary information for it to make a determination on whether to release an owner or operator from the requirements of part 320.

C. Subpart C—Available Financial Responsibility Instruments

Under this proposed rule, an owner or operator would have to establish financial responsibility by obtaining one or a combination of mechanisms as specified in proposed subpart C. CERCLA § 108(b)(2) states that ''financial responsibility may be established by any one, or any combination, of the following: Insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. In promulgating requirements [under CERCLA § 108(b)], EPA is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing such evidence of financial responsibility in order to effectuate the purposes of [CERCLA].''

EPA is proposing to establish required wording for all of the instruments (including the financial test and corporate guarantee) for several reasons. By specifying the instrument terms, EPA reduces the administrative burden to the Agency of reviewing the wide range of potential instrument wording that may otherwise be employed. EPA does not wish to create a situation where resources that otherwise would have been devoted to cleanups would be expended reviewing the myriad possible instrument constructions. EPA is also specifying the terms of the instruments so that they operate in a manner that integrates the CERCLA § 108(b) instruments into the overall CERCLA scheme and are uniformly enforceable by the Agency or other parties seeking compensation for costs and damages. Third, EPA's RCRA Subtitle C, subpart H financial assurance requirements (see 40 CFR 264.151) similarly specify the required wording of the instruments and EPA has found this to be a beneficial feature. Fourth, EPA has received comment as it developed this proposal from stakeholders that the RCRA Subtitle C instruments are well-understood by regulated entities and the financial industry. Without nationally-consistent provisions, EPA does not expect that a similar familiarity with the CERCLA § 108(b) regulations would be as likely to develop.

Those same commenters suggested that EPA use the RCRA Subtitle C regulations as the basis for its proposed CERCLA § 108(b) instruments because those instruments are well-developed and understood by regulators, the regulated community, and the financial-services industry. This proposal does in fact use the instruments specified in the RCRA Subtitle C, subpart H regulations as the model from which EPA developed its proposed CERCLA § 108(b) instruments, in part, for that reason.[62] EPA discusses particular provisions adapted from these RCRA regulations in its discussions of individual instruments later in this preamble, as well as new aspects necessitated by the CERCLA 108(b) rule structure. In addition, this proposal reflects some of the lessons EPA has learned in administering the RCRA Subtitle C financial assurance program. For example, to ease administration EPA is proposing that contact information for key parties (*e.g.,* the EPA, the representative of the financial institution) be identified in the instruments to facilitate the notification requirements and other necessary communication. More information on the required wording of the instruments and the rationale for such wording is in the background document entitled ''*Potential Requirements for Insurance, Surety Bonds, Letters of Credit, and Trust Agreements and Standby Trust Agreements under CERCLA Section 108(b),*'' which is in the docket for this proposal (Docket No. EPA–HQ–SFUND–2015–0781). EPA requests comment on the proposed wording of the financial responsibility instruments including the proposed required documentary conditions required to make a claim under several of the instruments.

1. Letter of Credit (§ 320.40)

An owner or operator would be able to satisfy the requirements of this section by obtaining an irrevocable standby letter of credit in accordance with the proposed requirements of § 320.40 and the proposed wording of § 320.50(b). A letter of credit is an independent agreement by the issuer (*e.g.,* a bank) to pay up to a specified amount to parties upon the presentation of certain documents on behalf of its customer. Through a letter of credit, the bank provides assurance that the CERCLA response costs, health assessment costs, and natural resource damages for which the owners and operators are responsible would be paid. The financial strength of the bank would backstop that of the owner and operator, reducing the credit risk to potential claimants. EPA requests comment on the required wording and specification of the letter of credit in this proposed rule.

Issuer Eligibility (§ 320.40(a))

The issuing institution would be required to be an entity that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or state agency. These proposed requirements ensure that the letter of credit operations are overseen by a regulator, a requirement that EPA intends to help protect against failure of the issuing institution by ensuring that the operations are regularly examined (*e.g.,* lending limits are being observed). This requirement is the same as that in the RCRA Subtitle C financial assurance requirements for closure and post-closure care,[63] which EPA believes has worked well, and would be familiar to the regulated community and to the Agency. EPA considered additional qualifications for banks providing letters of credit but is today proposing the same qualifications as are required in the Subtitle C regulations. Some of the alternative criteria considered were minimum ratings from a rating agency or differentiating between state or nationally chartered institutions. Additional information on the consideration of alternative provider qualifications is in the background document titled ''Potential Issuer Eligibility Requirements for Insurance, Surety Bonds, Letters of Credit, and Trust Agreements and Standby Trust Agreements under CERCLA § 108(b).'' EPA is proposing a standard similar to

[62] EPA is not, however, reopening the RCRA Subtitle C, Subpart H regulations by this proposal, nor will EPA respond to comments related only to those regulations.

[63] *See* 46 FR 2826, January 12, 1981

the Subtitle C standard so as to not unduly constrain supply because additional requirements beyond the existing framework of Federal and state examination and regulation would limit the pool of available providers and also to avoid the administrative burden on EPA of verifying additional qualifications.

The Institute of International Banking Law and Practice (IIBLP) suggested to EPA that the minimum issuer qualifications may be improved by specifying that the institution must be one that ''regularly issues standby letters of credit.'' IIBLP's stated intent of the recommended specification was to align the EPA requirement with the Uniform Commercial Code [64] (UCC) § 5–108(e) that obligates issuers to observe the standard practice of ''financial institutions that regularly issue letters of credit''. However, such a provision would require EPA to determine what constitutes regularly issuing letters of credit and would increase the administrative burden of implementation. Because the UCC would apply in the background as state law the Agency does not expect it is necessary to include such a requirement in the proposed regulations, and so is not proposing such a requirement.

Required Standardized Wording (§ 320.40(b))

EPA is proposing required wording of the letter of credit. The proposal would require that instruments be worded identically to the language proposed in § 320.50(b) of this proposed rule, except that the instructions in brackets would be replaced with the relevant information and the brackets deleted. The IIBLP also suggested that EPA should allow for greater flexibility to accommodate confirmations, other parties obtaining the letter of credit or state variations. Specifically, IIBLP recommended that the letter of credit wording be ''substantially in accordance with'' the specified instrument language. While flexibility may help accommodate a wider range of circumstances, EPA has found in its financial assurance programs that standardized wording is generally acceptable to providers, and provides significant benefits. Most significantly, standardized wording saves EPA staff from having to review and assess the myriad variations in instrument wording that may arise, which the Agency may not have the technical expertise to readily undertake. However, EPA requests comment on whether specific additional aspects of the proposed wording could benefit from additional flexibility. Specifically, EPA requests comments on additional variations that should explicitly be provided for in brackets that may improve the effectiveness of the proposed letter of credit specifications.

Two Letter of Credit Constructions (§ 320.40(b)–(d))

The proposed required wording provides for two separate letter of credit constructs—one in which the letter would be issued in favor of any and all third-party CERCLA claimants and one in which the letter of credit would be issued in favor of the trustee of a trust fund established by an agreement worded identically to the language for the proposed trust fund. EPA is proposing to allow for two possible letter of credit constructions based on feedback the Agency received during discussions with the banking community. Providing both options enhances flexibility and is consistent with the RCRA third-party liability program where a similar letter of credit arrangement is employed.[65]

The first option for a letter of credit is for it to be issued in favor of any and all third-party CERCLA claimants. Under this arrangement, parties seeking payment from the letter of credit for CERCLA claims against the current owners or operators of the facility would be able to make claims by presenting the necessary documents directly to the issuing institution. This would provide a streamlined approach for paying claims and may entail lower fees and expenses than the second option. EPA intends for the CERCLA 108(b) instruments to be available to any potential CERCLA claimant. Given that the identity of potential claimants is both difficult to ascertain at a given point and because they may change over time, EPA is concerned that attempting to name particular beneficiaries would be unworkable. For example, EPA would be unable to determine in many cases what claims made by what parties would arise. In addition, EPA wishes to avoid a claims administration role that could result if EPA were the named beneficiary. EPA is concerned about the resources that would be necessary to assess the merits of and make all CERCLA claims that may be made against the instruments nationwide. Such a role would have the potential to redirect Superfund programmatic resources away from cleanups and other high priority activities to assessing claims at facilities where EPA may not otherwise have been involved or considered a priority. Further, in instances where EPA is involved, EPA may be a claimant. EPA was concerned that the Agency may be placed in the awkward position of administering and prioritizing claims in that situation. Finally, EPA is concerned that specifying EPA as the beneficiary of the instruments may be inconsistent with the direct action provision and preclude other claimants from taking direct actions against the instruments as provided by 108(c)(2).

At the same time, several industry representatives expressed their concerns about the possibility of such a wide range of potential claimants who could not possibly be ascertained at the time the letter of credit is established. Instead, these representatives indicated a strong preference for a named beneficiary.

In light of this feedback, and because EPA does not intend to restrict options such that institutions may be unwilling to issue letters of credit, EPA is also proposing letter of credit language that would provide the option for the letter of credit to be issued in favor of a single named beneficiary, specifically the trustee of a trust fund that would be established pursuant to the proposed trust fund regulations. In this case, the letter of credit would authorize the trustee to make draws on the letter of credit to administer the claims process for CERCLA response costs, health assessment costs, and natural resource damages in accordance with the terms of the trust agreement. Parties seeking payment from the letter of credit for CERCLA claims against the current owners or operators of the facility would be able to present claims against the trust fund in accordance with the proposed trust agreement language. The trustee would, upon receipt and review of the required documents, accordingly make a draw on the letter of credit and provide the claimant with payment.

This latter option also appears to provide other advantages. First, letter of credit issuers indicated to EPA that this option is more consistent with commercial practice. Second, representatives of trustee institutions expressed a high level of comfort and willingness to provide such administrative services over a letter of credit. Third, the trust fund itself could be the subject of any direct actions authorized by CERCLA § 108(c). Accordingly, in this proposal, the language acknowledging that direct action claims may be brought against

[64] The Uniform Commercial Code (UCC) is a comprehensive code of law addressing commercial transactions in the United States created to serve as a model for state adoption. Use of standby letters of credit is governed by state laws that track Article 5 of the UCC.

[65] *See* 40 CFR 264.151(k)

the issuing institution is required only for letters of credit issued in favor of any and all third-party CERCLA claimants, and is not required for those letters of credit issued in favor of a trustee. Considerations regarding the direct action provisions are discussed in more detail in section IV.B.5. of this preamble.

Even with these advantages, EPA expects that the principal disadvantage in having the trustee hold the letter of credit and channel claims through the trust fund is that it will result in higher trustee expenses and fees in comparison with the letter of credit issued in favor of any and all third-party CERCLA claimants. This is because the trustee would need to hold the letter of credit and review the documents presented as part of the claims process to determine whether payment was merited under the terms of the trust. EPA is proposing nevertheless to offer such an arrangement in order to provide additional flexibility in compliance options for the owners and operators subject to the rule as well as offer an option that the Agency has been told is more consistent with commercial practice.

EPA considered a third possible letter of credit option. Under this option, EPA would be the named beneficiary of the letter of credit and would administer the claims process but would require that the letter of credit provide for assignment of proceeds to other parties as identified by EPA. EPA recognized that this approach may provide the familiarity of a named beneficiary for issuers of letters of credit and may reduce trustee expenses because they would not need to provide a custodial service over the standby letter of credit. However, as discussed earlier in this preamble section, EPA's concerns about administering the claims process has led EPA not to include provisions for this option in this proposal. However, EPA solicits comment on this option.

Finally, the proposed rule also includes specific information submission requirements in proposed § 320.40(c) and (d). Where the beneficiary is a trustee, the original letter of credit would be held by the trustee as part of the trust fund property. A certified copy of the letter of credit would be required to be submitted to the Administrator. In addition, the owner or operator would be required to submit the original letter to the trustee authorized to make draws on the letter of credit, and then submit to the Administrator an acknowledgment of receipt of the letter of credit by the trustee. Submission of this information to EPA is intended to assist the Agency in monitoring compliance as part of its program oversight role.

If the letter of credit is issued in the favor of any and all third-party CERCLA claimants, under proposed § 320.40(d) the original letter of credit would be submitted to EPA, also to assist the Agency to monitor compliance.

Requirement To Establish a Trust Fund, Automatic Extension and Irrevocability Provisions of the Letter of Credit (§§ 320.40(e) Through (f) and (k) Through (l))

Standby letters of credit are typically issued for specific, finite periods of time although they may automatically extend provided the issuer has the right to allow the credit to expire. In developing this proposal, one consideration for EPA was how to assure funds would be available when necessary. One consideration with the letter of credit was that the issuer may wish not to extend the letter of credit at some point potentially leaving the owner or operator without the required evidence of financial responsibility. EPA was concerned that the decision not to extend a letter of credit may occur at a time when the owner's or operator's finances were in decline at which point the ability of the owner or operator to obtain alternate financial responsibility may be constrained. To ensure continuity of financial responsibility coverage EPA is proposing a suite of regulatory provisions intended to provide strong assurance that funds would be available when necessary.

First, an owner or operator who uses a letter of credit to satisfy the requirements of this regulation would also be required to establish a trust fund and update Schedule A of the trust agreement within sixty days after a change in the amount of CERCLA § 108(b) financial responsibility. The requirement to establish a trust fund is included regardless of whether the letter of credit is issued in favor of all third-party CERCLA claimants, or in favor of the trustee of a trust fund. EPA is proposing to require that a trust fund either hold the letter of credit or be established alongside the letter of credit to provide a repository for funds drawn from the letter of credit in instances where the issuing institution declines to extend the letter of credit and the owner or operator fails to obtain replacement financial responsibility.

This standby trust fund would be worded identically to the proposed trust fund language (see § 320.50(a) for the proposed wording of the trust agreement) and would meet the same requirements specified for the trust funds (*see* § 320.45 for proposed trust fund regulations) with two exceptions. The first is that an originally signed duplicate of the trust agreement would be submitted to the Administrator with the original or the certified copy of the letter of credit. The second is that, unless the standby trust fund was funded pursuant to the requirements of this part including holding a letter of credit as specified in § 320.40 and described earlier, the following would not be required: (1) Payments into the trust fund as specified in § 320.45; (2) annual valuations as required by the trust agreement; and (3) notices of payment as required by the trust agreement.

Second, EPA is proposing that the letter of credit must be irrevocable and issued for a period of at least one year. Without this provision the letter of credit could potentially be withdrawn or modified for any reason and at any time by the issuer unilaterally, without notification to the current owner or operator. With this provision, the owner or operator, third-party CERCLA claimants, and EPA are assured of at least one year of coverage.

Further, EPA is proposing that the letter of credit must provide that the expiration date would automatically be extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies the owner or operator, the trust fund trustee (if the letter of credit is held by the trustee) and the Administrator by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days would begin on the date when the owner or operator, the trust fund trustee (if the letter is issued in favor of the trustee), and the Administrator have received the notice, as evidenced by the return receipts. This proposed automatic extension provision would help to ensure that coverage continues. Combined with the irrevocability provision, the owner and operator, EPA and other third-party CERCLA claimants can be assured of continuous coverage unless notified by the issuing institution.

As a final proposed provision to ensure continuity of coverage, the proposed rule would provide for the possibility for the letter of credit to fund the trust fund in one of two ways if the letter of credit were not extended. The first way would apply when the letter of credit is issued in favor of any and all third-party CERCLA claimants. In that scenario, if the owner or operator did not establish alternate financial responsibility as specified in this proposed rule and obtain written

approval of such alternate financial responsibility from the Administrator within ninety days after receipt of a non-extension notice by the owner or operator and the Administrator, the Administrator would draw on the letter of credit if the letter of credit is issued in favor of any and all third party CERCLA claimants. The issuing institution would then deposit the unused portion of the credit into the standby trust. The second way would apply when the letter of credit is issued in favor of the trust fund trustee. In such scenarios, if the owner or operator did not obtain alternate financial responsibility and obtain written approval of such alternate financial responsibility from the Administrator within ninety days after receipt of a non-extension notice by the owner or operator, the Administrator and the trustee, the Administrator would inform the trustee that the owner or operator had not established alternate financial responsibility. This would prompt the trustee to draw on the letter of credit and deposit any unused portion of the credit into the trust fund.

The Administrator would be able to delay the drawing of funds or the notification to the trustee of the trust fund that the owner or operator had not established alternate financial responsibility, if the issuing institution grants an extension of the term of the credit. During the last thirty days of any such extension, if the owner or operator has failed to provide alternate financial responsibility as specified in this section and obtain written approval of such financial responsibility from the Administrator, the Administrator would draw on the letter of credit or notify the trustee of the trust fund that the owner or operator had not established alternate financial responsibility and obtained written approval of such alternate financial responsibility. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Administrator or the trust fund trustee in the circumstances described in this paragraph would be deposited by the issuing institution directly into the trust fund.

A similar arrangement is required under the RCRA Subtitle C closure post closure financial assurance regulations and the Agency has found it to be a valuable feature. The accompanying trust fund and the automatic extension provisions for letters of credit are an important feature of this proposal because letters of credit might otherwise not be extended after a release of hazardous substances or after marked financial decline of the owner or operator. Absent the ability for the trustee or the Administrator to make a draw on the letter of credit in instances of issuer notice of non-extension and the owner's or operator's failure to obtain replacement financial responsibility, financial responsibility may not be available when necessary. After notice of non-extension, a CERCLA claim may not necessarily be possible for some time because the CERCLA processes leading to a claim may be lengthy. In such an instance, the letter of credit may expire, leaving no financial responsibility instrument available. The proposed arrangement would ensure that funds are still available to pay the valid CERCLA claims. This provision, and the similar provisions for other proposed instruments, as well as alternatives are discussed in more depth in section VI.C.7 of this preamble.

IIPLP also provided comments to EPA on these proposed automatic extension and non-extension notification requirements. With respect to the non-extension notification, the IIBLP suggested that the wording of the letter of credit should not explicitly require notification to the owner or operator of the decision not to extend the credit as discussed earlier. Rather, IIBLP noted that the means of how issuers and their applicants communicate is typically left to a separate agreement from the letter of credit itself. However, EPA believes that specifying such a notification term in the letter of credit itself, including notice to the owner or operator, is preferable because timely receipt of such notice by both EPA and the owner or operator is important as it would establish the timeframe in which the owner or operator must obtain alternate financial responsibility. Further, the provision helps prevent expiration from taking place without the knowledge of EPA and the owner or operator, or a draw being necessitated due to pending expiration without the knowledge of the owner or operator. Finally, while it may be unusual as a general matter of commercial practice, such a provision is a common feature of government financial responsibility programs. For example, similar notification requirements are required in the RCRA Subtitle C closure and post closure letter of credit which has been broadly used as a financial assurance instrument by regulated entities in that program.

With respect to the automatic extension provisions, the IIBLP stated that a date should be identified beyond which extension should not be able to occur. However, such a provision would be inconsistent with other EPA financial assurance programs and necessitate more frequent re-establishment of financial responsibility on the part of the owner or operator or draws on the letter of credit prompted by pending expiration. Further, given that the time horizon over which an owner and operator must maintain financial responsibility under CERCLA § 108(b) may vary on a case-by-case basis, EPA could not identify a nationally-uniform date beyond which the letter of credit should be allowed to expire.

Claims Against a Letter of Credit Issued in Favor of Any and All Third-Party CERCLA Claimants (§§ 320.40(j) and 320.50(b))

Under the proposed letter of credit language (§ 320.50(b)) and regulations (§ 320.40(j)), when the letter of credit is issued in favor of any and all third-party CERCLA claimants, it would provide payment to third-party CERCLA claimants under three scenarios provided that the claimant provides the necessary documentation, in addition to authorizing direct action claims against the issuing institution itself. Under the proposed regulations the following claims would be authorized against the letter of credit when issued in favor of any and all third-party CERCLA claimants:

(1) Any party that obtained a final court judgment from a Federal court awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility against any of the current owners or operators to whom payment as required by the judgment had not been made within thirty days would be able to make a claim against the letter of credit. However, the party would only be able to make a claim if it had not recovered or been paid the funds from any other source.

(2) The Administrator or another authorized Federal agency would be able to make a claim against the letter of credit requesting payment if payment had not been made as required by a CERCLA settlement associated with the facility between a current owner or operator and EPA or another Federal agency.

(3) The Administrator or another authorized Federal agency would be able to make a claim against the letter of credit requesting payment into a trust fund established pursuant to a CERCLA unilateral administrative order issued to a current owner or operator if performance at the facility as required by the order had not occurred. The Administrator or other Federal agency would be able to make the claim against the letter of credit only if the owner or operator had provided a written statement that the letter of credit may be

used to assure the performance of the work required in the order.

In order to make a draw on the letter of credit under these three scenarios, claimants would need to present one of two sets of documents. The first set of documents would consist of a demand for payment bearing reference to the letter of credit by number, a final court judgment dated at least thirty days earlier from a Federal court, in favor of the claimant, awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility against any of the current owners or operators, and a certification from the claimant that reads as follows: ''I hereby certify that the amount of the demand is payable pursuant to regulations issued under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended.''

Because a claimant seeking satisfaction of a final court judgment awarding CERCLA response costs, health assessment costs, and/or natural resource damages may be any of a wide range of potential parties including Federal and state government officials, natural resource trustees, or private parties, EPA was told by several representatives of the financial industry that the potential for inappropriate claims in this scenario may be higher than in typical financial assurance programs where a particular regulator is the only named beneficiary. (The RCRA Subtitle C closure and post-closure letter of credit at 40 CFR 264.151(d) is an example of a single-beneficiary letter of credit). EPA was informed by one bank representative that documentary payment conditions requiring presentation of a court judgment would help ease concerns in this regard. Specifically, the representative suggested that the risk of fraud would be reduced if the rules required production of a court judgment in addition to a demand and certification. EPA does not expect that such a requirement would present a significant burden to legitimate claimants, and wishes to lower any perceived barriers to issuing the necessary instruments under this proposed rule. Thus, EPA is proposing that the language of the letter of credit issued in favor of any and all third-party CERCLA claimants require not just a demand for payment and a certification from the claimant but the presentation of the final court judgment as well.

As discussed in the general payment provisions section of the preamble, the proposed regulatory text in § 320.40(j) regarding letters of credit includes other requirements for making draws on the letter of credit. EPA's proposed letter of credit certification requirement is intended to encompass these requirements and thereby to help ensure that those supplemental criteria have been met. These requirements are designed to foster fairness for both potential claimants as well as to the owners or operators who provide the CERCLA § 108(b) financial responsibility. These requirements are (1) that a claim for satisfaction of a final court judgment may only be made against a CERCLA § 108(b) financial responsibility instrument if the judgment has been obtained against a current owner or operator at the facility and if the owner or operator has failed to make payment on the judgment within thirty days; and (2) that the claimant may only make such a claim if they have not recovered or been paid the funds from any other source. EPA is aware that letters of credit are designed to be an independent undertaking that would preclude the issuing institution from considering non-documentary conditions such as whether the previously-mentioned supplemental criteria had been met. EPA is thus requiring that claimants certify that the funds are payable pursuant to regulations issued under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended. EPA believes this additional documentary condition helps curb the potential for inappropriate draws when the letter of credit is issued in favor of any and all third party claimants.

The second set of documents that could be presented in order for EPA or another authorized Federal agency to make a draw when the letter of credit is issued in favor of any and all third-party CERCLA claimants is a demand for payment bearing reference to the letter of credit by number and a certification from the Administrator or another Federal agency that reads as follows: ''I hereby certify that the amount of the demand is payable pursuant to regulations issued under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended.'' EPA intends for this second set of documents to be presented by EPA or another authorized Federal agency in order to obtain payment for a CERCLA settlement or into a trust fund established pursuant to a CERCLA § 106 unilateral administrative order in instances where either (1) payment was not made as required by a CERCLA settlement associated with the facility with a current owner or operator, or (2) performance at the facility had not occurred as required by a CERCLA § 106 unilateral administrative order issued to a current owner or operator.

Because these payment scenarios are explicitly provided for in the proposed rules at 320.40(j)(2) and (3), and because those scenarios are limited to Federal agencies acting pursuant to CERCLA, EPA sees no reason to require any additional documentation beyond the demand for payment and the certification. A similar documentary payment condition is employed in the RCRA Subtitle C closure and post-closure letter of credit. See 40 CFR 264.143(d)(8); 264.151(d). Requiring only a certification and a demand for payment also streamlines the claims process in these scenarios and imposes a lower administrative burden on the claimants and on the issuing institutions because fewer documents would require review.

Other supplementary documentary requirements EPA considered were the presentation of the CERCLA settlement agreement or CERCLA unilateral administrative order themselves. However, EPA did not believe these additional requirements provided significant value beyond the certification from the Administrator or other authorized Federal agency. In discussions with representatives of the banking community, participants suggested a high degree of comfort with a certification from a Federal government agency as a documentary payment requirement, provided it was specified in the letter of credit. Thus, to avoid unnecessary documentary provisions, EPA is proposing that the required wording of the letter of credit issued in favor of any and all third-party CERCLA claimants not include a requirement to produce the underlying settlement or unilateral administrative order, in the scenarios limited to Federal government claimants.

Further, EPA is today also proposing letter of credit wording that does not require that the original letter of credit itself be presented by claimants requesting a draw. EPA's financial assurance programs under RCRA Subtitle C (closure/post-closure letters of credit and liability coverage letters of credit) similarly do not require presentation of the original letter of credit itself. Such a requirement would entail a greater level of administrative burden on both EPA and claimants, in particular due to the wide range of potential claimants and the need to coordinate between EPA and potential claimants. In discussions with representatives of the banking community, EPA was told that banks are likely to prefer that the presentation of

the original letter of credit not be a requirement and that such a requirement is a relic of the past. However, this does not mean there could be no value in such a requirement. The issuing institution may have noted on the letter of credit any prior payments that may help keep EPA informed of the remaining balance; however, EPA should be able to remain apprised of the value of the letter of credit based on claims and payment notification requirements included elsewhere in the proposal (see for example § 320.24). On balance, EPA is proposing to forgo such a requirement to be more consistent with current commercial practice and reduce the administrative burden entailed in the claims process. However, EPA solicits comment on whether such a requirement would be useful.

Draws on the Letter of Credit When Held by a Trust Fund Trustee (§§ 320.40(i) and 320.50(b))

If the letter of credit is issued in favor of the trust fund trustee, parties would be able to make claims against the trust fund in accordance with the terms of the trust agreement in order to receive payment from the letter of credit. Accordingly, the proposed language of the letter of credit (§ 320.50(b)) would require only a demand for payment from the trust fund trustee bearing reference to the letter of credit by number. This is similar to the required documentary provisions in the RCRA Subtitle C third-party liability letter of credit when it is issued in favor of a trustee. Other documentary requirements appear unnecessary under this construction because the third-party CERCLA claimants would be making claims against the trust fund instead of the letter of credit and would therefore need to meet the documentary conditions laid out in the trust agreement or successfully make a direct action claim against the trust fund itself. (Payments from the trust fund are discussed further in the trust fund section of the preamble.) This arrangement provides for a very streamlined process for the trustee to draw on the letter of credit when necessary to make payments to the successful claimants. EPA did not intend to burden this process with extra documentary conditions as that would only occasion greater fees and expenses on the part of the trustee and provide no clear benefit beyond the documentary review already performed by the trustee.

Such a documentary requirement would also provide the trustee of the trust fund the ability to make draws on the letter of credit when necessary to cover trustee expenses. While the proposed required wording of the trust agreement specifies that fees and expenses would be first paid by the grantor of the trust agreement, the proposed language also provides that all expenses not paid directly by the grantor shall be paid from the corpus of the trust fund which may require a draw on a letter of credit held by the trust fund. This allowance is important to allow trust expenses to be covered in instances where the grantor may cease to exist or is otherwise unavailable.

EPA recognizes that, when a letter of credit is issued in favor of a trustee of a trust fund, the trustee may incur significant fees and expenses in determining whether or not payment should be made from the trust fund, particularly in instances of a direct action against the trust fund. These expenses would likely reduce the value of the trust fund (and by extension potentially the value of the letter of credit held by the trust fund). However, given the apparent reluctance of institutions that issue letters of credit to provide letters of credit that could pay to a wide range of unnamed beneficiaries and institutions' expressed concerns regarding the institution itself being potentially subject to direct action suit from CERCLA claimants, EPA is proposing this compliance option. EPA requests comment on both options: (1) Where the letter of credit may pay to CERCLA claimants directly (i.e. be issued in favor of any and all third-party CERCLA claimants) or (2) where the letter of credit may pay to the trustee of a trust fund issued in accordance with the proposed trust fund regulations who would then pay valid claims (i.e. be issued in favor of the trustee). EPA is also interested in provisions or specifications that may allow for lower expenses or fees or that would protect the value of the trust fund (and thus the letter of credit) from expenses and fees when the letter of credit is issued in favor of the trust fund trustee.

Direct Action Language in the Letter of Credit (§ 320.50(b))

Under the proposed regulations, the issuing institution would be subject to direct action claims only when the letter of credit is issued in favor of any and all third-party CERCLA claimants. Because direct action is authorized by the statute, the possibility of a direct action suit should be clearly acknowledged by issuing institutions. Thus EPA has included required language acknowledging that direct action suits may be brought against the issuing institution for letters of credit issued in favor of any and all third-party CERCLA claimants and that the issuing institution consents to suit in those circumstances. The language further acknowledges that the liability of the issuing institution is limited by CERCLA § 108(d) and that the institution is entitled to the rights and defenses provided to guarantors in CERCLA § 108(c). The reader should note that this language is not required for those letters of credit issued in favor of a trustee. In the latter case, EPA intends the trust fund itself would be the subject of direct action suits. However, under the proposed regulations, the issuing institution would be subject to direct action claims when the letter of credit is issued in favor of any and all third-party CERCLA claimants.

Also included in the direct action language in the letter of credit is a provision that the issuing institution will provide notice of any such claims and payments resulting from a direct action to the Administrator. EPA has included a similar provision applicable to the owner and operator in proposed § 320.24, under which they are obligated to provide notice to EPA of claims made. However, EPA is including this proposed term as part of the letter of credit, because it expects that the owner or operator may not be able to provide such a notice of payment in a direct action scenario. Providing a mechanism for EPA to remain informed of claims against the instrument and of the value of the letter of credit in case of a direct action, is appropriate for similar reasons as described in proposed § 320.24.

Identification of Facility Information in Letter of Credit (§ 320.50(b))

The proposed language of the letter of credit would require the identification of the facilities covered, and the amount of financial responsibility provided by the letter of credit. EPA is today proposing language that allows (but does not require) a single letter of credit to cover multiple facilities if that is determined to be optimal by the owner and operator and their letter of credit provider. EPA anticipates that allowing coverage of multiple facilities simultaneously may have administrative efficiency benefits. As discussed in section VI.3.9. of this preamble, providing for one instrument to cover multiple facilities may provide for some administrative ease in the compliance and implementation process and is a common feature of EPA financial assurance programs.[66]

Thus, EPA has made provision in the letter of credit language for facility-specific sub-limits (i.e. the identification

[66] *See* for example, 40 CFR 264.143(h).

of an amount available for claims associated with each facility covered by the letter of credit beyond which the issuer would have no obligation to pay claims associated with that facility) when a letter of credit is covering multiple facilities. The proposed letter of credit would require the EPA identification number(s), name(s), address(es) and CERCLA § 108(b) financial responsibility amount(s) covered by the letter of credit for facility(ies) that would be covered by the instrument.

EPA recognizes that such information may not typically be included in letters of credit, where the preference is typically for the simplest and briefest language possible. However, this approach allows the letter of credit to reflect the site-by-site amounts of financial responsibility required, and at the same time, it will assist all parties (e.g. the issuing institution, third-party CERCLA claimants) in knowing the amount of financial responsibility available for claims associated with any of the facilities.

EPA is also considering whether to limit each letter of credit to coverage of a single facility. The additional information about other facilities and facility-specific sub-limits would not need to be included. In this way the letter of credit could be drafted in a simpler manner. However, as the EPA is not proposing to require that multiple facilities must be covered by one letter of credit, EPA believes the proposed language provides the flexibility to draft a relatively simple letter of credit. As such, EPA is today proposing language that allows the letter of credit to cover multiple facilities if that is determined to be optimal. EPA requests comment on this proposed provision and the alternative option of requiring only one facility per letter of credit.

2. Surety Bond (§ 320.41)

An owner or operator would be able to satisfy the proposed CERCLA § 108(b) financial responsibility requirements by obtaining a surety bond in accordance with the proposed requirements including the proposed required wording and submitting the originally signed bond to the Administrator. Through a surety bond, the Surety would guarantee that it will pay third-party CERCLA claims for response costs, health assessment costs, and natural resource damages associated with the facility against any of the current owners and operators, even if not listed as the principal on the bond, under certain circumstances in the event the claims are not satisfied by the owners or operators, up to the bond limits.

Issuer Eligibility (§ 320.41(b))

The surety company issuing the bond would be required to, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury. This requirement for providers of surety bonds is the same as that in the RCRA Subtitle C financial assurance regulations which EPA believes has worked well and will provide familiarity for implementing staff and the regulated community. In selecting this eligibility criteria EPA is also taking advantage of a pre-existing Federal examination and authorization process designed specifically for sureties. EPA recognizes that a Federal government agency will not be listed as the obligee of CERCLA § 108(b) surety bonds under the proposed language and thus Circular 570 listing may not be strictly necessary to comply with Treasury regulations. However, EPA and other Federal government agencies are likely to be claimants under the proposed CERCLA § 108(b) construct and thus EPA believes a similar level of oversight of the solvency of a surety providing a bond is merited. Further, upon examination of eleven years of data EPA did not identify any instances of default of a surety listed on Circular 570 suggesting the criterion is robust. EPA considered additional qualifications for surety companies but is today proposing the same qualifications as are required in the RCRA Subtitle C regulations. This decision was based largely on the desire to not unduly constrain supply, a desire to leverage the pre-existing robust criterion for sureties already well established, and to avoid the administrative burden on EPA of verifying additional qualifications. For more information on the consideration of alternative provider qualifications, please see the background document on instrument provider qualifications titled ''Potential Issuer Eligibility Requirements for Insurance, Surety Bonds, Letters of Credit, and Trust Agreements and Standby Trust Agreements under CERCLA § 108(b).''

Requirements To Ensure Continuity of Financial Responsibility Coverage (§§ 320.41(f), (g)(4) and (k))

EPA is proposing a suite of regulatory provisions in order to ensure continuity of CERCLA 108(b) financial responsibility coverage. First, an owner or operator that elected to use a surety bond to satisfy the requirements of this section would also be required to establish a standby trust fund and update Schedule A of the trust agreement within sixty days after a change in the amount of CERCLA § 108(b) financial responsibility. This standby trust fund would have to be worded identically to the proposed trust fund language in § 320.50(a) and meet the same requirements specified for the trust funds, except that: (1) an originally signed duplicate of the trust agreement would be submitted to the Administrator with the surety bond; and (2) until the standby trust fund is funded pursuant to the requirements of this section, the following would not be required by the proposed regulations: (1) payments into the trust fund as specified in § 320.45, (2) annual valuations as required by the trust agreement; and (3) notices of payment as required by the trust agreement.

The second proposed provision designed to ensure continuity of the CERCLA § 108(b) financial responsibility is the cancellation provision in the bond. EPA is proposing that, under the terms of the bond, the surety would be able to cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Administrator. Cancellation would not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Administrator, as evidenced by the return receipts.

Finally, EPA is proposing that, under the terms of the bond, the surety would become liable up to the penal sum [67] of the bond in the event the owners or operators failed to provide alternate financial responsibility and obtain the Administrator's written approval of the financial responsibility provided, within ninety days after receipt by both the owner or operator and the Administrator of a notice of cancellation of the bond from the surety. Under the proposal, payment from the bond into the standby trust would then occur.

A similar arrangement is required under the RCRA Subtitle C hazardous waste financial assurance regulations for closure and post closure care and the Agency believes it has been a valuable feature. EPA believes the standby trust and cancellation provisions are an important feature of this proposal as bonds could otherwise be cancelled after a release of hazardous substances from the facility or after marked financial decline of the owner operator. A CERCLA claim for payment from the bond would not necessarily be mature

[67] The penal sum represents the maximum amount the surety will pay for CERCLA response costs health assessment costs and/or natural resource damages under the bond.

for some time and thus financial responsibility may not be available when necessary. EPA believes the proposed arrangement however will ensure that funds are still available to pay the CERCLA response costs, health assessment costs, and natural resource damage claims of third parties. This provision, and the similar provisions for other proposed instruments, as well as alternatives are discussed in more depth in the preamble section headed 'issuer cancellation provisions.'

Claims Against the Surety Bond (§§ 320.41(g) and 320.50(c))

In addition to guaranteeing that replacement financial responsibility will be obtained in the event the surety provides notice of cancellation of the bond, the bond would also guarantee payment of CERCLA response costs, health assessment costs, and natural resource damages to third-parties. Under the proposed terms of the bond, the bond would guarantee that the owner or operator would make payments for or ensure payments are made for CERCLA response costs, health assessment costs, and/or natural resource damages associated with a facility covered by the bond as required in a final court judgment from a Federal court awarding such costs against any of the owners or operators within thirty days to the parties obtaining the judgment. In these circumstances a claimant would present the unsatisfied final court judgment dated at least thirty days earlier from a Federal court, in favor of the claimant, awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility against any of the current owners or operators at the facility to the surety directly. Additionally, the claimant would be required to provide a signed statement from the claimant certifying that the amounts sought had not been recovered or paid from any other source, including, but not limited to, the owner or operator, insurance, judgments, agreements, and other financial responsibility instruments.

Upon receipt of these documents the surety would then make payment in accordance with the instructions of the successful claimant. These documentary payment requirements were selected as it removes EPA from the claims administration process but ensures that a court has determined that payment is due to the party making the claim under CERCLA and that the party has not already recovered or been paid the funds from another source. Further, by relying on objective documentary submissions the Surety should be able to determine whether payment should occur under the terms of the bond with only minimal due diligence.

Additionally, the bond would guarantee the owner or operator would make payments or ensure payments were made as required in a CERCLA settlement associated with the facility between any of the current owners and operators at the facility and EPA or another authorized Federal agency. The Administrator or the other Federal agency, in these situations, would present a written signed statement to the surety requesting payment from the surety on the grounds that payment had not been made as required by a CERCLA settlement associated with the facility and with any of the current owners or operators. Additionally, the Administrator or the Federal agency would need to present a signed statement certifying that the funds sought had not been recovered or paid from any other source, including, but not limited to, the owner or operator, insurance, judgments, agreements, and other financial responsibility instruments.

EPA believes that, similar to EPA's thinking on the documentary payment conditions for the letter of credit issued in favor of any and all third-party CERCLA claimants (discussed in section VI.C.1. of this preamble), in the instances when the potential claimants are limited to Federal government agencies a more streamlined payment condition is optimal. EPA believes that the requirement of a signed statement from the Administrator or another Federal agency is a clear documentary condition and will require minimal due diligence on the part of sureties.

Finally, the bond would guarantee that the owner or operator performs or ensures the performance of the work at the facility as required by a CERCLA unilateral administrative order issued to any of the current owners or operators by EPA or another Federal agency for which the owner or operator has provided a written statement allowing for the bond to assure performance of the work. Payments would be made at the request of EPA or another Federal agency into a standby trust established pursuant to the administrative order if the work was not performed in accordance with the order.

In this scenario, to make a claim against the surety bond the Administrator or the other Federal agency would present a written signed statement requesting payment from the surety into a trust fund established pursuant to a CERCLA unilateral administrative order on the grounds that performance at the facility had not occurred as required by a CERCLA administrative order issued to a current owner or operator. Additionally, the EPA Regional Administrator or the Federal agency would need to present a signed statement certifying that the funds sought had not been recovered or paid from any other source, including, but not limited to, the owners or operators, insurance, judgments, agreements, or other financial responsibility instruments.

As discussed earlier, in the two payment scenarios limited to Federal government claimants EPA is attempting to limit the complexity of the documentary requirements. EPA believes the relatively simple requirements of signed statements from EPA or another Federal agency will streamline the claims process and reduce uncertainty on the part of the surety as to whether or not payment should be made.

EPA requests comment on the proposed documentary requirements for payment from the surety bond. In particular, EPA is interested in hearing if there are other documentary payment requirements that could further limit the discretion required on the part of the surety and yet still provide assurance against inappropriate claims being paid.

EPA recognizes that the payment mechanics of the surety bond involve multiple parties that will not be listed explicitly on the surety bond. In discussions with representatives of the surety bond industry, EPA learned that such a construction may likely be less palatable to potential providers of surety bonds than a construction with one designated claimant. Similarly, the Surety and Fidelity Association of America (SFAA) recommended that EPA be the only claimant on the bond. SFAA stated that multiple claimants enlarges the surety's exposure to claims and possibly dilutes the protection to EPA as the Agency may have less assurance of the proper use of the funds by third-parties other than EPA. However, EPA is not proposing to list EPA as the sole obligee on the bond for several reasons. First, non U.S. Government claimants would need a final court judgment from a Federal court awarding payment for CERCLA response costs, health assessment costs, and/or natural resource damages ensuring that a court had reviewed the merits of the claim (e.g. the consistency of the action with the national contingency plan) and found the claim to be valid. As a result, EPA does not share the concern that payment of funds to parties other than EPA will compromise the protection of human health and the environment. EPA

believes that, given the nature of CERCLA where any number of parties may have claims under CERCLA § 107, it is necessary to provide payment from the bond to a range of third-party CERCLA claimants.

EPA considered an option whereby EPA would be listed as the obligee and administer the claims process however, as discussed in the letter of credit § 320.40 of the preamble. EPA is not proposing this option for several reasons. First, EPA would not necessarily be involved in all CERCLA actions at facilities and did not wish to redirect its programmatic resources away from high priority sites to administer the claims process for CERCLA § 108(b). Moreover, EPA may not be able to assess the merits of all CERCLA claims which include natural resource damages and health assessments that are primarily the responsibility of other entities. Finally, it may create a perception of partiality were EPA to administer the claims process in scenarios where the Agency was one of the claimants. EPA believes that the proposed construction best achieves the need of providing payment to the full range of potential CERCLA claimants while simultaneously protecting against improper claims and preventing the sub-optimal redirection of Superfund resources away from high-priority sites.

Surety Liability (§ 320.41(h))

Under the terms of the bond, the surety would become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. EPA believes that this is an additional advantage of the proposed instrument payment terms. In discussions with representatives of the surety industry, representatives stressed to EPA that the surety company should be secondary to the owners and operators and claimants should first look to the owner or operators for satisfaction. EPA hopes that this feature of the proposed CERCLA § 108(b) surety bond's consistency with that aspect of surety practice will encourage participation on the part of surety companies in the CERCLA § 108(b) program.

The liability of the surety would be limited to the penal sum [68] of the bond plus the amount of any investigation or legal defense fees incurred by the surety. EPA, to the greatest extent possible, wishes to preserve the value of the financial responsibility to pay CERCLA claimants. EPA is thus proposing that any legal or investigation fees incurred by the surety remain outside the penal sum of the bond and not erode the value of the financial responsibility. A similar provision is also being proposed for insurance and the corporate guarantee. EPA requests comment on these proposed provisions.

Direct Action Language in the Surety Bond (§ 320.50(c))

In addition to the payment triggers described earlier, the proposed language of the CERCLA § 108(b) surety bond would also include language that the surety acknowledges that direct action suits may be brought against the surety. The direct action provision would allow for parties with CERCLA § 107 or § 111 claims, in certain instances identified in CERCLA § 108(c)(2), to take actions directly against the surety. It is a cause of action authorized by the statute and EPA expects it would operate independently of the three previously-described payment scenarios. In these instances, as described in the proposed bond language, the surety would have the rights and defenses identified in CERCLA § 108(c) and the liability protections in CERCLA § 108(d).

Similar to the corporate guarantee, insurance and letter of credit issued in favor of any and all third-party CERCLA claimants, EPA is proposing that the required wording of the bond include a provision that the surety notify EPA of any claims and payments made as a result of a direct action. EPA believes this notification requirement is valuable as the owner or operator may not be available to provide such a notice of claims and payments in a direct action scenario yet EPA wishes to remain informed of claims against the instrument and the value of the financial responsibility.

The SFAA also expressed concern that the direct action provision in a CERCLA § 108(b) surety bond may expose the sureties to too many claims. Specifically, SFAA stated that a surety bond is a conditional obligation under which the surety's obligation is triggered when the principal defaults. SFAA stated that bankruptcy (one of the preconditions for a direct action identified in CERCLA § 108(c)) is too broad as, in many cases, an owner or operator may still be able to fulfill its responsibilities even though bankrupt. EPA agrees that the owner or operator could still potentially fulfill its obligations even though bankrupt. Claimants could still pursue the potentially responsible party directly without implicating CERCLA § 108(b) instruments. EPA believes including the direct action provision is important as in some cases it may not be possible for EPA, or another third-party CERCLA claimant to obtain satisfaction from or obtain a court judgment against the party liable under CERCLA § 107 (or other necessary documents to make a claim against the bond) and thus recognizes the need for the surety, as guarantor, to stand in the owner's or operator's shoes

Multiple Sureties (§§ 320.41(e) and 320.50(c))

The surety bond would be able to be issued by multiple sureties provided that each is liable for its individual vertical percentage share of the total penal sum of the bond. (§ 320.41(e)) EPA is proposing surety bond language that would provide the option for owners and operators to obtain surety bonds from multiple issuers in the required amount of financial responsibility. EPA expects the required amounts of CERCLA § 108(b) financial responsibility may be relatively large at some facilities and wishes to provide this flexibility. The proposed arrangement for allowing multiple sureties to cover a single facility is consistent with the approaches employed by all of the financial responsibility programs EPA reviewed. All financial responsibility programs reviewed, including the Coast Guard CERCLA § 108(a), RCRA Subtitle C liability coverage, RCRA Subtitle C closure/post-closure, and RCRA Subtitle I Underground Storage Tanks, require sureties to bind themselves jointly and severally for purposes of allowing a joint action(s) against the issuers of the surety bond, but allow for payment based on pre-determined proportions of the penal sum (several liability).

In the proposed CERCLA § 108(b) surety bond language, individual sureties would identify percentage limits of their liability in the surety bond for which they would each be liable while these individual surety limits would sum to the total penal sum of the bond. EPA believes that such an arrangement may increase surety bond issuers' capacity to collectively cover greater amounts of financial responsibility because the surety's level of coverage would not be impacted by the potential risk for non-payment by other sureties.

When multiple sureties issue a single bond, the proposed regulations would require that each surety be liable for their individual vertical percentage share of the total penal sum of the bond. EPA is proposing that the sureties' individual amounts of liability be

[68] The penal sum of a bond is the specified maximum amount that the surety will be required to pay and is a required input in the proposed surety bond language.

specified in the bond as a percentage of the penal sum of the bond. The proposed specification would create a vertical relationship whereby a surety's liability is not affected by other co-sureties' abilities to pay their shares. EPA believes this provides greater protection against the insolvency of one of the participating sureties. This approach also simplifies the claims process as the exhaustion of one surety's liability does not need to be determined before payment can be received from another surety. An additional advantage of this proposed structure is that sureties would be binding themselves jointly and severally for purposes of allowing a joint action(s) against the issuers of the surety bond. This would allow for a simpler claims process for claimants.

An alternative EPA considered was proposing that multiple sureties could form a tower of coverage comprised of horizontal layers. In such an arrangement each surety in the horizontal tower would be agreeing to cover its layer of the tower, not a percentage of the total. Those sureties higher up the horizontal tower become responsible on a layer-by-layer basis as the limits of each underlying surety's obligation become exhausted. However, EPA is not proposing such an arrangement due to several concerns with such an arrangement. First, a horizontal arrangement presents the opportunity for sureties covering higher coverage layers to avoid liability if a surety on a lower level becomes insolvent and cannot cover the liability within its layer. This was a concern also identified by the U.S. Coast Guard in development of its CERCLA § 108(a) regulations (*see* 59 FR 34220 (July 1, 1994)). Secondly, such an option would raise the administrative burden on EPA because EPA would need to ensure that each layer of coverage fits with the layers above and below and EPA would also need to ensure that the layers contained exhaustion provisions.

EPA requests comment on the proposed arrangement for allowing multiple sureties to execute one bond by identifying their vertical percentage share of the penal sum. Specifically, EPA is interested in other potential arrangements that may encourage surety participation in the program and provide for relatively high amounts of financial responsibility coverage yet not overly complicate implementation of the claims process.

Written Statements From Attorneys General and Insurance Commissioners (§ 320.41(d))

EPA believes a bond written as required under this proposal may implicate state insurance law and thus the validity of any such bond may depend on state law. This issue has come up in other EPA rulemakings including the financial responsibility requirements for underground storage tanks containing petroleum (*see,* for example, 52 FR 12786, April 17, 1987) and the RCRA Subtitle C third party liability requirements (*see,* for example, 53 FR 33941, September 1, 1988). State insurance regulation and law is by and large the purview of the states and thus the Agency does not believe it can state with certainty whether any particular bond would subject the issuer to state insurance law, and whether it would be valid with respect to such law. Similar to the way the issue was handled in those programs, EPA is proposing that a surety bond may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of (i) the state in which the surety is incorporated, and (ii) each state in which a facility covered by the surety bond is located have submitted a written statement to EPA that a surety bond executed as described in the regulations is a legally valid and enforceable obligation in that state. EPA believes that the surety bond would be an important compliance option and welcomes comments from state Attorneys Generals and Insurance Commissioners on this issue.

Termination of the Bond by the Owner or Operator (§§ 320.41(l) and 320.50(c))

The owner or operator would be able to terminate the bond if the Administrator has given prior written consent based on his receipt of evidence of alternate financial responsibility as specified in Part 320 or if the Administrator releases the owner and operator from the financial responsibility requirements of that part. To assist in implementing this requirement the proposed wording of the surety bond includes a provision governing the principal's (i.e. the owner's or operator's) termination of the bond. The proposed bond language states that the principal may terminate the bond by sending written notice to the surety(ies), provided however, that no such notice shall become effective until the surety(ies) receive(s) written authorization for termination of the bond by the Administrator. In this way, the owner or operator would not be able to unilaterally terminate the bond without the authorization of EPA.

Performance Bond

In meetings with potential providers EPA was told that sureties typically prefer having an option of either performing or paying under a bond. EPA considered providing such an option as the Agency believed it may encourage greater participation from sureties in the CERCLA § 108(b) program as well as potentially allow sureties to conduct work in certain cases, which may be more economical than EPA or another Federal agency conducting the work itself. Specifically, EPA thought that the option of performance could be advantageous in some situations, for example, when the surety became liable because an owner or operator either did not perform as required by a CERCLA unilateral administrative order or failed to perform work as required by a CERCLA settlement.

However, EPA could not determine how to specify a workable performance option into the CERCLA § 108(b) surety bond in light of some of the features of the rule's framework. Unlike typical reclamation and closure programs, CERCLA § 108(b) does not include a series of defined and costed-out activities (e.g. closure) which the surety guarantees will be completed. In such programs, if the principal defaults and the surety elects to perform, the surety is typically liable until the defined tasks are all completed. CERCLA § 108(b) does not include any pre-defined obligations. Rather, a CERCLA § 108(b) financial responsibility instrument could be subject to multiple claims by a variety of claimants under the various payment scenarios over the life of the instrument. Therefore, a very accurate accounting of the liability of the surety is necessary with respect to the claims paid and the penal sum of the bond. Such accounting would be difficult if claims were satisfied by performance as it is not clear how the performance should be valued absent a pre-existing accounting of the activities to be conducted. Therefore, surety performance would leave questions about the remaining value of the bond which would create uncertainty around future claims and the availability of financial responsibility. Further, as CERCLA § 108(b) financial responsibility amounts may be relatively large, EPA anticipates that multiple sureties may issue single bonds. This would create even greater complexity around coordinating performance and determining the remaining value of the bond. In light of these considerations, EPA is today

proposing surety bond language that provides only for payment, not performance. EPA requests comment on how EPA could specify a performance option in the CERCLA § 108(b) surety bond in light of the considerations discussed.

3. Insurance (§ 320.42)

An owner or operator would be able to satisfy the CERCLA § 108(b) financial responsibility requirements by obtaining insurance for CERCLA response costs, health assessment costs, and natural resource damages which conforms to the requirements of the regulations. Through the policy the insurer agrees to pay for the CERCLA response costs, health assessment costs, and natural resource damages associated with the facility of the current owners and operators under certain circumstances should the current owners or operators fail to do so. Each insurance policy would be required to be amended by the attachment of a CERCLA § 108(b) insurance endorsement as worded in § 320.50(d).

Issuer Eligibility (§ 320.42(b))

At a minimum, the insurer would be required to be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states. These proposed minimum criteria for an insurer providing insurance under the regulations are the same as those used under the RCRA Subtitle C financial assurance program, which EPA believes have worked well. Additionally, these requirements would be familiar to the regulated community and implementing EPA staff. EPA believes that such standards help assure the integrity of the insurers whose policies are being used by owners or operators to meet the financial responsibility requirements. EPA believes these qualifications will assure that insurers are subject to some regulatory oversight by state insurance departments but will still permit broad participation in providing the insurance. EPA considered alternative qualifications for providers of insurance but is proposing that providers of insurance policies meet the requirements described in this section. In making this decision EPA attempted to balance the benefit of potentially lower default rates by insurers providing insurance under the proposed regulations on the one hand, and the potential impact on the supply of instruments and the administrative burden on the Agency entailed in verifying providers met additional qualifications of these alternatives on the other. For more information on alternatives considered, please see the background document that addresses instrument provider qualifications.

EPA also requests comment on allowing owners and operators to obtain insurance policies from captive insurers and/or risk retention groups. A captive insurer is an insurance company that provides insurance primarily or exclusively to its owner(s). A pure captive is defined as having only one owner and providing insurance coverage to only one corporate entity, whereas a group captive is defined as having more than one owner and providing insurance coverage only to members of the group. A risk retention group (RRG) is a liability insurance company owned by its members (policy holders) and organized under the Federal Liability Risk Retention Act.

EPA is aware that some observers have noted concerns with such forms of insurance suggesting that captive insurance and risk retention groups may present a higher level of risk than commercial insurance. EPA is particularly concerned about the risk that captive insurers may present. Specifically, the EPA Inspector General in its 2001 and 2005 reports on the RCRA financial assurance program has pointed to the limited financial independence between the insurer and the owner or operator as one source of risk. The OIG, in the 2005 report, explained that the financial health of the captive insurer is tied to the parent company. Most captive insurance companies are wholly owned subsidiaries, so there is a lack of independence between the captive and the parent company. If the parent company has financial difficulties, then the captive insurer may not have the funds to cover the assured costs. (see Office of Inspector General, Audit Report: RCRA Financial Assurance for Closure and Post-Closure, Report No. 2001–P–007 March 30, 2001; and Office of the Inspector General, Continued EPA Leadership Will Support State Needs for Information and Guidance on RCRA Financial Assurance, Report No. 2005–P–00026, September 26, 2005). EPA has concerns that pure captive insurers in particular may offer insufficient assurance in the context of CERCLA § 108(b) financial responsibility. Pure captive insurance has a limited ability to fulfill a basic purpose of insurance: To spread the risks of potential losses among multiple parties. In their 2007 report on captive insurance the Environmental Financial Advisory Board (EFAB) noted that the greatest risk to the solvency of a captive insurer is an infrequent, large insurance claim. (See Environmental Financial Advisory Board. The Use of Captive Insurance as a Financial Assurance Tool in Office of Solid Waste and Emergency Response Programs. March 2007.) This may be the very nature of claims for CERCLA response costs, health assessment costs, and natural resource damages associated with hardrock mining facilities, which can be quite large and difficult to predict with certainty, for which the 108(b) financial responsibility instruments would be intended to pay.

EPA believes that risk retention groups may also carry potentially higher risk than commercial insurance but may be better suited to provide insurance under CERCLA 108(b) than pure captive insurers due to their greater ability to spread risk across multiple insureds. Risk retention groups were the subject of a 2005 GAO report that identified some concerns with risk retention groups. One of the primary concerns identified by the GAO was the 'patchwork' nature of state regulation and oversight of risk retention groups. (See Government Accountability Office, Risk Retention Groups: Common Regulatory Standards and Greater Member Protections Are Needed, GAO–05–536. August 2005.) Such a patchwork regime of state regulation and oversight may allow some risk retention groups to operate with limited oversight, including solvency regulation.

EPA also recognizes that allowing insurance policies written by captive insurers and risks retention groups may add potential insurance capacity. EPA believes insurance is an important financial responsibility instrument under CERCLA § 108(b). EPA also understands from its discussions with representatives of the commercial insurance industry as it developed this proposal that environmental insurance policies commonly issued may be narrower in scope than the proposed CERCLA § 108(b) requirements. The Agency was also told that the scope of the insurance coverage the Agency is proposing to require today would likely be viewed as a hybrid between a closure and risk transfer policy.[69] EPA recognizes that a market for this type of hybrid coverage thus may not currently exist and may need some time to fully develop. EPA believes one benefit of allowing owners and operators to purchase policies written by captive insurers and risk retention groups may be, at least initially, a deeper market for

[69] A closure policy would assure the performance or satisfaction of certain known or foreseeable obligations. A risk transfer policy, on the other hand, addresses losses arising from fortuitous events (e.g. releases) that may or may not occur.

insurance policies to meet the CERCLA § 108(b) regulations. EPA's expectations in this respect are strongest for risk retention groups, and are informed by the 2005 GAO report, which noted that many insurance regulators have commented that risk retention groups have filled voids where commercial insurers may not have had a strong interest. The report identified medical malpractice insurance as an area where risk retention groups were able to provide coverage where the availability of affordable commercial insurance was limited. Furthermore, EPA's evaluation of markets for financial responsibility instruments suggested that risk retention groups may present an opportunity for creation of additional capacity to serve the financial service needs of the hardrock mining industry. Specifically, the report stated RRGs have been able to offer additional capacity to the insurance markets to cover volatile, capital-intensive risks like those associated with hardrock mining.

In light of these tradeoffs between potentially higher risk to third-party claimants and taxpayers presented by captive insurers and risk retention groups and the possible additional capacity they may provide, EPA requests comment on allowing policies written by these types of insurers. Specifically, EPA requests comments on allowing policies issued by captives or risk retention groups provided the issuer had a minimum financial strength rating from A.M. Best or a comparable rating from another Nationally Recognized Statistical Ratings Organization (NRSRO). EPA believes requiring, at a minimum, that captives and risk retention groups have a minimum financial strength rating may address some of the concerns associated with these types of policies. First, recognizing the limited financial independence between the owner or operator and the insurer and that captive insurance in particular has some similarities to self-insurance, a financial strength rating would help to demonstrate that the insurer has the financial wherewithal to pay claims on behalf of the owner or operator. Secondly, the financial strength rating provides an independent and common assessment of the financial strength of the insurer and thus may alleviate the concerns of the state-by-state variation in oversight and solvency examination the GAO noted with respect to risk retention groups. Such a provision would also be consistent with one of the findings in the 2007 EFAB report that the use of independent credit analysis (*i.e.,* credit ratings) is a cost-effective mechanism for demonstrating the financial strength of a captive insurer and that these ratings help address the limited capacity of state regulatory bodies to undertake extensive credit analysis.

The value of a potential rating requirement for a captive insurer or risk retention group can also be illustrated by lower historical default rates for higher rated insurers. In 2015 AM Best reported [70] that US life/health and property/casualty insurers rated by AM Best over the period 1977–2014 with secure ratings had a cumulative three-year impairment rate of 1.05 percent. The same impairment rate for life/health and property/casualty insurers rated by AM Best with vulnerable ratings over that time period was 10.45 percent suggesting that ratings requirement could meaningfully reduce the impairment risk of a risk retention group or captive insurer.

EFAB also recommended to EPA in its 2007 report on captive insurance that in addition to the captive insurer having a minimum rating, the financially responsible affiliate (*e.g.* the owner or operator demonstrating financial responsibility with insurance from a captive) should also hold a minimum credit rating. EPA requests comments on this additional potential requirement for captive insurance should captive insurance be allowed in the final rule. EPA believes that such a requirement would address some of the concern associated with the similarities between pure captive insurance and a financial test but would increase the administrative burden on the Agency.

EPA recognizes, however, that a requirement for a financial strength rating would not address all concerns with these instruments. These remaining concerns would include: (1) A concern that state insurance regulation of captives and risk retention groups may not be as uniform as that for commercial insurance and may be limited to only the state in which the insurer is chartered; [71] (2) a concern that captives and risk retention groups may not be able to spread risk across many insureds given the limitations inherent in for whom they can write policies. EPA is therefore seeking comment on these issues, and on suggested approaches to address these remaining concerns.

For example, EPA requests comment on the concept of allowing policies issued by risk retention groups or group captives that met a certain minimum rating, but not allowing pure captive insurers to meet the CERCLA § 108(b) financial responsibility requirements. The rationale for such a distinction would be that risk retention groups and group captives may be able to spread risk across a larger pool of financially and legally independent policy holders than a pure captive insurer that may be restricted to spreading risk amongst its own financially-related affiliates. As such, accepting insurance policies from risk retention groups or group captives, but not pure captives, may address the second concern identified. EPA also requests comment on whether insurance policies provided by risk retention groups and group captive insurers more generally should be treated equivalently.

EPA recognizes that a financial strength rating would not necessarily be available in the near term as some captive insurers or risk retention groups, were they to ultimately be considered acceptable issuers, may be newly created in response to these regulations. EPA is thus accepting comment on whether, if EPA ultimately allows policies written by captives and/or risk retention groups, to phase in the ratings requirement. A phased ratings requirement could operate by requiring that owners and operators provide evidence of the requisite financial strength of a captive insurer or risk retention group beginning five years after the effective date of the rule. In this way, a rating agency would be able to review a multi-year track record of the insurer's performance which may be necessary in order to accurately rate the insurer.

Submission of Endorsement (§ 320.42(c))

Typically, financial responsibility regulations require submission of either a certificate of insurance or an endorsement as evidence of the required insurance coverage. A certificate of insurance is a form that typically is completed by an insurance broker or agent at the request of an insurance

[70] A.M. Best. *Best's Impairment Rate and Rating Transition Study–1977–2014.* U.S. Property/Casualty & Life/Health. Exhibit 2. Pg 5. (August 21, 2015)

[71] This concern is one of the concerns identified in the 2005 GAO report but may not be unique to captive or risk retention groups in the context of environmental insurance. Similar to captive insurers and risk retention groups, an excess or surplus lines insurer must be licensed in the state that serves as its domicile and must meet the solvency requirements of that state alone. Excess or surplus lines insurers cover difficult to standardize risks which often includes environmental insurance and, the Agency anticipates, may include CERCLA 108(b) coverage initially due to the relatively high dollar limits of liability and high risk facility classes.

policyholder, which evidences the fact that an insurance policy has been written. An endorsement to an insurance policy is a valid and binding part of the contract considered to be part of the insurance contract. EPA is today proposing that an endorsement be submitted as evidence of financial responsibility by owners and operator that choose to obtain insurance coverage as the means of complying with the CERCLA § 108(b) insurance requirements. Specifically, the owner or operator would be required to submit a signed duplicate original of the CERCLA § 108(b) financial responsibility endorsement to the Administrator, or to regional delegees of the Administrator, if applicable, if the endorsement covers facilities located in multiple regions. For more information on the required wording of the endorsement and alternatives considered please see the discussions later in this preamble, and the background document ''Potential Requirements for Insurance, Surety Bonds, Letters of Credit and Trust Agreements and Standby Trust Agreements under CERCLA § 108(b)'' regarding instrument specifications.

In discussions with representatives of the insurance industry, EPA was told by the participating representatives that they were indifferent between a certificate of insurance and an endorsement as the form of the evidence of financial responsibility. EPA did not want to require the whole policy be submitted in all cases and is thus today proposing that an endorsement be submitted as evidence of financial responsibility. Other financial responsibility programs specify either certificates, endorsement or both. In order to reduce the complexity of the proposed regulations and provide a narrower range of documents EPA would need to review during implementation, the Agency is proposing an endorsement be submitted. Further, because an endorsement is part of the insurance contract itself, it may provide greater certainty with respect to the insurance coverage provided by the policy than a certificate of insurance.

Requirements To Ensure Continuity of Financial Responsibility Coverage (§§ 320.42(f)(k) and (l))

An owner or operator using insurance to satisfy the requirements of this section would also be required to establish a standby trust and update Schedule A of the trust agreement within sixty days of a change in the amount of CERCLA § 108(b) financial responsibility. Similar to the requirements for the letter of credit and surety bond, the standby trust is being required alongside the insurance instrument to ensure continued coverage, in conjunction with the automatic renewal provision of the policy and the potential liability of the insurer if the owner or operator does not obtain replacement financial responsibility. EPA's concern is that an insurance policy might be cancelled, not renewed or otherwise terminated leaving no financial responsibility in place for the payment of valid third-party CERCLA claims. EPA is especially concerned that policies may be cancelled, terminated or otherwise not renewed following the issuance of a notice letter of potential liability for the release of hazardous substances or marked financial decline of the owner or operator, and financial responsibility may not be in place when a claim is made. Amplifying these concerns is the recognition that the CERCLA processes leading to a claim (*e.g.* cost recovery) may be lengthy, which may make it particularly difficult to ensure continuity of CERCLA § 108(b) insurance coverage without these requirements.

As a result, in addition to the requirement to establish a standby trust, EPA is proposing an automatic renewal provision. Specifically, EPA is proposing that the endorsement provide that cancellation, failure to renew, or any other termination of the insurance by the insurer will be effective only upon written notice to the owner and operator and the Administrator by certified mail and only after the expiration of 120 days beginning with the date of receipt of the notice by both the Administrator and the owner or operator, as evidenced by the return receipts. Such an automatic renewal provision in the policy would be required to provide the insured with the option of renewal at the face amount of the expiring policy. In this way, insurance coverage could only lapse after 120 days' notice providing the owner and operator an opportunity to obtain replacement financial responsibility.

The cancellation and termination language in the endorsement proposed today was intended to closely follow the language used in the RCRA Subtitle I insurance endorsement for underground storage tank financial responsibility. A 2004 court decision held that those regulations preclude rescission as a remedy for misrepresentation and provide only for prospective cancellation of the insurance.[72] EPA is concerned that at the time a claim was made against a CERCLA § 108(b) insurance policy, rescission (retrospective cancellation) of the policy due to misrepresentation of the insured, would result in the financial responsibility being unavailable and leave valid claims unsatisfied. EPA recognizes the public policy merits of protections to insurers in the event of misrepresentation. However, in the CERCLA § 108(b) context, EPA would not have access to the owner or operator's application for insurance and any investigations into misrepresentations or omissions would potentially be burdensome to the Agency and redirect resources away from cleanups and other programmatic priorities. EPA believes that the insurer is in the best position to conduct investigations as to the accuracy of the information provided in the application for insurance and thus should retain the risk from misrepresentation rather than any CERCLA claimants. EPA's intent today is to preclude rescission of the insurance coverage as a remedy for misrepresentation and instead provide that prospective cancellation, non-renewal or other termination of the insurance are the sole remedies. EPA requests comment on this proposed provision and endorsement language.

Finally, the endorsement would be required to specify that in instances where the owner or operator fails to obtain alternate financial responsibility and obtain written approval of such alternate financial responsibility from the Administrator within ninety days after receipt by both the owner or operator and the Administrator of a notice from the insurer that it has decided to cancel, not renew or otherwise terminate the insurance policy, the insurer would be liable up to the face value of the policy for payment into the standby trust in accordance with the terms of the endorsement. EPA believes the combination of the requirements for a standby trust, a notice of cancellation, failure to renew or other termination of the policy and the insurers potential liability if the owner or operator did not obtain alternate financial responsibility would provide assurance to EPA and other claimants that funds will be available to make payment for CERCLA response costs, health assessment costs, and natural resource damages as required under the proposal. This requirement would be similar to those for owners and operators using letters of credit or surety bonds. This arrangement, and the similar provisions for other proposed instruments, as well as alternatives are

[72] *See: Zurich Am. Ins. Co.* v. *Whittier Props., Inc.,* 356 F.3d 1132 (9th Cir. 2004).

discussed in more depth in the preamble section headed 'issuer cancellation provisions.'

A notable feature of the issuer cancellation provision proposed today for insurance is how failure to pay the premium would be treated. Under this proposed rule, if failure to pay the premium was the rationale for the insurer's decision to cancel, not renew, or otherwise terminate the policy, the insurer would be liable on the policy to fund a standby trust if the owner or operator failed to obtain alternate financial responsibility and obtain written approval of such alternate financial responsibility from the Administrator within ninety days after receipt by both the owner or operator and the Administrator of the notice of the insurers intent to cancel, not renew, or otherwise terminate the policy. EPA believes that this is the appropriate treatment of the insured's failure to pay the premium. EPA believes that the instances in which the owner or operator is unable to pay the premium are likely instances where financial responsibility coverage is most needed as the owner's or operator's ability to satisfy valid third-party CERCLA claims is likely limited. EPA believes one of the benefits of CERCLA § 108(b) is that the credit risk of the owners and operators of facilities managing hazardous substances can be transferred from the taxpayer and other third-party CERCLA claimants to the insurance and financial responsibility providers better able to manage, assess and make arrangements for such credit risks.

One alternative option would be to allow cancellation in the event of the insured's failure to pay the premium, without potential insurer liability. While, for the reasons discussed earlier, EPA is not proposing such an arrangement, the Agency requests comments on this alternative and the proposed treatment of failure to pay the premium on the part of the insured.

Payment for Third-Party CERCLA Claims From the Insurance (§§ 320.42(h) Through (j) and (l) and § 320.50(d))

Under the proposed regulations the insurance would provide for payment to third-party CERCLA claims with three payment triggers in addition to providing for direct action as provided by CERCLA. EPA anticipates these four payment scenarios would operate independently of each other. These payment scenarios are the same as for the other instruments and are discussed more fully in section VI.B.5. of this preamble.

The policy would be required to provide for the payment awarded in final court judgments from a Federal court against any of the current owners and operators awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility to the party obtaining the judgment should such payment not be made within thirty days.

The policy would be required to provide for payment as required by a CERCLA settlement associated with the facility between any of the current owners or operators at the facility and EPA or another Federal government agency should the payment as required by the settlement not be made.

The policy would also be required to provide for payment into a trust fund established pursuant to a CERCLA unilateral administrative order issued to any of the current owners or operators at the facility by EPA or another Federal agency in instances where performance at the facility as required by the order does not occur. The owner or operator must have provided a written statement allowing the insurance policy be used to assure performance of the work required in the order.

In addition to the three proposed payment scenarios identified for which EPA intends to provide insurance coverage, the proposed CERCLA § 108(b) insurance would also be required to provide for direct action against the insurer in instances identified in CERCLA § 108(c)(2). Specifically, the proposed required wording of the CERCLA § 108(b) insurance endorsement includes language stating that in the case of a release or threatened release of (a) hazardous substance(s) from a facility covered by the policy, the insurer acknowledges that any claim authorized by CERCLA §§ 107 or 111 may be asserted directly against the insurer as provided by CERCLA § 108(c)(2). The endorsement would also state that the insurer consents to suit with respect to these claims subject to the limitations in CERCLA § 108(d), and that the insurer will be entitled to all rights and defenses provided to guarantors by CERCLA § 108(c). Further, under the proposed terms of the endorsement the insurer would provide notice of any such resulting claims and payments to the Administrator. EPA believes this notification requirement is valuable as the owner and operator may not be available to provide such a notice of payments or claims in a direct action scenario yet EPA wishes to remain informed of claims against the instrument and the value of the financial responsibility.

General Performance Clause (§ 320.50(d))

The proposed insurance endorsement language includes a general or blanket performance clause as a means to address the myriad number of ways the scope of insurance coverage provided by an insurance policy may be limited. EPA recognizes that the ability to tailor insurance coverage to the specific needs of the insured is one of the virtues of insurance contracts; however, the Agency believes that in the context of statutorily required financial responsibility such limiting provisions of the policy may conflict with the intended scope of the financial responsibility coverage and may frustrate the realization of the public policy goals. Environmental insurance policies can be long, complex contracts that operate as a whole to define and restrict the coverage provided.

EPA believes it is necessary to propose a performance clause in the language of the endorsement that would amend any terms of the policy inconsistent with the regulatory requirements for CERCLA § 108(b) insurance or the terms specified in the endorsement. Similar performance clauses are employed in the certificate of insurance required as evidence of financial assurance for closure and post-closure care of hazardous waste facilities in the RCRA Subtitle C program (*see* 40 CFR 264.151(e)) and in the required wording of the endorsement used in the RCRA Subtitle C third-party liability program (*see* 40 CFR 264.151(i)). EPA believes that the proposed performance clause in the endorsement will provide EPA evidence of financial responsibility submitted by owners and operators electing to use insurance without necessitating EPA review of the entire insurance policy. Without such a provision, the administrative burden involved with reviewing insurance submissions would be significantly higher and may require expertise not readily available within EPA.

The proposed performance clause states that the insurance afforded with respect to the covered facilities is subject to all of the terms and conditions of the policy; provided, however, that any provision, exclusion, definition, condition, retroactive date, clause, defense, or other term of the policy inconsistent with 40 CFR 320.42 or certain identified required specifications in the endorsement are hereby amended to conform with 40 CFR 320.42 and the required specifications in the endorsement. EPA intends for the performance clause to

help ensure that financial responsibility coverage will continue and that the insurer will satisfy valid third-party CERCLA claims as intended by the proposed regulations. In light of the fact that insurance policies are often long, complex documents that may include numerous exclusions, definitions, conditions, or other terms that may undercut the intended coverage, EPA requests comment on the proposed performance clause in the CERCLA § 108(b) insurance endorsement. Furthermore, EPA is interested in comments as to whether or not the proposed insurance specifications, including the performance clause, will reliably provide for the intended coverage (*e.g.* payment under the scenarios described in IV B 5 ''General Provisions for Instrument Payment'' of the preamble).

Retroactive Dates (§ 320.50(d))

The most notable aspect of the proposed performance clause may be the specification that any retroactive date [73] contained in the policy inconsistent with the intended scope of CERCLA § 108(b) financial responsibility coverage is amended to conform with the regulatory specifications and the terms of the endorsement. EPA believes that such a specification is necessary to effectuate the purpose of CERCLA § 108(b) and has public policy merits. CERCLA § 108(c)(2) provides a cause of action against insurers providing CERCLA § 108(b) coverage in certain instances for any claim authorized by CERCLA §§ 107 or 111. CERCLA's liability scheme is established in CERCLA § 107 and is retroactive and includes costs incurred addressing the threat of a release. EPA believes a retroactive date would be inconsistent with the intended scope of CERCLA § 108(b) financial responsibility which is intended to cover the full suite of potential CERCLA liabilities including threatened releases, which could be a significant driver of costs and risk and may exist at many facilities subject to CERCLA § 108(b) financial responsibility requirements.

This issue relates to the concept of CERCLA § 108(b) presenting a hybrid risk from the viewpoint of insurers mentioned earlier. In discussions with representatives of the insurance community, EPA was informed that the scope of a CERCLA response cost is broad and has elements suited to risk transfer policies that commonly have retroactive dates (*e.g.* costs incurred responding to fortuitous releases) and closure insurance that typically would not have a retroactive date (*e.g.* costs incurred responding to the threat of release). EPA recognizes that for this reason, the CERCLA § 108(b) financial responsibility scope of coverage may, at least initially, be perceived as an unfamiliar or hybrid risk by insurers yet believes that allowing retroactive dates inconsistent with intended scope of coverage could result in many valid third-party CERCLA claims being unsatisfied on the basis that the pollution condition pre-dated the retroactive date of the policy. EPA requests comment on the performance clause and in particular the proposed language amending any retroactive dates inconsistent with the scope of coverage prescribed by the regulations.

One possible arrangement that representatives from the insurance community offered was to separate the financial responsibility requirements into two separate obligations. Such an arrangement for CERCLA § 108(b) would allow EPA to specify an appropriate retroactive date for the fortuitous risks and not have one for the more ''known'' CERCLA response and health assessment costs. In the RCRA Subtitle C financial assurance program EPA was able to specify separate instruments for known costs (*e.g.* closure) and third-party liability financial assurance which is more fortuitous in nature. However, such a construct is not possible in the case of CERCLA § 108(b) financial responsibility. Because CERCLA § 108(b) financial responsibility does not support a permitting program EPA cannot establish, by regulation, performance requirements for owners and operators subject to the rule (*e.g.* closure requirements that might address a threat of release) which would be the basis for a separate amount of financial responsibility. Further it is important to recognize that the determination of a CERCLA § 108(b) financial responsibility amount does not constitute a determination of CERCLA liability for regulated entities or establish any presumptive remedy which could be the basis of an amount for costs amenable to a closure policy. This is one of the reasons why CERCLA § 108(b) financial responsibility is inherently different from financial responsibility that complements reclamation and closure programs. Given the uncertainty around what Superfund actions may ultimately be required at a facility, EPA believes it unwise to establish different pots of money. Such an approach would only be optimal in instances where there is established certainty that particular actions will need to take place at a facility (*e.g.* in a program with regulatory requirements for closure or post-closure).

Multiple Insurers (320.42(d))

EPA is proposing that up to four insurers would be able to provide the required amount of CERCLA § 108(b) financial responsibility at a single facility. EPA expects the required amounts of CERCLA § 108(b) financial responsibility may be relatively large and wishes to provide this flexibility. The proposed endorsement language would require that the participating insurers identify their percentage share of the coverage at facilities covered by the policy and the corresponding dollar value of that percentage share.

The proposed arrangement for allowing multiple insurers to cover a single facility is consistent with the proposed arrangement for multiple sureties with a few exceptions. As described in the surety bond section of the preamble, the proposed language of the surety bond requires sureties to bind themselves jointly and severally for purposes of allowing a joint action(s) against the issuers of the surety bond, but allow for payment based on pre-determined proportions of the penal sum (several liability). Unlike in the case of surety bonds where such a provision has a great deal of precedent, such a provision for insurers participating in vertical towers of coverage is less common in the financial assurance programs EPA reviewed. As a result, EPA is proposing that participation by multiple insurers be limited to four insurers to ensure a manageable claims process. The U.S. Coast Guard included the same cap on the number of participating insurers (59 FR 34220 (July 1, 1994)). EPA does not want to create a scenario whereby claimants need to take action against many insurers which would complicate the claims process and create a protracted process for the satisfaction of valid claims. EPA requests comment on this limitation. Specifically, EPA is interested in comments as to whether, in instances where multiple insurers provide coverage at a single facility, requiring participating insurers to bind themselves jointly and severally for the purposes of allowing a joint action(s) against the group of insurers would be possible and how such a provision might best be specified.

When multiple insurers do provide coverage at a single facility, the

[73] The ''retroactive date'' or ''continuity date'' (terminology varies) establishes the foregoing temporal limits of insurance policies: Pollution conditions commencing before the specified date are not covered, even if a claim about such a pollution condition is first made during the policy term.

proposed regulations would require that each insurer be liable for their individual vertical percentage share of the total CERCLA § 108(b) financial responsibility amount. The proposed specification would create a vertical relationship whereby an insurer's liability is not affected by the other insurers' abilities to pay their shares. EPA believes this provides greater protection against the insolvency of one of the participating insurers. The U.S. Coast Guard also restricted multiple insurers to only providing vertical towers of coverage.[74] This approach also simplifies the claims process as the exhaustion of one insurer's liability does not need to be determined before payment can be received from another insurer.

An alternative EPA considered was proposing that multiple insurers could form a tower of coverage comprised of horizontal layers. In such an arrangement each insurer in the horizontal tower would be agreeing to cover its layer of the tower, not a percentage of the total. Those insurers higher up the horizontal tower become responsible on a layer-by-layer basis as the limits of each underlying policy become exhausted. However, EPA is not proposing such an arrangement due to several concerns. First, a horizontal arrangement presents the opportunity for insurers covering higher coverage layers to avoid liability if an insurer on a lower level becomes insolvent and cannot cover the liability within its layer. This is a concern also identified by the U.S. Coast Guard when it developed its CERCLA § 108(a) regulations.[75] Secondly, such an option would raise the administrative burden on EPA because the Agency would need to ensure that each layer of coverage fits with the layers above and below by ensuring the insurance included the necessary ''follow form'' provisions.[76] Further, EPA would also need to ensure that the layers contained ''drop down'' provisions to address exhaustion issues that might arise as a result of insolvency of an underlying insurer.[77]

EPA requests comment on the proposed regulatory provision allowing up to four insurers to provide coverage at one facility by identifying their vertical percentage share of the total CERCLA § 108(b) financial responsibility amount in the submitted endorsement. Specifically, EPA is interested in other potential arrangements that may encourage insurer participation in the program and provide for relatively high amounts of financial responsibility coverage yet not overly complicate implementation or the claims process.

Termination of Insurance Coverage by the Owner or Operator (§ 320.42(n) and (p))

The owner or operator would be required to maintain the insurance in full force and effect until the Administrator consents to termination of the insurance by the owner or operator. The Administrator would give written consent to the owner or operator that he or she may terminate the endorsement when: (1) An owner or operator substitutes alternate financial responsibility as specified in this section; or (2) the Administrator releases the owner or operator from the requirements of this section in accordance with § 320. 26. This provision is intended to ensure that the coverage of the financial responsibility does not cease, and that funds remain available when needed, until the release provisions are met or alternate financial responsibility is provided.

4. Financial Test (§ 320.43)

a. Overview and Introduction

CERCLA § 108(b) (2) provides that financial responsibility may be established by any one, or any combination of, the instruments listed in that paragraph, including ''qualification for self-insurance.'' A financial test is a financial responsibility instrument that allows an owner or operator to qualify for self-insurance by demonstrating that it has sufficient financial strength to meet its environmental obligations. When allowing the use of a financial test, the Government accepts the facility's demonstration of financial strength as the only assurance that the owner or operator will meet its environmental obligations, and does not require that it establish a trust fund or obtain additional security in the form of a third-party financial instrument, such as insurance, a surety bond, or letter of credit.

The Agency is co-proposing two separate regulatory approaches in the form of options regarding the use of a financial test to assure that this important issue is thoroughly considered before the Agency makes a decision in the final rule. The Agency is proposing, under Option 1, not to allow the use of a financial test or corporate guarantee, and is proposing under Option 2 allowing the use of a credit rating-based financial test and corporate guarantee. At this time, EPA prefers Option 1. However, the Agency is proposing both options to fully evaluate this issue, and to gather as much information as possible to inform its ultimate decision on whether the financial test and corporate guarantee mechanisms are appropriate for use by hardrock mining facilities under CERCLA § 108(b). EPA has identified, and presented in this preamble discussion, a number of factors that the Agency will consider in making its final decision, and seeks public comment on these factors, as well as additional information from the public that could inform the Agency's final decision.

By replacing the requirement to obtain a third-party instrument with a demonstration of financial strength, the financial test results in significant cost savings to eligible owners or operators, from not having to purchase a third-party financial responsibility instrument. However, by allowing a financial test, EPA would accept the risk that, if the company's financial situation deteriorates and it cannot obtain a third-party instrument or fund a trust fund to meet its environmental obligations, the costs of addressing the environmental risk at the facility could fall to the public. With the added layer of a third-party financial responsibility instrument, however, the risk of default to the public would be lessened by the financial strength of the instrument provider. Nonetheless, EPA recognizes that the risk of default exists regardless of the type of financial responsibility instrument. For example, even in the case of secured financial responsibility instruments, the possibility remains that the banks and insurance companies underwriting these instruments could also fail. Regardless of the scenario, with or without a financial test, EPA and the public are not without some risk of having to cover such obligations.

EPA also is carefully considering the elements of the financial test. Financial tests can vary in approach and in sensitivity. The combination of terms

[74] *See* 33 CFR 138.80(c)(1)(i).

[75] *See* 59 FR 34220 (July 1, 1994).

[76] A ''follow form'' provision means that the excess insurer agrees to abide by the terms of the primary or underlying policy(ies) to the extent that the excess policy does not contain a conflicting parallel term. The intent of an EPA requirement for such a provision would be to eliminate coverage gaps that may arise when excess policies do not ''follow form'' of underlying policies. For example, a gap may arise when the primary policy covers gradual pollution but the excess policy does not.

[77] An exhaustion provision states that an excess layer of coverage cannot be triggered until all primary and underlying layers have been exhausted. Problems in accessing excess layers can arise when either the insured or an underlying insurer cannot pay due to insolvency. A ''drop down'' specification can address the situation of insolvency on the part of an underlying insurer, although other terms and conditions in the excess policy will affect whether the coverage will drop down.

and conditions impacts the balance of cost savings to the regulated community and the risk to the public, as well as a test's efficacy. Thus for example, bond ratings and financial ratios are commonly used measures of financial strength in financial tests. For bond-rating-based tests, establishing a lower minimum rating(s) requirement for self-insurance, can expand the availability of the test to the regulated community. At the same time, such entities with lower credit ratings also possess a higher likelihood of defaulting on their obligations. Thereby, permitting less credit worthy companies the ability to use the financial test increases the chance that an obligation may go unpaid and be borne by the public.

Further, the financial strength of an owner or operator as measured by a financial test represents a snapshot in time. Thus, for a financial test to be effective, the owner or operator must provide periodic evidence that it continues to pass the financial test and that it can meet the costs associated with its facility over time. For a financial test to be effective: (1) The financial test must accurately reflect the financial strength of the owner or operator; (2) the Agency and/or owners and operators must identify when the owner or operator no longer qualifies for self-insurance under the financial test; (3) the owners or operators that no longer qualify for the financial test must be able to quickly obtain an alternate instrument(s) to cover their obligations instead of self-insuring; and (4) the requisite instruments must in turn be available to such owners and operators who no longer are able to self-insure. The Agency is concerned, however, that third-party financial instruments may not be available to a company that is experiencing a period of financial hardship. While, in general, such an issue has not been a widespread problem in other EPA financial responsibility programs, the Agency is concerned that the highly cyclical, capital-intensive nature of the mining industry may present unique challenges under a CERCLA § 108(b) rule for hardrock mines.

There are several other broader considerations with respect to the adoption of a financial test. First, EPA has concerns regarding the extent to which sufficient resources and expertise will be available to implement a financial test under CERCLA § 108(b). Second, EPA has policy concerns about: (1) Whether offering a financial test would adversely affect the incentives created by the rule for better practices; (2) the potential inequity of offering a test due to the advantage that the test may create for larger versus smaller owners and operators; and (3) whether, given the potentially significant costs associated with Superfund liabilities, should the financial test fail as an instrument, these costs may not be paid or may fall to the taxpayer to pay. All of these considerations are discussed elsewhere in the preamble. The Agency remains extremely concerned regarding the boom and bust nature inherent to the hardrock mining industry and recent volatility in commodity prices and global markets. History suggests that the increased risk of default for these companies makes this sector particularly problematic from the perspective of allowing them to self-insure through a financial test. Finally, many hardrock mining facilities require long-term care, such as long-term water treatment of acid mine drainage. Allowing owners or operators to self-insure where such long-term liabilities are anticipated may be ill-advised given that some sites require treatment into perpetuity. It should be noted that, although EPA currently allows the use of a financial test under various agency programs,[78] other agencies have chosen not to allow the use of a financial test for owners and operators in the mining sector.[79] [80] [81] EPA discusses all of these factors in the following sections of this preamble.

b. Option 1—No Financial Test (Preferred Option)

Under this option, which EPA prefers, the Agency is proposing an approach under which a financial test would not be available for use by hardrock mining facilities subject to this rule. Under this approach, owners or operators could demonstrate financial responsibility only by using a trust fund, insurance, a letter of credit, or a surety bond, or a combination of those instruments. A corporate guarantee, which is based on the financial test, would not be available. EPA is proposing this option as a preferred option based on a number of factors. Covered initially are four broader factors of concern regarding the appropriateness of financial tests under CERCLA § 108(b). Further discussion follows that also outlines factors for why the use of any financial test would be particularly problematic for the hardrock mining industry. (1) Concerns regarding the use of a financial test under CERCLA § 108(b).

The Agency considered several concerns regarding the use of a financial test under this proposed rule. The Agency first considered the work involved in overseeing a financial test in the context of CERCLA § 108(b). EPA is particularly concerned about the administrative burden of a test under CERCLA § 108(b) given the freestanding nature of the CERCLA § 108(b) obligation that would not be buttressed by a permitting program. Observers, more generally, have commented that the financial test poses additional administrative burden. For example, in a 2001 audit of the RCRA Subtitle C financial assurance program, the Agency's OIG reported that financial tests pose unique administrative complexities that raise their implementation burden.[82] In 2005, when GAO was tasked with identifying obstacles to full realization of the ''polluter pays'' principle, GAO observed that financial tests and corporate guarantees are among the instruments that pose the greatest financial risk to the Government and are an administrative burden since they require specialized expertise to oversee.[83] The Agency is considering whether the unique characteristics of the CERCLA § 108(b) financial responsibility program and of the hardrock mining industry may increase the administrative burden of implementing a financial test, and make the use of a financial test less appropriate under this proposed rule than under other Agency programs. EPA solicits comment on this issue.

As discussed earlier, successful use of a financial test requires adequate oversight by the regulatory agency to assure that financial submissions are accurate and adequate, and that when owners or operators no longer meet the requirements of the financial test they secure an alternative financial responsibility instrument in a timely manner. Generally, where a financial responsibility requirement is tied to a permit, EPA has ongoing oversight of the owners or operators of the facility,

[78] The financial test is an allowable instrument under RCRA Subtitle C, Subtitle D, and Subtitle I regulations, as well as under the Underground Injection Control (UIC) program.

[79] *See* 43 CFR § 3809.570(a) through (c) related to self-insurance and pre-existing self-bonds under BLM regulation.

[80] *See* U.S. Forest Service, Forest Service Manual §§ 2817.24; 6562 (2008).

[81] For example, the Federal agency that regulates surface mining of coal recently advised states to not allow self-insurance by mining companies and also announced that it was changing the federal rules regarding self-insurance under the Surface Mining Control and Reclamation Act (SMCRA).

See: *http://www.eenews.net/eenewspm/stories/1060041689*

[82] *See* EPA Office of Inspector General. *RCRA Financial Assurance for Closure and Post-Closure.* March 30, 2001. 2001–P–007.

[83] *See* Government Accountability Office. *Environmental Liabilities: EPA Should Do More to Ensure That Liable Parties Meet Their Cleanup Obligations.* August 2005. GAO–05–658.

which supports implementation of a financial test at that facility. For example, under EPA's RCRA Subtitle C regulations for permitted hazardous waste treatment, storage, or disposal facilities, EPA receives extensive information about the facility in its permit application under 40 CFR part 270, and conducts regular and detailed inspections of the facility, including both the physical operations and financial assurance information required under the permit. As described earlier, however, CERCLA § 108(b) is an independent financial responsibility requirement that is not associated with a permit program, so the Agency may have less immediate access to information regarding the current status of the facility.

The Agency has attempted to address some of these concerns by structuring the proposed financial test to reduce implementation concerns, for example, by including reliance on credit rating. (This issue is discussed in section VI.C.4. of this preamble). However, even with the proposed financial test, the Agency would still be required to, at a minimum, verify the credit ratings, and to annually review financial submissions to assess whether the company meets other test requirements, such as coverage multiple requirements [84] related to a company's tangible net-worth and the value of their U.S. Assets. This review is potentially complex and may require a level of financial expertise not readily available in all ten EPA Regional Offices. For example, the data in the Chief Financial Officer (CFO) letter [85] may vary from the latest annual financial statements. Professional judgment may be needed to evaluate deviations between the CFO letter and audited statements, which increases the administrative burden and the demand for technical expertise to implement the financial test.

In addition, the efficacy of the financial test proposed under Option 2 depends on the accurate and accessible accounting of covered environmental obligations company-wide to meet the U.S. assets and tangible net worth coverage multiple requirements. These requirements will be implemented by EPA Regional offices, but the co-proposed financial test includes nationwide obligations as part of the calculation, to ensure effectiveness of the test. This may necessitate verification of information located in another region or held by another agency or state entity, which could be a very timely and costly process.

The Agency has found implementation of a financial test under other Agency financial responsibility programs to present challenges. EPA is concerned that under CERCLA § 108(b), without the structure of a permit program and the level of interaction and knowledge of site conditions that it provides, it may be even more challenging to successfully oversee and implement.

Second, EPA is concerned that the use of a financial test may limit the realization of one of the potential benefits of this rule—the development of better mining practices. EPA believes that this is an important impact of this proposed rule. As explained in the discussion of the financial responsibility formula, EPA has built such incentives into that aspect of the rule. Those incentives are reinforced by the effect that an owner or operator adopting sound practices can be expected to be able to purchase an instrument from a third party, for a reduced amount of coverage and at a reduced cost. Similarly, some third-party providers may encourage owners and operators to adopt safer practices as well. However, with a financial test, so long as the owner or operator can meet the test requirements and avoid the need to obtain third party coverage, the cost savings incentive to implement improved practices may be lost, along with the associated risk reductions they would afford. Therefore, the Agency believes that providing a financial test under this proposed rule could reduce salutary effects of the rule. Further, because financial tests are available to the owners or operators that are best able to bear the costs, this reduced incentive affects the owners or operators in the best position to invest in improved practices.

Third, the Agency is further concerned that because of the potentially high costs associated with Superfund liabilities, particularly from hardrock mining facilities, and the potential for such costs falling to the taxpayer should the financial test fail, it might not be an appropriate instrument for use under CERCLA § 108(b). Under the proposed rule, owners or operators would be required to establish and maintain financial responsibility to cover all CERCLA § 107 liabilities at their facilities—response costs, natural resource damages, and health assessment costs.[86] In many Superfund cases, and particularly in the case of hardrock mining facilities, these costs can be quite high. Thus as noted in the introductory discussion, use of a financial test for such large amounts presents a larger risk to the public should cases arise where the financial test fails to be effective.

Finally, because the financial test co-proposed in this rule is by design only available to the owners or operators best able to bear the costs, the Agency recognizes that allowing the use of a financial test in this rule would provide an economic advantage (in the form of a cost savings) to the economically strongest owners or operators, and potentially create an economic and competitive disadvantage for others.

The Agency solicits comment on the concerns identified by EPA regarding the use of a financial test under CERCLA § 108(b).

(2) Concerns Regarding Use of a Financial Test by the Hardrock Mining Industry

Beyond concerns related to the use of a financial test under CERCLA § 108(b), EPA considered issues specific to the use of a financial test for the hardrock mining industry under 108(b). First, there are significant concerns that owners or operators that are no longer able to meet the requirements of a financial test may become less able than owners or operators in other industries to secure an alternative financial responsibility instrument. One reason is because frequent fluctuations in commodity prices within the hardrock mining industry may result in sharp declines in production and accelerated mine closures. This scenario is currently playing out in the case of the coal mining industry.[87]

[84] In this proposal, an owner or operator eligible to use this financial test for any portion of its CERCLA § 108(b) obligations also would be subject to a coverage multiple requiring them to have both a tangible net worth and U.S. Assets each equivalent to at least six times the amount of environmental obligations covered by a financial test. The U.S. Asset requirements could also be met by demonstrating that at least ninety percent of total assets are located in the United States.

[85] To demonstrate passage of the financial test, owners or operators would be required to annually submit a standardized letter to the Administrator signed by its CFO.

[86] Facilities with obligations under other statutes will be separately responsible for meeting the financial assurance requirements, such as those under RCRA Subtitle C and Underground Injection Controls (UIC) programs.

[87] In recent years, the banking industry has been stepping back from providing loans to the coal industry:

- In 2015, Bank of America cut off its financing for coal extraction projects to reduce its exposure. (Kate Sheppard, *Bank of America Backs Away from Funding Coal Mining,* Huffington Post. May 6, 2015.)
- In 2015, Citi Group and Goldman Sachs Group sold its investments in mining and reduced its financing of coal mining operations faced with large environmental obligations. (Jeanne Dugan, Timothy Puko, *Goldman Sachs Sells Colombian Coal Mines to Murray Energy,* The Wall Street Journal. April 13, 2015; Kadhim Shubber, *Citi Promises to Cut*

Continued

Many mineral resource extraction firms are not able to absorb market fluctuations because they lack diversified lines of business. This may make it harder to ensure that owners or operators who do fail the test obtain a replacement instrument.[88] Furthermore, requiring a company to purchase a more expensive means of financial assurance once it begins to experience liquidity problems may only serve to aggravate its financial difficulties. This effect also makes it harder for EPA to oversee the use of the financial test. For example, rapid fluctuations in financial status may necessitate more frequent reporting to the Agency, resulting in increased oversight burden, as discussed earlier. Thus, it may be more important in the case of mining than in other industries to require an owner or operator to secure a third-party financial responsibility instrument or fund a trust fund when it is financially able to do so.

Second, numerous troublesome cases have occurred involving hardrock mining facilities that have gone through bankruptcy, while leaving extremely significant environmental impacts in their wake. Remedial work can be stopped or slowed in situations where the owner or operator's cash flow and revenue is reduced or they go bankrupt. Such impacts have occurred in the past when owners or operators of mines engaged in CERCLA cleanups have had to negotiate changes to the scope of work due to drops in metal prices. EPA experienced this problem when a major mining company slowed work at sites and then filed for bankruptcy in 2005. The company was using a financial test (which was a less sensitive financial test than the test proposed under Option 2) under a CERCLA Consent Decree with EPA at a smelter site in the northwest part of the U.S. EPA discovered that the company was having financial struggles, despite having recently submitted information that it met the necessary financial test requirements. In response, EPA requested that the company obtain a liquid financial responsibility instrument under the provisions of a consent decree, but the company was unable to do so, given its declining financial condition.

Third, given the relative market volatility observed within the hardrock mining industry, some have argued that there are no circumstances under which owners or operators of hardrock mining companies should be allowed to self-insure through a financial test. Analysis has shown that mining companies can be more likely to default on their financial obligations than other types of companies.[89] For example, the recent downturn in metals prices has led to a default rate in the metals and mining sector which is nearly three times the economy-wide corporate default rate.[90] Moreover, financial analysts have predicted that mining sector default rates are likely to rise.[91] Mining companies also tend to default more quickly than other types of companies,[92] and may have multiple mining operations, meaning that a single failure could have broader impacts.

EPA is concerned that close linkage between the hardrock mining industry and global commodity prices means that companies that are invested in the same minerals are likely to fail or experience financial hardship at the same time, when the prices of these minerals decline.[93] If so, additional strain would be placed on EPA's ability to administer the test and ensure compliance across multiple companies at multiple sites simultaneously.

Congress and the states have expressed concern over the volatility in the mining industry and the potential inability of a financial test to account for rapidly changing market conditions, asking the Comptroller General for a review of self-insurance practices.[94] [95]

EPA has information that decisions in the mining industry to expand or open new facilities are generally made over a longer period of time than some other industries (on for example, a ten-year, twenty-year, or longer amortization and investment basis).[96] Such investment decisions often don't always correspond to the demand cycle for the commodity.[97] Moreover, mining assets generally are immobile, making it difficult to transfer equipment and facilities to other productive uses during periods of low demand.

Mining companies generally attempt to manage cyclical patterns by balancing new investment with projected sales of minerals.[98] Metal prices, however, can

Lending to Coal Miners, Financial Times. October 5, 2015.)

• In 2016, JPMorgan announced it would be no longer finance new coal-fired plants in the U.S. (Michael Corkery, *As Coal's Future Grows Murkier, Banks Pull Financing,* New York Times. March 20, 2016.)

[88] These concerns were noted in the 2005 report from the Government Accountability Office, *EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations,* at p. 42. Available at *http://www.gao.gov/products/GAO-05-658.*

[89] *See* Standard & Poor's 2014 Global Corporate Default Study at p. 11. Available at: *https://www.nact.org/resources/2014_SP_Global_Corporate_Default_Study.pdf.* (While the total number of defaults in 2014 declined from previous years, the default rate in the energy and natural resources industry rose to 25 percent. Eight of the 15 companies that defaulted were metals, mining, and steel companies.)

[90] *See* Energy, Mining Companies Lead Debt Default Rates Higher,'' 24/7 Wall St. (Aug. 14, 2015). Available at: *http://247wallst.com/banking-finance/2015/08/14/energy-mining-companies-lead-debt-default-rates-higher/* (Overall corporate default rate for the twelve months trailing July 2015 was 2.5 percent, while the trailing rate for exploration and production companies was 5 percent, and the rate for metals and mining companies was 7.1 percent).

[91] *See Why Bankruptcy Might be the Mining Industry's Last Best Hope,* Bloomberg Business (Dec. 2, 2015), *http://www.bloomberg.com/news/articles/2015-12-03/why-bankruptcy-might-be-the-mining-industry-s-last-best-hope* (warning that falling commodities prices and an oversupplied market will trigger more bankruptcies in the mining sector); *Warning of another string of mining bankruptcies in 2016,* (Mar. 1, 2016), *http://www.mining.com/warning-of-another-string-of-mining-bankruptcies-in-2016/* (noting dramatic credit deterioration in the oil & gas, and metals and mining sectors, ''with no other sectors even in the same ballpark,'' and with credit conditions expected to worsen in 2016).

[92] *See* Standard & Poor's 2014 Global Corporate Default Study at p. 44. The time to default from original credit rating for energy and mining companies is 3.9 years versus 5.7 years for the economy overall. The time to default from ''post-original rating'' for the energy & resources sector is even shorter, at an average of just 2.1 years.

[93] *See* Moody's Investors Service, ''Moody's places energy and metals & mining issuers on review for downgrade,'' (Jan. 22, 2016), *https://www.moodys.com/research/Moodys-places-energy-and-metals-mining-issuers-on-review-for-PR_342773* (announcing placement of 55 metals and mining companies on review for downgrade); Moody's Investors Service, *Moody's places 11 mining companies in the U.S. on review for downgrade* (Jan. 21, 2016), *https://www.moodys.com/research/Moodys-places-11-mining-companies-rated-in-the-US-on-PR_342543* (warning of an ''unprecedented shift'' in the mining industry and advising that ''deteriorating industry fundamentals require a recalibration of the global mining portfolio rated by Moody's'').

[94] Self-bonding may be otherwise understood to mean self-insurance.

[95] A recent letter from Senators Maria Cantwell of Washington and Richard Durbin of Illinois to the Comptroller General requested an investigation by GAO into the use of self-bonding across federal programs governing resource extraction, and a performance audit of self-bonding under the Surface Mining Control and Reclamation Act. The letter, dated Mar. 8, 2016, is available at *http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=47C14E0B-8A9D-457F-A1DE-0B7135144E1B.*

[96] Investments within the hardrock mining sector tend to be longer term given the lifetime of typical mines and the extreme amount of capital that must be invested up-front. Such investments and assets must therefore be amortized or written-off over a longer period of use. Firms will utilize amortization for spreading out of capital expenses for intangible assets over a specific period of time (usually over the asset's useful life) for accounting and tax purposes. Amortization is similar to depreciation, which is used for tangible assets, and to depletion, which is used with natural resources.

[97] *See* J.T. Bradbury, *International Movements and Crises in Resource Oriented Companies: The Case of Inco in the Nickel Sector,* Economic Geography, Vol. 61, No. 2, 1985.

[98] *See* Philip Maxwell, *Was there a Nickel Shakeout?,* Minerals and Energy, Vol 21, No. 3–4, 2006. J.T. Bradbury, *International Movements and Crises in Resource Oriented Companies: The Case of Inco in the Nickel Sector,* Economic Geography, Vol. 61, No. 2, 1985.

unfortunately experience substantial increases or decreases over a relatively short time period. The speed of these price changes results in swings in market volatility rendering it difficult for a capital-intensive industry like mining to adjust quickly. Analysis of price cycles from composite metals indices for certain metals, over the past thirty years, reveal that there have been between three and five price cycles lasting between five and eight years, depending on the metal. Typically, the peak price occurs during the first half of the cycle, often exactly halfway between the two trough prices. Price fluctuations tend to happen rapidly with prices increasing by more than 75 percent in one month, or decreasing by more than thirty percent over the course of a month.[99]

''Mining companies have volatile earnings, coming from macroeconomic factors that are not in their control. As the economy weakens and strengthens, mining companies see their earnings and cash flows track with the commodity price.'' [100] And the stability of earnings and cash flow of mining companies is significantly less than the average of other industries.[101] Significant income fluctuations are also compounded by the fact that many mines use debt financing to support the large infrastructure investments needed to get a mine started and to expand operations.[102] This leads to high volatility in equity values and debt ratios for mining companies.[103]

Mining profits are also generally tied to revenue rather than operating costs because operating costs tend to be highly fixed in the industry.[104] ''Commodity price is a principal determinant of revenue, but it is also the factor with which the greatest level of financial risk is associated.'' [105] Today, many mines cannot survive these price fluctuations.[106] During low price periods, the mining industry tends to contract since they are losing revenue with increased periods of bankruptcy and company consolidation. Over the past 25 years, the rate of mining bankruptcies has spiked during sharp price declines and sustained periods of low prices. Between 1981 and 2010, there were approximately 43 mining company bankruptcies, not counting smaller mining operations that may undergo personal, rather than corporate, bankruptcy.

During the recent economic recession (characterized by the stock market drop in September 2008) for example, copper, nickel, tin, and zinc prices fell more than twenty percent between September and October 2008.[107] Notwithstanding periods of market volatility, on average, metal prices also generally experience a three to seven percent increase or decrease on a monthly basis. This further substantiates that the mining industry must operate under a great deal of uncertainty, often facing greater and more frequent changes in expected market return than other sectors.

Such volatility impacts the effective use of a financial test by hardrock mining facilities. The cyclical nature of the industry and the rapid fluctuations in commodity prices may result in corresponding fluctuations in the financial health of hardrock mining companies. Whereas a mining company may accumulate substantial amounts of cash flow from operating activities during a period of peak prices, a price trough likely would result in decreased revenues, and corresponding decreased cash flow.

However, because of falling revenues and potentially compromised cash flow stemming from commodity price swings, EPA is concerned that companies may have insufficient tangible assets (financial reserves) to establish alternate financial instruments in years where they are unable to pass the financial test.[108]

In 2000, the BLM identified similar concerns when it decided to prohibit new corporate guarantees for future reclamation work to restore lands when hardrock mining operations cease.[109] Commenters at the time noted that because the value of the ore fluctuates over time and may lose value as it is mined, that the soundness of the guarantee might be most questionable at the time it is most needed.[110] In making the decision to eliminate self-insurance from its hardrock mining regulations, BLM cited both the Bureau's lack of expertise to perform the periodic reviews of companies' assets, liabilities, and net worth that would be necessary to oversee guarantees, as well as the fact that even with annual reviews by skilled staff, a default risk would remain. BLM therefore decided to shift the financial risk to the businesses they regulate who have to purchase financial assurances from independent third parties, such as banks. In a 2005 report, GAO identified examples of BLM's inability to collect funds for reclamation when operators of hardrock mines using corporate guarantees filed for bankruptcy.[111] The inability of companies to be able to afford alternate financial assurance when failing the financial test could be exacerbated in the CERCLA § 108(b) context by the potentially high costs associated with Superfund liabilities, particularly from hardrock mining facilities. Owners or operators would need to secure a third-party financial responsibility instrument or fund a trust fund for a high dollar amount in a time when their financial health may be compromised, which may be difficult or impossible. The Agency solicits comment on these concerns.

As a fourth and distinct concern, when a mine is reaching the end of its life and is bringing in less revenue, the owner or operator may not be able to secure a financial responsibility instrument for CERCLA liabilities that may continue to be required after the

[99] *See Background Document for Financial Test Analyses,* Industrial Economics, Inc. (IEc). 2016.

[100] *See Valuation of Metals and Mining Companies,* Svetlana Baurens, p. 56 (July 11, 2010). Available at: *http://www.basinvest.ch/upload/pdf/Valuation_of_Metals_and_Mining_Companies.pdf.*

[101] *See Rating Companies in the Mining Industry,* p.7 (June 2011). Available at: *http://www.dbrs.com/research/240365/rating-companies-in-the-mining-industry.pdf.*

[102] *See Valuation of Metals and Mining Companies,* Svetlana Baurens, p. 13 (July 11, 2010). Available at: *http://www.basinvest.ch/upload/pdf/Valuation_of_Metals_and_Mining_Companies.pdf.*

[103] Ibid.

[104] Ibid.

[105] *See Valuation of Metals and Mining Companies,* Svetlana Baurens, p. 36, July 11, 2010. Available at: *http://www.basinvest.ch/upload/pdf/Valuation_of_Metals_and_Mining_Companies.pdf.*

[106] *See Background Document for Financial Test Analyses,* Industrial Economics, Inc. (IEc). 2016.

[107] Gold responded differently. For ten years the price of gold rose quickly, aided especially by the stock market meltdown of 2009. After hitting its high in August 2011, gold saw a gradual decline, even as the stock market rose into record territory. Then gold plummeted 25 percent in mid-April 2013, seeing its biggest one-day decline in more than thirty years on April 15, 2013.

[108] As stated by the U.S. General Accountability Office, ''If a company that passed the test later files for bankruptcy or becomes insolvent, the company in essence is no longer providing financial assurance because it may no longer have the financial capacity to meet its obligations. Such financial deterioration can occur quickly. While companies no longer meeting the financial test are to obtain other financial assurance, they may not be able to obtain or afford to purchase it.'' GAO. *EPA Should Do More to Ensure That Liable Parties Meet their Cleanup Obligations* (2005). Available at: *http://www.gao.gov/products/GAO-05-658.*

[109] *See* 65 FR 69998, at 70074, November. 21, 2000, stating: ''We agree that a corporate guarantee is less secure than other forms of financial guarantees, especially in light of fluctuating commodity prices. Recent bankruptcies added to the concern that corporate guarantees don't provide adequate protection. We believe the number of new mines that might have wanted to rely on corporate guarantees is relatively small, and we also believe, given the economics of the industry, that companies that would have been eligible to hold a corporate guarantee should not have a significant problem finding a third-party surety, or posting the requisite assets.''

[110] Id., at 70073.

[111] *See* GAO. *Hardrock Mining: BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs,* GAO–05–377 (Washington, D.C.: June 20, 2005). Available at: *http://www.gao.gov/products/GAO-05-377.*

mine closes. If a company fails the financial test after its mining facility closes, it may thus not be able to obtain alternate financial responsibility that may be required after the facility closes. EPA solicits comment on the likelihood of this scenario.

As a fifth concern, allowing a financial test under this proposed rule for hardrock mining would be inconsistent with the approach taken by some other Federal regulators that have experience and expertise in the regulation of the hardrock mining facilities. After having formerly allowed a financial test, BLM modified its regulations at 43 CFR part 3809 and removed the financial test as an available financial responsibility instrument; [112] the U.S. Forest Service regulations governing financial responsibility requirements applicable to locatable minerals operations also do not allow the use of a financial test; [113] and the Nuclear Regulatory Commission, explicitly prohibits the use of self-insurance for uranium mills.[114] EPA is concerned that allowing the use of a financial test under this proposed rule would be inconsistent with the approach to hardrock mining financial responsibility that has developed through these other Federal programs. Further, not allowing a financial test would reflect the experience and expertise of these regulators, all of which have determined that a financial test is not appropriate for hardrock mining facilities. The Agency solicits comment on these concerns.

Finally, as noted earlier, the Agency is concerned that a financial test for the hardrock mining industry may not fully reflect the financial health of the owner or operator. Based on experience from requiring financial responsibility for CERCLA consent decrees, EPA has learned that mining companies often do not list ''contingent'' liabilities, such as the potential need for long-term operation and maintenance (''O&M'') on their corporate balance sheets, at least not during the early exploration and start-up phases of a mine. As such, a balance sheet can show that a given company has sufficient assets to meet the requirements of the financial test, despite the fact that all or a portion the recorded assets may be zeroed out by unrecorded ''contingent'' liabilities. The Agency solicits comment on this concern. Specifically, EPA is concerned that the six times multiples for tangible net worth and U.S. assets that have worked well in the RCRA Subtitle C program would not be effective for a mining industry with the potential for large contingent liabilities.

For these reasons, the Agency is proposing, as its preferred option, not to allow the use of a financial test under this proposed rule. The Agency solicits comment on this proposal.

c. Option 2—Financial Test

Although the Agency's preferred option is to not allow a financial test under the proposed rule (see Option 1), EPA is proposing a second option—that is, to make a financial test available for use by hardrock mining facilities subject to this proposed rule. The Agency is proposing this option because it recognizes that allowance of a financial test under this proposed rule could result in significant savings to those members of the regulated community that could use it and qualify to self-insure.

Under the option that would allow a financial test, EPA is proposing the use of a credit rating—based financial test, developed specifically for this proposed rule. In developing the proposed financial test, the Agency attempted to address as many of the concerns discussed in Option 1 as possible, though the Agency recognizes that it cannot eliminate all of the concerns identified. EPA analyzed several financial test options and selected one for proposal that carries with it a relatively low risk to the Government that firms will pass the financial test and still default on their obligations. EPA requests comments on the extent to which its proposed financial test addresses the concerns outlined in Option 1.

(1) Financial Test Overview

EPA is proposing the use of a financial test based on the long-term corporate credit rating of the owner or operator. Under the terms of the proposed financial test, an owner or operator could assure its entire financial responsibility obligation by submitting annual verification that it holds at least one long-term corporate credit rating equal to or higher than A- as issued by Standard & Poor's (S&P) or its equivalent by another NRSRO. In addition, for some owners and operators with lower credit ratings, the proposed test would further allow an owner or operator to alternatively assure one half of its obligation by submitting annual verification that it holds at least one long-term corporate credit rating of BBB+ or BBB from S&P or the equivalent from another NRSRO.

In addition, an owner or operator electing to use the financial test would be required to have: (1) a tangible net worth of at least six times the amount of environmental obligations, including guarantees, covered by a financial test or guarantee, including this financial test and the corporate guarantee proposed in this rule; and (2) U.S. assets equal to or greater than ninety percent of its total assets, or six times the amount of environmental obligations covered by a financial test or guarantee, including this financial test and the corporate guarantee proposed in this rule.[115] EPA discusses each of these components in the sections that follow.

(2) Financial Test Components

(a) Credit Rating Thresholds

The proposed test would allow the owner or operator to self-insure its entire obligation by submitting annual verification that the owner or operator holds at least one long-term corporate credit rating equal to or higher than A- as issued by S&P or its equivalent by another NRSRO. Credit rating-based thresholds are widely relied upon as a central feature of many financial tests. For example, this proposed rating threshold is the same as that used in the NRC's financial test for self-insurance of the decommissioning costs associated with byproduct materials licensees (per 10 CFR 30 Appendix C). The Agency chose this long-term corporate credit rating threshold based on expected default rates over a three year horizon.[116] Based on the NRSROs'

[112] *See Mining Claims under the General Mining Laws; Surface Management* 65 FR 69998 @70073–70074, November 21, 2000. BLM cited the necessity to review submissions annually as well as its limited capacity to do so, as contributing factors in its decision not to allow additional use of a financial test. Further justifying its decision, BLM stated that even if it had the expertise to perform reviews on a periodic basis, the risk of default remains.

[113] *See* 36 CFR 228.13 (allowing a bond, blanket bond, or cash).

[114] *See* 10 CFR 40 Appendix A criteria 9,

[115] Tangible Net Worth and U.S. Asset thresholds have been developed and historically utilized in financial responsibility regulations for the purpose of controlling for the possibility of a company that may have multiple obligations (both within the U.S., and/or abroad). Such scenarios could further limit the company's ability to self-insure the totality of its obligations. Cases where multiple obligations exist become very difficult for regulators to readily identify, and having tangible net worth and U.S. Asset thresholds already embedded within the financial test requirements helps to temper this concern.

[116] Bankruptcy data from S&P are available for one, three, and five-year periods, and it is the three-year horizon that is most widely accepted for use in the projection of default rates for purposes of financial assurance analyses. The three-year time horizon was for example used in the analyses that were conducted when the Agency's RCRA C financial test were originally promulgated. The reason for this is that the one-year data would be unrepresentative since this wouldn't allow sufficient time for the government to respond to such bankruptcies. Conversely, the five-year data results reflect an excessive period of time needed

extensive default data, EPA can expect three-year default rates below 0.4 percent for owners or operators meeting this ratings criteria.[117] Because the probability of default is projected to be well below one percent for hardrock mining companies thought to be capable of meeting the requirements of the proposed financial test, the probability that companies who pass the test will enter into bankruptcy is substantially reduced. This in turn reduces the risk of defaults and lowers potential costs for the public, when compared to less stringent tests.

The proposed test would further allow for coverage of up to one half of an owner's or operator's obligation by submitting annual verification that the owner or operator holds at least one long-term corporate credit rating of BBB+ or BBB from S&P or the equivalents from another NRSRO. This long-term corporate credit rating threshold was also chosen based on expected default rates over a three-year horizon. The Agency's analysis indicates that the risk of default roughly doubles for these rating tiers compared to A-rated long-term issuer credit ratings[118] and thus EPA proposes to proportionately scale back the coverage of the test for companies in these ratings tranches.

Finally, under the proposed test EPA would not allow those companies at the lowest tier of investment grade ratings (BBB- in S&P's notation and the equivalent rating from other NRSROs) from using a financial test. EPA determined that, based on the three-year horizon default history for firms with the lowest tier investment grade ratings, the risk of default was significantly higher than for firms with investment grade ratings one tier higher. For example, the risk of default for firms rated BBB- by S&P is roughly twice that of firms rated BBB by the same rating agency.[119]

EPA is aware that this demarcation differs from the normal split between investment grade and speculative grade ratings, and that often investors distinguish on the basis of whether a particular issuer carries an investment versus speculative grade rating. However, because of the significantly higher default rates for the very bottom of investment grade found in its analysis, the Agency proposes to eliminate the very bottom notch of investment grade from being allowed to self-insure under the proposed financial test.

EPA solicits comment on the credit-rating thresholds the Agency is proposing for use in the proposed financial test under Option 2.

(b) Tangible Net Worth Requirement

In this proposal, an owner or operator eligible to use this financial test for any portion of its CERCLA § 108(b) liabilities would also be subject to a coverage multiple requiring them to have a tangible net worth of at least six times the amount of environmental obligations, including guarantees, covered by a financial test or guarantee, including this financial test and the corporate guarantee proposed in this rule. This is an important additional component of the proposed financial test as it would provide for a common check across EPA financial responsibility programs that a firm is not assuming too great a level of future costs that they might unduly strain the firm's ability to pay for them.

EPA financial tests typically account for only cost estimates and obligations covered by an EPA financial test. However, because of the numerous regulatory agencies that regulate hardrock mines, EPA expects that an owner or operator subject to this rule may have many of its financial test demonstrations under other Federal or state programs. To assure that a company is not using the same assets to self-insure multiple obligations, EPA believes it is necessary to account for all environmental obligations covered by a financial test or guarantee, and not just EPA financial assurance obligations covered by a financial test or guarantee.

(c) U.S. Asset Requirement

Owners or operators would also be subject to an additional coverage multiple, requiring them to submit proof that the company either has assets located in the United States amounting to at least ninety percent of total assets or has U.S. assets totaling at least six times the amount of environmental obligations covered by a financial test or guarantee, including this financial test and the corporate guarantee proposed in this rule. This would serve as an additional precautionary measure to help ensure that U.S. assets would be available for claimants to proceed against, in the event of a bankruptcy or other default.

This proposed requirement would be very similar to that used for U.S. assets in past financial tests the Agency has created. For example, the RCRA Subtitle C closure and post-closure financial test requires assets located in the U.S. amounting to at least ninety percent of total assets or at least six times the sum of current closure and post-closure cost estimates and the current plugging and abandonment cost estimates.[120] Similar financial test components are also used in the Underground Injection Controls (UIC) financial responsibility programs and in the CERCLA model financial test instrument used to support financial responsibility under CERCLA orders and settlements. Using a similar ninety percent or six times multiplier allows for more effective financial responsibility across EPA programs.

For those firms without assets in the United States amounting to ninety percent or more of total assets, the firms would be required to demonstrate that they have U.S. assets greater than six times the sum of all financial responsibility obligations covered by a financial test. This six-times ratio is consistent with Alternative I of a recent RCRA consent decree that EPA entered into with several phosphoric acid mining companies, and is similar to other requirements in EPA's UIC Class VI well regulations and the RCRA Subtitle C regulations. The six times multiplier is intended to address the possibility that, in the event of a bankruptcy, funds required to meet other environmental obligations assured through other financial tests would reduce an owner or operator's ability to satisfy any CERCLA claims.

(d) Reporting Requirements for Passage of the Financial Test

The proposed option that would allow a financial test would also require reporting of information necessary to implement the financial test. To demonstrate passage of the financial test, owners or operators would be required to submit the following information annually:

by the government to identify and respond to a bankruptcy, while also reflecting projected probabilities of default that are unnecessarily high.

[117] *See: Default, Transition, and Recovery: 2013 Annual Global Corporate Default Study and Rating Transitions.* Standard and Poor's. March 19, 2014 Table 26 p. 58; *Corporate Default and Recovery Rates, 1920–2013.* Moody's Investors Service. Special Comment. February 2014. Exhibit 35, p. 35; *Fitch Ratings Global Corporate Finance 2013 Transition and Default Study.* Fitch Ratings, March 17, 2014. Appendix 1, p. 13.

[118] *See: Default, Transition, and Recovery: 2013 Annual Global Corporate Default Study and Rating Transitions.* Standard and Poor's. March 19, 2014 Table 26 p. 58; Corporate Default and Recovery Rates, 1920–2013. Moody's Investors Service. Special Comment. February 2014. Exhibit 35, p. 35; *Fitch Ratings Global Corporate Finance 2013 Transition and Default Study.* Fitch Ratings, March 17, 2014. Appendix 1, p. 13.

[119] *See Default, Transition, and Recovery: 2013 Annual Global Corporate Default Study and Rating Transitions.* Standard and Poor's. March 19, 2014 Table 26 p. 58.

[120] *See* 40 CFR 264.143(f)(1)(i)(D) and (ii)(D).

Chief Financial Officer Letter (CFO Letter): A letter to the Administrator signed by its chief financial officer (CFO) as worded in § 320.50. The CFO Letter confirms that the entity satisfies the financial criteria required under the financial test that makes the entity eligible to utilize the financial test as financial responsibility under this regulation.

The Agency is proposing to require standardized the language in the CFO Letter from the owner or operator. Such an approach is consistent with other Agency rules such as the RCRA Subtitle C or the Standardized Permit Rule and carries with it several benefits to the Agency. First, a standard CFO Letter will provide for relatively quick Agency review of financial test submissions and lowers the chances of administrative error in the review of submissions. Administrative burden, once again, is a key concern to the Agency as it wishes to preserve the resources for conducting cleanups. The Agency believes a standardized CFO Letter offers the additional potential advantage of improving the consistency and completeness of submissions, thereby limiting delays caused by human error and omissions.

(2) Annual Financial Statements: A copy of the owner's or operator's most recent independently audited annual financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles (U.S. GAAP). At present, EPA expects that firms seeking to self-insure through the use of a financial test will do so based on financial statements that are audited in accordance with U.S. GAAP. The Agency recognizes that foreign firms might prepare audited financial statements in accordance with either GAAP or International Financial Reporting Standards (IFRS), and that IFRS and U.S. GAAP may converge into a global set of accounting standards at some point in the future. Until such time as a unified set of accounting standards is established, the Agency is proposing to accept only audited financial statements in accordance with U.S. GAAP for purposes of compliance with the financial test criteria. However, EPA accepts comment on an alternative whereby the acceptable accounting standards are linked to those accepted by the Securities Exchange Commission (SEC) in order to potentially lower the reporting burden for certain firms seeking to use the financial test. Presently, such an option would allow foreign firms that file with the SEC to be able to submit annual financial statements prepared in accordance with IFRS or GAAP while domestic firms would submit statements prepared in accordance with GAAP. However, the underlying fundamentals of IFRS and GAAP differ with respect to the accounting of liabilities and assets. As such, to accept both IFRS and GAAP financial statements in support of the financial test would yield a potentially disproportionate playing field wherein some companies using IFRS may pass the test where they might otherwise fail under GAAP, and vice versa. EPA would thus be accepting potentially divergent levels of assurance.

(3) Special Audit Report: A special report of procedures and findings of an audit conducted by a licensed, third-party, independent certified public accountant (CPA) resulting from an agreed-upon procedures (AUP) engagement in accordance with applicable Federal laws governing independence and AUP engagements, or standards set by the American Institute of Certified Public Accountants, Inc. (AICPA), to supplement Federal laws or when Federal laws are not applicable. The report would be required to describe the procedures performed and related findings as to whether or not there were differences or discrepancies identified between the financial information in the owner's or operator's CFO Letter and the owner's or operator's most recent audited annual financial statements. Where differences or discrepancies were found in the comparison of the owner's or operator's CFO Letter and the owner's or operator's most recent audited annual financial statements, the report of procedures and findings would reconcile any differences or discrepancies.

There are advantages to third-party auditing requirements, particularly with strong auditor competence and independence criteria. According to the Center for Chemical Process Safety (CCPS), ''Third-party auditors . . . potentially provide the highest degree of objectivity,'' [121] A leading scholar on regulatory third-party programs also found that a well-designed and implemented ''third-party verification [program] could furnish more and better data about regulatory compliance'' while providing additional compliance and resources savings benefits.[122] Studies show that auditors are more likely to provide lenient or biased audit reports that can fail to accurately identify problems or violations when there are insufficient safeguards to ensure auditor independence.[123]

In audit engagements, CPAs are required by professional standards and Federal and State laws to maintain independence (both in fact and in appearance) from the entity for which they are conducting an attestation (audit and review) engagement. However, the Public Certified Accounting Oversight Board (PCAOB) found evidence that many, if not most, of some types of financial audits are flawed due to insufficient auditor competence, independence and/or lack of public transparency. Third-party auditing is a cornerstone of financial reporting, but the PCAOB found audit deficiencies in portions of seventy of the ninety audits they reviewed in its third annual report on audits of broker-dealers registered with the SEC. Independence problems were found in 21 of the ninety audits where, contrary to SEC rules, firms helped with the bookkeeping or preparation of the financial statements they audited.[124]

Therefore, EPA is proposing to require that a CPA performing the audit required under this proposal be licensed. This requirement is designed to ensure the auditor has the requisite education and experience to perform the audit. Each state has its own licensing board. The proposal would also require that auditors be independent, follow the independence rules and standards established by the AICPA's Audit Standards Board (ASB), have passed the Uniform Certified Public Accountant Examination, be licensed as a CPA, and be current with all continuing professional education requirements.

The Agency also is proposing to require that the AUP engagement be conducted in accordance with the AICPA Statement on Standards for Attestation Engagement (SSAE) and related attestation interpretations, AT Section 201—*Agreed Upon Procedures Engagements,* or any future superseding standards set by AICPA or any superseding body. This provides further assurance that the CPA's review was done in accordance with accepted accounting industry standards. The Agency recognizes that the AICPA may update its standards, and thus the

[121] *See* CCPS. March 2007 Guidelines for Risk Based Process Safety. Available at: *http://www.aiche.org/ccps/resources/publications/books/guidelines-risk-based-process-safety.*

[122] *See Regulation by Third-Party Verification,* Lesley K. McAllister. January 2012. 53 B.C. L. Rev. 1, 21–26. Available at: *http://lawdigitalcommons.bc.edu/bclr/vol53/iss1/1/.*

[123] *See,* e.g., *Truth-Telling By Third-Party Auditors and the Response of Polluting Firms: Experimental Evidence From India,* Esther Duflo et al., 128 Q. J. of Econ. 4 at pp. 1499–1545, 2013.

[124] *See Third Progress Report on PCAOB Inspections of Broker and Dealer Auditors Shows Continued High Number of Findings.* PCAOB. Aug. 18, 2014. Available at: *http://pcaobus.org/Inspections/Documents/BD_Interim_Inspection_Program_2014.pdf.*

Agency is proposing a flexible standard for the CERCLA § 108(b) regulations that relies upon the method(s) currently accepted, instead of specifying a particular standard that may need to be updated in the future. EPA solicits comment on whether, in addition to those set by the AICPA, applying SEC and/or PCAOB rules and standards would provide appreciable additional assurances of independence. In this regard, EPA further believes that some owners and operators who seek to use the financial test, if available, may already be SEC registrants and issuers. As such cases, the application of more stringent SEC/PCAOB independency standards should result in little added burden for owners and operators already subject to such standards.

The audited annual financial statements, the CFO Letter, and an AUP engagement report signed and certified by an independent, licensed CPA would be submitted annually, within ninety days of the close of the owner's or operator's fiscal year. In so doing, the Agency receives up-to-date financial information to ensure the company still meets the standards of the test. In general, financial reports made directly to the SEC are completed within ninety days of the company's fiscal year end. Most small and medium-sized businesses, who are not filing with the SEC, track their fiscal year end to a calendar-year end. These companies tend to complete their annual financial reports in support of tax filings to the Internal Revenue Service, and generally do so within ninety days of the calendar year end. In either instance, most companies already prepare annual financial statements, and therefore the financial reporting requirements of the financial test should not present too significant of a reporting challenge. The annual reporting requirement is essential to ensure firms using the financial test maintain the requisite financial strength and do not pose an undue risk.

EPA believes, together, these reporting requirements will foster accountability, improve compliance, and ensure EPA is receiving an accurate portrayal of a company's financial ability to meet its environmental obligations. Thus, if the use of a financial test were to be allowed in the final rule, this would reduce the risk that the taxpayer would have to finance cleanup in the future. EPA believes that third-party reviews will help assist in rule compliance and oversight. Independence is important to preserve the integrity and objectivity of these audits, thereby providing reliable compliance information to EPA.[125]

The Agency believes that requiring an AUP engagement would also further ease the implementation burden associated with reviewing financial test submissions, and reduce the prospect for errors. Third-party, independent audits will also promote cost-effective EPA prioritization of Superfund resources, and provide benefits to communities near facilities by assuring that secure financial responsibility is in place. The AUP would give EPA an independent third-party expert's opinion and attestation as to whether or not the financial information provided in the CFO Letter is consistent with that in the most recent audited financial statements and thus with U.S. generally accepted accounting practices. EPA believes independent, licensed CPAs are better suited to review such data and make such determinations, as EPA is not primarily a financial regulator.

EPA is asking for comment on these reporting requirements. Specifically, the public should comment on what other requirements, if any, should be required to ensure the completeness, reliability, and accuracy of the information submitted to determine that facilities have the funds necessary to meet their environmental obligations, thereby preserving taxpayer money. EPA is also accepting comments on the application of these laws and standards, whether or not these requirements are sufficient to ensure compliance with the financial test, provide EPA with the necessary information to implement the financial test, or preserve independence in performing under an AUP engagement, and the ability of the requirements to help EPA respond to deficiencies in financial test submissions or changes in financial situations.

(e) Self-Reporting Requirements for Owners or Operators No Longer Able To Pass the Financial Test

Additionally, owners or operators would be required to notify the Administrator in the event of a change in their long-term issuer credit rating or financial position that would disqualify them from using the financial test. This requirement also exists in other EPA financial tests including the RCRA Subtitle C test for hazardous waste facilities. Such notification is designed to be independent from the annual reporting requirements associated with the financial test. Owners or operators would be required to notify the Administrator upon verifying that a change in their financial status has resulted in their becoming disqualified from using the financial test. In such circumstances, owners or operators will be required to send notice to the Administrator within thirty days, documenting their intent to establish an alternate financial responsibility instrument to cover the portion of their obligations for which they can no longer use the financial test. As such, owners and operators that currently qualify for self-insurance under the financial test will be responsible for continually self-monitoring their qualification status whenever they experience a change in their long-term issuer credit rating, tangible net worth, or value of U.S. assets. The Agency is proposing this reporting requirement to allow EPA to respond as quickly as possible to negative changes in a company's financial position. In the event the owner or operator no longer passes the financial test, the owner or operator would have 120 days from the date the owner or operator no longer qualifies to obtain a replacement instrument for that portion of its CERCLA § 108(b) financial responsibility requirement previously covered by the test.

(f) Provisions for Administrator's Discretion

The proposed regulations would allow the Administrator to request reports of financial condition at any time from the owner or operator in addition to those specified in § 320.43(b) in the event that the Administrator has reason to believe the owner or operator may no longer meet the financial test requirements. This is similar to a provision in the RCRA Subtitle C financial test found at 40 CFR 264.143(f)(7), for example. The Agency has found this provision very helpful in evaluating compliance with the regulations and proposes to include a similar provision in these regulations.

The Administrator would also have the discretion to disallow use of this test on the basis of qualifications of opinion given in the independent certified public accountant's report in the AUP engagement or the audited financial statements. An adverse opinion or disclaimer of opinion in either report will result in disallowance of the test. The Administrator will evaluate other qualifications on an individual basis. An adverse opinion suggests that the financial statements do not present fairly the financial condition of the firm. A disclaimer of opinion states that the auditor does not express an opinion on the financial statements. In both cases,

[125] *See The Integrity of Private Third-party Compliance Monitoring.* Short, Jodi L., and Michael W. Toffel. Harvard Kennedy School Regulatory Policy Program Working Paper, No. RPP–2015–20, November 2015. (Revised December 2015.)

the Agency believes there is inadequate assurance that the information presented in the financial statements can be relied upon to evaluate the credit risk of the firm.

The owner or operator would be released from the proposed requirements of demonstrating financial responsibility with the financial test when: (1) An owner or operator substitutes alternate financial responsibility as specified in this section; or (2) The Administrator releases the owner or operator from the requirements of this section in accordance with § 320 27.

(3) Discussion

The Option 2 proposed financial test was developed by EPA for use by hardrock mining facilities under CERCLA § 108(b). The Agency believes that it is more suited for use by hardrock mining facilities to demonstrate financial responsibility under CERCLA § 108(b) than are other financial tests currently implemented by EPA. As discussed earlier, EPA has also attempted to address to the extent possible, many of the concerns raised about the use of a financial test for hardrock mining facilities under proposed Option 1.

The proposed financial test utilizes long-term corporate credit ratings, rather than a series of ratios derived from a company's financial statements, as other tests do. The Agency took this approach, in part, to ease potential implementation challenges. A test based on long-term corporate credit ratings is relatively easy to verify and carries with it the lowest administrative burden of the financial test options considered. Moreover, the use of long-term corporate credit ratings is further substantiated by the robust data underpinning the measures of risk associated with each rating level. For example, default rate studies are often backed by large samples spanning many years. The ratings agencies themselves have done extensive studies demonstrating the efficacy of credit ratings as an indicator of credit risk.[126]

The Agency's decision to propose a credit rating-based test also reflects the EFAB's statements, made in its reporting on the financial test and corporate guarantee under the RCRA programs, that independent credit analysis, *i.e.* credit ratings, can be a cost effective mechanism for demonstrating financial responsibility.[127] The use of long-term corporate credit ratings leverages the expertise of a third party, relieving the Agency of the primary burden of performing credit analysis.

EPA has used different systems of ratings in other financial tests. This includes using the rating on the most recent bond issuance in the RCRA Subtitle C financial test, for example, found in 40 CFR 264.143(f). The use of long-term issuer credit ratings is included in this proposal as the Agency believes they most accurately reflect a firm's ability to meet the entirety of its financial obligations over the long term as opposed to the obligations related to a single debt issuance (*e.g.* a bond rating), which is narrower in scope. This view is based on EPA's review of the credit rating agencies' literature performed for this proposal.[128] An additional benefit of using a credit rating is that a firm does not need to issue bonds or any other debt instrument to be issued a credit rating, which may increase the availability on instruments. While this approach allows the Agency to rely on the evaluation of an outside party, rather than on in-house financial expertise, this approach is not without concerns. For example, there is continued criticism that the credit-rating agencies themselves may not truly be independent from the entities they rate.[129] The Agency solicits comment on the use of a credit-rating-based financial test.

The proposed financial test includes a high credit rating threshold so an owner or operator with declining financial health will still have a relatively high credit status when it initially becomes ineligible to use the financial test. EPA expects that this will help to assure that owners or operators that no longer qualify for the test will still be sufficiently viable to obtain an alternate instrument. This is so, because evidence from agency analyses of past bankruptcies in this sector suggest that it usually takes many years for a company to enter bankruptcy after its credit rating drops below BBB.[130] In addition, this is also the case given that the proposed financial test has two tiers of credit rating thresholds. As such, should an owner's or operator's credit rating drop below A-, the amount that they may self-insurance for drops from 100 percent to 50 percent of the obligations, provided that they still retain an investment grade credit rating. The impact on a company may be more gradual when the owner or operator experiences a decline in their credit rating. The Agency solicits comment on the validity of this approach.

The financial responsibility instruments proposed in this rule are new and unique and the market's appetite for providing these instruments is yet to be determined. The Agency expects that allowing a financial test could potentially help to address market capacity issues, should they arise.[131] If there is limited capacity when this rule becomes final, the availability of a financial test could help to address that issue. The Agency solicits comment on whether the financial test could help to address market capacity issues.

Making a financial test available to owners or operators of hardrock mining facilities under this proposed rule would be consistent with EPA's approach in other programs. It would not, however, be consistent with approaches taken by some other Federal agencies.

According to the CERCLA § 108(b) Regulatory Impact Analysis (RIA), the estimated annualized compliance cost to industry without a financial test is $171 million. However, by allowing financial test, the cost to industry goes down to $111 million, which represents a 35 percent in cost saving to industry.

With respect to the impacts on government, without the financial test, the industry would internalize in approximately $527 million in potential CERCLA liabilities that would otherwise assumed by the Government (in instances of owner or operator failure) in the baseline (without the rule). However, by allowing the financial test, the cost internalized by the industry goes down to approximately $511 million. Therefore, the increased risks to the Government from unforeseen

[126] *See* for example: *Default, Transition, and Recovery: 2013 Annual Global Corporate Default Study and Rating Transitions.* Standard and Poor's. March 19, 2014; *Corporate Default and Recovery Rates, 1920–2013.* Moody's Investors Service. Special Comment. February 2014; *Fitch Ratings Global Corporate Finance 2013 Transition and Default Study.* Fitch Ratings, March 17, 2014.

[127] *See EFAB Initial Findings Concerning use of the Financial Test and Corporate Guarantees to Meet Financial Assurance Requirements under the RCRA programs.* Environmental Financial Advisory Board. January 11, 2006, p. 5.

[128] *See Guide to Credit Rating Essentials: What are Credit Ratings and How Do They Work?* Standard and Poor's (2010), pp. 11–12; *Moody's Rating Symbols & Definitions.* Moody's Investors Service. New York, NY (2009), p. 11; and *Definitions of Ratings and Other Forms of Opinion.* Fitch Ratings (2011) pg 9.

[129] *See* for example, CFR.org Staff, *The Credit Rating Controversy,* Council on Foreign Relations, updated February 19, 2015. Available at: *http://www.cfr.org/financial-crises/credit-rating-controversy/p22328.*

[130] *See Draft Background Document for Financial Test Analyses,* Industrial Economics, Inc. (IEc), November 2016.

[131] Under a no financial test option, limited market capacity may be burdened by a need for all hardrock mining companies to obtain third-party financial responsibility instruments. However, under a financial test option, some companies would be able to self-insure, possibly freeing up market capacity for companies unable to do so.

defaults of owners and operator allowed to self-insure is $16 million, which is about three percent of the total potential liability, relative to the baseline.

Finally, EPA solicits comment on the potential impacts on small businesses of allowing a financial test under the proposed CERCLA § 108(b) rule. As noted earlier, concerns exist regarding the potential inequity of offering a test due to the advantages that it may create for larger versus smaller owners and operators. This is in part because the proposed financial test was designed to be highly stringent. As proposed, only those owners and operators with strong long-term credit ratings, plus substantial tangible net worth and U.S. assets would pass the test. Designing the test in this manner greatly lowers the risk of default by owners and operators that pass the test. Analyses conducted by EPA of the financial test options considered offers evidence, however, that fewer small businesses are likely to possess the credit ratings and net worth necessary to qualify for self-insurance. EPA, therefore, solicits comment on whether the availability of a financial test would thus create a competitive disadvantage for small businesses.

EPA also solicits comment on how allowance of a financial test under the CERCLA § 108(b) rule could affect the potential availability of third-party instruments to small businesses. EPA anticipates that the impact would depend in part on the willingness of instrument providers to provide instruments to small businesses. If instrument providers are willing to provide instruments to small businesses, allowing a financial test could make instruments more available to small businesses by freeing up overall capacity of such instruments in the open market. On the other hand, if instrument providers prove less willing to provide instruments to small businesses, the capacity freed by allowing the financial test may not increase the availability of the instruments to those entities. EPA therefore solicits comment on the likely impact on small businesses of making a financial test available in the rule, both in terms of potential disadvantages, and in terms of the availability of the instruments themselves.

(4) EPA's Data Analysis: In this section, EPA discusses the data analysis it performed in connection with developing financial test options generally for the CERCLA § 108(b) proposed rule, and in connection with the particular test selected for proposal. Specifically, EPA conducted several basic analyses to understand the impacts of the rule and tradeoffs associated both with and without a financial test. This is discussed in the following section (a). In section (b), EPA discusses its data analysis of the expected cost savings and potential costs to the public of alternative financial tests considered for proposal under Option 2. In section (c), EPA discusses its analysis of the ability of the alternative tests to screen out bankruptcies.

(a) Analysis of Rule With and Without a Financial Test Option

For this proposal, EPA sought to estimate the overall cost to the public from potential industry defaults that could occur absent the rule, versus the potential cost to industry under a rule without any financial test provisions (Option 1). All quantitative analyses conducted in relation to financial tests are more thoroughly described within the ''Background Information Document for Financial Test Options Analysis for Hardrock Mining Industry under CERCLA § 108(b).''

For purposes of analysis EPA adopted several assumptions. At the time of these analyses, estimates were not yet available regarding the amounts of the financial responsibility that individual companies would be obligated to cover under this rule. Therefore, in order to facilitate necessary analyses of options for a financial test, EPA assumed an across-the-board obligation amount for all companies (both at $50 million, as well as $200 million respectively).[132] EPA also assumed there would essentially be full recovery of instruments under the rule, plus negligible recovery from bankruptcy proceedings.

The Agency's analyses puts the annualized response costs for public taxpayers from bankruptcies and defaults at $1.22 billion in the absence of any CERCLA § 108(b) rule for the hardrock mining industry. EPA also calculated that in order to eliminate such costs borne by the public to the maximum extent possible, requiring financial responsibility (absent a financial test) would result in additional annualized costs to industry of approximately $488 million.

(b) Analytical Basis for the Proposed Financial Test

EPA evaluated the No Test and a range of alternative Financial Test options, incorporating a variety of financial metrics, to assess the ability of these tests and metrics to predict the likelihood of bankruptcy and ensure that sufficient funds are available to meet a company's ongoing environmental commitments. The Agency evaluated all candidate hardrock mining firms for which financial information was available against a variety of financial test options, including tests promulgated under other Federal statutes such as RCRA, and two ratings-based options designed by EPA (referred to as the Investment Grade and Higher-than-Investment-Grade Rating Tests).

The least sensitive of the options considered looked at using a test based solely on Investment Grade credit ratings. Under this test option, all companies with a rating of BBB- or better qualify to self-insure 100 percent of their financial responsibility obligations under the rule.[133] Similar, but somewhat more sensitive, is the option of using the same test as that which is used under RCRA Subtitle C. The RCRA Subtitle C Financial Test contains two alternative avenues by which a company may successfully qualify for self-insurance (one with, and one without a ratings-based threshold). To pass the test under RCRA Subtitle C a company must either possess an investment grade rating on its most recent bond issuance from Standard and Poor's or Moody's, or must otherwise demonstrate that their financial status (including that of total liabilities, net worth, net income, total assets, current assets, and current liabilities) all meet certain minimum standards. In order for companies to self-insure under either of these alternatives, their tangible net worth must exceed their financial responsibility obligations by a factor of six at a minimum (and not be less than $10 million), while their U.S. Assets must equal at least ninety percent of their total assets (or be at least six times that of the financial responsibility obligations).

EPA also developed a more sensitive ratings-based financial test (the Higher-than-Investment-Grade Rating Test), which further limits qualification for self-insurance to only those companies with a BBB or better rating. Unlike the

[132] While this assumption allows for comparison of a company's cost accrual relative to other financial tests, it does not correctly scale the obligation amount to the size of the company's operations. To the extent that this amount overstates actual obligations, specifically for smaller companies, the $50 million coverage requirement may affect cost effectiveness determinations if there is a systematic relationship between company size and financial test passing rates.

[133] While this section refers to ratings according to the notation used by S&P, the financial test option considers ratings from S&P or an equivalent NRSRO for the purposes of assessing a company's ability to meet the financial test requirements.

other tests considered, companies with ratings of BBB- would not qualify for any self-insurance under this test. Furthermore, this test establishes a hybrid hierarchy whereby only companies with ratings of A- or higher qualify at 100 percent, while those with ratings of BBB or BBB+ qualify to self-insure no more than fifty percent of their financial responsibility obligation. Lastly, because tangible net worth and U.S. Asset requirements are frequently included as an important feature of financial responsibility regulations, tangible net worth and U.S. Asset limitations (similar to those stipulated under RCRA Subtitle C) were added as a further component of the Higher-than-Investment-Grade Rating Test.

(c) Analysis of Financial Test Options Considered

EPA first assessed the relative costs borne by industry to maintain a financial test, or in lieu of doing so, to obtain a third-party instrument (industry's expected cost). EPA also assessed the costs that may be borne by the public in the event a company defaults on its obligations (public's expected default cost).

Results of these analyses indicated that the estimated costs to industry consistently increase, as the conditions of the alternative financial tests become more sensitive and fewer companies qualify to self-insure. As fewer companies are able to pass the test, they are required to pay for third party financial responsibility instruments on the open market, which comes at a cost. Conversely, as alternative financial tests become more sensitive and fewer companies qualify to self-insure, the potential for defaults decreases along with the potential costs to the public associated with such potential defaults.

Under the Investment Grade Ratings Test, EPA's analysis estimates the annualized cost savings to industry at approximately $112.5 million. As a result of allowing the test, the public would in turn experience potential costs in annualized dollars of approximately $19.6 million due to the possibility of a company defaulting in spite of having passed the test. Similarly, estimates for the RCRA Subtitle C Test, reveal marginally lower annualized cost savings to industry of roughly $110.2 million, with the public bearing potential costs from defaults valued at an annualized cost of $16.4 million.

Under a Higher-than-Investment-Grade Rating Test (with and without tangible net worth and U.S. Asset requirements), annualized cost savings to industry range from $75.2 to $90.8 million, respectively. Annualized costs to the public from potential defaults is further diminished to between $10.4 and $12.0 million respectively. By creating a stricter set of requirements, the Higher-than-Investment-Grade Rating Test (with tangible net worth and U.S. Asset provisions) makes it more difficult for companies with border-line investment grade ratings or insufficient assets to qualify for self-insurance. In so doing, this test further reduces the chance of defaults and potential costs to the public precipitated by such defaults, as compared to the other financial tests considered.

The Higher-than-Investment-Grade Rating Test is also the only option designed to carry with it a provision allowing a company to cover only a portion of its obligations depending on its current rating. Companies with lower relative ratings (BBB and BBB+) may only self-insure for up to 50 percent of their financial responsibility obligation. Such lower rated companies are not only at greater risk of default, but may also enter into default at a faster pace than companies rated at A or better, based on probability of default estimates for companies in different ratings tranches as seen in historical default studies done by NRSROs. Consequently, this tailored feature of the Higher-than-Investment-Grade Rating Test helps to further diminish the potential costs to the public relative to other financial tests, while still allowing some level of self-insurance in recognition of the creditworthiness of companies with investment grade ratings of BBB or higher.

(d) Analysis of Bankruptcy and Predictiveness of Alternative Tests

The Agency endeavored to craft a test that would be able to predict bankruptcy in the hardrock mining industry. To assess both the no test proposal and that of the financial test options in this respect, the Agency collected as much financial information as possible for each of 3 years proceeding identified bankruptcies that had historically occurred among hardrock mining companies. This data was matched with bankruptcies in the industry identified over a 35-year period spanning 1980 to 2015, resulting in a sample of 25 unique occurrences of bankruptcies in this industry for which data is available. The financial data for each of these bankruptcies were then used to assess whether any of these companies would have been capable of passing any of the alternative tests, in each of the 3 years before entering bankruptcy. Of the tests considered, it was the Higher-than-Investment-Grade Rating Test (with Tangible Net Worth and U.S. Asset thresholds) that performed best in disqualifying companies from passing the test during the three-year period before they ultimately went bankrupt.

Indeed, the Agency's analysis shows that of the 25 hardrock mining bankruptcies for which data were available, the proposed test would have completely screened out 24 of the 25 companies at least three years in advance of bankruptcy. However, even in the case of the one company that the test did not screen out, the Higher-than-Investment-Grade Rating Test succeeded in restricting the level of self-insurance for which they qualified to just fifty percent of its financial responsibility obligations (instead of 100 percent). This resulted from the hybrid feature of the proposed Higher-than-Investment-Grade Rating Test. This offers evidence of the effectiveness of the hybrid approach included in the proposed test in meeting its objective of reducing the exposure to unfunded costs (by fifty percent) for the subset of companies with higher expected bankruptcy rates and ratings below that of an A rating.

Further, since a BBB rating forms the minimum basis for whether a company can qualify for any self-insurance of their financial responsibility obligation, EPA conducted further analyses to evaluate this ratings threshold more specifically. In particular, the Agency sought to assess fluctuations in BBB ratings in relation to previous bankruptcies in the hardrock mining industry. By looking at the historical record of rating shifts below the BBB threshold, the Agency sought to obtain perspective on how often BBB-rated companies experienced ratings downgrades, how susceptible companies were to receiving speculative-grade ratings after previously having been rated BBB, and how quickly they may have entered bankruptcy subsequent to their ratings having dropped to below BBB.

To assess these questions, EPA collected data on 102 hardrock mining companies that were rated by S&P at least once between 1984 and 2010. These companies reflected both hardrock mining companies (targets), and parents of hardrock mining companies (parents) who might ultimately be in a position to provide a corporate guarantee for their subsidiaries' obligations. The inclusion of parent companies within the scope of these analyses furthermore supplemented the Agency's analysis where hardrock mining target company data were unavailable.

Based on the data available from the 26-year sample period, the Agency's

analyses identified only four bankruptcies of companies (out of 36) that had ever historically been rated at the BBB level.[134] In the case of these bankruptcies, only one of these mining companies entered bankruptcy within one year following a drop in its BBB rating. While the company had retained BBB or better ratings presumably due to their strength and longevity, they ultimately succumbed to multimillion-dollar asbestos claims over a very short period. Of the other three companies entering bankruptcy within the sample period, two did so within three years of a downgrade, and the other entered bankruptcy 17 years later.

What these results suggest are that relatively few bankruptcies were shown to have occurred for companies rated at BBB. The results also suggest that while ratings fluctuations do occur, such fluctuations generally do not signal an unfailing decline towards bankruptcy. Thirdly, they suggest that when a company that has been rated at investment grade does experience a ratings decline and ultimately defaults, this process is likely to take one or more years for such relatively solid enterprises to enter into bankruptcy. In such instances, the proposed annual Higher-than-Investment Grade Rating Test (combined with RA notification requirements when a company's qualification for the financial test ceases) will alert regulators as to the company's inability to pass the Higher-than-Investment-Grade Rating Test. Therefore, it appears that establishing the cutoff for passing the proposed test at a rating of BBB or above is well justified. Setting the ratings threshold at BBB, prevents companies with ratings of BBB- or below from passing the Higher-than-Investment-Grade Rating Test. This is designed to help ensure that there is sufficient time for the Agency to intercede and enforce the test requirements should a company's rating begin to decline.

Summary

EPA is proposing two options—to not allow a financial test (Option 1—preferred option), and to allow a ''Higher-than-Investment-Grade Rating Test'' (Option 2). EPA believes that not allowing a financial test would best avoid undue costs to the Government and to the public from unsecured environmental obligations that companies may be unable to cover when they go into default or bankruptcy, and that it would eliminate administrative burden upon the Agency associated with the review and verification of financial statements and attestations from financial test submissions.

Alternatively, the ''Higher-than-Investment-Grade Rating Test'' is being proposed, as it was the best financial test, from among those considered, at providing cost savings to industry while limiting the risks to the Government and the public. The Higher-than-Investment-Grade Rating Test was selected as the least risky option for the co-proposal, relative to the other tests considered, because it results in the lowest expected potential costs that may be borne by the Government, while offering significant cost savings to industry. In addition, the Higher-than-Investment-Grade Rating Test performed better than the other tests at predicting which owners or operators may have a higher potential for defaulting on their obligations. Finally, the Higher-than-Investment-Grade Rating Test also takes advantage of publically available credit analyses conducted by independent ratings agencies as a way to help lower administrative burdens on both industry and the Government.

EPA solicits comment on both proposed options.

5. Corporate Guarantee (§ 320.44) (Option 2 Only)

Under proposed Option 2, which would allow a financial test, EPA also is proposing to allow owners and operators to demonstrate financial responsibility by obtaining a written corporate guarantee from another firm that meets the financial test requirements. The corporate guarantee serves as a contract through which a related firm guarantees to third-party CERCLA claimants that it will make payment for CERCLA response costs, health assessment costs, and/or natural resource damages as provided in the guarantee.

a. Issuer Eligibility (§ 320.44(b) and (c))

The Agency would allow guarantees from the direct or higher-tier parent corporation of the owner or operator, a firm owned by the same parent corporation as the owner or operator, or a firm with a substantial business relationship with the owner or operator. These potential guarantors are the same as those allowed to provide guarantees under the RCRA Subtitle C Closure and Post-closure financial assurance and third-party liability regulations.

Initially, under the RCRA Subtitle C financial assurance requirements for closure and post-closure care, EPA allowed for guarantees provided only by immediate corporate parents believing that that relationship between the owner operator and the guarantor would aid in the enforceability of the guarantee and its strength. Further, EPA adopted a definition of ''parent corporation'' to ensure the relationship was close and direct.[135] EPA is proposing the same definition of parent corporation as employed in the RCRA Subtitle C financial assurance program. EPA believes that the definition will be familiar to the regulated community and EPA implementers which should ease implementation efforts. Furthermore, because the definition ensures that the connection between the parent and the subsidiary is close and direct, the parent will likely have a strong interest in the financial and environmental performance of the subsidiary and the facility which the Agency believes strengthens the guarantee. The proposed definition of parent corporation is ''a corporation that which directly owns at least fifty percent of the voting stock of the corporation which is the facility owner or operator; the latter corporation is deemed a 'subsidiary' of the parent corporation.''

However, EPA received several comments on the July 11, 1986 interim final rule that urged EPA to allow non-parent firms to provide guarantees. EPA analyzed the validity and enforceability of guarantee contracts by non-parent firms and decided to authorize the guarantees provided by ''sibling'' firms (firm whose parent corporation is also the parent corporation of the owner or operator) and firms with a substantial business relationship with the owner or operator in the third party liability regulations provided they were able to provide certain additional information.[136] EPA later authorized non-parent guarantors in the closure and post-closure regulations as well.[137] EPA has determined that guarantees issued by non-parent corporations can be valid and enforceable when they are issued in accordance with the regulations and thus EPA proposes this same suite of potential guarantors in this proposal provided they supply the same necessary information to make the guarantee enforceable as required under the RCRA Subtitle C regulations. Specifically, if the guarantor's parent corporation is also the parent

[134] One additional bankruptcy occurred by a company who had never been rated BBB, but had been previously downgraded from BBB+ to BB-.

[135] *See Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Financial Assurance Requirements,* 47 FR 15037 April 7, 1982; and *See Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Financial Assurance Requirements; Liability Coverage,* 51 FR 25350 @253511 July 11, 1986.

[136] *See* 53 FR 33941, September 1, 1988.

[137] *See* 57 FR 42833, September 16, 1992.

corporation of the owner or operator, the letter from the guarantor's CFO would have to describe the value received in consideration of the guarantee. If the guarantor is a firm with a ''substantial business relationship'' with the owner or operator, this letter would be required to describe this ''substantial business relationship'' and the value received in consideration of the guarantee. These proposed descriptions were determined by EPA to be important in ensuring the ultimate validity and enforceability of the guarantee contract in past Agency financial responsibility rulemakings. Under fundamental principles of contract law, contracts must be supported by ''consideration.'' Consideration is generally defined as a legal detriment that has been bargained for and exchanged for the promise. The general principle underlying the concept of consideration is that the law will not enforce gratuitous promises.

For the demonstration of sufficient consideration for the contract if the guarantor has a substantial business relationship with the owner or operator, the guarantor must describe the substantial business relationship in a way that would meet the proposed definition. EPA is proposing the same definition of substantial business relationship as used in the RCRA Subtitle C financial assurance program which recognizes that no single legal definition exists of what constitutes a business relationship between two firms that would justify upholding a guarantee between them and that such a determination would depend upon the application of the laws of the States of the involved parties. The proposed definition of substantial business relationship is ''the extent of a business relationship necessary under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A ''substantial business relationship'' must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the Administrator.''

In addition, if the guarantor's parent corporation is also the parent corporation of the owner or operator or if the guarantor is a firm with a ''substantial business relationship'' with the owner or operator the letter from the guarantor's CFO would have to describe the value received in consideration of the guarantee. In some cases, preexisting business relationships, no matter how substantial, will be insufficient by themselves to demonstrate consideration because they will not have been bargained for to induce the promise in the guarantee contract. For this reason, these guarantors must also describe the consideration for the contract in the letter from their chief financial officer. As mentioned earlier, these requirements are the same as under the RCRA Subtitle C financial assurance closure post-closure and third-party liability financial assurance programs. These requirements would be familiar to the regulated community and the regulators familiar with RCRA financial assurance and were based on analysis to ensure the enforceability of the contract.

Furthermore, EPA would allow a guarantee from a non-U.S. guarantor that meets the financial test requirements outlined in the proposed regulations provided the guarantor also has identified a registered agent for service of process in the state in which the facility covered by the guarantee is located and in the state in which it has its principal place of business. This requirement is identical to that required in the RCRA third party liability regulations and was required to ensure a non-US guarantor be subject to enforcement proceedings in the U.S. The function of the agents is to accept service of process for the guarantor corporation for legal actions in a given state.[138] In addition, and as described earlier, all guarantors would have to pass the financial test requirements including a U.S. assets requirement. The Agency has included U.S. Assets requirements to ensure assets are available in the United States to be levied against if a judgment is entered against the guarantor.[139] EPA believes this situation is similar and wants similar assurance that there are assets available in the U.S. should claimants need to recover funds from the guarantor.

The guarantor would be required to provide the same evidence and supporting documentation that the guarantor passes the financial test. In addition, the guarantor would be required to submit a signed copy of the guarantee and comply with the terms in the guarantee. The wording in the guarantee would have to be identical to that specified in § 320.50(f).

b. Wording of the Corporate Guarantee (§ 320.50(f))

In developing the proposed corporate guarantee language EPA looked to the guarantee language used in the RCRA Subtitle C program. Those guarantees were the product of iterative proposals, responses to comment and EPA analysis.

In the proposed CERCLA § 108(b) guarantee, the guarantor would guarantee payment up to the most current CERCLA § 108(b) financial responsibility amount required at each facility covered by the guarantee exclusive of any legal defense costs incurred by the guarantor in the same three scenarios for which the other instruments intend to provide financial responsibility (discussed later in this preamble). The value of the guarantee thus is designed to adjust with the value of the CERCLA § 108(b) financial responsibility amount. As evidence that the guarantor passes the financial test, the guarantor would be required to submit the letter from its CFO that identifies, for all the facilities for which it is providing a corporate guarantee, the amount of CERCLA § 108(b) financial responsibility covered by the guarantee. This would occur annually or as required by a change in the CERCLA § 108(b) financial responsibility amount. The CERCLA § 108(b) financial responsibility amounts covered by the guarantee identified in the CFO letter at each facility would serve as the basis for the value of the guarantee under the proposed guarantee language.

A similar arrangement is used in the RCRA Subtitle C closure post-closure guarantee whereby the value of the guarantee is linked to the current closure and post-closure cost estimates. The RCRA Subtitle C closure and post closure guarantee provides that, if the owner or operator fails to perform closure or post closure care of the facilities covered by the guarantee in accordance with the closure or post-closure plans and other permit or interim status requirements whenever required to do so, ''the guarantor shall do so or establish a trust fund as specified in subpart H of 40 CFR part 264 or 265, as applicable, in the name of [owner or operator] in the amount of the current closure or post-closure cost estimates as specified in subpart H of 40 CFR parts 264 and 265. In this way the value of the guarantee adjusts without required amendments or modifications to the guarantee. EPA is proposing that the value of the guarantee similarly adjust to the current CERCLA § 108(b) financial responsibility amount.

To help effectuate this intent, the proposed language of the corporate guarantee would require the guarantor to agree to comply with the reporting requirements for guarantors and to report the full amount of CERCLA § 108(b) financial responsibility for

[138] *See* 52 FR 44317, November 18, 1987.

[139] *See* 52 FR 44317, November 18, 1987

which it is eligible to cover as determined by the financial test criteria for each facility covered by the guarantee in the letter from its CFO. EPA believes it is necessary for the guarantor to report the full amount of CERCLA § 108(b) financial responsibility for which it is eligible to cover as determined by the financial test criteria for each facility covered by the guarantee in the letter from its CFO as those amounts would form the basis of the guarantor's potential liability under the guarantee. If the guarantor was able to report an amount lower than the maximum amount for which the guarantor is allowed to cover under the financial test criteria, the guarantor could unilaterally adjust the ''value'' of the guarantee downwards by reporting some percentage of the maximum amount. Such a provision is not necessary in the RCRA Subtitle C closure post-closure guarantee as the owner operator is responsible for preparing the cost estimates and thus the guarantor could not unilaterally change the ''value'' of the guarantee.

An alternative approach would be to include specific dollar values for each facility in the guarantee itself as the basis of the guarantor's liability. Under this option, the guarantee would have to be amended or modified regularly as the amounts of CERCLA § 108(b) financial responsibility changed and create additional reporting burdens. Further, EPA anticipates that potential guarantors will typically seek to provide a guarantee for the maximum amount allowable under the regulations to realize the maximum cost savings. Nevertheless, EPA requests comment on the proposed arrangement whereby the guarantor's liability is linked to the current CERCLA § 108(b) financial responsibility amount and does not require regular amendment of the guarantee as well as the alternative whereby the guarantee would specify specific dollar amount and would require routine amendment.

c. Payment for CERCLA Response Costs, Health Assessment Costs, and/or Natural Resource Damages From the Guarantee

The proposed language of the corporate guarantee would allow claimants to make claims against the guarantor under three scenarios in addition to the direct action scenario. First, in the event that payment was not made for CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility as required in a final court judgment from a Federal court against one of the current owners or operators within thirty days, the guarantor would do so. Secondly, in the event that payment is not made as required in a CERCLA settlement associated with the facility between a current owner or operator and EPA or another Federal government agency, the guarantor would do so. Third, in the event that performance does not occur as required at the facility under a CERCLA unilateral administrative order issued to a current owner or operator by EPA or another Federal agency and for which the owner or operator provided a written statement allowing the guarantee to serve as financial responsibility assuring the work in the order, the guarantor would make payment into a trust fund established pursuant to the order.

The payment scenarios in the proposed guarantee are analogous to those in the other instruments proposed today. Similar documentary requirements are also required for a claimant to receive payment under these three scenarios in the proposed guarantee. Specifically, under the terms of the proposed guarantee, the guarantor would satisfy a third-party CERCLA claim on receipt of specific documents. Claimants seeking satisfaction of a valid final court judgment from a Federal court awarding payment for CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility against any of the current owners or operators at the facility that had not been satisfied within thirty days would need to submit the final court judgment itself. In addition, the claimant would need to submit a signed statement from the claimant certifying that the amounts had not been recovered or paid from any other source, including, but not limited to, the owner operator, insurance, judgments, agreements, and other financial responsibility instruments. These documentary payment requirements were selected as it removes EPA from the claims administration process but ensures that a court has determined that payment is due to the party making the claim under CERCLA and that the party has not already recovered or been paid the funds from another source. EPA believes that guarantors will be able to review such objective documentary submissions and determine whether payment should occur under the terms of the guarantee. A similar provision requiring the submission of a valid final court order is required in the RCRA third party liability guarantee (*see* 40 CFR 264.151(h)(2)).

In the payment scenario where payment was not made as required in a CERCLA settlement associated with the facility between a current owner or operator and EPA or another Federal government agency, Administrator or another Federal agency may make a claim by presenting two documents to the guarantor for payment. The first document would be a written signed statement from the Administrator or another Federal government agency requesting payment from the guarantor on the grounds that payment had not been made as required by a CERCLA settlement associated with the facility and with any of the current owners or operators. The second document is the signed statement from the claimant certifying that these amounts have not been recovered or paid from any other source, including, but not limited to, the owner operator, insurance, judgments, agreements, and other financial responsibility instruments.

In the payment scenario where performance at the facility does not occur as required under a CERCLA unilateral administrative order issued to a current owner or operator, the Administrator or another Federal agency may make a claim by presenting a similar set of two documents as described earlier in the settlement scenario to the guarantor for payment. Specifically, the first document required to make a claim in this scenario under the terms of the proposed guarantee would be a written signed statement from the Administrator or other Federal government agency requesting payment from the Guarantor into a trust fund established pursuant to a CERCLA unilateral administrative order on the grounds that performance at the facility had not occurred as required by a CERCLA administrative order issued to a current owner or operator. The second document that would be required to make a claim under this scenario would be a signed statement from the claimant certifying that these amounts have not been recovered or paid from any other source, including, but not limited to, the owner operator, insurance, judgments, agreements, and other financial responsibility instruments.

EPA believes, similar to the case of the letter of credit issued in favor of any and all third-party CERCLA claimants, the trust fund and the surety bond, that in instances where the claimant is a Federal government agency acting pursuant to delegated CERCLA authority a simpler set of documentary requirements are appropriate. EPA believes the relatively simple requirements of signed statements from EPA or another Federal agency acting pursuant to delegated CERCLA authority will streamline the claims

process and reduce uncertainty as to whether or not payment should be made under the terms of the guarantee. EPA requests comment on the proposed documentary requirements for payment from the guarantee.

In addition to the three defined payment scenarios, the guarantor could also be subject to direct action under CERCLA § 108(c)(2). Specifically, the proposed terms of the guarantee include an explicit acknowledgement that in the case of a release or threatened release of (a) hazardous substance(s) from a facility covered by the guarantee, any claim authorized by § 107 or § 111 of CERCLA may be asserted directly against the guarantor as provided by CERCLA § 108(c). Further, the proposed terms of the guarantee require that the guarantor consents to suit with respect to these claims subject to the limitations in CERCLA § 108(d) and acknowledge that the guarantor would be entitled to the rights and defenses provided to guarantors by the statute in § 108(c). Finally, under the proposed language of the guarantee, the guarantor would agree to provide notice of any claims and payments resulting from a direct action to the Administrator. EPA believes this notification requirement is valuable as the owner operator may not be around to provide such a notice of claims and payments in a direct action scenario yet EPA wishes to remain informed of claims against the instrument and of the value of the financial responsibility.

The proposed language of the guarantee would also explicitly specify that the limit of the guarantor's liability under the guarantee would be exclusive of legal defense costs incurred by the guarantor. A similar provision is being proposed for insurer and surety liability today. To the maximum extent possible, EPA would like the value of the financial responsibility be preserved for the payment of valid third-party CERCLA claims. EPA requests comment on this proposed provision.

d. Notification Requirements in the Guarantee

The proposed language of the CERCLA § 108(b) corporate guarantee also includes several other notification requirements. First, under the proposed language, the guarantor would agree that if, at any time before the termination of the guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within ninety days, by certified mail, notice to the Administrator and to the owner or operator that he intends to provide alternate financial responsibility as specified in Subpart C of 40 CFR part 320 in the name of the owner or operator. A similar provision is also employed in the RCRA Subtitle C closure post closure and third-party liability guarantee. The provision would provide EPA notice that the guarantee no longer passes the financial test and an acknowledgment from the guarantor that he intends to provide alternate financial responsibility as required under the terms of the guarantee should the owner or operator fail to do so. EPA believes it is important for the Agency to receive prompt notice of the guarantor's inability to continue to pass the financial test as the guarantor's financial strength is foundational to the efficacy of the guarantee. Further, EPA believes that it is not just consistent with past precedent but important that the guarantor be responsible for obtaining alternate financial responsibility in these instances. The proposed provision helps limit the risk that, in instances when a guarantor no longer passes the financial test, the facility will be left without alternate financial responsibility.

Likewise, the proposed terms of the guarantee would require the guarantor to agree that within thirty days after being notified by the Administrator of a determination that the guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a guarantor, the owner or operator would be required to establish alternate financial responsibility as specified in Subpart C of 40 CFR part 320, as applicable, in the name of the owner or operator unless the owner or operator had done so. This provision serves the same intent as the provision described earlier—that the guarantor be responsible for obtaining alternate financial responsibility in an instance where the guarantor notices EPA that it no longer passes the financial test. The provision helps limit the risk that, in instances when a guarantor no longer passes the financial test, the facility will be left without alternate financial responsibility. This would be a very similar requirement to those used in the RCRA Subtitle C corporate guarantees so the regulated community should be familiar with the provision.

Under the proposed terms of the guarantee the guarantor would also be required to notify the Administrator by certified mail, of a voluntary or involuntary proceeding under Title 11 U.S.C. (Bankruptcy), naming the guarantor as debtor, within ten days after commencement of the proceeding. This provision is also required in both the RCRA Subtitle C closure post closure and third-party liability guarantees. EPA recognizes the value of this notification provision and proposes its inclusion to the CERCLA § 108(b) guarantee in order for EPA to be promptly notified of such indicators of the guarantor's financial distress.

Finally, under the proposed terms of the guarantee, the guarantor would need to send a notice by certified mail to the Administrator and to the owner operator of its intent to terminate the guarantee. The intent of this provision is to provide notice to the Administrator and the owner operator that the guarantor wishes to cease providing a guarantee on behalf of the owner operator. Such a provision helps ensure continuity of financial responsibility coverage.

e. Provisions in the Guarantee Ensuring Continuity of Coverage

As described earlier, under the proposed terms of the guarantee, the guarantor would need to send a notice by certified mail to the Administrator and to the owner operator of its intent to terminate the guarantee. The corporate guarantee would remain in force and may not be terminated unless and until the owner or operator obtains, and the Administrator approves alternate financial responsibility. If the owner or operator failed to provide alternate financial responsibility as specified in the regulations and obtain the written approval of such alternate financial responsibility from the Administrator within ninety days after receipt by both the owner or operator and the Administrator of a notice of termination of the corporate guarantee from the guarantor, the guarantor would be required, under the terms of the guarantee, to provide such alternative financial responsibility in the name of the owner or operator. This provision would ensure the continuity of financial responsibility and is similar to that required for the other instruments. However, in the case of the guarantee, unlike the other instruments, the guarantor would not necessarily need to fund a trust fund. The guarantor could choose from the range of acceptable financial responsibility instruments when obtaining a financial responsibility mechanism on behalf of the owner or operator. This provision, and the similar provisions for other proposed instruments, as well as alternatives are discussed in more depth in the preamble section headed 'issuer cancellation provisions.'

f. Requirements for Attorneys General or Insurance Commissioners written statements (§§ 320.44(f) and (g))

In the case of corporations incorporated in the United States, a guarantee would only be able to be used

to satisfy the CERCLA § 108(b) financial responsibility requirements if the Attorneys General or Insurance Commissioners of the State in which the guarantor is incorporated, and each State in which a facility covered by the guarantee is located have submitted a written statement to EPA that a guarantee executed as described in the regulations at §§ 320.44 and 320.50(f) is a legally valid and enforceable obligation in that State.

For non-US corporate guarantors a guarantee would be able to be used to satisfy the CERCLA § 108(b) financial responsibility requirements only if the Attorney General or Insurance commissioner of each state in which a facility covered by this guarantee is located and the state in which the guarantor corporation has its principal place of business has submitted a written statement to EPA that a guarantee executed as described in the regulations and §§ 320.44 and 320.50(f) is a legally valid and enforceable obligation in that State.

These requirements for written statements from state Attorneys General and Insurance Commissioners are similarly used in the RCRA Subtitle I Underground Storage Tank financial responsibility regulations and the RCRA Subtitle C third-party liability regulations. The reason for the requirements is that EPA is concerned that guarantors may be subject to states insurance laws.[140] State insurance regulation and law are by and large the purview of the states and thus the Agency does not believe it can state with certainty whether any particular guarantee would subject the guarantor to state insurance law, and whether it would be valid with respect to such law. Therefore, the Agency is today proposing that the responsibility would rest with the owner or operator to obtain the written statement from the relevant state Attorneys General and Insurance Commissioners stating that a guarantee as described and worded in the regulations would be valid and enforceable. EPA invites comments as to whether or not this requirement would be necessary or on alternative means by which the owner or operator could provide assurances to the Agency that the guarantee would be valid and enforceable.

6. Trust Fund (§ 320.45)

An owner or operator would be able to satisfy the proposed CERCLA § 108(b) financial responsibility requirements by establishing a trust fund in accordance with the proposed requirements including the proposed required wording. Funds transferred to the trust fund by the owners and operators or any letters of credit held by the trust would be held in the trust for the purpose of paying valid third-party CERCLA claims in certain circumstances identified in the trust agreement. In this way, the trust fund acts as a means of self-insurance whereby the owner and operator set aside funds to pay future claims which otherwise may not be satisfied at such a future date.

a. Submission of Trust Agreement and Trustee Eligibility (§ 320.45(a))

The owner or operator would be required to submit an originally signed duplicate of the trust agreement to the Administrator. This is a similar reporting requirement to those under EPA's RCRA Subtitle C financial assurance regulations and aids in the evaluation of compliance. The Agency does not anticipate this to be a significant burden to owners and operators. The trustee would be required to be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or state agency. This requirement is the same as that under the RCRA Subtitle C financial assurance program, which EPA required in order to establish a minimal level of reliability and security for trustee institutions managing trust funds under the Agency's financial assurance regulations (see 46 FR 2824, January 12, 1981). EPA considered alternative qualifications for trust providers but is proposing to utilize those that EPA has found to work well under the RCRA Subtitle C program. In making this decision, EPA considered the impact on the potential number of trustees and the administrative burden on EPA of reviewing additional qualifications. For more information on the consideration of alternative provider qualifications, please see the background document on instrument provider qualifications.

b. Required Wording and Updates to Schedule A of Trust Agreement (§ 320.45(b))

The wording of the trust agreement would be required to be identical to the wording specified in § 320.50(a)(1), and the trust agreement would be required to be accompanied by a formal certification of acknowledgment (for example, see § 320.50(a)(2)). As discussed in the introduction to Subpart C of the preamble ''Available Financial Responsibility Instruments'' EPA believes there are significant benefits to standardized wording. Namely, a standardized trust agreement reduces the administrative burden of reviewing the wide range of possible trust agreement wording that may otherwise be employed and ensures uniform integration with the Superfund program and enforcement of the CERCLA § 108(b) instruments nationwide. The trust agreement would be required to be accompanied by a formal certificate of acknowledgment. The language of the acknowledgment would be expected to vary by state to accommodate individual state requirements but the intent would be to ensure the validity and authenticity of the signatures on the trust agreement. This requirement exists for trust agreements in other EPA financial responsibility programs,[141] and adds to the legal standing and enforceability of the instrument.

Under the proposed regulations, Schedule A of the trust agreement, which would identify the facilities covered by the trust agreement and their EPA Identification Numbers, names, addresses, current owners and operators, and the current financial responsibility amount, or portions thereof, for which financial responsibility is being demonstrated by the trust agreement, would have to be updated within sixty days of a change in the amount of CERCLA § 108(b) financial responsibility at a facility covered by the agreement. Maintaining the accuracy of the information in Schedule A, including the current amount of CERCLA § 108(b) financial responsibility the trust fund is covering at each facility, would be important to ensure the trustee would have an accurate accounting of the value of CERCLA § 108(b) financial responsibility for each facility covered. This amount would serve as an upper bound for the value of payments made for valid third-party CERCLA claims associated with any given facility.

c. Payments Into the Trust (§ 320.45(c))

Payments by the owner or operator into the trust fund would be required so that the value of the trust fund would be at least as great as the required CERCLA § 108(b) financial responsibility amount. For existing facilities subject to this proposed rule, these payments would be made by the owner or operator in accordance with

[140] *See,* for example, *Liability Requirements for Hazardous Waste Facilities; Corporate Guarantee,* 52 FR 44314 @ 44316–44317; and *Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Liability Coverage* 53 FR 33938 @ 33942, September 1, 1988.

[141] *See,* for example, 40 CFR 264.151(a)(2) and 280.103(b)(2).

the compliance schedule for the CERCLA § 108(b) financial responsibility regulations in proposed § 320.1. The trust fund would thus need to be fully funded within four years of the owner operator being subject to the regulations. In addition to payments, this requirement would also be able to be met by obtaining a letter of credit that conforms to the requirements of the proposal and is held by the trust. The four-year implementation window established by the statute and discussed earlier would thus serve as the trust fund's pay-in period.

EPA is aware that four years is shorter than the pay-in period provided by some EPA financial assurance programs. However, under the proposed regulations owners and operators would be allowed to use a combination of instruments to demonstrate the required CERCLA § 108(b) financial responsibility amount. Owners and operators would thus be able to simulate a longer trust fund pay-in period by combining the trust fund with another appropriate instrument. The trust fund could be funded over a longer period of time with the unfunded portion of the trust provided by a separate instrument. EPA believes this would help relieve any burdens that may be encountered because of the relatively short pay-in period required by the statute.

For new facilities, owners and operators would also be required to make payments into the trust fund so that the value of the trust fund is at least as great as the required CERCLA § 108(b) financial responsibility amount. However, in these cases there would not be a pay-in period as is provided for existing facilities by the four-year implementation period in the statute. For this first CERCLA § 108(b) rule, EPA expects that new hardrock mining facilities would likely have lower financial responsibility amounts as their footprint would be smaller initially and then grow over time, obviating the need for a pay-in period. EPA requests comment on the need for a pay in period for new facilities. EPA is specifically interested in comments as to the appropriate length of a pay-in period that could be provided for new facilities.

d. Language of the Trust Agreement (§ 320.50(a))

In developing required trust agreement language for this proposed rule, EPA first looked to the trust agreement language used in the RCRA Subtitle C financial assurance program. The basic terms and conditions of the RCRA Subtitle C trust agreement were defined by EPA in close consultation with trust experts at the American Banking Association and legal practitioners in the late 1970s and early 1980s. Additionally, the trust agreement was published for public comment multiple times. The required wordings of the RCRA trust agreements have served as templates adopted by other financial responsibility programs, both within EPA and across many States. This proposal includes proposed trust agreement language primarily modified to suit the needs of the proposed CERCLA § 108(b) financial responsibility program. The most significant aspects of the proposed trust agreement are discussed in following sections. Please also see the background document ''Potential Requirements for Insurance, Surety Bonds, Letters of Credit and Trust Agreements and Standby Trust Agreements under CERCLA § 108(b)'' that discusses potential instrument specifications and alternatives considered for more information on the proposed trust agreement specifications.

e. Specification of Beneficiary of the Trust Agreement

The proposed trust agreement language specifies that the trust fund is established for the benefit of any and all parties with valid third-party CERCLA claims against the grantor or other current owners and operators arising from the operation of the facilities covered by the agreement. EPA elected to propose such a beneficiary specification as the Agency believes it provides adequate flexibility to accommodate the various payment scenarios envisioned by the trust agreement and the CERCLA § 108(b) regulations. The RCRA Subtitle C closure post-closure trust agreement specifies EPA as beneficiary. However, due to the potential for multiple claimants including, but not limited to, EPA, the Agency considered such an arrangement sub-optimal. In such an arrangement, EPA would need to review all claims and assess the merits of the claims and direct payment from the trust fund accordingly. As discussed earlier in the letter of credit section, there are several draw backs to EPA administering the claims process. These draw backs include the redirection of Superfund resources to claims administration activities and away from cleanups or other programmatic priorities, frustrating the intent of the direct action provision and the potential for EPA to be in the awkward position of administering a claims process in which it is a potential claimant.

As a result, EPA elected a variation of the beneficiary specification employed in the RCRA Subtitle C third-party liability program that identifies ''any and all third parties injured or damaged by [sudden and/or non-sudden] accidental occurrences arising from operation of the facility(ies) covered by'' the trust agreement as beneficiaries. EPA believes that the proposed beneficiary specification provides adequate flexibility in that parties that obtain final court judgments or have other valid third-party CERCLA claims against one of the current owners or operators for CERCLA response costs, health assessment costs, or natural resource damages associated with the facility could make a claim without having to be specifically named in the trust agreement (see discussion of claims against the trust fund in following sections). At the same time, EPA intends that the beneficiary language combined with the payment instructions in the trust agreement will provide adequate clarity to trustees as to when to make payment from the trust fund. The EPA requests comments on the proposed specification of the beneficiary of the CERCLA § 108(b) trust agreement.

f. Claims Against the Trust Fund

Claims against the trust fund could be made by parties with valid third-party claims for CERCLA response costs, health assessment costs, and/or natural resource damages against one of the current owners or operators at the facility.

Under the proposed regulations, the trust would be available to claimants that obtain a final court judgment from a Federal court against any of the current owners or operators at the facility awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility should payment not occur as required by the judgment within thirty days. Under the proposed terms of the trust, the claimant would need to present the valid final court judgment to the trustee. The judgment would have to be dated at least thirty days earlier and be accompanied by an additional signed statement from the claimant certifying that the amounts had not been recovered or paid from any other source, including, but not limited to, the owner operator, insurance, judgments, agreements, and other financial responsibility instruments. The two proposed documentary requirements are being proposed with the intent of ensuring that a court has awarded such payment of CERCLA response costs, health assessment costs, and/or natural resource damages, the owner operator had thirty days to make

payment himself and that the claimant is not attempting to be paid twice for the same claim. Based on discussions with representatives of trust institutions, EPA believes that a final court judgment would be a documentary payment condition acceptable to potential trustees. The representatives expressed comfort in the concept of a court having ordered payment and a desire for minimal due diligence to be required on the part of the trustee.

Under the proposed regulations, the trust would also provide for payment as required in a CERCLA settlement associated with the facility between a current owner operator and the EPA or another Federal agency if payment had not been made. In this scenario, to make a claim, the Administrator or other Federal agency would have to present two documents: (1) A written signed statement requesting payment from the trust fund on the grounds that payment had not been made as required by a CERCLA settlement associated with the facility and with any of the current owners or operators; and (2) a signed statement certifying that the amounts had not been recovered or paid from any other source, including, but not limited to, the owner operator, insurance, judgments, agreements, and other financial responsibility instruments.

Finally, under the proposed regulations, the trust fund would also be available to pay into a trust fund established pursuant to a CERCLA unilateral administrative order issued to a current owner or operator by EPA or another Federal agency in the event performance at the facility did not occur as required by the order. The Administrator or other Federal agency would only make such a claim if the owner or operator had provided written consent for the financial responsibility instrument to assure the obligations under the administrative order.

In this scenario, to make a claim, the Administrator or other Federal agency would have to present two documents: (1) A written signed statement requesting payment from the trust fund into a trust fund established pursuant to a CERCLA unilateral administrative order on the grounds that performance at the facility had not occurred as required by a CERCLA administrative order issued to a current owner or operator; and (2) A signed statement certifying that the amounts had not been recovered or paid from any other source, including, but not limited to, the owners or operators, insurance, judgments, agreements, and other financial responsibility instruments.

EPA selected these straightforward certifications as documentary payment conditions because EPA believes that in the instances when the potential claimants are limited to Federal government agencies a more streamlined payment condition is optimal to limit the administrative burden on the trustee. This is a similar documentary payment condition to that proposed for the letter of credit issued in favor of any and all third-party CERCLA claimants and the surety bond. EPA considered alternative documentary requirements for the claims scenarios limited to Federal claimants but did not believe they added additional benefit and may burden the trustee with additional administrative expenses. For example, the proposed trust agreement could specify the presentation of the CERCLA settlement itself as a requirement for making a claim but the benefits of such a requirement were unclear to EPA. EPA believes that the requirement of signed statements from the Administrator or another Federal agency acting pursuant to delegated CERCLA authority is a clear documentary condition and will require minimal due diligence on the part of trustees. EPA requests comment on the proposed documentary requirements for making a claim against a CERCLA § 108(b) trust fund.

g. Direct Action Claims Against the Trust Fund

In addition to the three payment scenarios, like all CERCLA § 108(b) financial responsibility instruments, the direct action provision in CERCLA § 108(c)(2) could come into play at facilities where a trust fund is the financial responsibility instrument. EPA is proposing trust agreement language that acknowledges that cause of action in the trust agreement itself.

In discussions with representatives of the trust industry, representatives expressed some concern about the direct action provision. Specifically, representatives suggested that interpreting ''guarantor'' as defined in CERCLA §§ 101(13) and 108(c)(2) to include a trustee of a CERCLA § 108(b) trust fund would greatly reduce the willingness of trust institutions to offer such services. EPA believes that in the CERCLA § 108(b) context, whereby a trust fund is funded by the owner or operator for the purposes of satisfying future valid third-party CERCLA claims, such an interpretation would be inappropriate. The trustee is simply providing administrative and fiduciary services over the funds set aside by the owner or operator and is not providing the instrument itself. EPA believes a more appropriate reading is that the trust fund itself is the guarantor as it provides for the funds set aside by the owner or operator to be available to third-parties with valid CERCLA claims.

As a result, the proposed trust agreement language expressly provides that in the case of a release or threatened release of (a) hazardous substance(s) from a facility covered by the agreement, any claim authorized by §§ 107 or 111 of CERCLA could be asserted directly against the trust fund as provided by CERCLA § 108(c)(2) subject to the limitations in CERCLA § 108(d). The proposed language of the agreement goes on to state that the trust fund shall be entitled to all rights and defenses provided to guarantors by CERCLA § 108(c) and that the trust fund itself is available for paying and defending claims in those instances.

Further, the proposed trust agreement language further clarifies the intent of the trust agreement with respect to direct action under section 3 of the agreement that deals with establishment of the fund. The relevant proposed wording in section 3 states that ''The Grantor and Trustee do not intend for the Trustee to qualify as a ''guarantor'' as that term is used in CERCLA §§ 101(13) and 108(c)(2), and therefore intend that the Trustee will not be subject to a direct action by Trustee's agreement to act as Trustee for the Fund. The Grantor and Trustee intend for the Fund to qualify as a ''guarantor'' as that term is used in CERCLA §§ 101(13) and 108(c)(2), and therefore intend that only the Fund will be subject to any direct action brought pursuant to CERCLA § 108(c)(2).''

EPA believes that clearly specifying the Agency's intent that the trust fund itself, not the trustee, be the subject of any direct actions is optimal. Such an approach is more consistent with the role the two entities serve and does not suggest that trust institutions would be put in the unfamiliar and potentially unwelcome position of being sued under CERCLA. The downside to this arrangement is that the trust fund could incur significant legal expenses under a direct action scenario that may reduce the value of the trust fund available to make payment for valid third-party CERCLA claims. EPA has proposed to specify that trust expenses generally be paid by the owner operator that established the trust fund (the grantor) to reduce the impact of trustee expenses on the value of the financial responsibility. However, by its very nature, in a direct action scenario, the owner operator is unlikely to be available or able to pay such expenses and thus such expenses may be paid from the trust fund itself. This is a limitation of the proposed arrangement

that EPA requests comment on. Specifically, EPA is interested in provisions that could help effectuate the direct action provision in CERCLA § 108(c)(2) that may ameliorate the concern of trustee expenses significantly reducing the value of the trust fund.

h. Payment of CERCLA Claims

The proposed trust agreement language also provides additional direction to the trustee with respect to when and how claims should be satisfied from the trust fund. Specifically, the proposed trust agreement specifies that claims be paid on a first come first serve basis. Additionally, the proposed trust agreement language also clarifies that in the event of simultaneous valid claims that exceed the value of the fund, the trustee would pay the claimants a pro rata share of their claim determined by the size of each valid claim. This language was included to reduce the potential uncertainty and ambiguity a trustee may face in the event multiple claims against the trust fund occur that exceed the value of the fund. Finally, the proposed language of the trust agreement specifies that payments for a claim should not exceed the value of the CERCLA § 108(b) financial responsibility for that facility provided by the trust fund which would be identified and updated in schedule A. The language is intended to provide added clarity that, if the trust agreement covers multiple facilities, claims against the fund associated with one facility should not exceed the value of the CERCLA § 108(b) financial responsibility for that facility provided by the trust fund. EPA believes that such facility-specific sub-limits are important to the extent multiple facilities are covered by one trust agreement as other current owners and operators at the facilities, in addition to the grantor, may have all contributed funds but may not be owner operators at all the facilities covered by the agreement.

Ambiguity in instances where a trustee may have to decide how much and if to make payment was a concern EPA heard from representatives of the banking community. EPA intends the proposed trust agreement language to reduce such uncertainty, but requests comment as to other language or specifications that might provide added clarity and provide trustees greater certainty.

i. Provisions Authorizing Trustee To Hold and Draw on Letter of Credit

As discussed in the letter of credit section of the preamble, this proposed trust agreement expressly authorizes and anticipates that a trustee may hold a CERCLA § 108(b) letter of credit for the purposes of drawing on the letter of credit to make payments to third-parties with valid CERCLA claims as provided by the trust agreement. EPA has included language in whereas clauses, section 4 of the trust dealing with payment from the fund, section 5 dealing with payments comprising the fund, section 6 dealing with trustee management, section 8 dealing with the express powers of the trustee, and section 10 dealing with annual valuations providing for and accounting for this possible role of the trustee. The intent of the language is to ensure that a trustee will be able to hold, account for, and draw upon, as necessary, a CERCLA § 108(b) letter of credit issued in favor of the trustee. As discussed in the letter of credit section, EPA believes this a worthwhile feature to propose based on input from members of the banking community that suggested a trustee may be better suited to manage the CERCLA § 108(b) claims process than an institution issuing a letter of credit. EPA requests comments on other provisions that could be included in the trust agreement that may provide further clarity of the trustee's ability to hold and draw on the letter of credit as provided for in the terms of the trust agreement.

In addition to the trust providing the trustee the authority to draw on the letter of credit to satisfy valid third-party CERCLA claims brought to the trust fund, under the proposed trust agreement, the trustee would also have the responsibility to draw on the letter of credit in order to maintain continuity of coverage. Specifically, the proposed trust agreement language provides that in the event of receipt of a notice of a decision not to extend the letter of credit from an institution issuing a letter of credit held by the trust fund, the trustee shall draw on the letter of credit and deposit any unused portion of the credit into the trust fund if the Administrator informs the Trustee that the owner operator did not establish alternate financial responsibility and obtain written approval of such alternate financial responsibility from the Administrator within the time frame provided by the regulations. The trust agreement would specify that this draw must occur prior to the expiration of the letter of credit. EPA believes this a necessary provision as in the case of a letter of credit issued in favor of a CERCLA § 108(b) trust fund trustee, EPA would not be authorized to draw on the letter of credit. EPA requests comment on this proposed trust agreement language.

j. Trustee Management

In specifying the trustee's responsibilities with respect to trust management, EPA looked to the ''prudent investor'' standard which has become prevalent in trust law and practice. Specifically, the proposed language of the trust agreement reads as follows: ''In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge its duties with respect to the trust fund with undivided loyalty and solely in the interest of the beneficiaries and with the reasonable care, skill, and caution of a prudent investor, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.'' However, while EPA is proposing the prudent investor rule form the basis of the instruction to the trustee, the Agency is proposing a modified prudent investor standard. Specifically, the proposed trust agreement language would prohibit the trustee from acquiring or holding securities or other obligations of the grantor, or any other current owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, Title 15 U.S.C. 80a–2(a) unless they are securities or other obligations of the Federal or a state government. This provision is similar to language used in other EPA financial assurance programs including the RCRA Subtitle C Closure Post-closure and third-party liability programs. The intent of the modification to the prudent investor rule is to restrict investments in assets whose performance may be correlated with the financial performance of the owners and operators at the facility. A further proposed modification to the prudent investor standard employed in the proposed trust agreement is an explicit authorization that the trustee may hold and draw upon standby letters of credit as specified in 40 CFR 320.40. EPA intends for the trustee management instructions in the trust agreement be consistent with current trust practice and requests comment on the proposed trustee management language in the trust agreement.

k. Refunds to the Grantor

The proposed language of the trust agreement also includes a provision that if notified by the Administrator that the trust fund contains amounts in excess of the required CERCLA 108(b) financial responsibility amount, the trustee shall refund to the grantor such amounts in excess of the CERCLA § 108(b) financial

responsibility amount covered by the trust fund. A similar provision was used in the RCRA Subtitle C Closure and Post-Closure trust agreement. EPA believes this provision is necessary to allow for excess funds in the trust agreement to be released back to the owner operator. EPA envisions that such a scenario could arise either due to growth of the value of the trust fund, the owner operator substituting alternate financial responsibility for some portion of the trust fund, or as a result of a downward adjustment in the required amount of CERCLA § 108(b) financial responsibility. EPA believes that providing for the possibility of a release of funds from the trust fund that did not necessitate the termination of the trust agreement was advantageous.

l. Termination of the Trust (§ 320.45(i))

The Administrator would agree to the termination of the trust when the owner or operator substituted alternate financial assurance as specified in the regulations or the Administrator released the owner or operator from the requirements of these regulations in accordance with the proposed release provisions. As the proposed trust is irrevocable, [142] termination of the trust would necessarily require the approval of the Administrator. The trust agreement itself specifies that the trust shall be irrevocable and shall continue until terminated at the written agreement of the trustee, the grantor, and the Administrator or by the Trustee and the Administrator, if the Grantor ceases to exist. The irrevocability of trust agreements is a common requirement in financial responsibility programs and ensures that the trust fund will not unilaterally be terminated and will be available to satisfy third-party CERCLA claims when necessary.

7. Issuer Cancellation Provisions

One similar feature across many of the instruments (surety bond, insurance, letter of credit and corporate guarantee, if allowed) in this proposal are cancellation provisions that include the potential requirement for the instrument provider to fund a standby trust (or in the case of a corporate guarantor, if a corporate guarantee is ultimately provided for, obtain alternate financial responsibility in the name of the owner operator). For the specifics related to cancellation for each instrument please see the instrument specific preamble discussions earlier in this preamble.

In each of the scenarios governing insurance, surety bond, letter of credit and guarantee cancellation, the proposal specifies that the issuer would be liable for the value of the instrument in the event the owner or operator failed to obtain alternate financial responsibility and obtain the Administrator's written approval of the financial responsibility provided within ninety days after receipt of a notice of cancellation from the issuer by the relevant parties. In the case of insurance, letter of credit or surety bond, the issuer would be liable to fund the accompanying standby trust to the value of the instrument. In the instance of a guarantee, if allowed, the guarantor would be required to provide alternate financial responsibility, in accordance with the regulatory requirements, in the name of the owner or operator.

Such cancellation provisions are very similar to provisions in other EPA financial assurance programs for letters of credit, surety bonds and corporate guarantees. EPA is proposing such cancellation provisions to ensure continuity of financial responsibility coverage and provide assurance that funds will be available to EPA and other third party claimants when necessary to pay for CERCLA response costs, health assessment costs, and natural resource damages incurred by claimants while limiting the implementation burden on EPA.

EPA acknowledges that such a provision may impact providers' appetite to issue instruments in particular for insurance, where there is not past precedent in EPA financial assurance programs of a requirement for the insurer to fund a standby trust. EPA did consider alternatives that may reduce the likelihood the instrument provider would need to make payment and thus may provide greater flexibility but, for the reasons provided in subsequent preamble discussion, believes this proposed approach is the best option available.

One possible alternative would be to specify issuer liability to fund a standby trust only after notice of cancellation by the provider if the owner or operator does not obtain alternate financial responsibility and obtain written approval of such alternate financial responsibility from the Administrator within ninety days after receipt by both the owner or operator and the Administrator of the notice and some additional triggering event had occurred. For example, additional conditions necessary to trigger issuer payment into a trust fund could include bankruptcy of the owner or operator, abandonment of the facility, and/or the issuance of a CERCLA notice letter. These are all indications of potential higher risk at the facility and a potential more imminent need for the financial responsibility. However, EPA is concerned that such criteria alone may not provide adequate assurance funds will be available when necessary to pay valid third-party CERCLA claims. Facilities owned or operated by non-bankrupt companies and non-abandoned facilities can present risks and require Superfund actions or create natural resource damages for which the owner operator may not be able to pay. Further, EPA was told by potential providers of CERCLA § 108(b) instruments that the credit profile of the owner or operator is an important consideration of theirs. If cancellation occurred when the owner operator was in marked financial decline, the facility may end up abandoned and the company bankrupt before alternate financial responsibility could be obtained, highlighting the risk of allowing cancellation of the financial responsibility instrument in a wide range of scenarios without a requirement to fund a standby trust. The inclusion of a CERCLA notice letter as another condition that would trigger issuer responsibility to fund a standby trust would provide some added assurance. However, this would potentially require EPA to perform a preliminary assessment/site investigation to assess the site which in many cases would not be possible in the 120-day notice of cancellation period. As EPA is not necessarily the primary regulator or permitting authority at these facilities, EPA may not have the same level of understanding of the conditions and risks at the facilities as it does in other EPA financial assurance programs. Beyond just practical timing and feasibility concerns, such an approach would raise serious resource concerns for the Superfund program. Such a provision may require the Superfund program to shift its resources from its priority sites to facilities where financial responsibility maintenance was in question. If EPA did not or could not take action to investigate the facility's condition to determine whether a notice letter should be issued, financial responsibility coverage could lapse in a broader range of circumstances that may ultimately be optimal and financial responsibility may not be available if a CERCLA action was necessary.

EPA also considered a notification of a release of a hazardous substance at the facility to the National Response Center as required under CERCLA § 103(a) as a

[142] An irrevocable trust agreement may not be revoked or amended without the agreement of key parties to the instrument.

possible additional condition that could be proposed as a trigger for issuer liability to fund a standby trust in the instances of an issuer sending notice of cancellation and the owner operator's failure to obtain replacement financial responsibility. However, such a notice would be limited to only releases. The proposed CERCLA § 108(b) financial responsibility program intends to cover CERCLA liabilities as defined in CERCLA § 107 which is much broader than just costs associated with responding to releases. For example, response costs may also be incurred by reacting to a threat of a release which would not be accounted for in the notice of a release and may almost universally exist at facilities regulated under CERCLA § 108(b). Further, such a provision may create a perverse incentive to not report releases in order to avoid triggering issuer liability and any costs to the owner operator that may result from payment from the instrument. In light of these considerations, and with the desire not to skew Superfund priorities while also providing strong assurance that funds would be available when necessary to pay valid third-party CERCLA claims, EPA is not proposing such a nuanced payment requirement into a standby trust. By proposing that the issuer be liable for the owner operator's obtaining alternate financial responsibility in all instances, EPA recognizes that it is erring on the side of caution with the intent of not creating additional administrative burden on EPA while providing a high level of assurance that funds would be available when necessary to pay valid third-party CERCLA claims.

EPA requests comment, however, on any additional criteria (e.g. bankruptcy, abandonment of the facility), for requiring the issuer to fund the standby trust beyond the requirements previously discussed—the owner operator does not obtain alternate financial responsibility; and obtain written approval of such alternate financial responsibility from the Administrator within ninety days after receipt by both the owner or operator and the Administrator of the notice. EPA is interested in whether such additional criteria may be optimal for certain instruments, despite reducing the level of assurance provided that financial responsibility will be available to pay valid third-party CERCLA claims. Further, EPA is interested in other objective, readily identifiable supplemental criteria that EPA could include if such an option was ultimately pursued.

Another option EPA considered to address the potential lapse in coverage that may result from the issuer of a financial responsibility instrument cancelling the instrument is to specify non-cancellation triggering events. Under such an option, cancellation of the instrument could not occur after notice of cancellation by the provider if: (1) The owner operator does not obtain alternate financial responsibility and obtain written approval of such alternate financial responsibility from the Administrator within ninety days after receipt by both the owner or operator and the Administrator of the notice of cancellation, and (2) some additional triggering event had occurred. A further refinement to such an option would be to also restrict the scenarios in which cancellation can occur. EPA's RCRA Subtitle C closure and post-closure insurance regulations offer an example. Those regulations do not require the establishment of a standby trust alongside insurance. Rather, the provider is only permitted to cancel the policy in instances where the owner and operator failed to pay the premium and the provider gave at least 120 days advance notice. Further, cancellation, termination or failure to renew the policy may not occur in the event of one of several ''triggering events.'' Specifically, the RCRA Subtitle C closure insurance regulations state that cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration: (1) The Administrator deems the facility abandoned; (2) the permit is terminated or revoked or a new permit is denied; (3) closure is ordered by the Administrator or a U.S. district court or other Federal court; (4) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 U.S.C (Bankruptcy); or (5) the premium due is paid.[143]

Such a series of non-cancellation provision was one alternative to a requirement to fund a standby trust that EPA considered. Such an option could potentially be used for all instruments. However, the non-cancellation triggering events used in the RCRA Subtitle C closure post-closure would not all be applicable in the instance of the proposed CERCLA § 108(b) financial responsibility program which does not compliment a broader permitting program. For example, two of the triggering events (the termination, revocation or denial of a permit and the Administrator ordering closure) are not applicable here as EPA does not have permitting authority over these facilities.

Additional triggering events similar to those identified (e.g. issuance of a CERCLA notice letter, notification of a release at the facility) could bolster such a provision to lower the likelihood that financial responsibility was not available when needed to pay valid third-party CERCLA claims. However, these supplemental criteria would present the same limitations, implementation challenges and resource issues as they would in the option where they would be additional triggers for issuer liability to fund a trust fund. Moreover, EPA was also concerned that such an arrangement may lead to scenarios whereby instruments may need to remain in effect and non-cancellable for many years. For example, it could take several years before a claimant could obtain a judgment for CERCLA response costs, health assessment costs, and/or natural resource damages that may prompt a claim against the instrument. Based on conversations with instrument providers, EPA believes multi-year non-cancellation periods would likely be unpalatable to instrument providers. This concern is substantiated by past EPA experience. In the development of the RCRA Subtitle C closure and post-closure financial assurance programs EPA proposed that instruments would not be able to be terminated when a compliance procedure was pending. Specifically, after notice of intent to cancel or terminate an instrument was sent by the issuer, EPA would issue a compliance order requiring the owner operator to obtain alternate financial assurance. EPA would have been able to draw on the instrument to fund a standby trust had the owner operator not complied with the order. In the interim, the instrument would be non-cancellable as a result of the pending compliance proceeding and thus a lapse in financial assurance coverage would have been avoided.[144] However, such proposal was met with dissatisfaction from issuers of letters of credit and surety bonds. Institutions that issue letters of credit commented that non-cancellation provisions would preclude a defined date on which the letter of credit could expire—an important feature of letters of credit. Sureties noted that such an arrangement did not provide them adequate opportunity to limit their risk. As a result, the RCRA Subtitle C closure post-closure financial assurance regulations include a 120 days' notice period of the intent to cancel or fail to extend a surety bond or

[143] *See* 40 CFR 264.143(e)(8).

[144] *See* 46 FR 2822–2823 January 12, 1981.

letter of credit during the last thirty days of which the instrument provider would be liable if the owner operator did not obtain alternate financial assurance. Such a provision is what is being proposed today for surety bonds, letters of credit and insurance.

Nevertheless, EPA requests comments on the option to specify non-cancellation triggering events and provisions that could eliminate the need for providers to fund a standby trust after a notice of intent to cancel the instrument. Specifically, commenters are asked to identify appropriate non-cancellation triggers, how instrument providers may react to the prospect of protracted periods of non-cancellation and whether such an arrangement may be appropriate for some mechanisms but not others.

EPA also considered an option whereby after the 120-day notice of cancellation period, issuers would face no potential liability and the instrument would be terminated regardless of whether the owner or operator provided alternate financial responsibility and obtained the Administrator's approval of the financial responsibility. This option has the advantage of possibly being the most palatable to instrument providers; however, it was not proposed for a variety of reasons. In particular, it provides the least assurance that funds would be available when necessary to pay CERCLA claimants. EPA believes the incentive to cancel, terminate, fail to renew or extend the coverage may be greatest in times when the facilities may present the greatest need for the instrument (e.g. the owner operator is experiencing financial decline, after a release of hazardous substances) and thus coverage may be lost precisely when it is most needed. Moreover, this concern is elevated in the case of CERCLA § 108(b) which may require the cost recovery process to run its course before a claim could be made against an instrument.

With all of these considerations in mind, EPA has decided to propose that the instruments would require a 120 day notice of cancellation, termination, failure to extend or failure to renew and that the issuer would become liable for the value of the instrument if the owner operator does not obtain alternate financial responsibility and obtain written approval of such alternate financial responsibility from the Administrator within ninety days after receipt by both the owner or operator and the Administrator of the notice. The proposed approach provides strong assurance that funds will be available when necessary to pay CERCLA claims and limits the extent to which Superfund resources are shifted from conducting cleanups to administering the proposed financial responsibility program. This approach also has the virtue of ensuring a trust fund is available to hold financial responsibility funds at each facility if necessary after facility closure or the owner operator no longer exists. EPA recognizes that a trust fund is unique when compared to third-party mechanisms such as surety bonds, letters of credit or insurance in that ongoing payments from the owner or operator are not necessary if funded adequately upfront. Depending on the duration of risk at a given facility, financial responsibility may need to remain in place long after the owner or operator ceases to exist. The proposed arrangement whereby if the owner or operator does not provide alternate financial responsibility in instances of cancellation of the instrument a trust is funded, ensures financial responsibility can remain in place for the long term.

However, EPA acknowledges that under this construction there would be instances where issuers would be required to make payment into a standby trust at facilities where a CERCLA claim may never arise. EPA requests comments on these provisions of the proposal. Furthermore, EPA requests comment on whether a hybrid of the options may be most appropriate whereby for one instrument one option be employed, and for another instrument a different option might be employed.

8. Use of Multiple Financial Responsibility Instruments (§ 320.46)

An owner or operator would be able to satisfy the requirements of this section by establishing more than one financial instrument per facility. The instruments would be required to meet the regulatory specifications applicable to each instrument except that it would be the combination of instruments, rather than the single instrument, which would have to demonstrate financial responsibility for an amount at least equal to the required amount of CERCLA § 108(b) financial responsibility. If an owner or operator were to use a trust fund in combination with a surety bond, letter of credit or insurance policy, including a trust fund holding a letter of credit, the owner or operator would be able to use the trust fund as the standby trust fund for the other instruments. Should the owner or operator obtain a letter of credit issued in the favor of a trust fund trustee in combination with a surety bond or insurance policy, the owner or operator would be able to use the trust fund holding the letter of credit as the standby trust fund for the other mechanisms. A single standby trust fund could be established for two or more instruments. A claimant would be able to elect against which instrument used to provide evidence of financial responsibility to make a claim for CERCLA response costs, health assessment costs, and/or natural resource damages. In this way, there would not be 'primary' or 'excess' instruments where the ability to draw on one instrument may be predicated on the exhaustion of another. EPA is electing to provide for multiple instruments in this fashion as the Agency believes it will be significantly less administratively cumbersome and will make implementation of the claims process easier.

9. Use of a Financial Instrument for Multiple Facilities (§ 320.47)

An owner or operator would be able to use a financial responsibility instrument specified in this section to meet the requirements of this section for more than one facility. Evidence of financial responsibility submitted to the Administrator must include, for each facility, the EPA Identification Number, name, address, and the amount of funds for CERCLA § 108(b) financial responsibility assured by the instrument. If the facilities covered by the instrument are in more than one Region, identical evidence of financial assurance would be required to be submitted to and maintained with the regional delegees of the Administrator, as applicable, of all such Regions. The amount of funds available through the instrument would be required to be no less than the sum of funds that would be available if a separate instrument had been established and maintained for each facility. EPA is proposing this as it may provide for some administrative ease in the compliance and implementation process.

This is also provided for in RCRA Subtitle C closure and post-closure financial assurance program. However, in the proposed CERCLA § 108(b) financial responsibility program there is a much wider range of potential parties that may make a claim against an instrument than in the Subtitle C program. Therefore, the instruments proposed today are intended to have clear facility-specific sub-limits. Maintaining the accuracy of the facility-specific sub-limits is important as the consolidated form provision in CERCLA § 108(b)(4) provides that multiple owners and operators may obtain an instrument together while only one may be a common owner or operator at each facility covered by the instrument.

Ensuring the accuracy of the amount of coverage an instrument provides at each facility may occasion additional burden on the regulated community and on EPA. For example, EPA is proposing that schedule A of the trust agreement that identifies the facilities and amounts covered by the trust agreement, be updated within sixty days of a change in the information, even if the trust is not currently funded. EPA believes such a provision is necessary as the trust may ultimately be funded when the grantor of the trust is not around and such information should be as current as possible. However, EPA believes that such additional burden will likely be offset by the burden reduction provided by using one mechanism across facilities.

One final consideration is whether the inclusion of facility specific sub-limits might affect instrument providers' willingness to provide instruments. EPA believes that the added clarity and clear delineation of a provider's potential liability at any given facility combined with the lower administrative burden of preparing only one instrument would be a welcome specification. However, EPA could envision a scenario where a provider found issuing multiple instruments cleaner and easier than maintaining an accounting of the sub-limits within an instrument. For example, the proposed wording of the letter of credit would require the identification of the amount of financial responsibility at each facility covered by the credit. EPA, in past Agency rulemakings had proposed including such information in the letter of credit but was informed by commenters that such information typically would not be included in a letter of credit. As, in that case, the information could be included in a separate letter from the owner operator, EPA decided not to require the inclusion of facility specific amount in the letter of credit itself (See 47 FR 15042 April 7, 1982). However, as the Administrator will not be directing payments from CERCLA § 108(b) instruments such information would need to be included in the instrument were a letter of credit to cover multiple facilities.

The proposed instruments do not require that multiple facilities be covered and thus EPA believes and intended that they provide flexibility for regulated entities and instrument providers to identify the most efficient arrangement. EPA requests comment on the proposed allowance for mechanisms to cover multiple facilities. Specifically, EPA is interested in hearing if there are alternative means of specifying facility-specific sub-limits that may have certain advantages.

10. Consolidated Form and Multiple Owners and/or Operators (§ 320.48)

EPA had to consider how best to implement the provision for multiple owners or operators at a facility in CERCLA § 108(b)(4). The provision provides guidance on how a financial responsibility instrument could provide financial responsibility for the CERCLA response costs, health assessment costs, and or natural resource damages of all the current owners and operators of the facility in instances where there is not one single owner and operator. Under the proposal, where a facility is owned and/or operated by more than one person, evidence of financial responsibility covering the facility may be established and maintained by one of the owners or operators, or, in consolidated form, by or on behalf of two or more owners or operators. In practice, the instruments would follow the same form regardless of whether one of the owners or operators establishes a single instrument at the facility, whether multiple owners or operators establish a single instrument at the facility, or whether multiple owners or operators establish one or more instruments at the facility. EPA believes the flexibility in establishing financial responsibility at a facility when there are multiple owner operators is important as each arrangement may lend itself best to certain instruments. For example, EPA understands that sureties and banks issuing letters of credit have strong preference for one party obtaining the instrument. In discussions with the surety community, EPA learned that the surety typically interacts and has a surety relationship with one party at a facility and thus prefer one principal on the bond. While the bond would cover the valid CERCLA claims associated with all current owners and operators at the facility, only one principal need be listed. Representatives from the banking community also expressed a preference for one applicant per letter of credit on whom the lending institution would perform its credit assessment. Similar to the bond, the credit will cover the CERCLA response costs, health assessment costs, and/or natural resource damages associated with all current owners and operators at the facility. On the other hand, EPA understands that with insurance a multiple insured arrangement is more common and may be required for the policy to cover claims against all the parties at the facility. In that case, EPA anticipates additional insureds may be listed on the policy. In this way, EPA proposes to implement the rule in a way that is consistent with both CERCLA's liability scheme and with commercial practice.

When evidence of financial responsibility is established in a consolidated form, the proportional share of the cost of demonstrating the financial responsibility for each participant would have to be shown in a separate letter submitted to the Administrator. This provision will require the owners and operators to plan out and apportion the responsibility of obtaining and maintaining the instrument up front which EPA believes may help reduce the likelihood of an instrument obtained by multiple parties lapsing due to failure to pay any premiums or fees required by the instrument provider.

In either scenario, the evidence of financial responsibility would have to be accompanied by a statement authorizing the owner or operator submitting the evidence of financial responsibility to act for and on behalf of each participant in submitting and maintaining the evidence of financial responsibility. It is worth noting that all of the current owners and operators at the facility would still be responsible for ensuring financial responsibility at the facility is obtained and maintained in accordance with the regulations. EPA would thus retain enforcement authority for the regulations against all of the current owners and operators.

E. Subpart H—Requirements Applicable to Hardrock Mining Facilities

1. Universe of Hardrock Mining Facilities Covered by the Rule (§ 320.60)

a. Applicability of the Rule

The Agency is proposing that the classes of facilities within the hardrock mining industry that are identified in § 320.60 be subject to this rule. The classes of facilities that EPA is proposing for regulation are the classes of facilities that were identified in the 2009 *Priority Notice* with the exception of four classes determined by the Agency to present a lower level of risk of injury than the remainder of the classes identified in the notice, if they meet certain conditions. The classes EPA is proposing not to include in the rule are: (1) Mines conducting only placer mining activities as defined in § 320.62, (2) mines conducting only exploration activities as defined in § 320.62, (3) surface mines with a disturbance as defined in § 320.62 of less than five acres not located within a mile of mine disturbance that occurred in the prior ten-year period that do not

employ hazardous substances in their processes; and (4) mineral processors as defined in § 320.62 with less than five acres of surface impoundment and waste pile disturbance. Owners or operators of facilities that conduct only these limited activities would not be required to comply with the requirements of Part 320.

b. Universe Development

(1) Identification of Classes of Facilities Within the Hardrock Mining Universe for Rule Development

In the 2009 *Priority Notice,* EPA identified classes of facilities within the hardrock mining industry as those for which the Agency would first develop CERCLA § 108(b) regulations. EPA stated, for purposes of the notice, that hardrock mining facilities include those which extract, beneficiate and process metals (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, zinc) and non-metallic, non-fuel minerals (e.g., asbestos, phosphate rock, sulfur). The Agency also noted that it was not identifying non-hardrock mineral mines, such as sand, gravel, limestone, and stone; oil, oil shale or gas operations; or the mining and preparation of coal as priority classes of facilities.[145] In the 2009 *Priority Notice,* EPA stated it would inform its selection of classes based on indicators of risk and the related effects, and reviewed information contained in a number of studies, reports, and analyses. This review identified numerous factors EPA could consider. For example, typical elements in evaluating risk to human health and the environment include the probability of release, type and duration of exposure, and toxicity.[146] [147]

Based on the information available at the time, EPA concluded that hardrock mining facilities present such risk that warranted giving those classes of facilities priority in the development of financial responsibility requirements under CERCLA § 108(b).

Throughout the discussion of its data analysis, EPA addresses several topics that were raised in public comments that EPA received on its data analysis for the 2009 *Priority Notice* and in response to EPA's 2010 ANPR relating to other facility classes, where those topics are relevant to the data analysis for this proposal. It is important to note, however, that the 2009 *Priority Notice* was a one-time event, under which EPA identified the classes for which EPA would first develop CERCLA § 108(b) requirements. Consistent with this approach, EPA did not seek public comment on the notice, and nothing in CERCLA required EPA to issue its 2009 *Priority Notice* in proposed form, or required EPA to provide responses to comments received. The 2009 *Priority Notice's* sole purpose was to identify a set of facilities for which EPA would begin the process of developing CERCLA § 108(b) regulations, as provided for in CERCLA § 108(b)(1) (second sentence), and EPA provided a significant amount of factual information in support of its conclusions. EPA is not reopening its identification in the 2009 *Priority Notice* of hardrock mining as the classes for which it would first develop CERCLA § 108(b) regulations by this proposal. EPA requests public comment on its data analysis. However, EPA is not seeking comment on the 2009 *Priority Notice.*

As previously discussed, CERCLA § 108(b) states that ''[p]riority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury.'' Though the 2009 *Priority Notice* identified the classes of facilities within the hardrock mining industry as those for which the Agency will first develop financial responsibility requirements, it did not provide criteria to define classes of facilities, or to identify which classes of facilities within that universe present the highest level of risk of injury. In developing this proposed rule, EPA thus considered these issues to determine which facilities within the universe described in the 2009 *Priority Notice* would be included in this proposed rule.

The Agency considered how to define classes of mining facilities. EPA considered two options. EPA first considered identifying classes of mines based on the commodity mined. This approach had two advantages—it was consistent with the approach taken in the 2009 *Priority Notice* to identify the universe to be considered, and it was consistent with general industry practice to identify mines (e.g. gold mine, silver mine, phosphate mine, etc.) so would have been readily understandable to the regulated community. However, that approach had several drawbacks. First, the commodity mined is not necessarily the source of risk of injury at a mine. Numerous hardrock mining facilities mine multiple ores. Thus, it alone served as a poor basis to compare level of risk of injury. Second, similar sources of releases exist at facilities within a range of commodities. Third, minerals are not located in consistent geologic settings, so the risks associated with a specific commodity could vary on that basis alone from case to case. Under the second option considered by EPA, processes that are known to affect the level of risk of injury at a mine would be identified and facilities would be grouped based on the presence of those characteristics and the risk they present. EPA believes this approach created a more logical link to risk of injury, and the Agency adopted it in developing this proposed rule. As previously noted, EPA had identified hardrock mining facilities as those involved in the extraction, beneficiation or processing of metals (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (e.g., asbestos, phosphate rock, and sulfur) but not the specific classes of mining listed in a memorandum to the record for the 2009 *Priority Notice.*[148] Based on the Agency's analysis of the current universe of hardrock mining and mineral processing facilities, for illustration purposes the following table provides examples of commodities that the Agency expects are subject to the regulations being proposed today. However, it is important to note that this list is not intended to be an all-inclusive list of the universe of commodities potentially subject to this rulemaking. This includes commodities with no currently active or abandoned facilities that might in the future commence/resume operation, e.g., asbestos, arsenic, bismuth. Any facility that meets the definition of a hardrock mining or mineral processing facility (*see* section VI.D.3. of this preamble), would also be subject to the requirements in this proposed rulemaking.

[145] EPA excluded several classes of facilities (identified by commodity sector), that otherwise fell within the broad definition of ''hardrock mining.'' See memorandum to Jim Berlow, from Stephen Hoffman and Shahid Mahmud, entitled: *Mining Classes Not Included in Identified Classes of Hardrock Mining,* June 2009.

[146] *See Risk Assessment in the Federal Government: Managing the Process.* National Research Council. National Academy Press, Washington, DC. 1983.

[147] *See* U.S. EPA 2004. *Nationwide Identification of Hardrock Mining Sites.* Office of Inspector General. Report No. 2004–P–00005. Available at: *http://epa.gov/oig/reports/2004/20040331-2004-p-00005.pdf.*

[148] *See supra* note 130.

COMMODITY

Alumina	Germanium	Osmium	Sulfur
Antimony	Gold	Palladium	Talc
Arsenic	Hafnium	Phosphate	Tantalite
Asbestos	Huebnerite	Phosphorus	Tantalum
Bastnaesite	Ilmenite	Platinum	Tellurium
Barite	Iridium	Potash	Thallium
Bauxite	Iron (including hematite, magnetite, siderite, taconite)	Potassium	Thorite
Beryl	Lead	Psilomelane	Thorium
Beryllium	Limonite	Pyrolusite	Tin
Bismuth	Lithium	Quicksilver	Titanium
Boron	Magnesium	Radium	Trona
Cadmium	Manganese	Rare earth metals	Tungsten
Cerium	Manganite	Rhenium	Uranium
Chromite	Mercury	Rhodium	Vanadium
Chromium	Microlite	Rhodochrosite	Vermiculite
Cinnabar	Molybdenite	Ruthenium	Wolframite
Cobalt	Molybdenum	Rutile	Wulfenite
Columbite	Molybdite	Scheelite	Zinc
Columbium	Monazite	Selenium	Zinc
Copper	Nickel	Silver	Zirconium
Fluorspar	Niobium	Strontium	

EPA has described in the following sections the basis for determining that exploration mines, placer mines, small surface mines of less than five acres, and mineral processors with less than five acres of surface impoundment and waste pile disturbance present a lower level of risk of injury. These classes, it should be noted, were identified based on facility characteristics and operations, rather than on the commodity mined.

EPA solicits comment on whether it would be feasible and appropriate to identify additional classes of hardrock mining facilities as presenting a lower level of risk of injury, particularly classes of mines that differ in their operations and associated risk from more tradition hardrock mining operations. For consistency with the approach taken by EPA to identify the lower level of risk of injury classes proposed in this rule, information to support additional lower level of risk of injury classes should address facility characteristics and operations, and should not rely on the commodity mined as a classification factor. However, EPA further solicits comment on whether classes of mines identified by commenters as presenting a lower level of risk of injury based on facility characteristics and operations could potentially encompass iron ore, phosphate, and uranium mines.

(2) Basis for Determination of Lower Level of Risk of Injury for Classes Not Included in Proposal

(a) Exploration Mines

EPA has determined that exploration mines present a lower level of risk of injury and thus propose that owners and operators of facilities that conduct only exploration activities as defined in § 320.62 would not be required to comply with the CERCLA § 108(b) financial responsibility requirements. Mineral exploration is a precursor to the production of ores and associated wastes at hardrock mining and mineral processing facilities. The primary purpose of mineral exploration is to locate ore deposits and/or find significant extension of previously located deposits associated with operating or abandoned mines.[149] [150] However, exploration activities do not typically result in the generation of significant amounts of hazardous substances or mineral waste.

Many exploration projects have only minimal surface disturbances or impacts. Mineral exploration efforts begin with surface explorations for signs of potential mineral deposits, commonly utilizing initial field surveys generally involving low-impact techniques, such as aerial photography and remote sensing.[151] [152] Additional geochemical and geophysical survey techniques use either low-volume surface sampling [153] or no sampling, relying on sophisticated tools to determine geologic properties of sites, such as chemical composition and magnetism. For most commodities, these result in only limited surface sampling as only a few minerals, such as gold and platinum-group metals, economically justify deep subsurface exploration.[154] In many cases, exploration activities thus present a negligible level of risk.

Potential impacts of mineral exploration can arise when sub-surface exploration does occur and include clearing land and potential contamination from boreholes (narrow shafts penetrating below the surface). Poor planning and management of drilled holes may cause aquifer contamination by infiltration of polluted surface water or by migration of materials in other layers of the earth that previously did not come in contact with the aquifer. However, due to nature of these operations where large-scale extraction of resources has not occurred, the disturbance and impact would be expected to be significantly smaller. For example, tailings facilities, large open pits, heap and dump leach operations, and large waste rock deposits, leading sources of releases of hazardous

[149] *See* Lee-Moreno, J.L. 2011. In *SME Mining Engineering Handbook.* Third Edition. Volume 1. Chapter 3.2: Minerals Prospecting and Exploration. United States: Society for Mining, Metallurgy, and Exploration, Inc.

[150] *See* BLM defines exploration as the creation of non-negligible surface disturbance to evaluate the type, extent, quantity, or quality of mineral values present, including sampling, drilling, or developing surface or underground workings. 43 CFR Subpart 3809.5

[151] *See* International Council on Mining & Metals (ICMM). *Good Practice Guidance for Mining and Biodiversity.* Accessed February 25, 2015 at: *http://www.icmm.com/document/13.*

[152] *See* A. Erickson and J. Padgett. 2011. Chapter 4.1 Geological Data Collection. In *SME Mining Engineering Handbook.* Ed. P. Darling. Third Edition. Volume 1.

[153] For example, a survey conducted over gold-silver vein mineralization in Canada described the optimal sample depth of 18–24 inches. For most stream sediment surveys, about 1.1 to 2.2 lbs of material are collected from the near-surface sediment layer. See: Jaacks, J.A., Closs, L.G., and J. A. Coope. 2011. Chapter 3.4. Geochemical Prospecting. In *SME Mining Engineering Handbook,* Ed. P. Darling. Third Edition. Volume 1.

[154] *See* Lee-Moreno, J.L. 2011. Chapter 3.2: Minerals Prospecting and Exploration. In *SME Mining Engineering Handbook.* Third Edition. Volume 1. United States: Society for Mining, Metallurgy, and Exploration, Inc.

substances at hardrock mining sites historically, would not be expected to exist at exploration projects. Moreover, hazardous substances would typically not be employed in the exploration activities further lowering the risk posed by exploration activities compared to commercial or larger-scale mining operations. The limitation that exploration excludes activities where material from the site is extracted for commercial use or sale limits the construction of large facilities such as those named earlier.

EPA found no evidence directly linking exploration activities to releases leading to CERCLA listing. Although CERCLA documents noted the presence of mineral exploration activities at eight sites, exploration activities appear to have played little to no direct role in releases of hazardous contaminants.

For the reasons stated, EPA believes that mineral exploration presents a lower level of risk. As such, these mineral exploration activities are not included in today's proposed rule. EPA requests public comment regarding our determination to not include exploration mines in today's proposal.

(b) Placer Mines

EPA has determined that placer mines, as defined by EPA in this proposal (See proposed definition in section 320.62) present a lower level of risk of injury. EPA recognizes that placer mining would not typically be considered hardrock mining; however such mining practices would fall within the definition of hardrock mining used by EPA in identifying the priority class for regulation in the 2009 *Priority Notice.* As a result, and due to the lower level of risk of injury presented by placer operations, EPA is proposing that placer mines not be included in the CERCLA 108(b) hardrock mining financial responsibility regulations.

Placer mining is a method of mining in which the unconsolidated overburden is removed to expose valuable mineral-bearing gravel deposits beneath. Placer mines, commonly in alluvial deposits, typically seek to recover gold, titanium, and rare earths minerals. Alluvial deposits are commonly non-lithified (non-cemented) sands and gravels that rarely contain minerals that are more commonly the sources of contamination in other deposits (e.g. lode deposits). Placer mining can involve open pit, underground, or dredging operations using backhoes, bulldozers, or other excavating equipment to extract sand and gravel; at frozen placer mines, drilling and blasting techniques can be used to tunnel into the ground. Most commonly, dredges are used to break apart sand and gravel and remove valuable minerals. Dredge types vary widely, but generally use either mechanical methods to transport material on moving buckets or belts, or hydraulic methods to bring raw materials to the surface using pumps and pipes. Most placer recovery involves only sizing and separation by physical properties such as specific gravity, color, or magnetism.[155] For example, vibrating screens can separate the ore into particles of different sizes. This stands in contrast to non-placer mines that may employ chemicals in their heap leaching processes, a significant source of releases or threatened releases at hardrock mining facilities. Placer mines may have tailings, open pits and other features common at other mines. However, due to the environmentally benign nature of typical alluvial deposits, such features would not be expected to result in releases of hazardous substances as such features would not typically contain minerals (e.g. pyrite) that are more commonly the sources of contamination in non-placer deposits at other mines.

Placer mining sediment discharges may diminish the quality of surrounding environmental resources such as surface water, ground water, soil, wetlands, and wildlife. Historically, the primary environmental impact from placer mining has been increases in sedimentation and heavy metals concentrations downstream from mining operations. Most current placer mining does not utilize added chemicals, nor would a placer operation using hazardous substances meet EPA's definition of placer mine, minimizing the potential for release of hazardous substances.

Placer mining practices were directly linked to releases leading to a CERCLA listing at two mining sites stemming from methods not typically recently employed domestically as a result of enhanced environmental regulation and law. Evidence revealed that at one of the sites sediment discharges resulted from hydraulic mining techniques which disturbed large volumes of sediment. Hydraulic mining, which was common in California and Alaska through the 1980s, used high-pressure jets of water to break apart gravel beds, washing mixtures of water, sand and minerals into a collection area. However, regulatory regimes that have since emerged greatly restrict hydraulic placer mining[156] and EPA thus does not expect it to be a common practice at placer mines in the US going forward. At the other site where placer mining practices were directly linked to releases leading to a CERCLA listing, contamination stemmed from mercury amalgamation, which was historically used for processing gold in placer mining operations. By following this process, mercury and gold would form an amalgamated substance from which pure gold could be extracted. The use of amalgamation processes, however, has fallen precipitously in the US since the 1970s due to its high cost, inefficiency for larger-scale mines, growing scarcity of ores for which the technique can be used, and the introduction of various environmental regulations.[157] Furthermore, a placer mine that did employ mercury amalgamation would need to comply with the Part 320 financial responsibility regulations as they would fail to meet the proposed definition of placer mine which specifies that a placer mine does not use CERCLA hazardous substances in the concentration or processing of materials (see definitions at § 320.62).

In light of the benign nature of alluvial deposits and the absence of hazardous substances in the processing operations at placer mines meeting EPA's proposed definition, EPA believes such placer mines are unlikely to result in contamination. EPA requests public comment regarding our determination to not include placer mines in today's proposal. EPA requests comment on whether the class of placer mines as defined that is proposed as a lower level of risk of injury classes is appropriate, or whether that class should be further defined to limit the placer mines not included under this proposal.

(c) Small Surface Mines of Less Than Five Acres

EPA has determined that small surface mines with a disturbance of less than five acres not located within a mile of mine disturbance that occurred in the prior ten-year period that do not employ hazardous substances in their processes, and are not underground, present a lower level of risk of injury. While individual small mines may cause

[155] Chemicals are rarely used for processing. Flotation may be used in phosphate operations, and hot acid leaching using sulfuric or hydrochloric acid is sometimes used for zircon sand. In these operations, effluent treatment involves the addition of neutralizers and the removal of solids, with effluent water being recycled back to avoid off-site discharges.

[156] *See* Bullock, Richard L et al., *Placer Mining and Dredging. SME Mining Engineering Handbook.* 3rd ed. Vol. 2. Society for Mining, Metallurgy, and Exploration, (SME), 2011. 1062.

[157] *See* U.S. Environmental Protection Agency. *Gold Placers. Technical Resource Document: Extraction and Beneficiation of Ores and Minerals,* Volume 6. October 1994.

releases or contamination as a result of certain hazardous substances or mining practices used, such contamination tends to be more limited due to their lower volumes of mining. Superfund sites are therefore not generally associated with small individual surface mining facilities, except in circumstances where there are major clusters that increase the potential for cumulative impacts.

Small surface mines tend to extract near-surface higher grade ores and previously unmined placer deposits. Larger mines are more able to take advantage of new ultra-mechanized mining; metallurgical techniques allow them to use lower-grade, large-volume extraction and processing. Small surface mines likely do not engage in these more modern practices due to financial factors. As a result, small surface mines will have much lower volumes of waste and the features from which releases have historically occurred (e.g. waste rock piles, open pits) will be much smaller. Furthermore, lower level of risk is further ensured by the requirement that the small mine also not employ hazardous substances in their mining practices. As a result, cyanide leaching, one source of releases or threatened releases, would not be practiced at small mines; nor would hazardous process chemicals be stored at the facility lowering the possibility of spills or other mishandling of hazardous substances. Additionally, it is worth noting that because this determination of lower risk is being made for small surface mines, processing operations would not be included in this lower risk class. As such, practices such as electrowinning, hydrometallurgy, or pyrometallurgy would not occur at these facilities; nor would tailings facilities exist. Underground mines are excluded because an underground mine can expose significant reactive material (e.g. pyrite) in underground workings, thereby causing contaminated mine drainage, and still be in an area covering less than 5 acres if the mined material is hauled off site for processing. Please see a discussion of low risk mineral processing facilities later in this preamble for more information on what class of mineral processing facilities EPA has determined present lower levels of risk of injury.

In current Federal and state regulations, ''small'' mines are also typically defined by acreage or volume of ore processed. Small mines are regulated by the BLM, Forest Service and most states based on their potential impacts and in most cases face reduced permitting and operation requirements.[158] In the case of both BLM and the Forest Service, small mine projects causing a surface disturbance of less than five acres are eligible for exemptions from certain financial responsibility requirements. Alaska, Montana, Nevada, and other states also have reduced requirements for facilities and projects no greater than five acres in size. BLM, USFS, and most states do not extend non-major mining exemptions to operations that use toxic process chemicals or that have the potential to discharge hazardous substances to water resources.

The reduced risk presented by small mines is evident by the lack of small mines individually becoming Superfund sites. Historically, Superfund sites with smaller-scale mines reflect the combined environmental impacts of non-major mines in close proximity. One example consists of numerous abandoned and inactive hardrock mine sites that produced gold, lead, zinc and copper.[159] [160] Mining waste problems impacting the 53-square mile watershed from abandoned and inactive mine sites led to CERCLA listing. EPA identified 150 individual mine sites within the watershed boundary, of which 70 have been prioritized for cleanup. Concern over the potential issues that may arise from the cumulative impact of numerous small mines in close proximity is the rationale for the proposed additional qualification for small mines determined to present a lower level of risk as those not located within a mile of mine disturbance that occurred in the prior 10-year period.

EPA believes that small surface mines of less than five acres present a lower level of risk when such mines are not in close proximity to another mine and do not use hazardous substances. EPA requests public comment on the proposal that owners and operators of such small mines would not be required to comply with the CERCLA § 108(b) hardrock mining financial responsibility regulations.

[158] *See* Kuipers, J., 2000, *Hardrock Reclamation Bonding Practices in the Western United States,* National Wildlife Federation.

[159] *See http://www2.epa.gov/region8/upper-tenmile-creek-mining-area.*

[160] Additional Superfund sites representing mining districts with multiple smaller-scale operations include: Copper Basin Mining District (CERCLIS ID TN0001890839), Oronogo-Duenweg Mining Belt (CERCLIS ID MOD980686281), Cherokee County (CERCLIS ID KSD980741862), Washington County Lead District (CERCLIS ID MON000705027), Basin-Cataract Mining District (CERCLIS ID MTD982572562), California Gulch (CERCLIS ID COD980717938), and Carpenter Snow Creek Mining District (CERCLIS ID MT0001096353).

(d) Mineral Processors With Less Than Five Acres of Surface Impoundment and Waste Pile Disturbance

EPA is proposing that owners and operators of mineral processing facilities with less than five acres of surface impoundment and waste pile disturbance not be required to comply with the financial responsibility requirements in Part 320. EPA is proposing this because the Agency believes that releases from surface impoundments and waste piles present elevated risk at mineral processing facilities. These features were identified as contamination sources at many superfund sites historically. For example, surface impoundments which contained tailings and wastewater were the source of contamination for more than 160 different response actions; slag and heap leach waste piles were sources of contamination for more than 54 and 17 responses respectively. Further waste piles and surface impoundments at mineral processing and combined mining and mineral processing sites have caused natural resource damages.[161] Additionally, releases from surface impoundments have resulted in EPA needing to issue imminent and substantial endangerment orders and other orders requiring injunctive relief.[162] Moreover, in a 1998 EPA study of mineral processing damage cases, EPA found that many of the cases involved releases from waste piles and surface impoundments. Additionally, the report noted at least one additional NPL site (not included in the damage cases reviewed) where contamination appeared to be from land-based mineral processing units. The report also noted that land placement of products, byproducts, in-process materials, and intermediates can result in environmental problems.[163] Since 2004, EPA's National Enforcement Initiative on Mining and Mineral Processing has performed over 100 inspections of mineral processing facilities. These facilities ranged from small to very large operations and had a wide variety of waste management practices. However, EPA found that facilities that managed wastes in large surface impoundments or piles posed higher environmental risk to human health and the environment

[161] For examples, *see Select NRD Cases at Mineral Processing Facilities,* PDF portfolio available in the docket for this proposed rule.

[162] For examples, *see Select Enforcement Cases at Mineral Processing Facilities,* PDF portfolio available in the docket for this proposed rule.

[163] *See* U.S. EPA. *Damage Cases and Environmental Releases from Mines and Mineral Processing Wastes.* April 1998.

than facilities with smaller waste management units.[164]

Some of the risk of surface impoundments and waste piles stems from poor environmental practice (e.g. failure to use liners, overtopping, instability of berms). For example, in 2004, an EPA inspection of a mineral processing facility in Florida found that storage and disposal of hazardous waste into unlined ditches and surface impoundments released hazardous substances off-site. Nearby groundwater and private drinking water wells were contaminated as a result of these releases.[165]

As the volume of wastes disposed of in a surface impoundment or pile increase, the units become larger and hydraulic pressure increases. This results in higher incidents of leaks and structural failures.[166] Larger units also have increased pressure due to larger surface areas exposed to rainfall. Sometimes a surface impoundment may be located on top of or adjacent to a waste pile. For example, releases from a large waste pile/surface impoundment (referred to as a ''phosphogypsum stacks'') in Florida, Texas, and Mississippi released millions of gallons of highly acidic wastewater resulting in fish kills and impacting other aquatic life and natural resources.[167]

Mineral processing facilities with less than five acres of surface impoundment and waste pile disturbance generally pose lower risk due to the lower quantities of hazardous substances present, and less likelihood of spills and structural instability and the smaller expected impact of any releases. As such, EPA proposes that owners and operators of mineral processing facilities with less than five acres of surface impoundment and waste pile disturbance not be required to comply with the financial responsibility requirements in Part 320. EPA requests comment on this proposal. Specifically, EPA is interested in damage cases that have arisen at mineral processing facilities with less than five acres of waste pile or surface impoundment disturbance.

[164] *See* U.S. EPA. *National Enforcement Initiative for Mining and Mineral Processing Summary of Activities 2005 to 2016.* November 15, 2016.

[165] For examples *see* 2004 Coronet compliance evaluation inspection report file in *Select Enforcement Cases at Mineral Processing Facilities,* PDF portfolio available in the docket for this rulemaking.

[166] *See Select Surface Impoundment Technical Reports* PDF portfolio in the docket.

[167] *See* Mosaic, Agrifos, and Piney Mulberry examples in *Select NRD Cases at Mineral Processing Facilities,* and *Select Enforcement Cases at Mineral Processing Facilities,* PDF portfolios, available in the docket for this rulemaking.

2. Timeframes for Compliance (§ 320.61)

CERCLA § 108(b)(3) requires a phased-in approach to implementation of the financial responsibility requirements of this proposal. That section requires that financial responsibility requirements be imposed as quickly as can reasonably be achieved but in no event more than four years after the date of promulgation of the final rule. The statute further requires that, where possible, the amount of financial responsibility shall be achieved through incremental, annual increases. This phased approach provides time for the financial markets to develop and make available instrument capacity while, at the same time, has financial responsibility put into place at facilities subject to the rule quickly.

Under the proposed schedule for implementation of financial responsibility requirements, owner or operator's would be required to demonstrate financial responsibility for: (1) Health assessment costs by twenty four months after promulgation of the final rule, i.e., after publication of the final rule in the **Federal Register**; (2) for fifty percent of the response and natural resource damages amount of financial responsibility by thirty six months after promulgation of the final rule; and (3) for full response and natural resource damages amount by forty eight months after promulgation of the rule.

In developing this proposed schedule for implementation of financial responsibility requirements, EPA considered the requirement in the statute that financial responsibility implemented in incremental annual increases, as well as the need for the financial markets do develop and make available capacity. EPA also sought to provide the maximum amount of time for owners or operators to establish a financial responsibility level for their facilities.

EPA proposed that owners or operators provide the amount of financial responsibility for the health assessment component of the formula first as that amount does not require a calculation, and thus requires no input of information by the facility. This approach provides three years before the first amount of financial responsibility that must be calculated is due to EPA. EPA believes that this is a reasonable approach, and that it balances the needs of the owner or operator as well as the financial market. Delaying further significant levels of financial responsibility would have resulted in a surge in demand on the financial market in year four. Requiring calculated financial responsibility earlier would have provided less time for owners or operators to become familiar with the formula, gather any necessary information, and perform necessary calculations.

EPA believes that this schedule would meet the statutory requirement for phased implementation, and would provide owners and operators an adequate time period to identify the necessary financial responsibility amount for their sites. Further, these phased-in requirements would help to assure the availability of instruments by providing extended time for market capacity to build. EPA solicits comment on this approach to implementation of the financial responsibility requirements, on the schedule for compliance, and on whether this approach would help assure availability of instruments. EPA solicits comment on this approach.

For owners and operators of hardrock mining facilities that come into operation after the effective date of this rule, the Agency is proposing a different approach.

Facilities that become subject to the rule after the effective date of the final rule and on or before the date four years after the effective date would be comply with the requirements for demonstrating financial responsibility that are applicable to facilities that were authorized to operate, or should have been authorized to operate on the effective date of the final rule. For example, if a facility were to become subject to the requirements of this rule two years after the effective date, the owner or operator would be required to demonstrate financial responsibility for the health assessment amount prior to beginning operations, and then follow the schedule provided in § 320.61(a).

Finally, facilities that become subject to the rule more than four years after the effective date of the final rule would be required to demonstrate financial responsibility for the full amount required under this rule before beginning operations.

The Agency believes this approach is reasonable in that the capacity concerns that arise when a newly promulgated rule becomes effective are not relevant as the Agency does not expect a large number of newly regulated facilities to enter the market seeking financial responsibility instruments after the rule initially becomes effective. The Agency solicits comment on this approach.

3. Definitions (§ 320.62)

The Agency is proposing definitions in § 320.62 that are applicable to this

Subpart. The Agency solicits comment on these definitions.

4. Determining the Financial Responsibility Amount (§ 320.63)

EPA considered options for how to calculate financial responsibility amounts for classes of facilities under CERCLA § 108(b). The statute provides only very general direction on this question, and thus confers upon EPA significant discretion in both methodology and in the ultimate selection of the appropriate amount. CERCLA § 108(b) establishes a general end-point for the Agency's financial responsibility requirements, which must be ''consistent with'' the ''degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances'' at the facility. EPA does not interpret this to require any precise association with a risk calculation. Standard dictionary definitions of the term ''consistent'' include merely ''being in agreement'' or ''compatible.'' [168] Moreover, as discussed earlier, CERCLA § 108(b) amounts are necessarily established in the absence of any response action, although it is through such response actions that the precise level of risk associated with a particular site is ascertained. Thus, EPA believes that Congress intended for the Agency to set a level of risk that is generally reflective of risk for each facility class.

The statute also does not specify any particular methodology to reach that general end-point, specifying simply that the amount of financial responsibility be established at the level that the EPA ''determines is appropriate.'' The statute does provide a non-exclusive list of information sources in CERCLA § 108(b)(2) on which it is to base its decision—the payment experience of the Superfund; courts settlements and judgments; and voluntary claims satisfaction. Notably, it does not specify how the information from these sources is to be used—for example, how the data from each source should be weighted relative to the other sources. Similarly, the list of sources does not specify whether EPA is to derive particular values from each category to be aggregated into one amount that is ''consistent with the degree and duration of risk,'' or whether EPA is to identify from each category, particular practices (that is, for example, the types of activities for which the Fund has paid) the cost of which can form the basis for an amount. Therefore, EPA has concluded that these provisions of the statute confer a significant amount of discretion upon the Agency in how it uses the data it has, to determine the appropriate amount for which owners and operators must provide evidence of financial responsibility.

EPA considered four approaches to identify a financial responsibility amount for a facility—fixed amount, site-specific amount, parametric approach, and formulaic approach. A description of each approach follows. This proposed rule uses a combination of these approaches—specifically, a fixed cost approach for certain costs (health assessments) and a formulaic approach to identify an amount for potential response costs consistent with the risks to human health and the environment based on facility features.

Under a fixed amount approach, the Agency would identify a standard cost for the class. This method does not rely on site-specific factors but rather on historical costs associated with similar facilities to calculate an expected future amount. This approach is best applied where the costs at issue are fairly uniform, as the wider the variation, the lower the accuracy of the financial responsibility amount for that cost. If there is wide variation in the costs associated with the facilities within the class to which the fixed amount is applied, the result can be significant over-regulation at those facilities with lower levels of liabilities, and significant under-regulation of facilities with higher levels of liabilities. At the same time, this approach has advantages in that it requires a lower level of effort on the part of the regulated community and the Agency to implement because the rule does not require a site-specific calculation to be developed, submitted, or evaluated. Thus, EPA believes that in certain circumstances the fixed amount approach may be the best choice to implement CERCLA § 108(b) requirements.

For example, as discussed in section VI.D.4. of this preamble, the Agency was able to determine a fixed level for health assessment costs under this proposed rule, but applied a formulaic approach to determine financial responsibility amounts for response costs and natural resource damage costs.

The second method considered by EPA is a site-specific approach. Under this approach, the owner or operator would calculate the cost of conducting known activities to address identified problems. This approach is the most precise of the three approaches considered by EPA. However, it is also the most resource intensive to implement. It requires gathering detailed information about the site, including an assessment of the site conditions, and is most easily implemented where a release has occurred, a response is necessary, and a remedy determination has been made. As described earlier, CERCLA § 108(b) financial responsibility is not based on a remedy determination; therefore, EPA determined that a site-specific approach was not appropriate or practical for use under this rule. EPA solicits comment on how a site-specific approach might be developed for future CERCLA § 108(b) rulemakings in situations where there has been no remedy decision.

Having identified reasons that a site-specific approach may not be appropriate or practical to determine financial responsibility amounts for response costs and for natural resource damages, EPA sought to develop an approach that was more accurate than the fixed amount, yet could be implemented without conducting a full site investigation at the facility. The Agency's efforts resulted in development of a formula designed for facilities within the hardrock mining industry.

(a) Information Used To Determine Financial Responsibility Amounts Under CERCLA § 108(b)

As discussed earlier, CERCLA § 108(b)(2) requires that the level of financial responsibility must be ''based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction.'' Thus, in developing this proposed rule, EPA considered how to consider those factors. EPA considered two approaches to basing financial responsibility levels on the ''payment experience of the Fund.'' Under one approach, the Agency would consider the cost of past cleanups at similar facilities, and use those costs as a basis for financial responsibility. For example, EPA would look to historical cost data and, if a Superfund remedy at similar facilities averaged $X dollars, EPA would consider that the appropriate amount of financial responsibility for that class of facilities and promulgate a regulation requiring that amount at facilities in the class.

This interpretation would best be applied to the fixed amount methodology. Thus, if past Superfund actions at a class of facilities averaged $X dollars, the Agency would identify by rule that amount as the financial responsibility amount required for that class of facilities. EPA recognized limitations associated with this approach. For example, because it looks

[168] 301 Webster's II New Riverside University Dictionary (1988).

to historical data, it assumes that operations at historical facilities are similar to current operations, and that costs will be similar. The Agency recognizes, however, that past operating procedures, before the advent of environmental laws, were likely in many cases to give rise to environmental problems that current regulations and modern operating practices can prevent or minimize. In addition, Superfund cost data represents only a portion of the expenditures at historical facilities, especially those with ongoing cleanups or maintenance, and a uniform set of data that includes all expenditures at facilities is not available. However, EPA believes this approach is appropriate in some circumstances—for example, where current costs are available for an activity that is fairly consistent in cost from facility to facility. Thus, EPA has proposed adopting this approach to determine the financial responsibility amount for health assessment costs as discussed in section VI.D.4. of this preamble.

Under a second approach, EPA would look at components of response actions taken by Superfund in the past—that is, distinct activities Superfund paid for—at facilities within the to-be-regulated class, and determine the cost of those activities today. For example, if a Superfund remedy involved installing an impermeable cap at a surface impoundment, the Agency would calculate the cost of installing such a cap today at the regulated facility with a similar unit to determine the financial responsibility amount. This second approach to considering the ''payment experience of the Fund'' was used by EPA in developing the formula for determining financial responsibility amounts for response costs and natural resource damages under this proposal. The Agency solicits comment on these two approaches to basing financial responsibility under this proposal on the criteria in CERCLA § 108(b)(2).

It should be noted that the Agency's decision to not propose requirements in this rule based on a site-specific approach to determining financial responsibility amounts does not mean that the Agency has concluded that methodology is not appropriate under CERCLA § 108(b). In fact, following initial implementation of financial responsibility at facilities subject to this proposed rule, EPA may identify site-specific conditions that indicate a response action is needed at the facility, and that the current amount of financial responsibility implemented under CERCLA § 108(b) is not adequate to cover the costs associated with the response. In those cases, the Agency believes it could apply a site-specific methodology at the facility to determine a more precise amount of financial responsibility more consistent with the degree and duration of risk at the facility. EPA would increase the amount of financial responsibility required at the facility under CERCLA § 108(b) rather than apply CERCLA § 106 authority to require a separate financial responsibility instrument. The Agency solicits comment on this approach.

(b) Development of the Hardrock Mining Financial Responsibility Formula

EPA developed a financial responsibility formula for owners and operators of hardrock mining facilities to use to calculate the amount of financial responsibility that would be required under this proposed rule. EPA considered how to develop an amount of financial responsibility that reflected an estimate of funds that might be required in the event of a release from a regulated facility.

As described in section IV.B of this preamble, EPA is proposing to make the financial responsibility instruments available for all types of CERCLA liabilities enumerated in CERCLA § 107. Thus, in developing the financial responsibility formula, EPA sought to take into account the same three categories of costs (response costs (including both removals and remedial actions), natural resource damages, and health assessment costs) that may be incurred by owners and operators of facilities subject to the rule. To do so, EPA separately developed three formula components to estimate financial responsibility for each of those three categories. These three components—response costs, natural resource damages, and health assessment costs—make up the final formula.

EPA collected and analyzed data on both the total funds expended at CERCLA sites and the types of goods and services on which those funds were spent. Total funds expended were used to estimate both the health assessment component and the natural resource damage component, while the types of goods and services were used to estimate the response component. For each, this preamble discusses EPA's data collection efforts, how the Agency developed estimates of costs from that data, and how it developed the resulting formula.[169] EPA has followed the Agency's Peer Review Policy with respect to the underlying formula supporting this action. Specifically, EPA has conducted a peer review of the Background Document. Peer review materials, including charge questions, are available in docket for this proposed rule (Docket No. EPA–HQ–SFUND–2015–0781).

(i) Response Component

EPA collected information on response costs from national priorities list (NPL) and non-NPL CERCLA response activities. This data consisted of records of decision (RODs), settlements, actual expenditures to date by EPA, and estimated expenditures for present and future work by potentially responsible parties. EPA used these data to generate a best estimate of total response costs at these hardrock mining facilities. EPA was able to collect this information for 319 sites.

In addition to the total response cost data, EPA also collected data on specific activities conducted at 438 operable units at 88 NPL or Superfund alternative hardrock mining sites. From this data on activities themselves, EPA could link specific site features to releases or threatened releases of hazardous substances, and to remedies that incurred response costs. EPA found that thirteen site features [170] [171] served as the source of release that resulted in remedies within the following twelve categories: (1) On-site disposal (excavation, capping, covering, revegetation); (2) off-site disposal; (3) engineering and/or containment (other); (4) surface water diversion; (5) water treatment (other); (6) water treatment (lime addition); (7) no action; (8) alternative drinking water; (9) sediment dredging/disposal; (10) monitoring (all media and as separate remedy); (11) monitored natural attenuation/recovery; and (12) deconstruction/decontamination of buildings. EPA solicits comments on additional remedies or categories of CERCLA

[169] For a detailed discussion of the development of the formula, *see* the *CERCLA 108(b) Financial Responsibility for Hardrock Mining Facilities Background Document—Peer Review Draft* (Background Document), located in the docket for this proposal (Docket No. EPA–HQ–SFUND–2015–0781).

[170] The 13 site features include (in order of frequency): (1) Contaminated soils, (2) tailings (pond, pile), (3) waste rock or overburden, (4) contaminated sediments, (5) acid mine/rock drainage, (6) slag, (7) smelter emissions, (8) underground workings, (9) process areas and buildings, (10) leachate (from failed cap/cover or similar system), (11) demolition debris, (12) heap leach piles/leaching waste, and (13) open pits/pit lakes.

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response costs that do not appear in this list, as well as the data supporting the inclusion of those remedies.

(*aa*) Linking Response Categories to Current Cost Estimates

EPA's prior experience with CERCLA cleanups leads it to expect that similar types of remedies will continue to be selected for mining sites in the future. EPA also expects that for eleven of the twelve remedy categories described earlier (the exception being ''no action''), the magnitude of that cost will differ with changing site characteristics. For example, the expected costs of constructing a cap over a unit to prevent water infiltration can be expected to increase with the acreage of that cap. Thus, in order to produce more accurate estimations of costs at a particular facility, it is necessary to consider both specific response costs and specific response activities. However, EPA generally found that the response cost data discussed earlier were available in the form of payments or total expenditures. Since these payments or expenditures were aggregated across various activities, they could not be separated into more specific cost amounts (*e.g.,* the cost to construct a particular cap on a particular tailings impoundment).

Given this difficulty, EPA considered how to estimate the expected costs associated with these particular activities. EPA searched for existing, publicly available engineering cost estimates that contained costs specific to these activities. EPA found that such engineering cost data was readily available from cost estimates developed for state and Federal mining reclamation and closure plans, and associated documents. These engineering cost data were available for currently operating facilities potentially regulated under the proposed rule, and represented similar site features (*e.g.,* tailings facilities, open pits) as facilities for which prior response actions were taken. Thus, these data reflect recent engineering cost values appropriate for EPA's statistical analysis.

In order to monetize the expected costs for eight of the twelve types of remedies listed earlier, EPA linked these remedy types to similar tasks identified in the current engineering cost data. The remaining three CERCLA remedy types, ''No action,'' ''Alternative drinking water,'' and ''Monitored natural attenuation'' are excluded from the initial list of twelve remedy types. Since these three remedy types do not involve engineered controls, EPA was concerned that including them as part of a nationally-applicable rule could have the effect of producing an inadequate amount of financial responsibility for those sites where engineered controls were necessary. Therefore, as a conservative assumption to help ensure thea adequacy of the amount of financial responsibility should engineering controls prove necessary, EPA excluded these three remedy types from further consideration.

Also excluded was ''Sediment dredging/disposal.'' Although this element has appeared historically as a response category, EPA notes that it was already incorporated in the natural resource damages component. For example, the final restoration plan for the Upper Arkansas River/California Gulch Superfund site (one of the data points used in developing the natural resource damages multiplier) includes dredging of contaminated soils as a restoration alternative.[172] Thus, EPA believes that since this cost is already represented in the natural resource damages multiplier, it is inappropriate to duplicate that cost in the response component of the formula. EPA solicits comment on whether this activity is more appropriately included in the response component or the natural resource damages component of the formula.

''On-site disposal (excavation, capping, covering, revegetation)'' and ''Engineering/containment (other)'' were linked to engineering cost estimates categorized as backfill, portal closure, earthwork, revegetation, feature-specific stormwater controls, and source controls. These first two remaining categories were further linked to the specific site feature being addressed: Open pit, underground mine, waste rock, tailings facility, heap/dump leach, process ponds and reservoirs, and slag piles. Since not all currently operating facilities have all of these site features, this site-feature linkage allowed EPA to identify costs for only the features present at a given mine.

''Off-site disposal'' and ''Deconstruction/decontamination of buildings'' were linked to engineering cost estimates categorized as solid waste disposal, hazardous waste disposal, organic solution removal, building decontamination, contaminated soils disposal, and haulage and disposal. ''Surface water drainage'' was linked to drainage controls. ''Water treatment (lime)'' and ''Water treatment (other)'' were linked to engineering cost estimates categorized as site and water management, process fluid stabilization, neutralization, solution disposal, reclamation of well-field and disposal wells, seepage capture, and water treatment. Finally, ''Monitoring (all media and as separate remedy)'' was linked to engineering cost estimates categorized as groundwater and surface water monitoring, geotechnical stability monitoring, erosion and vegetation monitoring, fish and wildlife monitoring, and other short- and long-term monitoring.

While not specific to any remedy category, multiple remedies' operations and maintenance activities were linked to the reclamation and closure plan tasks of road maintenance, stormwater repairs, revegetation repairs, reclamation of monitoring and pumpback wells, well maintenance, evaporation pond maintenance, and stormwater, erosion, and vegetation maintenance. Additionally, all remedies were linked to reclamation and closure plan tasks necessary to conduct direct engineering work including mobilization/demobilization, engineering design/redesign, contingency, contractor profit and overhead, contractor liability insurance, payment and performance bonds, agency direct costs, and agency indirect costs. EPA solicits comment on the accuracy of these linkages, and specific data or examples that would indicate an alternative linkage should be made.

(*bb*) Response Component Data Collection

EPA sought through its engineering cost estimate data collection effort to accumulate as much recent, high quality cost information for currently-operating hardrock mining facilities as possible and represent the range of states and commodities produced. EPA obtained and sorted data from the Mining Safety and Health Administration (MSHA) and the U.S. Geological Survey (USGS) to generate a combined list of 354 facilities. To derive this group of 354, EPA identified facilities that would correspond to the scope of the proposed rule. Thus, EPA excluded from the combined MSHA/USGS data set, those facilities that were not identified in the 2009 *Priority Notice,*[173] as well as closed or abandoned facilities. Therefore, the data set consisted of active, intermittent, or temporarily idled mining or mineral processing facilities. Comprehensive lists of all data sources

[172] *See* Stratus Consulting Inc. (2010). *Restoration Plan and Environmental Assessment for the Upper Arkansas River Watershed.* Available at: *http://www.fws.gov/mountain-prairie/nrda/leadvillecolo/californiagulch.htm.*

[173] *See Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements,* 74 FR 37213, July 28, 2009.

are available in Appendices A through M of the Background Document.

EPA obtained a sample of 63 facilities' reclamation and closure plan engineering cost data. This 63 facility subset was representative of the frequency of states and commodities identified in the full universe of 354 potentially regulated mines. Thus, EPA expected it would be representative of the larger group of facilities. This dataset included costs as well as related inputs that drive these cost components. For example, acreage is an input of the Standardized Reclamation Cost Estimator model used to conduct several of the collected engineering cost estimates. One of the highest-dollar response categories, water treatment, also presented one of the smallest cost sample sizes with only 15 facilities represented. As a result, EPA supplemented the closure plan cost data on water treatment costs with data from the three CERCLA sites contained in EPA's CERCLA site data set, for which water treatment cost data were readily available, and could be disaggregated from the sites' full costs. EPA solicits comment on additional cost estimates, whether historical or current, that would appropriately represent active hardrock mining facilities. EPA solicits comment on data generally, and specifically regarding industrial minerals, slag pile, in-situ leach, and water flows. EPA solicits comment on expanding the water treatment variable to capture additional facilities that would necessarily need more advanced water treatment due to the nature of their leachate.

EPA subject-matter experts believed that other variables could explain the differences between higher and lower costs at sites based on their professional experience. First, these experts believed that water-related factors such as distance to groundwater or surface water, as well as net precipitation could influence the costs estimated for a site. Second, these experts believed that the process methods used could influence costs necessary for a site. These data are not included in the reclamation plan data collected. Therefore, EPA located and collected them from Environmental Impact Statements or other publicly available documents.

Water-balance-related data that were available in these public documents included precipitation, evaporation, distance to surface water, and depth to groundwater. EPA solicits comment on the collection of these water balance data. In particular, six of the hardrock mining facilities in EPA's data set did not contain depth to groundwater data. EPA solicits comments on depth to groundwater data for the six hardrock mining facilities for which data were not collected. These facilities are: Silver Bell (Arizona), Clear Creek (Colorado), Hibbing Taconite (Minnesota), SCRAM (Minnesota), Standard (Nevada), and Trenton Canyon (Nevada).

In addition to water-balance-related data, EPA collected data related to process methods for the four leaching processes identified at the 63 sites in EPA's data set. These process method data included the use of floatation, cyanide, acid, and in-situ leaching processes. EPA solicits comments on data characterizing the process methods for these 63 sites as well as how EPA might analyze such data.

For more details about the data collected, see Section 4 of the Background Document. EPA solicits comment on alternative uses of its actual cost data from Section 2.2 of the background document. EPA solicits comment on additional data points that may be more appropriately apportioned to other site features. EPA solicits comments on the use of a 62 percent upward adjustment based on Ernst & Young (2015). The Agency also solicits comment on the proposal to use the 2013 Reclamation and Closure Plan document for Pinto Valley.

(*cc*) Response Component Regression Analysis

EPA performed statistical analysis on the engineering cost data collected, for each response category. The purpose of this statistical analysis was to establish a numerical relationship between a limited number of a facility's site-specific characteristics and the resulting associated reclamation and closure plan costs. Once this relationship was established, it could be used to generate a sub-formula that results in an expected financial responsibility amount for each response category, on a nation-wide basis. To ensure the accuracy of the regressions, EPA solicits comment on whether the reclamation and closure plan data is accurately described in Appendix G of the Formula Background Document. Specifically, EPA solicits comment on the accuracy of the estimated cost figures, acres, and source control tags for the thirteen response categories, as described in Appendix G.

A number of site-specific engineering-based models generated the detailed engineering cost estimates collected by EPA. However, certain parameters appeared to be central to the workings of those calculations. For instance, capital costs appeared to be affected by the relevant acreage that these costs were applied. While EPA did not know the exact suite of variables that might be relevant for any particular response category, some variables were much more likely to be statistically significant based on the use of these variables in reclamation and closure plan cost estimates. As a result, EPA chose to conduct a bidirectional elimination stepwise regression that started with variables believed to be most significant and test the addition or deletion of individual variables. Further details on the regression methodology, as well as the results of the regressions are available in Section 5 of the Background Document.

These results generally confirmed the significance of the variables EPA expected to be predictive. EPA performed an additional 88 robustness tests to demonstrate that the regressions selected by the stepwise regression process were the best fit possible for the data. EPA solicits comment on the appropriateness of the bidirectional elimination stepwise regression used here as well as alternative methods that may be appropriate and justifications for using those methods. EPA also solicits comments generally on the steps and criteria used in the stepwise regression process as applied. In particular, EPA solicits comment on the retention of the source control variable in the heap/dump leach regression (including additional data points that would supplement the two source controls in the dataset) and on the addition or removal of variables from the starting suite of variables when such additions or removals were made. EPA solicits comment on influence points Continental and Chino Mines for the Interim O&M regression, and Phoenix Copper for Water Treatment regression.

Further, because the formula is trying to monetize potential future CERCLA liability response costs, in the absence of an actual release/response to monetize, a potential drawback of this approach of predicting levels of financial responsibility could be that future major incidents will not have sufficient assurance to cover the necessary response costs, and that there could be an associated risk that the rule will potentially require financial responsibility that may never be required. EPA solicits comments on this potential drawback to the chosen approach.

EPA also calculated overhead and oversight costs (OCs) as a percent of direct engineering costs rather than through regressions on site-specific characteristics. However, not every facility calculated or reported every category of oversight costs. Thus, to avoid biasing any of the oversight cost

estimates low, EPA calculated each oversight cost separately, and used only data from facilities which had calculated that oversight cost. EPA estimated each oversight cost category at each facility as a percent of engineering costs. This was done by dividing the oversight cost in question at a facility by that facility's total direct engineering costs. Once all facility-specific oversight cost percentages were calculated, EPA averaged these oversight cost percentages for each category. EPA solicits comment on the approach of a fixed percentage of direct engineering costs for estimating oversight costs.

(*dd*) Converting O&M Costs into a Net Present Value

Four of the response cost categories—interim O&M, water treatment, short-term O&M, and long-term O&M—represent the expected costs for activities over time. Thus, the regression equations for represent annualized amounts. These annualized amounts must further be converted into a single net present value, so that they can be included as part of the final formula, which represents a facility's total financial responsibility amount. EPA converted to net present value using the same equation as that presented in U.S. EPA (2001).[174]

EPA used an O&M period of ten years for converting both the short-term O&M and interim O&M costs into a net present value. This period has been discussed and used in guidance documents such as U.S. EPA and USACE (2000).[175] O&M after ten years could prove to be unnecessary, or continue indefinitely. The cost estimation formula uses a perpetual period of O&M for both water treatment and long-term O&M. EPA considered using a period of thirty years similar to the default long-term O&M period of thirty years historically used by EPA for purposes of cost estimation in the absence of detailed estimates of project duration (U.S. EPA, 1988).[176] However, more recent guidance relies less heavily on this default period and more heavily on the actual project duration of each alternative considered in the RI/FS process (U.S. EPA and USACE, 2000).

In addition, EPA's CERCLA data from hardrock mining facilities indicates that perpetual O&M expenditures are common. Specifically, in U.S. EPA (2004),[177] EPA's Office of Inspector General collected survey responses from regional experts regarding expected long-term O&M durations at 156 hardrock mining facilities. The median response from that survey was that long-term O&M at hardrock mining facilities would continue into perpetuity. Therefore, the financial responsibility formula uses a perpetual period of O&M for both water treatment and long-term O&M. EPA solicits comment on the timeframes used in the net present value conversion. Specifically, EPA solicits comment on whether justifications of alternate timeframes exist for long-term O&M.

Finally, annualized O&M costs are converted to a net present value based on the ten-year short-term and perpetual long-term time horizons seen in the CERCLA cost data using the rate of return of the Superfund. Analysis of these real rates of return from the Superfund yielded a geometric mean of 2.63 percent. This approach is also consistent with recent EPA guidance on O&M cost estimation processes in the separate context of CERCLA settlement agreements and unilateral orders (U.S. EPA, 2015) [178] which recommends using a discount rate representative of real investment returns. EPA solicits comments on whether and how future rates of return should be automatically used to update the 2.63 percent rate of return of the Superfund. The Agency also solicits comments on the use of net present value of O&M.

(*ee*) State-Specific Adjustment Factors

On average, the sub-total of overhead costs calculated by EPA was found to be 35.78 percent of direct engineering costs. However, a similar sub-total of oversight cost percentages was not estimated due to the region-specific nature of agency indirect costs. To calculate these percentages, region-specific indirect cost rates are multiplied by the national average agency direct cost percentage to estimate the agency indirect costs as a percentage of direct engineering costs. Adding agency direct cost percentage to the region-specific indirect cost percentages yields region-specific agency cost percentages. Total non-construction costs are estimated by adding the 35.78 percent overhead cost percentage sub-total to the region-specific total agency cost percentages. Using this approach, EPA calculated ten region-specific oversight cost percentages to be applied to the direct engineering costs estimated in the formula response components. These percentages can be found in Appendix II of the proposed rule.

Furthermore, the relationships estimated represent only a generic, nationwide engineering cost of a CERCLA response because the response category regressions were estimated using reclamation and closure plan cost data that had been normalized to national values. While this was necessary to perform regression analysis and develop a nationwide formula, the same labor and materials can have different prices in different locations. Hence, the resulting estimates described in earlier sections would immediately be inaccurate for any given state. To adjust for these locality differences in prices, the response component of the formula is multiplied by the most current state cost adjustment factors in USACE (2015).[179] These adjustment factors can be found in Appendix III of the proposed rule.

(ii) Natural Resource Damage Component

EPA collected data on both natural resource damages and natural resource damage assessment costs at hardrock mining sites from CERCLA court settlements and judgments, and voluntary payments. This effort resulted in data on 64 sites. EPA's data indicate that natural resource damages and response costs are not independent of each other. Instead, response actions have regularly been shown to influence natural resource damages. This is particularly true in the case of sites receiving technical impracticability

[174] *See* U.S. EPA (Environmental Protection Agency). 2001. *Groundwater Pump and Treat Systems: Summary of Selected Cost and Performance Information at Superfund-financed Sites*. EPA 542–R–01–021a. OSWER. Washington, DC 20460. December. Available at: *http://www.epa.gov/superfund/cleanup/postconstruction/p1report.pdf*.

[175] *See* U.S. EPA (Environmental Protection Agency) and USACE (Army Corps of Engineers). 2000. *A Guide to Developing and Documenting Cost Estimates during the Feasibility Study*. EPA 540–R–00–002. OSWER. Washington, DC 20460. July. Available at: *www.epa.gov/superfund/policy/remedy/pdfs/finaldoc.pdf*.

[176] *See* U.S. EPA (Environmental Protection Agency). 1988. *Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA* (Interim Final). EPA/540/G–89/004. OSWER. Washington, DC 20460. October. Available at: *www.epa.gov/superfund/policy/remedy/pdfs/540g-89004-s.pdf*.

[177] *See* U.S. EPA (Environmental Protection Agency). 2004. *Nationwide Identification of Hardrock Mining Sites*. Report No. 2004–P–00005. OIG. Washington, DC. 20460. March. Available at: *https://www.epa.gov/sites/production/files/2015-12/documents/20040331-2004-p-00005.pdf*.

[178] *See* U.S. EPA (Environmental Protection Agency). 2015. *Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders*. OECA. Washington, DC 20460. April 6. Available at: *https://www.epa.gov/sites/production/files/2015-04/documents/fa-guide-2015.pdf*.

[179] *See* U.S. Army Corps of Engineers, ''*Civil Works Construction Cost Index System*,'' Manual No. 1110–2–1304 (31 March 2012, revised through September 30, 2015). Available at: *http://www.publications.usace.army.mil/Portals/76/Publications/EngineerManuals/EM_1110-2-1304.pdf*.

waivers. When a technical impracticability waiver is issued, previously projected response costs may be reduced. However, the remaining contamination may lead to additional natural resource damages.

One example summarized in U.S. EPA (2012) [180] is the technical impracticability waiver at the Silver Bow Creek/Butte Area. At that site, an EPA evaluation concluded that the water quality in an affected alluvial aquifer could not be improved within a reasonable time frame even assuming the most extensive and costly alternatives. Thus, EPA issued a technical impracticability decision that waived cleanup levels for several constituents in that aquifer. However, when such an aquifer is left contaminated, trustees may seek natural resource damages for that aquifer. In the case of the Silver Bow Creek/Butte Area, this same groundwater appeared in the trustees' final restoration plan.[181] So while the technical impracticability waiver reduced response costs, it increased the natural resource damages. Thus, while the proportion of total liabilities relating to response costs and natural resource damages was altered, the overall magnitude was similar.

EPA notes that although the extent of response actions ultimately necessary as a result of a release may affect the relative portion of how much natural resource damages may be in comparison with damages, the total magnitude of potential liabilities (response costs and natural resource damages combined) will increase or decrease together. This is effectively captured by a multiplier. Thus, EPA uses a similar approach here as to U.S. EPA (2014) [182] where the Agency estimated natural resource damages as a percent of cleanup costs where both future cleanup costs and future natural resource damages were uncertain. This average percent was used as a multiplier for the purposes of estimating natural resource damages once potential future response costs were estimated. As with that previous study, the natural resource damages and response costs are uncertain, but EPA found that a similar relationship between damages and costs was presented.

Within this dataset, EPA had both natural resource damages and total response costs from the response component data collection for 24 sites. From this subset of 24, EPA divided the average natural resource damages by the average response costs to generate a hardrock mining-specific natural resource damages multiplier. This resulted in average natural resource damages and natural resource damage assessment costs of 13.4 percent of the response costs to account for natural resource damages and assessment costs. Thus, EPA included a multiplier of 1.134 in the financial responsibility formula for the natural resource damage component. EPA solicits comment providing additional natural resource data. The Agency also solicits comment on the appropriateness of a fixed multiplier to estimate natural resource damages within the hardrock mining class of facilities, particularly with respect to the risk of magnifying any potential bias from the response cost formula. EPA solicits comment on alternate approach such as the use of a geometric mean or median instead of the mean for the multiplier calculation. EPA solicits comment on the feasibility of running the response component of the model for facilities which EPA has natural resource damages data for an alternative method, if data is readily available.

EPA is also considering an alternative approach. Under this approach, EPA would use the median natural resource damages and natural resource damage assessment costs of 3.8 percent of the response costs to account for natural resource damages and assessment costs. Thus, EPA would include a multiplier of 1.038 in the financial responsibility formula for the natural resource damage component. EPA solicits comment on whether the median or average NRD multiplier is more representative for application to future hardrock mining facilities.

(iii) Health Assessment Component

Under 42 CFR 90.14, by the Agency for Toxic Substances and Disease Registry (ATSDR) is required to maintain documentation pertaining to the costs associated with all phases of a Public Health Assessment or a Health Consultation (HA) performed by the Agency to form the basis for cost recovery by EPA.[183] Upon EPA's request, ATSDR provided cost information for recently completed health assessments. ATSDR limited the data provided to the minimum, maximum, and average costs of health assessments conducted over the past 18 months (as of March 2016). ATSDR did not provide hardrock mining-specific data, and thus non-mining health assessment costs are included in this dataset.

Based on the information available to it, EPA adopted a fixed amount of $550,000 representing the average health assessment cost reported by ATSDR as the health assessment component of the proposed formula. Health assessments often make use of EPA-collected data. Because this approach avoids potentially costly data collection activities, a relatively low amount of $550,000 is not unexpected for an average cost. Furthermore, EPA expects future health assessments to generally be consistent with this amount since ATSDR has experience performing the same types of reports routinely. Finally, EPA notes that this average health assessment cost reported by ATSDR is consistent with additional second-hand sources of estimates that EPA presents in Section 7 of the Background Document. EPA solicits comment on the appropriateness of a fixed health assessment cost for all classes, including data that would justify any alternate approaches suggested.

(c) Hardrock Mining Financial Responsibility Formula

EPA's proposed rule requires that a facility's financial responsibility amount be adjusted for inflation to preserve the real value of the financial responsibility. This inflation adjustment must be made to the entire financial responsibility amount as calculated in 2014 dollars. The proposed rule uses an inflation

[180] *See* U.S. EPA (Environmental Protection Agency). 2012. *Summary of Technical Impracticability Waivers at National Priorities List Sites.* OSWER Directive 9230.2–24. August. Available at: *https://nepis.epa.gov/Exe/ZyNET.exe/P100EYIC.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2011+Thru+2015&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C11thru15%5CTxt%5C00000005%5CP100EYIC.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL.*

[181] *See* Butte Natural Resource Damage Restoration Council (BNRC) and Montana Natural Resource Damage Program (NRDP). 2012. *Butte Area One: Final Restoration Plan.* December. Available at: *https://dojmt.gov/wp-content/uploads/Final-BAO-Restoration-Plan.pdf.*

[182] *See* U.S. EPA (Environmental Protection Agency). 2014. *Regulatory Impact Analysis (RIA) for EPA's 2015 Coal Combustion Residuals (CCR) Final Rule.* OSWER. Washington, DC. December. Available at: *www.regulations.gov* Document ID#: EPA–HQ–RCRA–2009–0640–12034.

[183] *See* 42 CFR 90.14 Documentation and cost recovery: (a) During all phases of ATSDR health assessments and health effects studies, documentation shall be completed and maintained to form the basis for cost recovery, as specified in § 107 of CERCLA; (b) Where appropriate, the information and reports compiled by ATSDR pertaining to costs shall be forwarded to the appropriate EPA regional office for cost recovery purposes.

factor derived from the most recent Implicit Price Deflator for Gross Domestic Product (GDP) published by the U.S. Department of Commerce in its Survey of Current Business. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for 2014. EPA selected the Implicit Price Deflator for the GDP as that has become the Department of Commerce's favored basis for the Implicit Price Deflators a representation of national output. Furthermore, the data is readily accessible from the Department of Commerce's Bureau of Economic Analysis providing for transparent implementation.[184] The Agency solicits comment on the appropriateness of the Engineering News-Record Construction Cost Index as an alternative inflation adjustment.

Additionally, in the absence of a site-specific remedial investigation/feasibility study (RI/FS) or ROD, EPA cannot categorically determine that source controls and water treatment activities would not be necessary to minimize the volume, toxicity, or mobility of hazardous substances. Therefore, as a conservative assumption to help ensure the adequacy of the amount of financial responsibility should source controls and water treatment prove necessary, EPA assumes that both will be used, and sets the variables corresponding to the activities equal to one for all hardrock mining facilities calculating CERCLA § 108(b) financial responsibility amounts. EPA solicits comment on two alternatives to this approach that could be used alone or in conjunction. In the first alternative, EPA solicits comment on whether a weighted average of costs with and without source controls or water treatment would be appropriate. The weights for this average would be determined based on historical use of these responses. EPA also solicits comment on whether a conservative upper confidence interval such as the 95 percent confidence levels presented in Appendix J of the background document would be appropriate to avoid underestimating future financial responsibility needs.

Incorporating the net present value calculations and the assumptions of source controls and water treatment into the regression results, the response category equations for the response component are:

(1) Solid and hazardous waste disposal category = $2,600,000 [185]

(2) Open pit category = $5.07\times10^{(4.24+1.08\times\mathrm{Log}_{10}[\text{Open Pit Disturbed Acres}])}$

(3) Underground mine category = $4,500,000 for an underground mine with hydraulic head or $200,000 for an underground mine otherwise.

(4) Waste rock category = $1.85\times10^{(5.18+0.75\times\mathrm{Log}_{10}[\text{Waste Rock Disturbed Acres}])}$

(5) Heap/dump leach category = $2.29\times10^{(4.57+1.01\times\mathrm{Log}_{10}[\text{Heap and Dump Leach Disturbed Acres}])}$

(6) Tailings category = $1.71\times10^{(5.32+0.68\times\mathrm{Log}_{10}[\text{Tailings Disturbed Acres}])}$

(7) Process pond and reservoir category = $1.64\times10^{(4.29+1.03\times\mathrm{Log}_{10}[\text{Process Pond and Reservoir Disturbed Acres}])}$

(8) Drainage category = $9.56\times10^{(3.42+0.57\times\mathrm{Log}_{10}[\text{Total Disturbed Acres}+1])}$

(9) Slag pile category = $64,000×[Slag Pile Acres] [186]

(10) Interim O&M category = $\{1.46\times10^{(6.04+0.01\times[\text{Net Precipitation}]+0.34\times\mathrm{Log}_{10}[\text{Heap and Dump Leach Disturbed Acres}+1]+0.10\times\mathrm{Log}_{10}[\text{Tailings Impoundment Disturbed Acres}+1])}\}\times\{1/0.0263\}\times\{1-(1/[1.0263^{10}])\}$

(11) Water treatment category = $\{1.16\times10^{(3.22+1.10\times\mathrm{Log}_{10}[\text{Flow}]+0.70\times[\text{In-Situ Leach}])}\}/0.0263$

(12) Short-term O&M and monitoring category = $\{1.82\times10^{(4.01+0.38\times\mathrm{Log}_{10}[\text{Total Disturbed Acres}+1])}\}\times\{1/0.0263\}\times\{1-(1/[1.0263^{10}])\}$

(13) Long-term O&M and monitoring category = $\{1.64\times10^{(3.12+0.58\times\mathrm{Log}_{10}[\text{Total Disturbed Acres}+1])}\}/0.0263$

Furthermore, the cost equation for water treatment requires the input of gallon per minute flows that require treatment. However, as discussed earlier, EPA calculates the potential costs associated with the use of source control covers for many site features. Albright (2015) [187] provides results of EPA's *Alternative Cover Assessment Program* (ACAP). These results indicate that such controls in place will necessarily reduce the amounts of seepage that may require capture and treatment prior to discharge. Thus, EPA expects that source controls would have the effect of reducing the expected volumes of water requiring treatment. The average infiltration for the ACAP data set was five percent of precipitation. As a result of these considerations, EPA has adopted the presumption of 95 percent effectiveness for source control covers, resulting in a residual five percent infiltration based on gross precipitation. EPA solicits comment on data demonstrating that source controls reduce the costs of diversion and/or O&M other than water treatment.

This results in flows being calculated as $0.05 \times \text{Precipitation} \times [\text{Total Disturbed Acres}] \times 0.05166$ for all flows except for underground mine flows and in-situ leach flows which are not assumed to receive the same types of source controls evaluated in ACAP. The Agency solicits comment on this approach for calculating the gallons per minute flow at a facility. EPA also solicits comment providing data demonstrating that source controls reduce the costs of diversion and/or O&M other than water treatment. EPA solicits comment on the exercise of validating the formula by running it for CERCLA sites that have incurred costs across all site features.

For a hypothetical facility with a single site feature of each type (*e.g.,* a single heap leach), EPA shows the proposed financial responsibility formula in Equation 1. EPA solicits comment on the appropriateness of this draft formula developed in the formula-approach to determine a reasonable amount for CERCLA § 108(b) financial responsibility.

[184] *See* Table 1.1.9, Implicit Price Deflators for Gross Domestic Product. Available at: *http://www.bea.gov/iTable/iTableHtml.cfm?reqid=9&step=3&isuri=1&903=13.*

[185] No variables were found to predict the variability in solid and hazardous waste costs. Thus, an average cost was applied as discussed in Section 5 of the Background Document.

[186] Slag piles were represented by only one cost data point, and therefore were included as a fixed cost of $64,000 per acre based on that data point.

[187] *See* Albright, William. 2015. *Final Covers for Mine Tailings.* Desert Research Institute Clu-In Seminar. Available at: *https://clu-in.org/conf/tio/mining_052015/slides/Albright_Day_Two.pdf.*

Equation 1

$$TotalFinancialResponsibility_y = \frac{Deflator_{y*}}{D_{eflator2014}} \times \left(\left[\sum_{i=1}^{n} ResponseCost_i\right] \times [1 + OverheadOversight_r] \times StateAdjustmentFactor_s \times 1.134 + \$550{,}000\right)$$

Where:

$Deflator_y$ = the most recent available GDP Implicit Price Deflator for year *y;* and

$Deflator_{2014}$ = the GDP Implicit Price Deflator for 2014

i = the *i*th response category (*e.g.,* water treatment costs);

n = the total number of relevant response categories;

r = EPA region *r* (*e.g.,* EPA Region 3); and

s = state *s* (*e.g.,* Montana).

(d) Inputs to the Financial Responsibility Formula

To implement the formula and calculate a financial responsibility amount for the facility, the owner or operator will have to input facility information. The Agency anticipates that the information required by the formula will largely be existing information, and that most facilities will not have to develop information to implement the financial responsibility formula. EPA solicits comment on whether the information required is largely existing at facilities.

The first piece of information required is acreage. For the site feature-specific calculations, the acreage is the total of all areas covered by the particular site feature. For example, a facility with two waste piles would add the acreage of each together and input the total acreage into the calculation. For site-wide calculations, such as short-term O&M, the acreage entered would be the entire area covered by the hardrock mine and/or mineral processor.

Several inputs to the formula are yes/no determinations. These include the presence of a pressurized bulkhead, in-situ leaching, and underground mines. If these are not present, the owner or operator should enter a zero into the formula.

(e) Reductions to the Financial Responsibility Amount

The Agency is proposing under § 320.63(c) to allow (but not require) owners or operators to reduce the response cost component under § 320.63(b) by making an adequate demonstration that risk reducing regulatory requirements are in place. Owners and operators will have to demonstrate that they meet specific minimum standards for various formula components, along with a general performance standard, and other requirements. This approach is specifically designed to account for reductions in risk at a facility that may result from compliance with applicable Federal, state, tribal, and local requirements. The Agency solicits comment on this approach.

In developing these proposed requirements, EPA sought to balance a number of competing concerns. EPA desires to account for risk-reducing effects of compliance with other programs, while acknowledging that requirements for hardrock mining and mineral processing facilities, and implementation of them, vary substantially across the country. The CERCLA § 108(b) proposed rules, however, are nationally applicable. EPA was thus concerned that, should it allow an owner or operator to invoke other requirements as justification for reducing the amount otherwise required by the formula, it should do so only to the extent that reductions can confidently be tied to reductions in risk in a nationally-applicable rule. Similarly, in order for EPA to allow an owner or operator to reduce the amount of financial responsibility that it must obtain under CERCLA § 108(b) based on its compliance with non-CERCLA regulatory requirements imposing future risk-reducing controls, EPA must be confident that those non-CERCLA requirements will have their intended risk-reducing effects, by ensuring the controls will be implemented when necessary. Lastly, as discussed earlier, EPA has sought to develop an effective, nationally-applicable formula that can be readily applied by the regulated community and overseen by EPA. EPA is accordingly proposing to allow for simple, all-or-nothing reductions for the formula sub-components, when they can be justified. In sum, therefore, this proposed rule allows an owner or operator to rely on other regulatory controls in order to obtain reductions in the amount of CERCLA financial assurance it must obtain, but includes several conditions that must first be met by the owner or operator. EPA intends for this approach to allow for a more tailored amount of financial responsibility under the nationally-applicable formula, while still providing assurance that the resultant amount is consistent with the level of risk.

First, the reductions incorporate a general performance standard in paragraph 326.63(c). In order to qualify for a reduction, the owners and operators must be prepared to demonstrate to EPA that any requirements relied upon under paragraph 320.63(d) also meet the general standard, that the engineering requirements will result in a minimum degree and duration of risk associated with the production, transportation, treatment, storage, or disposal, as applicable, of all hazardous substances present at that site feature. This general requirement will provide a benchmark against which the controls can be measured. In addition, this provision is intended to reflect that if the general performance standard is met, the proposed approach allows for a complete reduction from the financial responsibility formula component. Where the requirements do not result in a minimum level of risk, EPA cannot be confident that a complete reduction for that cost component is warranted.

Next, EPA is proposing to require that any of the requirements relied upon be enforceable against the owner or operator claiming the reduction, that they have in place adequate financial responsibility to assure that the requirements will be implemented, and that they certify that the facility is in compliance with the requirements. These conditions are intended to ensure that the underlying controls that form the basis of the risk reduction are highly likely to occur and thereby achieve their intended risk-reducing effect.

Third, EPA is proposing to require that the owner or operator certify that the facility is in compliance with the requirements relied upon in claiming a reduction to the facility's financial responsibility amount. This condition is intended to ensure that the controls

upon which the reduction is based are, in fact, currently implemented at the facility.

Fourth, the proposed rule also includes a general requirement that the owner and operator provide the information necessary for EPA to evaluate the claimed reductions. Specifically, § 320.63(c)(2) provides that information submitted must provide sufficient and detailed supporting information adequate to allow EPA to evaluate the adequacy of the financial assurance and of the underlying requirements for meeting the reduction.

Finally, EPA is proposing specific minimum standards for the various categories of reductions.[188] These are specified in § 320.63(d)(3). This portion of the proposed rule provides the criteria that owners or operators must meet for particular reductions. The performance standards in paragraph (c) describe objectives for reducing risk at facilities and include future engineering controls and practices that reduce the risk associated with the hazardous substances at the site. That paragraph provides reduction criteria for each component of the maximum financial responsibility formula—capital costs, interim O&M, short-term O&M, long-term O&M, water treatment, hazardous materials management, and surface water drainage. For capital costs, the paragraph provides reductions for each site-feature category—open pits, underground mines, waste rock, heap and dump leach, tailings impoundments and stacks, process ponds and reservoirs, and slag piles. Owners and operators that meet the criteria for a formula component reduction would not have to calculate financial responsibility for that component. Because the natural resource damage component is calculated by a multiplier, this component would produce a correspondingly smaller amount, as the reductions are claimed.

EPA solicits comment on the proposed reductions to the financial responsibility amount. EPA solicits comment specifically on whether the Agency has identified the appropriate criteria for the reductions, and whether the reduction criteria will provide incentives for owners or operators to implement more protective practices at their facilities to lower their financial responsibility amounts. EPA solicits comment on whether the criteria for the reductions are described in sufficient detail to allow for effective implementation and, if not, how they might be modified. EPA solicits comment on whether the reduction criteria are likely to be complied with and/or enforced such that, at the applicable time, risk at the facility will, in fact, be reduced.

EPA solicits comment on whether alternate or more flexible engineering standards can substitute for some or all of the numeric engineering standards in the proposed reduction criteria (e.g. planning for a 200-year storm event, reduction of net precipitation by 95 percent). In addition, EPA requests comment on whether the proposed reduction criteria would limit flexibility necessary for innovative or different site-specific approaches and, if so, how those might be preserved under the proposed rule. EPA also invites comment on a possible role for third-party certifiers or other regulatory authorities in identifying alternative, protective site-specific controls as a basis for financial responsibility reductions. EPA also requests comment on whether other regulatory programs already impose the requirements that would satisfy the reduction criteria. Finally, EPA solicits comment on allowing reductions to the financial responsibility amount for other risk-reducing practices and/or controls (e.g., voluntary practices) that are implemented at hardrock mining facilities that should be accounted for in the reductions, and on how, if reductions were allowed for such practices and/or controls, EPA could assure that those controls would remain in place and be effective over time where there is no regulatory program overseeing their maintenance and operation.

As discussed above, EPA is seeking to develop reduction criteria standards that are appropriate in the context of a nationally applicable rule. The Agency requests comment on whether any particular reduction criteria in paragraph 320.63(c) might be inappropriate under particular facility conditions that could still be defined in the context of a national rule. Specifically, EPA requests that commenters identify particular facility conditions where a nationally applicable standard different from the reduction criteria proposed should be applied. EPA requests that commenters identify both those alternative facility conditions and any appropriate reduction criteria with particularity. EPA is particularly interested in objective criteria that define facility conditions that could be verified by a certified professional.

Program Deferral Approach

As described above, EPA is proposing to allow reductions to the financial responsibility amount for the response component of the financial responsibility formula. Those reductions are based on criteria established in the rule for each of the thirteen response categories that together determine the response component amount. EPA is proposing that eligibility for the reductions be determined by owners and operators on a site-specific basis, subject to EPA review.

EPA has also considered whether reductions to the financial responsibility amount could be made by EPA, on a broader basis, to avoid expenditure of facility resources to determine eligibility for reductions, and reduce the burden on EPA to review each facility's claimed reductions individually. EPA is therefore also soliciting comment on whether the rule should also allow for EPA to conduct a programmatic review of other regulatory requirements and their implementation, with the objective of determining whether the reduction criteria are met across the program in question. Such a program deferral approach would provide for programmatic-based reductions in situations where the program meets the requirements for deferral of CERCLA § 108(b) requirements for the full response component of the financial responsibility formula—that is, for all facilities and all response categories.

Under this approach, owners and operators of facilities would not be required to comply with the requirements to calculate a financial responsibility amount and to obtain a financial responsibility instrument under EPA's CERCLA 108(b) regulations after EPA determines that a state or federal program meets certain criteria. The remainder of the requirements of Part 320 would remain applicable at the facility (e.g., notification to EPA, public notice requirements). Facilities would remain subject to these other requirements in order for EPA to monitor the regulated universe and ensure the continuing validity of any deferral determination. EPA would be able to withdraw its determination and impose all CERCLA § 108(b) requirements if the requirements for deferral are no longer met.

The criteria for deferral would be designed to assure that EPA would be able to make a program-wide determination that facilities regulated

[188] *See* U.S. EPA, Office of Land and Emergency Management, *Reductions Technical Support Document: Financial Responsibility Requirements under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry Proposed Rule,* November 30, 2016 for discussion of the development of the reduction criteria.

by a particular program would be subject to, and in compliance with, requirements that will result in a minimum degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of all hazardous substances present. This would involve EPA making a determination that: (1) The federal or state program has authority to impose all of the requirements necessary for the reductions described in proposed 320.63(d); (2) the program would impose those requirements on the same regulated universe subject to the proposed rule; (3) the program ensures that each facility obtains adequate financial assurance to ensure the other requirements will be implemented; and (4) the requirements will be enforced to assure compliance.

EPA recognizes potential advantages to this approach. First, deferral of these requirements would minimize the implementation of the CERCLA § 108(b) rule at facilities that are already subject to programmatic requirements that, if implemented and enforced, can be determined to result in a minimum level of risk, thereby focusing implementation resources on the remaining universe of facilities with less protective practices. This approach would also reduce costs for owners and operators subject to programs that qualify for deferral of CERCLA § 108(b) requirements, as they would not have to submit information to support the calculation of a financial responsibility amount, or the reductions to that amount. Finally, providing for deferral provides an incentive for programs to adopt the necessary requirements to comply with the reduction criteria.

At the same time, EPA recognizes several disadvantages to the programmatic deferral approach. First, EPA is concerned that it may be difficult for the Agency to ensure that facilities remain in compliance with the underlying requirements, and thus ensure that the facilities continue to present a minimum degree and duration of risk over time. Potential problems could include the necessity for EPA to monitor changes to permitting regimes and substantive technical requirements. EPA is also concerned about how it could ensure that the financial assurance actually provided by every facility under a given regulatory regime is sufficient to ensure that the reduction criteria would be met in practice. Without such an assurance, EPA may find it difficult to conclude that the regulatory program requirements relied upon for the deferral determination will result in minimum risk. This concern is presented particularly where the determination of the amount of financial assurance is subject to the discretion of the regulator, instead of being identified with particularity in the terms of the regulations. In this case, EPA is unsure how it could make a broad-based determination that financial assurance requirements will be sufficient, if they have potential for varying stringency in practice. Finally, EPA is concerned that as a practical matter it may be difficult for the Agency to withdraw a programmatic deferral once granted, even where there is evidence that the criteria for programmatic deferral are no longer met. Thus, EPA expects that any deferral option would necessitate an oversight mechanism short of full withdrawal. EPA also expects that a dispute resolution process to resolve differences that arise among implementers would be an important component of a programmatic deferral approach.

It should be noted, however, that in taking this approach, EPA would not expect to review Federal and state closure and reclamation programs for adequacy, or to judge the quality or efficacy of those programs. EPA's concern would be whether requirements meeting the reduction criteria, designed for purposes of CERCLA § 108(b), are imposed and enforced at facilities, and secured with financial assurance adequate to assure their implementation. Those questions are separate from the question of whether the Federal or state closure program is adequate for its intended purpose or whether the financial assurance required is adequate financial responsibility for the purpose of that program.

EPA solicits comment on the programmatic deferral approach. EPA particularly solicits comment on whether regulators would be interested in seeking an EPA determination of programmatic deferral, whether existing programs would qualify for programmatic deferral based on the proposed reduction criteria, whether commenters believe EPA could assure compliance with the proposed reduction criteria if a programmatic deferral was implemented, how a conflict resolution process might be developed and implemented, and how a programmatic deferral approach might be improved.

Partial Program Deferral Approach

EPA also solicits comment on whether to consider partial deferral from the response component of the formula where a federal or state program met the criteria for deferral for some but not all of the thirteen response categories. This would result in a requirement to calculate a financial responsibility amount and to obtain a CERCLA § 108(b) instrument, for a lower overall amount. This would not, however, otherwise change the operation of the rule in practice. As was discussed in section IV.D of this preamble, because the formula employs an aggregation of individual costs to obtain an overall amount for the facility, the individual cost components are not themselves intended to represent any sub-limits within the actual financial responsibility instrument—in other words, the total amount of funds would be available for any future Superfund action anywhere across the facility, and would not be tied to particular site features. This would remain the case in any partial deferral approach. For example, a program might include requirements that would satisfy the reduction criteria for the waste pile response category but not for the open pit category. In that situation, under this approach, owners or operators would not have to calculate an amount for waste pile areas at their facilities, or make the demonstrations necessary to qualify for reductions to that amount. Those facilities would still have to calculate a financial responsibility amount for open pit areas at their facilities, and any other portions of the formula not subject to an EPA partial deferral determination. The total amount of funds would be available for any future Superfund action

EPA sees a potential advantage to the regulated community from such an approach, because of the timing requirements of the statute. As was discussed in section VI.D.2 of this preamble, CERCLA § 108(b)(3) includes a statutory phasing provision that requires financial responsibility requirements to be imposed as quickly as can reasonably be achieved but in no event more than four years after the date of promulgation of the final rule. Thus, EPA has included provisions in the proposed rule reflecting this provision (§ 320.61). Owners and operators will need to comply with the requirement to calculate a financial responsibility amount and obtain a CERCLA § 108(b) instrument in accordance with the phase-in provisions of the proposed rule, until EPA makes a final determination on deferral. EPA's ability to make any deferral decisions (partial or complete) quickly, may in turn depend upon the actions of another regulator to make changes to its regulations, and/or the resources available to the Agency to undertake the necessary reviews. A partial program

deferral approach, even if adopted on a temporary basis, may allow EPA to make more rapid determinations on deferral requests, while federal and state mining programs make any necessary modifications to qualify for programmatic deferral. On the other hand, a partial deferral approach may increase the burden on EPA to undertake multiple reviews of many different programs.

EPA solicits comment on this approach. EPA requests comment on any drawbacks to allowing for partial deferral and, if the Agency were to adopt this approach, whether this approach should be a long-term component of the CERCLA § 108(b) requirements, or whether it should be a temporary mechanism to allow time for program modifications necessary to comply with the reduction criteria.

Partial Reductions Within Formula Sub-Components

Finally, EPA is also soliciting comment on whether partial reductions should be allowed within the formula sub-components, and how partial reductions might be structured. As was explained above, EPA is proposing to allow for all-or-nothing reductions when all reduction criteria are met, and when the general performance standard (and other requirements) are met. As also explained above, one key consideration is how to ensure that the reductions can confidently be tied to reductions in risk in a nationally-applicable rule. Accordingly, EPA does not expect that allowing partial reductions for a response category amount based on partial compliance with the reduction criteria would be appropriate, as the reduction criteria are not intended to reflect proportional reductions in risk—rather, EPA's intent is to establish a combined system of requirements that together, would result in a set of conditions that result in a minimum degree and duration of risk. Nonetheless, EPA solicits comment on whether partial reductions should be allowed for response categories. EPA requests information regarding how the amount of a partial reduction could be determined, and the basis upon which EPA could apportion the reduction in risk among the reduction criteria to assign a corresponding decrease in the financial responsibility, while still providing assurance that the resultant financial responsibility amount will be consistent with the level of risk.

5. Information Submission and Recordkeeping Requirements (§ 320.64)

Owners or operators are required under § 320.66 to submit information to support the calculation of financial responsibility at their facility, and to maintain that information for a period of three years. The information submitted must be in sufficient detail to enable EPA to review the cost estimate and determine its adequacy.

The Agency anticipates that the type of information can be found in existing documents such as the owners or operator's plan of operations, reclamation and/or closure plans, and permits. EPA solicits comment on these reporting and recordkeeping requirements.

6. Third-party Certification (§ 320.65)

EPA is proposing that elements of the calculation of the financial responsibility amount submitted to EPA be certified by an independent qualified professional engineer. EPA believes that this requirement would improve the accuracy of submissions, and would thereby facilitate implementation of the rule by requiring less review by EPA of financial responsibility amount submissions.

The requirements to determine a financial responsibility amount that are proposed in § 320.63 include a formula in § 320.63(b) and criteria for reducing the financial responsibility amount in § 320.63(c). EPA solicits comment on the use of professional certifications in the implementation of those requirements. EPA is particularly interested in which elements of the formula would be best suited to certification by an independent professional engineer, what other independent professional certifications might be appropriate, and whether independent professional certifications are beneficial.

Proposed § 320.65 includes the requirement that the qualified professional engineer that certifies the financial responsibility amount be ''independent.'' EPA is considering whether the requirement for independence would help strengthen the certifications under this proposal, and whether that extra level of protection is necessary in this rule where EPA is not the permitting authority and will therefore have less familiarity with the facility than it would in other circumstances (e.g., RCRA closure requirements under 40 CFR part 264 and Part 265). EPA solicits comment on the proposed requirement for independence of the qualified professional engineer, on whether a requirement that a qualified professional engineer be independent would strengthen the certification requirement, and on whether such a requirement is appropriate under this proposed rule. EPA wants to ensure that the definition of ''independent'' contribute to the objectivity of the certifier. Thus, EPA solicits comment on criteria to define ''independent,'' including criteria related to personal, professional, and economic relationships between the owner or operator and the certifier.

Finally, EPA solicits comment on whether certification by other professionals other than professional engineers could be incorporated into this proposed rule to facilitate implementation. For example, EPA has heard from states that they are using third parties to review site features, bonding requirements, and financial documents. EPA request comment on the experience of implementers and the regulated community on the use of professional certifications in regulatory programs, including the benefits and disadvantages of such an approach.

7. Continued Risk at Hardrock Mining Facilities

Since issuing the 2009 *Priority Notice,* EPA has continued to gather data and information on hardrock mines, practices, and risks associated with classes of facilities within the industry. EPA's review of available data indicates abundant evidence that hardrock mining facilities continue to pose risks associated with the management of hazardous substances at their sites. EPA reached this determination after further identifying and analyzing various sources of data, including: (1) CERCLA site data to better understand the types and sources of releases that occurred at National Priority List (NPL) and NPL-equivalent cleanups, (2) Toxics Release Inventory (TRI) and Resource Conservation and Recovery Act (RCRA) Hazardous Waste Biennial Report (BR) data to determine which facilities reported CERCLA hazardous substances/hazardous wastes, (3) Emergency Response Notification System (ERNS) to learn about the types and causes of releases reported, and (4) numerous existing reports that evaluated releases that occurred at hardrock mining and processing facilities.[189] Each of these are further discussed later in this preamble.

In developing this proposed rule, EPA also documented examples of releases and threatened releases of hazardous substances from recent and current mining operations. The documents developed by EPA can be found in the docket for this rulemaking, and are discussed below.

[189] These databases are all available on the EPA Web site—*www.epa.gov.*

a. Releases from Mining and Mineral Processing Facilities [190]

This document discusses sources of releases at approximately thirty recently or currently operating mines and mineral processing facilities that had no previous significant legacy mining issues. These releases to the environment from mining and mineral processing activities, including tailings impoundments, waste rock piles, open pits, and leach pads were subsequently mitigated using CERCLA or CERCLA like actions under Federal and/or state statutory authority. Mines that have predicted future discharges to the environment and have proposed either preventative actions or CERCLA like mitigations also are discussed.

Examples of releases at currently operating facilities discussed in this document include:

Smoky Canyon Mine/Pole Canyon Overburden Disposal Area (ODA): At the Smoky Canyon Mine in Idaho, phosphate ore is extracted from a series of open pits, located on the eastern slope of the Webster Range between Smoky Canyon and South Fork Sage Creek. To extract the ore, JR Simplot removes and disposes the overburden nearby; the Pole Canyon Overburden Disposal Area (ODA). The Pole Canyon ODA is an external disposal area that covers approximately 120 acres. Downstream of the ODA, selenium concentrations in groundwater and surface water emanating from the toe of the ODA exceed risk-based screening-level benchmarks for human receptors (surface water and groundwater) and ecological receptors (surface water). Removal and remedial actions are currently ongoing at the site.

Buckhorn Mine: The Buckhorn gold mine owned by Kinross Corp. located in Washington has been in operation since 2007. The site is an underground mine that includes waste rock. Water management during spring snow melt has been a well-documented problem at the mine. In 2011 and 2012, the Buckhorn Mountain mine's groundwater capture zone failed to contain spring rains and snow melt, resulting in contaminated water reaching Gold Bowl Creek. Water generated in the underground mine can carry high concentrations of heavy metals such as copper, lead and zinc that must be captured and processed before being discharged at approved outfalls. Violations in 2011 include allowing water discharges causing slope instability and erosion, and for discharging water at an unauthorized point. The mine is required to capture contaminated groundwater from around mine excavations and tunnels and under surface stockpiles, and pump it to a treatment plant. Since operations began at the mine in 2007, the Washington Dept of Ecology has issued $62,000 in penalties, six notices of violation and six administrative orders directing the company to control stormwater, rectify groundwater capture zone inadequacies, prevent slope failures, and comply with permit limits for nitrates, sulfate, acidity, copper, lead, zinc and solids from stormwater ponds.

Florida Canyon Mine: The Florida Canyon gold and silver open pit mine with cyanide heap leach operation, located in Nevada, has been in operation since 1986. A groundwater plume consisting of weak acid dissociable (WAD) cyanide, mercury and nitrate was identified on the west side of the mine's leach pad and appeared to be related to process solution leakage. As a result of continued contamination of groundwater the Nevada Division of Environmental Protection (NDEP) issued a Finding of Alleged Violation and Order in August 2012. BLM also placed the mine in non-compliance in August 2012. The facility has identified and mitigated groundwater contaminant sources, as well as operated and optimized the groundwater plume pump-back system and evaluates on a quarterly basis to verify that the plume migration has been halted, and that groundwater cleanup is occurring.

Jerritt Canyon: The Jerritt Canyon mine located in Nevada has been in operation since 1981. The gold and silver mine is an open pit and underground cyanide vat leach operation that also processes refractory ores using both roasting and chlorination processes. Seepage from the Tailings Storage Facility 1 (TSF–1) was detected in the alluvium in 1987. In an effort to address the seepage issue nine trench drains were constructed along the embankment toes in 1988 to intercept and collect seepage from the impoundment. As of January 2015, a ring of ninety monitoring wells surrounded TSF–1, of which 76 are operational. The facility is required to operate, maintain and monitor the Seepage Remediation System at all times to ensure the capture of affected groundwater, to preclude further migration, and to ensure contraction of the overall extent of the TSF–1 seepage groundwater contaminant plume. Contamination from TSF–1 leakage has degraded groundwater in the immediate vicinity, including in some cases with antimony, arsenic, cadmium, magnesium, manganese, mercury, selenium, and WAD cyanide. Authorization by NDEP to impound tailings slurry into another tailings storage facility (TSF–2) was granted in July 2013 and almost immediately, the 150 gpd permitted leak detection rate was exceeded. The facility believed that the specific cause of the exceedance was unknown but it was assumed to be puncture(s) in the primary liner system and/or residual meteoric waters that entered the system during liner repairs before operation began. After several unsuccessful attempts at addressing the leakage, the facility opted to manage TSF–2 as a single-lined facility and agreed to install vadose zone wells outside the periphery of TSF–2.

b. Overview of Practices at Hardrock Mining and Mineral Processing Facilities and Related Releases [191]

EPA also gathered information on current mining and mineral processing practices to better understand the extent to which present day practices might have changed, determine whether currently operating hardrock mining and processing facilities continue to release CERCLA hazardous substances, and evaluate the present and future concerns regarding these releases. Initial research efforts focused on characterizing practices within each commodity sector. However, hardrock mining encompasses multiple commodities that represent a broad range of activities and marketable products. Through initial research and consultation with mining experts, EPA concluded that, for the most part, many of the mining, mineral processing, and waste management practices that are in widespread use within the current U.S. hardrock mining industry have a common thread regardless of the commodity. EPA therefore concluded that rather than evaluate releases on a commodity by commodity basis, a better approach was to focus on commonly employed practices and, when necessary, also evaluate commodity-specific issues and processes. EPA thus identified the following thirteen hardrock mining, mineral processing, and associated waste management practices for detailed evaluation: (1) Surface and underground mining; (2) non-entry (in-situ leaching or solution) mining; (3) physical, gravity, and magnetic processing; (4) flotation; (5)

[190] *See* U.S. EPA, Office of Land and Emergency Management, Memorandum to the Record: *Releases from Hardrock Mining Facilities,* November 2016.

[191] *See* U.S. Environmental Protection Agency, Draft Comprehensive Report: *An Overview of Practices at Hardrock Mining and Mineral Processing Facilities and Related Releases of CERCLA Hazardous Substances,* November 2016.

cyanidation; (6) acid leach, solvent extraction, and electrowinning; (7) pyrometallurgical processes; (8) Bayer process for refining alumina; (9) ion exchange in uranium and phosphoric acid processing; (10) mine-influenced water; (11) waste rock piles; (12) tailings management; and (13) mining processes leaks and spills.

For each practice, EPA gathered information including literature reviews of technical references, academic sources, and government publications. EPA also consulted with United States Geological Survey (USGS) staff and mining experts. EPA focused this research and discussions on the following topics for each practice listed earlier: (1) Historical and current use, (2) technical description, (3) potential sources and releases of CERCLA hazardous substances and management practices to address those potential sources and releases, and (4) documented releases at historical sites and currently operating facilities.[192] [193] [194] [195]

EPA developed a profile of historical and contemporary practices and the environmental releases of CERCLA hazardous substances associated with each practice. Information about historical sites was gathered largely from Record of Decision (ROD) and Remedial Investigation/Feasibility Study (RI/FS) documents. Information about currently operating sites came from various EPA databases, Emergency Response Notification System (ERNS) incident notifications, Mine Safety and Health Administration (MSHA) records, Federal and state permit documents, and general research.

EPA selected a sample of the 102 historical CERCLA sites (including both NPL and non-NPL sites at which removal actions occurred), involving hardrock mining and primary mineral processing sites, for additional data collection to characterize the practices and releases of hazardous substances. Some findings of the study follow.

Underground and surface mining create large amounts of excavated material, with surface mining tending to generate greater amounts of waste rock. Large-scale surface (open-pit) mining techniques generally create a greater surface impact than underground or non-entry (e.g., in situ leaching) mining methods. Surface mines generate dust, large piles of waste rock, and large, usually permanent holes in the earth's surface. The corresponding amount of waste rock and tailings being mined and deposited is increasing as a result of large-scale mining operations. The scale of these mining operations poses formidable obstacles to effectively and efficiently addressing releases. Such large scale mining operations cause a significant increase in exposure of ore constituents to precipitation, resulting in the leaching of hazardous substances to ground and surface waters, and to the wind, resulting in air emissions. The Rio Tinto Kennecott Bingham Canyon site, an open-pit copper, gold, silver, and molybdenum mine located near Salt Lake City, Utah provides an example of the problems posed by such large scale mining operations. As part of its operations, Kennecott had deposited waste rock on the slopes of the nearby Oquirrh Mountains. The waste rock dumps leached metals-rich acidic water first through an unlined reservoir and then into a groundwater plume that extended 72 square miles. The State of Utah took legal action against Kennecott as a result of the contamination in 1986; as a result of a consent decree reached in 2007, Kennecott agreed to treat the contaminated groundwater for the next forty years.[196]

Similar to practices at some mines that became NPL sites, mining is currently performed in open pits and underground mines, both of which may discharge acidic waters, referred to as acid mine drainage that can result when stormwater, surface water or ground water comes in contact with sulfur bearing minerals, creating acidic water which dissolves and leaches toxic metals into the environment. The Formosa Mine, a former copper, zinc and thorium mine in southwest Oregon, provides an example of the risk posed by releases from underground mines. In this case, storm water-driven contaminant releases from the mine have led to an annual discharge of approximately five million gallons of acid rock drainage, containing up to 30,000 pounds of dissolved copper and zinc, along with other metals. One of the primary sources of these metals is underground mine workings; low pH shallow ground water and adit drainage to surface water, both laden with high concentrations of metals. According to the State of Oregon, the mine has contaminated 18 miles of the Oregon's Umpqua watershed (Middle Creek and South Fork of Middle Creek and Cow Creek)—eliminating prime habitat for the threatened Oregon coast Coho salmon and steelhead.[197]

Dust and waste rock, produced during both open-pit and underground mining, can release trace elements and other toxic substances. Waste rock and overburden piles are typically stored on-site and remain an important consideration for the environmental performance of currently operating mines. Disposal typically involves depositing the waste rock in dedicated dumps or piles, or in some cases using it as mine backfill. Waste rock can also be co-disposed with filtered tailings, or in a slurry pond. Further, releases from waste rock disposals can arise years after operations have ceased, through discharges of mine influenced water, and pile deformation or collapse. Thus, waste rock disposals are often the focus of reclamation and closure plans and require consistent and long-term maintenance, monitoring, and potentially treatment.

As with acid mine drainage, other mine influenced water can also be of concern. Mine influenced water encompasses any water whose chemical composition has been affected by mining or mineral processing. This includes not only acid mine drainage but also drainage that is neutral or alkaline. In addition to environmental concerns posed by acidity or alkalinity, mine influenced water often contains elevated concentrations of mobilized contaminants, suspended solids, or sulfate or arsenate content. There are many potential sources of mine influenced water, because it includes any natural waters that come into contact with mining operations. Common sources include groundwater affected by pits or underground workings, surface water that has entered

[192] *See* U.S. Environmental Protection Agency Region 10, *EPA and Hardrock Mining: A Source Book for Industry in the Northwest and Alaska* (Washington, DC: U.S. Government Publishing Office, 2003).

[193] *See* U.S. Environmental Protection Agency, *Damage Cases and Environmental Releases from Mines and Mineral Processing Sites,* March, 2007.

[194] *See Mining Sites on Superfund's National Priorities List—Past and Current Mining Practices,* Van E. Housman and Stephen Hoffman, U.S. Environmental Protection Agency, Washington, D.C., Published in: Proceedings, Chapter 6, *Risk Assessment/Management Issues in the Environmental Planning of Mines, Society for Mining, Metallurgy and Exploration (SME)* (September 1992), Proceedings, Second International Conference on Environmental Issues and Management of Waste in Energy and Mineral Production, University of Calgary (1992).

[195] *See* U.S. EPA, Office of Land and Emergency Management, Memorandum to the Record: *Releases from Hardrock Mining Facilities,* November 2016.

[196] *See Earthworks Factsheet: Problems with Bingham Canyon Mine, Earthworks,* published 2011. Accessed December 29, 2015, at: *https://www.earthworksaction.org/files/publications/FS_Problems_BinghamCanyon_2011_low.pdf*; and U.S. EPA Region 8 and Utah Department of Environmental Quality, *Five-Year Review Report: Kennecott North Zone Superfund Site, Salt Lake County and Tooele County, Utah* (Washington, DC: U.S. Government Printing Office, 2014).

[197] Also *see:* Earthworks, *Modern Mining Needs a Modern Mining Law.* Available at: *https://www.earthworksaction.org/library/detail/modern_mining#.V-QlSk37VD8.*

surface excavations, or any precipitation that comes into contact with pit faces, leach piles, waste rock piles, or tailings piles.

The risk for contamination from hazardous substances originating in waste rock depends on the mineralogy and geochemical composition of the waste rock and its level of exposure to air and water at the disposal site. For example, sulfide rock can generate acids that dissolve trace elements that, without long-term containment, collection, and treatment, pose a significant concern long after initial disposal. Discharges can take years to develop, and pose a long-term risk of hazardous releases at the site. Environmental issues resulting from mine influenced water vary depending on commodity, climate, type of mine or mineral processing facility, and mine phase. A key characteristic for most mine influenced water (whether acidic, neutral, or alkaline drainage) is an elevated concentration of trace elements that have leached from surrounding solids such as waste rock, tailings, or mine surfaces. These acidic and metal-contaminated fluids are frequently a serious problem at mines and may be acutely or chronically toxic and may have harmful effects on humans, fish, animals, and plants.

An example of such a situation is the Barite Hill/Nevada Goldfields facility. The Barite Hill gold/silver mine located in South Carolina was previously owned by Nevada Goldfields, Inc., who operated an open pit cyanide heap leach operation on the property from 1989 until 1994. Nevada Goldfields conducted mine reclamation activities from 1995 until 1999 when they went bankrupt and subsequently abandoned the property. After the mine closed, the 10-acre Main Pit began to fill with water. At its highest, the Main Pit contained approximately sixty million gallons of highly acidic water with high dissolved metals content. The main mine pit, ponds, sediment, surface water and soil are contaminated with arsenic, cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, zinc, and cyanide. Contamination affected surface water and sediment in Hawe Creek and its tributaries, posing a threat to people who eat fish from the Hawe Creek fishery as well as a nearby drinking water reservoir. When acid mine drainage occurs, it is extremely difficult and often very expensive to control, and also often requires costly long-term management measures.

Mineral processing practices likewise raise significant release issues. For example, flotation processes generate tailings that consist of a mixture of waste material and the remaining liquid, which consists mostly of water and any remaining reagents. These are generally pumped to a tailings impoundment, where solids are settled out of the solution. In some cases, reagents have the potential for environmental harm. Although most of these reagents are consumed during flotation and only small residual quantities make it into the tailings, facilities might dispose of wastes from various processes in the same waste management units, with the resulting mixture containing more hazardous constituents than tailings from flotation alone.

The use of cyanide in gold mining operations creates additional risks, including the potential release of cyanide into soil, groundwater, and/or surface waters, which has resulted in catastrophic cyanide spills. Cyanide leaching has occurred since the mid 1900's. While the use of acid to leach copper dumps, the use of cyanide to leach gold in heaps, and the spread of solvent extraction techniques have changed some aspects of mining, the basic operation of removing ore from the ground and concentrating it through beneficiation has remained fundamentally the same as when most of the non-active NPL sites were in operation. In the case of heap and dump leaching, the metals and other compounds in the ores have become more mobile due to the increased use of efficient lixiviants. In addition to the release of cyanide, discharges from cyanidation processes both during operations and after closure can also contain potentially toxic elements including lead, cadmium, copper, arsenic, and mercury. Leaching tanks, leach pads, piping and storage facilities (e.g., process solution ponds and facilities associated with leaching) can release sulfuric acid and mobilized contaminants into the environment. These leaching solutions can pose significant environmental and human health risks if they are not contained successfully. Information on documented releases reveals that acid leach operations have caused contamination of both surface and ground waters in addition to injuring habitat and wildlife. Releases due to equipment failures, chronic seepage, or weather-related overflows seem to be the most common problems; acid leach operations need to ensure proper reclamation of spent dump or heap leach piles, maintenance of equipment, and preparation of systems for severe weather in order to minimize environmental impacts. Cyanide leaching processes create wastes that can present risks of releases of hazardous substances such as cyanide, cyanide-metal complexes, and metals via groundwater and surface water routes. In addition, sulfuric acid can leach metals from other mining wastes and containment areas, transporting other contaminants to surface and groundwater systems. While leaching solutions are generally recycled back to the process, failure to contain them properly can result in releases. After leaching has been discontinued, the abandoned leach site can be a source of acidic effluents, hazardous trace elements, and total dissolved solids if it is not properly monitored and managed. Mine influenced water (e.g., acid, alkaline, or neutral mine drainage), i.e., runoff originating from exposed heap leach piles or tailings, is also a distinct risk associated with this practice.

The Beal Mountain Mine, a gold and silver mine in Montana, used cyanidation to extract precious metals until it was closed in 1997 when Pegasus gold went bankrupt. Although the mine is no longer operating, it has continued to pollute neighboring streams with cyanide, selenium and copper. Ongoing issues include the geotechnical stability of the pit high wall and leach pad dike, infiltration of precipitation and groundwater into the leach pad, and treatment and disposal of excess solution accumulating on the heap leach pad.[198] This mine also demonstrates the limitations of predicting environmental impacts of these facilities -when this mine was permitted, the Environmental Analysis concluded that the operation of the mine would have no impacts to water quality, because there will be no discharge of mine or process water to surface waters.[199]

Zortman and Landusky Mines, in Montana, likewise used cyanidation to extract precious metals and also underwent bankruptcy and left significant pollution at their respective sites. In addition to a heap leach pad leak, the Zortman and Landusky facility experienced cyanide releases from a leach pad pipe, a solution pond liner leak, and a process pond liner leak.[200]

[198] *See* USDA–FS, *Preliminary Leach Pad Investigation Beal Mountain Mine, February 2010. Available at: http://www.fs.usda.gov/detail/bdnf/landmanagement/projects/?cid=stelprdb5076989.*

[199] *See False Promises: Water Quality Predictions Gone Wrong—Large Mines and Water Pollution,* 2012. Available at: *http://wman-info.org/wp-content/uploads/2012/08/FalsePromisesWater.pdf.*

[200] *See* U.S. Bureau of Land Management, *Final Engineering Evaluation/Cost Analysis (EE/CA) For Water Management at the Zortman and Landusky Mines, Phillips County Montana,* prepared by Spectrum Engineering (Washington, DC: U.S.

Continued

According to BLM, ''modern'' open pit heap leach operations began in 1977.[201] The BLM, as the lead Federal agency, conducted removal actions under its CERCLA authority. In response to the numerous issues associated with cyanide leaching in Montana, the state, in 1998, enacted a referendum banning the development of new open pits that use cyanide leaching.

Releases also have occurred from other leach pad operations, including the Barrick Goldstrike mine in Nevada, where there was a release of 159,000 gallons of cyanide in 2003 and 21,625 gallons of sodium cyanide in 1995. Also, the Florida Canyon mine in Nevada released 52,500 gallons of sodium cyanide (30 percent solution) in 1996. The groundwater contamination that resulted from releases from this facility's leach pad operation was previously discussed.

Similar to historical releases, tailings management played a role in roughly half of the publicly documented releases. Tailings are the waste material created when valuable minerals or metals have been extracted from ore. Depending on the commodity and the mineral processing method, tailings may contain chemical residues inherent to processing. For example, milling operations that practice flotation or leaching may produce tailings containing reagents such as lime or glycol ether and lixiviants including acids and cyanide. The Robinson Nevada Mining Company operates the Robinson Operation surface mine in White Pine County, Nevada. This facility produces gold and copper using flotation processes. The facility released copper flotation tailings five times in 1996, leading to violations of its water pollution control permit.

Tailings usually take the form of a slurry (e.g., wet tailings), but may also undergo dewatering and disposal as paste or filtered tailings. Depending on the commodity and the beneficiation process, tailings may contain a variety of hazardous materials, originating from geologic components of the ore or chemicals introduced during processing. Therefore, they require proper disposal and storage.

In addition to the previously discussed releases from the tailings storage units at the Jerritt Canyon mine, there have been releases at other tailings storage units, including: ArcelorMittal Minorca is an iron mining and processing facility located in Virginia, Minnesota. Three failures in the tailings and waste rock pipe and tailings dike at the site occurred in 2013 and 2014, discharging 8,500 cubic yards of tailings and waste rock and affecting 15.3 acres of wetlands, potentially destroying the area's ability to function as a natural aquatic habitat and filtration system.[202]

The U.S. Silver Galena mine is a silver-lead and silver-copper underground mine located near Wallace, Idaho, and operated by the U.S. Silver Corporation since 2007. In 2014, U.S. Silver Corporation signed a Consent Agreement and Final Order with EPA Region 10 admitting to discharging wastewater from the Osburn tailings pond into Lake Creek and the Coeur d'Alene River that carried excessive concentrations of mercury and copper in 2012 and 2013. The discharge was the result of a failure to monitor treated water normally discharged to water system. U.S. Silver also admitted that on March 14, 2014, it discharged tailings slurry directly into Lake Creek.[203]

The Golden Sunlight mine located in Montana is a gold and silver open pit mine and underground cyanide vat leach operation. This facility's original tailing disposal facility operated from 1983 to 1995. Seepage was detected from Tailing Impoundment No. 1 in 1983. To control effluent from the impoundment, the bentonite cut-off wall was immediately repaired. An extensive system of monitoring wells has been installed over the years, and several hydrogeologic investigations have been undertaken to continue to monitor, evaluate, and control leakage from the impoundment.

Tailings management presents significant environmental challenges to current mining operations. Because acid may not be generated for many years and most tailings ponds are designed to allow infiltration of water through the pond, the potential of acid generation and mobile metals are of such concern that many mines construct complex monitoring and water management systems for their tailings ponds. It is likely that some constituents of concern (i.e., arsenic, sulfates, etc.) have become more mobile due to crushing the ore to a smaller particle size. Although operators now generally attempt to contain these waste management features, proper long-term management is required to safeguard against leaks, runoff, and catastrophic failure. Because reclamation and closure are yet to occur at currently operating facilities, the available data do not capture information characterizing the scope and efficacy of these practices. Based on the experience of currently closed sites, the environmental impacts of releases to groundwater and runoff from tailings impoundments and waste rock piles will continue to be of concern at these facilities long after closure.

Fugitive dust emissions from tailings storage units also can be a concern. For example, Hecla Greens Creek is a lead, zinc, silver, and gold underground mine located near Juneau, Alaska, and operated by the Hecla Greens Creek Mining Company. The mill produces 650,000 tons of tailings annually. In 2013, elevated concentrations of metals were detected in the snow and lichens adjacent to the tailings disposal facility. The USFS, who installed the lichen to act as a biomonitor of the recently expanded tailings facility, concluded the contamination was the result of fugitive dust emissions from the tailings.[204]

EPA recognizes various environmental regulatory programs may affect releases of CERCLA hazardous substances at hardrock mining and mineral processing facilities. Examples of the regulations include requirements under: (1) The Clean Water Act (CWA), (2) the Uranium Mill Tailings Radiation Control Act (UMTRCA), and (3) reclamation requirements such as the BLM's 3809 regulations. However, EPA has found that significant issues involving noncompliance with regulatory requirements resulting in releases of hazardous substances persist. EPA's ongoing concern with reducing the risk of mining waste contamination of drinking water, rivers, and streams, and work to cleanup mining and mineral processing facilities has been an enforcement priority for almost ten years, as reflected in the Agency's National Enforcement Initiative (NEI): Reducing Pollution from Mineral Processing Operations reflects the Agency's concerted effort to reduce the risk of mining waste contamination of drinking water, rivers, and streams, and work to cleanup mining and mineral

Government Printing Office, 2006). Accessed August 28, 2015 at: *http://www.blm.gov/style/medialib/blm/mt/field_offices/lewistown/zortman.Par.62509.File.dat/finaleeac.pdf.*

[201] *See Zortman and Landusky Mines—Project History, February 2006. Available at: http://www.blm.gov/style/medialib/blm/mt/field_offices/lewistown/zortman.Par.32256.File.dat/ZLbackground.pdf.*

[202] *See Pipeline, Storage Basin Failures Send Ore Tailings and Road Aggregate into Wetlands,* Minnesota Pollution Control Agency, June 24, 2015.

[203] *See* U.S. Environmental Protection Agency, *Consent Agree and Final Order In the Matter of U.S. Silver—Idaho Inc., Coeur and Galena Mines and Mills, Wallace, Idaho,* effective 16 September 2014.

[204] *See* United States Department of Agriculture, Forest Service, *Greens Creek Mine Tailings Disposal Facility Expansion: Final Environmental Impact Statement and Record of Decision* (Washington, DC: U.S. Government Printing Office, 2013), Volume 1.

processing facilities.[205] The Agency's FY 2011–2013 National Enforcement Initiatives states 'At some sites, EPA's inspections have found significant non-compliance with hazardous waste and other environmental laws.' EPA's *National Enforcement and Compliance Strategy for Mineral Processing FY2008–2010* states 'Environmental impacts caused by the mineral processing and mining sectors are significant. The mineral processing and mining sectors generate more wastes that are corrosive or contain toxic metals than any other industrial sector. Over the past decade, we have found that many of the facilities that manage these wastes, due either to noncompliance with state or Federal environmental requirements or legally permissible waste management practices, have created groundwater, surface water, and soil contamination.'

EPA believes the results of this relatively recent effort to further document the state of current mining practices substantiates the findings from the other documents described herein and further reinforces the Agency's belief that currently operating hardrock mining and mineral processing facilities subject to this proposal continue to present risks of release of hazardous substances.

c. Evidence of CERCLA Hazardous Substances and Potential Exposures at CERCLA § 108(b) Mining and Mineral Processing Sites [206]

The document ''Evidence of CERCLA Hazardous Substances and Potential Exposures at CERCLA § 108(b) Mining and Mineral Processing Sites'' reports EPA preliminary efforts from 2009–2012 to examine CERCLA site-specific documents for estimated exposures of human and ecological receptors to CERCLA hazardous substances from mining and mineral processing sites cleaned up under Superfund in the past. The report also collects available information on potential exposures of human and ecological receptors to CERCLA hazardous substances from mining and mineral processing sites that were operational in 2009 (the most current available data at the time the evaluation took place).

EPA concluded the following: (1) Some of the sites operational in 2009 are already on Superfund's National Priority List (NPL) requiring cleanup; (2) mining and mineral processing practices at sites cleaned up under Superfund in the past continue to be used at sites operational in 2009, especially when comparing sites that mine or process the same range of commodities; (3) there are similarities between the Contaminants of Concern [207] at sites cleaned up under Superfund in the past, and the CERCLA hazardous substances present at sites operational in 2009; (4) human and ecological receptors at sites cleaned up under Superfund in the past have parallel potential receptors at sites operational in 2009; and (5) environmental settings and exposure pathways at sites cleaned up under Superfund in the past have corresponding environmental settings and potential exposure pathways at sites operational in 2009.

Overall, the compiled information demonstrates that sites requiring cleaned up under Superfund in the past, and sites operational in 2009 share characteristics related to the potential release of CERCLA hazardous substances and the exposure of human and ecological receptors, and illustrates the applicability of EPA's CERCLA experience to evaluating currently operating mines and processors.

d. Previous Studies About Releases From Hardrock Mining and Mineral Processing Facilities

EPA has also identified numerous documents showing recent releases of CERCLA hazardous substances at hardrock mining and processing facilities and thus continuing risks of release or threatened release of CERCLA hazardous substances associated with those activities. These documents are available in the docket for this proposed rule and include:

Damage Cases and Environmental Releases from Mines and Mineral Processing Sites [208]

This document, published in 1997, presents summaries about mining and mineral processing damage cases that occurred since 1990. Many of the damage cases included in this document involved mining and mineral processing of commodities covered by this proposed rule. The release incidents occurred from the production, treatment, storage or disposal of hazardous substances involving extraction and beneficiation operations, including inadequate containment of tailings, clay ponds, waste rock, process water, process solution (*e.g.*, cyanide), wastewater, acid mine drainage, and stormwater. Many of the releases occurred through spills resulting from equipment failure, and operator error while others resulted from unusually heavy rains and, consequently, the generation of high stormwater volumes. The typical management practices used for storage or disposal of mineral processing secondary materials and wastes were found to have created or exacerbated ground water contamination in the immediate area. In some cases, a combination of feedstock, in-process materials, secondary materials, and wastes contributed to ground water, surface water, or soil contamination. EPA believes that this document presents a relatively accurate description of current mining and processing practices and the potential releases associated with these practices.

Mining Sites on Superfund's National Priorities List—Past and Current Mining Practices [209]

This document provides an overview of the types of releases of hazardous substances associated with the production, storage, and disposal of hazardous substances and the associated impacts, including NPL cleanups. It also documents that 'although some mining waste management practices have changed over time, the basic technology for extraction and beneficiation of mineral ores have remained fairly constant over the last fifty years.'

This document states that mining activities at many NPL sites resulted in the generation of tailings, acid drainage, waste dumps, and waste rock and that these are the same types of wastes generated by current mines. It further reports that tailings, mine water, and waste rock are the highest volume wastes generated by all past and current mining operations. In the case of tailings, it is likely that some constituents (*i.e.*, arsenic, sulfates, etc.) have become more mobile due to crushing the ore to a smaller particle size. In the case of heap and dump leaching, the metals and other compounds in the ores have become more mobile due to the increased use of

[205] *See* U.S. EPA Office of Enforcement and Compliance Assurance, *National Program Manager Guidance,* April 2015. Available at: *https://www.epa.gov/sites/production/files/2015-02/documents/oecas_draft_fy_2016-2017_national_program_manager_guidance_february_19_2.pdf.*

[206] *See* U.S. EPA, Office of Land and Emergency Management, Memorandum to the Record: *Releases from Hardrock Mining Facilities,* November 2016.

[207] A CERCLA hazardous substance found at a concentration that a Superfund risk assessment has determined poses an unacceptable risk to human health or the environment.

[208] *See* U.S. EPA 1997. *Damage Cases and Environmental Releases from Mines and Mineral Processing Sites.*

[209] *See* Van E. Housman and Stephen Hoffman U.S. Environmental Protection Agency Washington D.C. Published in: *Proceedings, Chapter 6, Risk Assessment/Management Issues in the Environmental Planning of Mines, Society for Mining, Metallurgy and Exploration (SME)* (September 1992), and in: *Proceedings, Second International Conference on Environmental Issues and Management of Waste in Energy and Mineral Production, University of Calgary* (1992).

efficient lixiviants (*i.e.*, the solution used in hydrometallurgy to assist in extracting the desired metal from ore in heap leaching, dump leaching, and in situ leaching).

The document also states that 'many current mining operations are extracting sulfide ores, having exhausted the less acidic oxide ores. Therefore, the potential for environmental damage from acid mine drainage at existing mines is possible, if favorable geologic and climatic factors exist. There are dozens of current mining operations with open pits or that have extensive underground tunnels are, similar to NPL sites, located in high sulfide environments.' These current operations continuously pump and treat groundwater that enters the pit or mined tunnels as part of the overall mine water management system. Some of the larger currently operating mines are not only pumping and chemically treating mine water, they are using other control methods such as intercepting aquifers to control water flow into the mine and diverting entire surface streams. In many cases, once the decision is made to divert streams and intercept aquifers, active water management will have to continue indefinitely, long after the mine is closed.

Finally, the document states that current mining practice is to impound tailings behind engineered dams and attempt to control and treat discharges to surface water and groundwater. Current design rarely includes lining the ponds. Unlined tailings ponds are specifically designed either to introduce water directly to groundwater or direct it to leachate collection systems that flow into surface ponds at the base of a dam (toe ponds). Tailings management presents significant environmental challenges to current mining operations. Because acid may not be generated for many years and most tailings ponds are designed to allow infiltration of water through the pond, the potential for acid generation and mobile metals are of such concern that many mines construct complex monitoring and water management systems for their tailings ponds.

Although this document was published almost 25 years ago, EPA has concluded that it still presents a relatively accurate description of current mining and mineral processing practices and the potential releases associated with these practices, as identified in the more recent documents previously described.[210] [211]

Human Health and Environmental Damages from Mining and Mineral Processing Wastes [212]

EPA developed this document to illustrate the human health and environmental damages caused by management of wastes from mining (*i.e.,* extraction and beneficiation) and mineral processing, particularly damages caused by placement of mining and mineral processing wastes in land-based units, including piles, surface impoundments, and ponds as part of its ''Phase IV'' Land Disposal Restrictions rulemaking under the RCRA Subtitle C program. This document presents 66 mining and mineral processing damage cases, including mining and mineral processing of commodities covered by this proposed rule. The damage cases demonstrate that land-based management practices for mining and mineral processing wastes are responsible for considerable damages to human health and the environment. These damages commonly arise from land placement of wastes in unlined units having minimally engineered release controls. These units include piles of slags, dusts, refractory bricks, sludges, waste rock and overburden, and spent ore; surface impoundments containing mill tailings and/or process wastewaters; and heap leaching solution ponds. In addition, many, if not most of the damage case facilities have caused human health or environmental damages through leaks or spills, such as releases from lined management units, valves, and pipes.

The damage cases illustrate the wide variety of human health and environmental impacts caused by wastes from mining and mineral processing operations, including groundwater, surface water, and soil contamination; human health damages or risks; and damages to vegetation, wildlife, and other biota. As noted earlier, in more recent documents prepared by EPA, many of the damage cases cited in this document involved releases that EPA has concluded are still indicative of current mining and mineral processing practices and the potential releases associated with these practices.

e. Data Concerning Releases, Generation, and Management of CERCLA Hazardous Substances

EPA evaluated several databases, as follows:

(1) Releases Reported Under the Emergency Response Notification System (ERNS)

EPA also looked at releases of CERCLA hazardous substances reported under the Emergency Response Notification System (ERNS). EPA considered these data because of the potential insights the data offered on an annual basis over a prolonged period of time—providing a means by which to show the extent of and reasons for reported releases of CERCLA hazardous substances by hardrock mining and mineral processing facilities.

ERNS primarily contains initial accounts of releases reported to the National Response Center, made during or immediately after a release occurs. The National Response Center receives all reports of releases involving hazardous substances and oil that trigger Federal notification requirements under several laws. It also should be noted that the National Response Center is strictly an initial report-taking agency and does not participate in the investigation or incident response. The National Response Center receives initial reporting information only and notifies Federal and state On-Scene Coordinators for response.

From the National Response Center Web site (*http://www.nrc.uscg.mil/*), EPA downloaded, by year, the details for each call reporting a release—from 1990 through 2014. Although releases have been reported to the National Response Center since 1982, the data from 1982–1989 are difficult to use because of inconsistent formats, and missing and/or inconsistent data fields, among other problems. A more uniform and consistent format for documenting calls was put into place in 1990, so EPA examined National Response Center data from 1990 through 2014. For the purpose of this rulemaking, EPA only focused on reported releases that involved CERCLA hazardous substances.[213] The ERNS data contains information about the material and the

[210] *See* U.S. EPA, Draft Comprehensive Report*: An Overview of Practices at Hardrock Mining and Mineral Processing Facilities and Related Releases of CERCLA Hazardous Substances,* November 2016.

[211] *See* U.S. EPA, Draft Report—*Discharges from Recently or Currently Operating Mines and Mineral Processing Facilities.* September 2016.

[212] *See* U.S. EPA December 1995. *Technical Background Document Supporting the Supplemental Proposed Rule Applying Phase IV Land Disposal Restrictions to Newly Identified Mineral Processing Wastes.* Damage cases used for this document were derived from previous studies by EPA identifying human health and environmental damages caused by mining and mineral processing waste management activities, including: *Report to Congress on Special Wastes from Mineral Processing,* July 1990; *Mining Waste Release and Environmental Effects Summaries,* Draft, March 1994; *Mining Sites on the National Priorities List: NPL Site Summary Report,* June 21, 1991; and *Mining Sites on the NPL,* August 1995.

[213] *See* U.S. EPA, *Extracting Useable Data from ERNS Incidents Applicable to HRM Facilities,* December 2015.

quantity released, where and when the release occurred, and information about property damage, injuries, and deaths occurring due to the release. The ERNS data include a general Incident Type and Incident Cause. Analyzing information from the Incident Description for each reported release, EPA developed and assigned a more detailed description of the incident type and cause.

EPA's analyses show that, since 1990, more than 950 reported releases of CERCLA hazardous substances were associated with currently operating facilities in the hardrock mining industry.[214] Looking at the more recent data, approximately 435 of the releases were reported since 2000, for an average of about thirty reported releases per year since 2000. These ERNS data provide yet another indicator of ongoing reported releases of CECLA hazardous substances at hardrock mining and mineral processing facilities. Many of the reported releases were due to: (1) Damage to/overflow of pond/impoundment/pile/landfill due to storms, (2) breaks or leaks of piping/hoses, (3) accidents/operator error, and (4) failure or overflow of process units and storage/treatment tanks/sumps.

EPA also reviewed a report that substantially relied on ERNS data to show pipeline, seepage control and tailings impoundment failures at operating copper porphyry mines in the U.S., and the associated water quality impacts.[215] This document states that 'copper porphyry mines are often associated with water pollution associated with acid mine drainage, metals leaching and/or accidental releases of toxic materials.'

(2) Analysis of Toxics Release Inventory (TRI) Data

The Toxics Release Inventory (TRI) includes data on chemicals (including numerous CERCLA hazardous substances) that are released, recycled, treated, or used for energy recovery. Under TRI, releases include air emissions, surface water discharges, underground injection wells, and placement to land, including RCRA hazardous waste landfills and other landfills. TRI data also show quantities transferred to publicly owned treatment works (POTWs) and to off-site facilities. In developing this proposal, EPA examined recent TRI data[216] in order to identify the types, amounts, and methods of hazardous substance management at facilities potentially subject to the rule. EPA's 2010 through 2013 Toxic Release Inventory (TRI) data indicates that the metal mining industry (*e.g.*, gold ore mining, lead ore and zinc ore mining, and copper ore and nickel ore mining) reported quantities of onsite releases of hazardous substances, averaging nearly 1.7 billion pounds per year. In 2013, the metal mining sector reported the largest quantity of total disposal or other releases, accounting for 47 percent of the releases for all industries. It also represents almost three quarters (71 percent) of the on-site land disposal for all sectors in 2013. (See: *http://www.epa.gov/toxics-release-inventory-tri-program/2013-tri-national-analysis-metal-mining.*) The preliminary 2014 TRI data likewise show nearly 1.8 billion pounds of onsite releases. Specific hazardous substances of concern that are released into the environment by mining facilities include: Ammonia, benzene, chlorine, hydrogen cyanide, hydrogen fluoride, toluene, and xylene, as well as heavy metals and their compounds (*e.g.*, antimony, arsenic, cadmium, chromium, cobalt, copper, lead, manganese, mercury, nickel, selenium, vanadium and zinc).

More than 99 percent of these onsite releases involved surface impoundments (*e.g.*, tailings) and other land placement (*e.g.*, waste piles) not subject to RCRA Subtitle C permits.[217] In addition to the placement of these quantities of CERCLA hazardous substances on the land, for the period covering 2010–2013, metal mining facilities also reported an average of three million pounds of air releases and over 800,000 pounds of surface water discharges. Over the time period of 2010–2012, releases of hazardous substances (ranging between 425,000 pounds and 978,000 pounds) also were reported due to catastrophic or one-time events; in 2013, nearly 194 million pounds of such releases were reported.

In the 2009 *Priority Notice,* EPA used Toxics Release Inventory (TRI) data to provide an indication of the quantities of hazardous substances that were associated with facilities in the hardrock mining industry. Commenters objected to EPA's use of these data. Commenters noted that releases reported to TRI encompass releases that may be permitted under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and RCRA Subtitle C. Thus, these commenters argued that these releases should not be used to predict the risk of releases and exposures to hazardous substances associated with potential mismanagement of hazardous substances.

EPA considered these objections to the use of these data, in developing its data for this proposal. The Agency recognizes that a significant portion of the TRI releases reported as air emissions and surface water discharges are likely permitted by Federal/state regulatory authorities. EPA also recognizes that some of the surface impoundments, landfills, and waste piles used to manage wastes containing these large volumes of hazardous substances might be designed and operated to mitigate releases into the environment.

These data provide some perspective about the number of currently operating facilities and offer insights on the types, amounts, and management of hazardous substances at hardrock mining and mineral processing facilities potentially subject to this proposed rule. The presence of such significant amount of hazardous substances, even if subject to regulatory controls, provides some indication of the potential for risks to result if improperly managed. In addition, EPA previously has discussed the evidence of non-compliance with regulatory standards. Thus, the TRI data provide relevant information on the risks associated with hardrock mining facilities.

(3) Analysis of RCRA Hazardous Waste Biennial Report (BR) Data

The RCRA Hazardous Waste Biennial Report (BR) contains data reported by hazardous waste handlers and must be submitted by large quantity hazardous waste generators and treatment, storage, and disposal facilities every two years. Because RCRA hazardous wastes, by statute, are designated CERCLA hazardous substances, EPA analyzed the BR data for the 2009, 2011, and 2013 reporting cycles. These data show the quantities of RCRA hazardous waste streams generated and how the waste

[214] *See* U.S. EPA, *Analyses of ERNS Data Applicable to HRM Facilities,* December 2015.

[215] *See* Bonnie Gestring, *U.S. Copper Porphyry Mines Report: The Track Record of Water Quality Impacts Resulting from Pipeline Spills, Tailings Failures, and Water Collection and Treatment Failures* (Washington, DC: Earthworks, July 2012). Available at: *https://www.fxsp0;earth workfxsp0;saction.fxsp0;org/files/publications/Porphyry_Copper_Mines_Track_Record✖8-2012.pdf.*

[216] TRI is a publicly available EPA database that contains information on a list of 581 individually listed chemicals and thirty chemical categories that are being used, manufactured, treated, transported, released into the environment, or recycled. Facilities (certain regulated industries and federal facilities) are required to annually report to TRI under the Emergency Planning and Community Right to Know Act (EPCRA § 313).

[217] Many of the wastes generated by mining and processing operations, *i.e.,* those processes that remove, concentrate, and/or enhance values contained in ores and minerals or beneficiated ores and minerals, have been excluded from regulation under RCRA Subtitle C per the Bevill Amendment.

was managed. It is important for the reader to note that many wastes generated by mining and mineral processing operations are excluded from RCRA Subtitle C hazardous waste regulation under the Bevill Amendment.)

EPA found a wide variation in the quantity of hazardous waste generated by facilities in the hardrock mining industry, including nearly 3,000 tons in 2009, nearly 25,000 tons in 2011, and more than 13,000 tons in 2013. These generated quantities, for the most part, do not represent actual releases to the environment but instead represent amounts of hazardous substances produced and managed at the reporting facilities. The sources and types of hazardous wastes generated by these facilities are numerous and varied, including: (1) Contaminated soil from remediation and/or past contamination; (2) contaminated soil and debris from spills and accidental releases; (3) filters, solid adsorbents, ion exchange resins and spent carbon from air pollution control devices; (4) sludges, liquids, solids from cleanout of process equipment; (5) laboratory analytical wastes; (6) spent process liquids or catalysts, (7) removal of tank sludge, sediments, or slag; and (8) discarding off-specification or out-of-date chemicals or products.

To a large extent, facilities in the hardrock mining industry ultimately transfer their RCRA hazardous wastes to offsite treatment and disposal facilities. However, for those facilities that do treat and dispose of hazardous wastes onsite, the potential co-mingling of hazardous wastes with Bevill excluded wastes or non-hazardous wastes is a concern to EPA. Indeed, EPA has determined that some facilities place mixtures of exempt wastes (e.g. tailings) and non-exempt wastes in an on-site waste management unit.[218] Recently, EPA and the U.S. Department of Justice announced a settlement with Mosaic Fertilizer, LLC that will ensure the proper treatment, storage, and disposal of an estimated sixty billion pounds of hazardous waste at Mosaic's facilities in Bartow, Lithia, Mulberry and Riverview in Florida and St. James and Uncle Sam in Louisiana. At these facilities, sulfuric acid is used to extract phosphorus from mined phosphate rock, which produces large quantities of a solid material called phosphogypsum and wastewater that contains high levels of acid. EPA inspections revealed that Mosaic was mixing certain types of highly-corrosive substances from its fertilizer operations, which qualify as hazardous waste, with the phosphogypsum and wastewater from mineral processing (Bevill wastes), which is a violation of Federal and state hazardous waste laws. The phosphogypsum piles can contain several billion gallons of highly acidic wastewater, which can threaten human health and cause severe environmental damage if it reaches groundwater or local waterways. In August 2016, one of these facilities (the New Wales in Mulberry) experienced a sinkhole, leaking 215 million gallons of contaminated water into the Floridian aquifer.

In the 2009 *Priority Notice,* EPA also used BR data to show the quantities of hazardous wastes that were associated with facilities in the hardrock mining universe. Commenters objected to EPA's use of these data to justify the need for financial responsibility requirements. Specifically, commenters stated: (1) That the BR data simply show the quantities of RCRA hazardous wastes that are generated and managed in accordance with the RCRA Subtitle regulations. They argued that thus these data are not an indicator of mismanagement and provide no information concerning the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances; (2) that EPA did not discuss whether, or how often, the generation of hazardous waste corresponds to on-site discharges of hazardous substances, or to costly cleanups; and (3) that the volume of hazardous waste reported on the RCRA BR may not be a realistic indicator of risk for CERCLA § 108(b) purposes. High volume waste streams often are highly dilute aqueous wastes that are managed in Clean Water Act wastewater treatment facilities.

EPA recognizes that the BR data concerning volume of hazardous waste generated and managed onsite, when considered alone, does not provide a direct indicator of risk of release or of mismanagement of wastes. Notwithstanding the issues pointed out by commenters, EPA believes these data do offer insights on the types, amounts, and management of RCRA hazardous wastes (by definition, CERCLA hazardous substances) at hardrock mining and mineral processing facilities potentially subject to this proposed rule.

e. Government Expenditures—Historical CERCLA Costs

EPA conducted analysis of historical response costs at 319 hardrock mining and processing sites on the National Priorities List (NPL) and at non-NPL CERCLA sites. EPA used this information to help further identify the magnitude of continuing risks from hardrock mining facilities potentially subject to the rule. Such costs also serve as a measure of the severity of consequences impacting human health and the environment as a result of releases of and exposure to hazardous substances. Specifically, the past and estimated future costs associated with protecting public health and the environment through what is often extensive and long-term reclamation and remediation efforts can be substantial.

The Agency developed a database for purposes of analysis that uses the ''Expenditures'', ''ROD Costs'', and ''Settlements'' data derived from CERCLIS, Integrated Financial Management System (IFMS), and Office of Enforcement and Compliance Assurance (OECA) information resources. These data sources for response costs included: (1) Fund expenditures incurred at each site to date, the type of expenditure (broadly speaking, construction versus non-construction) and the source of funds (whether the Fund was reimbursed by the potentially responsible party (PRP) through a ''special account''); and (2) Records of Decision (RODs) at each site. A ROD is a document that provides the justification for the remedial action (treatment) chosen at a Superfund site. It also contains information concerning site history, site description, and site characteristics. The ROD Costs database provides a dollar estimate for each remedial action chosen at a site. Last, information was compiled about settlements with PRPs, including ''cash out'' funds accrued and deposits into special accounts associated with settlements at each site.

Following a review of the discussed data sources, EPA developed a tailored approach that attempts to characterize the total (*i.e.*, past and future) response cost at each of the historical sites identified, taking advantage of all available data sources and site characteristics. EPA then verified and adjusted the response costs using reports from the U.S. Government Accountability Office (GAO) and from the Office of the Inspector General

[218] *See* U.S. EPA, *Mineral Processing Facilities Placing Mixtures of Exempt and Non-Exempt Wastes in On-Site Waste Management Units, Technical Background Document Supporting the Supplemental Proposed Rule Applying Phase IV Land Disposal Restrictions to Newly Identified Mineral Processing Wastes,* December 1995. (Note: *See* EPA's Supplemental Phase IV LDR Final Rule [63 F.R. 28595–97 (May 26, 1998), which included discussion of mineral processing secondary materials and Bevill Exclusion issues.

(OIG)) that investigated past and future costs at NPL sites.[219] [220]

In considering the total remediation and other expenditures experienced at these sites (including both past and projected future expenditures necessary to complete cleanup), EPA estimates that the historical response costs total $12.9 billion at 243 hardrock mining and minerals processing facilities evaluated for which data were available at the time of the analyses. The estimate of response costs for just 117 NPL sites from the sample totals more than $12 billion, or an average of more than $103 million per site. Federal expenditures to date total roughly one-third of the total (or $4 billion), paid for through EPA's Superfund program. Such significant cleanup costs may be considered as an indication of the relative risks present at these sites, and the potential magnitude of environmental liabilities associated with this industry overall. It should be noted that this data does not capture funds spend cleaning up hardrock mining facilities outside of the Superfund program (*e.g.*, by a state cleanup authority).

Costs associated with ATSDR Health Assessments and Natural Resource Damages further increase the liabilities attributable to the hardrock mining and mineral processing sectors. EPA identified documented natural resource damages settlements at 64 sites within this sector. This statistic alone suggests that as many as 25 percent of CERCLA sites in this sector have also been the source for associated damages to natural resources. Based on the natural resource damages cases identified, the values of the damages average more than $16 million across all of the cases, with individual settlements ranging from $32,000 to over $400 million.

f. EPA's Conclusions Regarding Risks Posed by Facilities in the Hardrock Mining Universe

Information available to EPA indicates strongly that the hardrock mining industry continues to present risks associated with the production, transportation, treatment, storage, and disposal of hazardous substances. Mining activities at many NPL sites resulted in the generation of tailings, acid drainage, waste dumps, and waste rock; these are the same types of wastes generated by current mines. In many cases, releases were largely due to the direct discharge of wastes into the local environment or minimal containment efforts. For example, the P4/Monsanto-South Rasmussen facility, operating near Soda Springs in southeast Idaho, discharged wastewater containing high concentrations of selenium and heavy metals from a waste rock dump at the mine without a required permit. Further, P4's unpermitted discharges, which contained selenium levels far above Idaho's state water quality standards, polluted a nearby wetland and an unnamed tributary of Sheep Creek, as well as downstream waters that drain to the Snake River. P4 agreed to pay a $1.4 million civil penalty for alleged Clean Water Act violations and to continue collecting selenium-contaminated leachate from the waste rock pile and to prevent leachate from entering nearby creeks and wetlands until such time as the company either obtains a National Pollution Discharge Elimination System permit, or it undertakes a restoration of the waste rock dump under another state or Federal order.

Additionally, many releases described in publicly available information occurred after closure of the mine or mineral processing site, suggesting that the potential for releases and adequate monitoring remains a long-term concern after closure of the mining or mineral processing operation.

While some mining waste management practices have changed over time, the basic technologies for extracting and processing of mineral ores have remained fairly constant over approximately the last 50 years. Mining technology has become more efficient over time in recovering mineral values—allowing lower grade ores to be mined which produce more waste. At the same time, a combination of economic and technological factors have increased the scale of surface disturbance and waste generation. Mining and mineral processing facilities generate more toxic and hazardous waste than any other industrial sector.

Underground and surface mining create large amounts of excavated material. Disposal typically involves depositing the waste rock in dedicated dumps or piles, or in some cases using it as mine backfill. Waste rock can also be co-disposed with paste or filtered tailings, or in a slurry pond. Waste rock and overburden piles are typically stored on-site, which may result in acidic or other mine-influenced water. Common sources include groundwater affected by pits or underground workings, surface water that has entered surface excavations, or any precipitation that contacts pit faces, leach piles, waste rock piles, or tailings piles. Sulfide rock can generate acids that dissolve trace elements which, without long-term containment, collection, and treatment, pose a significant concern long after initial disposal.

Further, releases from waste rock disposal can arise years after operations have ceased, through discharges of mine influenced water, and pile deformation or collapse. Most mines require ongoing management for acidic drainage. Evidence has shown that such problems continue to be a problem even at sites that have been inactive for more than a century. Thus, discharges can take years to develop, and pose a long-term risk of hazardous releases at the site.

EPA's research indicates that all processing of ore, including physical and magnetic processing, can result in spills of intermediate material and waste. This is because transport within the facility of the many different commodities and process chemicals used in hardrock mining activities is required between subsequent processing steps, thus resulting in risk of release. In addition, where operators use toxic process chemicals, the potential for harm associated with these spills is increased. Similarly, ore must be transported from the extraction site to the mineral processing facility. Process water and solutions are often stored in ponds on site for use and recycling. Slurries are piped from mill facilities to storage facilities (which can include waste management features such as tailings ponds) by pipeline, truck, or conveyor. The slurry, containing ore and process chemicals, can contain mobilized contaminants and other hazardous substances. EPA has documented that leaks also often occur due to liner failures, containment failures during transport or at exchange points (*e.g.*, conveyor drop points or truck offloads), and defects in pipe seams. EPA has also documented that operator error, such as mishandling of solutions (*e.g.*, over-fills) or equipment, and severe weather events that overwhelm containment systems can contribute to these types of releases.

Finally, information available to EPA indicates that potential risks posed by hardrock mining and mineral processing facilities can affect all environmental media. Air, land, and water contamination may result when waste rock dumps, tailings disposal facilities and open pits are not maintained properly and release hazardous

[219] *See* U.S. Government Accountability Office, *Superfund: EPA's Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels, and More Sites Are Expected to Be Added to the National Priorities List.* Report No. GAO–10–380. May 2010 (the GAO Report).

[220] *See* Office of Inspector General, *Nationwide Identification of Hardrock Mining Sites.* Report No. 2004–P–00005. March 31, 2004 (the OIG Report).

substances to the environment.[221] EPA has also documented that releases of CERCLA hazardous substances have occurred and continue to occur, including ongoing releases that have not yet been detected and/or mitigated.

VII. Statutory and Executive Orders Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is an economically significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket. The EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, Regulatory Impact Analysis, is available in the docket. Section I.C. of this preamble summarizes the results of the RIA. As discussed in that section of the preamble, on annualized basis, the estimated regulatory costs to private entities for the two options in the proposed action are $171 million (without a financial test), and $111 million (with a financial test). EPA also segregated the costs borne by private entities into social cost (borne by society) and intra-industry transfers. The majority of the industry costs represent a transfer from the regulated industry to the financial industry, and hence the quantified annualized net social costs are estimated at $30 million to $44 million. Similarly, the Agency conducted a qualitative analysis of the benefits of the rule; however, the results were not monetized. As such, the net benefit-cost analysis of the two options may have an annual effect on the economic near $100 million or more. Accordingly, EPA submitted this action to the OMB for review under Executive Order 12866, and plans to incorporate changes in response to OMB recommendations on the proposal rule.

B. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to the OMB under the PRA. The ICR document that the EPA prepared has been assigned EPA ICR number 2554.01. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

The proposed rule would require that owners or operators of facilities subject to the rule submit information to EPA. This ICR addresses the following proposed information requirements that are part of the rule: (1) Submit an initial Notification Form to EPA within thirty days of the effective date of the regulation; (2) make relevant information available to the public on the company's website; (3) calculate financial responsibility amount and submit information to support the calculation to EPA; (4) submit evidence that support the establishment of financial responsibility; (5) update financial responsibility amount at minimum every three years and submit evidence of proper maintenance of financial responsibility; (6) notify EPA when the owner or operator and the issuer of financial instruments enter Chapter 11 bankruptcy proceedings; (7) notify EPA of any claim pursuant to CERCLA naming the owner, operator, or guarantor as defendant; (8) notify EPA when the facility is no longer authorized to operate or the date by which the owner or operator must provide notification that the facility is ceasing operations under another regulatory program; and (9) maintain a record of all of the information related to financial responsibility requirements and retain those records for three years after the owner or operator released from financial responsibility requirements.

EPA believes that submission of the information would be needed for effective implementation of CERCLA § 108(b) requirements. By requiring the owner or operator to submit information about the facility to EPA, these requirements would better enable the Agency to assure full compliance with the requirements for financial responsibility throughout the time the facility is subject to those requirements.

As discussed in section VI.A.3. of this preamble, some element of the information required for submission under this proposed rule may be claimed as proprietary business information or trade secrets. As described in that section, the proposal would not require or provide for posting of this sensitive information. However, the Agency expects that much of the information submitted to EPA under the proposal could be made available.

Respondents/affected entities: Hardrock Mining Industry.

Respondent's obligation to respond: Mandatory, pursuant to CERCLA §§ 104, 108, and 115, 42 U.S.C. §§ 9604, 9608, 9615.

Estimated number of respondents: 221.

Frequency of response: One to three times (the first three years).

Total estimated burden: 7,057 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $490,504 (per year), includes $12,532 annualized capital or operation & maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to EPA. This information should be submitted to the docket for tis proposed rule (Docket No. EPA–HQ–SFUND–2015–0781). You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *OIRA_submission@omb.eop.gov*, Attention: Desk Officer for EPA. Since OMB is required to make a decision concerning the ICR between thirty and sixty days after receipt, OMB must receive comments no later than February 10, 2017. EPA will respond to any ICR-related comments in the final rule.

C. Regulatory Flexibility Act (RFA)

Pursuant to section 603 of the RFA, EPA prepared an initial regulatory flexibility analysis (IRFA) that examines the impact of the proposed rule on small entities along with regulatory alternative that could minimize that impact. The complete IRFA is available for review in the docket and is summarized here.

1. Why EPA is Considering This Action

A series of studies and reviews conducted by the EPA Office of Inspector General (OIG) and the Government Accountability Office (GAO) from 2004 through 2008 demonstrated that the hardrock mining industry presented a risk to EPA and taxpayers with respect to the amount of cleanup costs for which they would be responsible. Information available to EPA indicates strongly that the hardrock mining industry continues to present risks associated with the production, transportation, treatment, storage, and disposal of hazardous substances. In accordance with CERCLA § 108(b) and in response to these concerns, EPA is publishing the proposed rule that would create a financial responsibility program in CERCLA.

[221] *See* U.S. EPA. 2004. *Cleaning Up the Nation's Waste Sites: Markets and Technology Trends.* EPA 542–R–04–015. Accessed at: *http://www.epa.gov/tio/pubisd.htm.*

2. Objectives of, and Legal Basis for, the Proposed Rule

The proposed rule endeavors to increase the likelihood that owners and operators will provide funds necessary to address the CERCLA liabilities at their facilities, thus preventing the burden from shifting to the taxpayer. In addition, the rule would provide an incentive for implementation of sound practices at hardrock mining facilities that would decrease the need for future CERCLA actions.

3. Estimate of the Number of Small Entities To Which the Proposed Rule Would Apply

For purposes of assessing the impacts of this regulation on small entities, a small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR part 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

For the purposes of this analysis, EPA identified approximately 221 mines/processing facilities in the potentially regulated universe; of these, 53 facilities are estimated to have a small owner (including joint ventures), corresponding to 43 firms. Twelve additional mines have owners of unknown size (due to lack of available company data). Most (38) of these 53 facilities engage in mining/extraction; 15 facilities engage in processing/refining only.

Depending on the specific NAICS code of the owner, the determination of ''small entity'' status depends on either the revenue or the number of employees of the firm. The minimum threshold for revenue in the relevant NAICS codes ranges from $11 million to $36.5 million. The employment qualifications ranges from 100 employees to 1,500 employees. Table C–1 lists summary information on the small entity universe.

TABLE C–1—SUMMARY OF SMALL BUSINESS STATISTICS (COMPANY REVENUES)

NAICS code	Industry	SBA small business size standard (as of February 2016)		Number of small firms	Average annual revenues of small firms ($Millions)	Average number of employees of small firms	Number of small firms facing annual compliance costs >1% (Median)*	Number of small firms facing annual compliance costs >3% (Median)*
		Revenues ($millions)	Employees					
211111	Crude Petroleum and Natural Gas Extraction		1250	1	$61	194	1	0–1.
212210	Iron Ore Mining		750	1	100	475	1	0–1.
212221	Gold Ore Mining		1500	10	96	261	6–7	5–6.
212234	Copper Ore and Nickel Ore Mining		1500	5	22	80	5	4.
212291	Uranium-Radium-Vanadium Ore Mining		250	2	15	48	1	0–1.
212392	Phosphate Rock Mining		1000	<1	<1	6	1	1.
212393	Other Chemical and Fertilizer Mineral Mining		500	1	<1	3	1	1.
212399	All Other Nonmetallic Mineral Mining		500	3	329	173	2	2.
213114	Support Activities for Metal Mining	20.5		2	<1	7	2	2.
213115	Support Activities for Nonmetallic Minerals (except Fuels).	7.5		1	<1	2	1	1.
236115	New Single-family Housing Construction (Except For-Sale Builders).	36.5		1	8	10	1	0.
238910	Site Preparation Contractors	15		2	2	100	2	1.
325180	Other Basic Inorganic Chemical Manufacturing		1000	2	168	295	0–1	0.
325312	Phosphatic Fertilizer Manufacturing		750	1	47	315	1	0–1.
327992	Ground or Treated Mineral and Earth Manufacturing		500	2	32	111	2	1.
331313	Alumina Refining and Primary Aluminum Production		1000	1	2	550	1	1.
331410	Nonferrous Metal (except Aluminum) Smelting and Refining.		1000	1	13	83	1	0.
331491	Nonferrous Metal (except Copper and Aluminum) Rolling, Drawing and Extruding.		750	1	34	500	1	1.
423520	Coal and Other Mineral and Ore Merchant Wholesalers.		100	1	15	54	0	0.
522390	Other Activities Related to Credit Intermediation	20.5		1	<1	1	1	1.
551112	Offices of Other Holding Companies	20.5		2	<1	2	2	2.
561499	All Other Business Support Services	15		1	<1	1	1	1.
561990	All Other Support Services	11		1	<1	2	1	1.
Unknown	Unknown			Up to 12 additional.	Unknown	Unknown	Up to 12 additional firms.	Up to 12 additional firms.
TOTAL				44 to 56 firms			35 to 49 firms	25 to 42 firms.

As required by section 609(b) of the RFA, EPA convened a Small Business Advocacy Review (SBAR) Panel to obtain advice and recommendations from small entity representatives that potentially would be subject to the rule's requirements. The SBAR Panel evaluated the assembled materials and small-entity comments on issues related to elements of an IRFA. A copy of the full SBAR Panel Report is available in the rulemaking docket.

The SBAR Panel recommended that EPA:

(1) Solicit comment on whether to provide for programmatic-based deferral of the requirement for owners and operators of facilities to calculate an individual financial responsibility amount and to obtain a financial responsibility instrument in situations where all facilities regulated by a particular Federal or state mining program could qualify for reductions for the full response component of the financial responsibility formula—that is, for all response categories, and at all facilities.

(2) propose to allow reductions to the financial responsibility amount applicable at facility for future requirements that are enforceable against the owner and operator, that are supported by adequate financial assurance, and with which the owner and operator are in compliance, and solicit comment on allowing reductions to the financial responsibility amount for other risk-reducing practices and/or controls (*e.g.*, voluntary practices) that are implemented at hardrock mining facilities that should be accounted for in the reductions, and on how, if reductions were allowed for such practices and/or controls, EPA could assure that those controls would remain in place and be effective over time where there is no regulatory program overseeing their maintenance and operation.

(3) provide in the rule discussion and solicitation of comment on the impact of the financial test on small businesses. The discussion and solicitation of comment should consider whether making a financial test available would increase the available capacity for third-party instruments in the marketplace and increase the availability of such instruments to owners or operators of small businesses and/or whether it would create a competitive disadvantage for small business, and solicit comment on those concerns.

(4) solicit comment on all aspects of the proposed financial responsibility formula, including comment on specific elements of the formula such as the robustness of the regression analyses, identification and treatment of influential data points (*i.e.* potential outliers), the use and calculation of the individual smear factors, and the assumption of source controls.

(5) solicit comment on the criteria used to identify lower-level of risk of injury classes in the proposed rule, and whether it would be feasible and appropriate to identify additional classes as presenting a lower level of risk of injury, particularly classes of mines that differ in their operations and associated risks from more traditional hardrock mines, and on whether such classes of mines, defined based on facility characteristics, could potentially encompass iron ore, phosphate, and uranium mines.

(6) request comment on whether more alternate or more flexible engineering standards can substitute for some or all of the numeric engineering standards in the proposed reduction criteria (*e.g.* planning for a 200-year storm event, reduction of net precipitation by 95 percent), on whether the proposed reduction criteria would limit flexibility necessary for innovative or different site-specific approaches and, if so, how those might be preserved, and on whether other regulatory programs already impose the requirements that would satisfy the reduction criteria.

EPA revised the rule to include in § 320.63 a proposal to allow reductions to the financial responsibility amount applicable at facility for future requirements that are enforceable against the owner and operator, that are supported by adequate financial assurance, and with which the owner and operator are incompliance. These reductions are described in section VI.D.4. of this preamble. EPA also solicited comment on most of the areas recommended by the Panel.

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

EPA estimates industry costs for the owner/operator companies that are unable to utilize a self-insurance option under the proposed rule as the resources expended and/or foregone to obtain a third-party financial responsibility instrument. Additional administrative and recordkeeping costs to industry include reading the regulations, submitting initial facility information to EPA and the public, calculating financial responsibility amounts, choosing a financial responsibility instrument, acquiring and maintaining a financial responsibility instrument, recalculating financial responsibility amounts to reflect any changes in facility operations, and any functions the rule requires of owners and operators upon the transfer of a facility, owner or operator default, a CERCLA claim against the owner or operator, and release from financial responsibility.

As described earlier, EPA began its assessment of the impact of regulatory options on small entities by first estimating the number of small entities owning hardrock mining facilities that would be subject to the proposed rule. EPA then assessed whether these small entities would be expected to incur costs that constitute a significant impact; and whether the number of those small entities estimated to incur a significant impact represent a substantial number of small entities.

To assess whether small entities' compliance costs might constitute a significant impact, EPA averaged the annualized compliance costs as a percentage of entity revenue (cost-to-revenue test). EPA compared the resulting percentages to impacts criteria of one percent and three percent of revenue. Small entities estimated to incur compliance costs exceeding one or more of the one percent and three percent impact thresholds were identified as potentially incurring a significant impact.

Table C–1 shows that 35 to 49 small entities may face an average annual compliance cost of greater than the one percent of revenues. Similarly, 25 to 42 small entities may experience impact on revenues above three percent. The results of the impacts analysis do not vary significantly between the two regulatory options. However, impacts are generally lower under Option 2 due to the lower compliance costs when a financial test is available.

These results may suggest that a significant number of small entities expected to incur annualized cost of more than the three percent of the revenue thresholds. However, because of data limitations, the screening level analysis relied upon estimated financial responsibility amounts for each facility based on facility type, rather than actual size and nature of operations. Further, reliable and current revenues information for small, private firms was not readily available. As a result, these results are not suggestive of impacts for any specific company or entity.

5. Related Federal Rules

These are the only financial responsibility requirements for non-transportation related facilities pursuant to CERCLA.

6. Description of Alternatives to the Proposed Rule

The Agency considered alternatives to provisions of this rule. Those alternatives are discussed in section VII.K. of this preamble.

D. Unfunded Mandates Reform Act (UMRA)

This action contains a Federal mandate under UMRA, 2 U.S.C. 1531–1538, that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any one year. Accordingly, EPA has prepared a written statement required under section 202 of UMRA. The statement is included in the docket for this action and briefly summarized here.

The RIA estimates the rule may affect 221 hardrock mining and processing facilities. EPA estimates that the regulation will have aggregate annual compliance costs ranging from $111 million to $171 million to the private sector. A detailed assessment of the anticipated costs and benefits (presented qualitatively) of the Federal mandate is provided in the RIA.

In accordance with UMRA § 205, EPA is proposing a range of regulatory options. The options can be summarized as: (1) A financial responsibility regulation that allows for a financial test, and (2) a financial responsibility regulation that does not allow for a financial test. These options are all considered to be technologically feasible and economically achievable.

This action is not subject to the requirements of § 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

EPA believes that this action will not have federalism implications as defined by agency policy for implementing Executive Order 13132, entitled ''Federalism.''

Earlier in the development of this proposed rule, EPA projected that the CERCLA § 108(b) rules would have federalism implications under the terms of Executive Order 13132, and EPA planned certain outreach activities accordingly. As discussed in Section IV of this preamble, EPA spent significant time and effort gathering and evaluating information on regulated entities and considering various approaches to structuring the proposed rule. EPA also considered as part of this the potential relevance of CERCLA § 114(d). In light of further development of the proposed rule and its resultant analysis of the question of federalism implications as explained below, EPA has come to expect that this action does not, in fact, have federalism implications. Regardless of this determination on the applicability of the Executive Order, EPA nonetheless engaged its intergovernmental partners in the same pre-proposal outreach activities expected under the Executive Order.

As part of the regulatory impact analysis, EPA analyzed the CERCLA § 108(b) proposed rule's potential for federalism implications as 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.'' EPA typically considers a policy or regulation to have federalism implications if it results in the expenditure by State and/or local governments in the aggregate of $25 million or more nationally in any one year, or if the policy or regulation results in preemption, whether by intent or effect, of State of local government law. The proposed CERCLA § 108(b) rule does not impose requirements on, nor is expected to result in significant expenditure by, state and/or local governments. Further, as discussed in Section V of the preamble, EPA does not believe that CERCLA § 114(d) gives a preemptive effect to EPA's CERCLA § 108(b) financial responsibility regulations over state reclamation bonding requirements.

In any case, this proposed rule is of significant interest to state and/or local governments. Therefore, consistent with the EPA's policy to promote intergovernmental communication and cooperation, and in response to the considerable interest shown by states prior to and during the development of this action, EPA engaged in extensive pre-proposal consultation, under the auspices of Executive Order 13132, to ensure that our state and local partners would have the opportunity to provide meaningful and timely input into its development. EPA also anticipates additional state and local government input in response to the proposed rule. In this regard, EPA is interested in receiving information on any state hazardous substance response program(s) that require demonstrations of financial responsibility for claims made and that states believe could be preempted by this proposal. EPA is committed to continued interactions with the states before promulgating any final rule.

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

This action does not have tribal implications as specified in Executive Order 13175 (Executive Order 13175). Executive Order 13175, Consultation and Coordination with Indian Tribal Governments,[222] 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.'' EPA believes that any tribal impacts from this regulation will be limited, because no tribal governments own or operate facilities in the potentially regulated universe.

Earlier in the development of this proposed rule, EPA projected that the CERCLA 108(b) rules would have tribal implications and EPA planned certain outreach activities accordingly. As discussed in Section IV of this preamble, EPA spent significant time and effort gathering and evaluating information on regulated entities and considering various approaches to structuring the proposed rule. In light of further development of the proposed rule and its resultant analysis of the question of tribal implications as explained below, EPA has come to expect that this action does not, in fact, have tribal impacts. Regardless, EPA held early engagement with tribal governments as guided by EPA Policy on Consultation and Coordination with Indian Tribes.

To assess the impact on tribal governments, EPA identified tribal lands and associated tribes that overlap with the ''included'' universe of currently operating facilities potentially subject to the CERCLA § 108(b) rulemaking. Relevant tribal lands were identified through a GIS dataset available from the U.S. Census Bureau.[223] This dataset included the following legal and statistical entities: Federally recognized American Indian reservations and off-reservation trust land areas;[224] State-recognized

[222] *See* 65 FR 67249, November 9, 2000.

[223] *See* U.S. Census Bureau. (2014). ''TIGER/Line Shapefile, 2014, Series Information File for the Current American Indian/Alaska Native/Native Hawaiian Areas National (AIANNH) National Shapefile.'' Accessed at: *https://catalog.data.gov/dataset/tiger-line-shapefile-2014-series-information-file-for-the-current-american-indian-ala.*

[224] The Census Bureau defines off-reservation trust land as ''areas for which the United States holds title in trust for the benefit of a tribe (tribal trust land) or for an individual American Indian (individual trust land). Trust lands can be alienated or encumbered only by the owner with the approval of the Secretary of the Interior or his/her authorized representative. Trust lands may be located on or off a reservation; however, the Census Bureau tabulates

American Indian reservations; Hawaiian home lands (HHLs); Alaska Native village statistical areas (ANVSAs); Oklahoma tribal statistical areas (OTSAs); Tribal designated statistical areas (TDSAs); and State designated tribal statistical areas (SDTSAs).

To estimate the physical extent of the facilities, buffers of varying sizes were projected around these coordinates in ArcGIS. Half mile, one-mile, and ten-mile buffers were projected around each set of coordinates. The number of facilities overlapping tribal lands varied considerably depending on the size of the buffer used: with the half-mile buffer, four facilities overlapped three tribal land areas; with the one-mile buffer, six facilities overlapped four tribal land areas; and with the ten-mile buffer, 35 facilities overlapped 38 tribal land areas. A complete list of the facilities and tribes that fall within these buffers is presented in the RIA.

EPA has concluded that this action will have limited tribal implications to the extent that the facilities in its regulated universe are located close to tribal lands. As no tribal governments own or operate any of the regulated facilities, and therefore will not incur any direct compliance costs as a result of the proposed rule, Executive Order 13175 does not apply to this rule.

Although Executive Order 13175 does not apply, the EPA consulted with tribal officials during the development phase of the proposed rule, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes. In early June 2016, EPA sent letters to all federally recognized Indian tribes, notifying them of the opportunity to provide input to the proposed rule during the consultation and coordination period. EPA conducted tribal outreach activities including a tribal webinar on June 22, 2016, and conference calls with the National Tribal Caucus on August 3, 2016, and the Great Lakes Fish and Wildlife Commission on August 8, 2016. EPA also participated in the Tribal Lands and Environment Forum from August 15–18, 2016, where several tribal leaders expressed interest in the proposed rulemaking. The EPA also intends to hold a second round of consultation and coordination with tribal officials aligned with the public comment period for the proposed rule. EPA also intends to summarize comments and input received from both consultation and coordination periods with the final action.

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

This action is not subject to Executive Order 13045 because EPA does not expect the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. EPA expects that by adjusting the amount of financial responsibility to account for environmentally safer practices, the proposed rule would provide an incentive for implementation of sound practices at hardrock mining facilities and thereby decrease the need for future CERCLA actions. To the extent that environmental conditions surrounding mine sites improve following this rule, the children living in close proximity to mining facilities are likely to benefit. To assess the proportional distribution of the benefits of the proposed rule, EPA prepared an analysis of the demographic characteristics of populations surrounding hardrock mining site to identify the number and proportion of children living in close proximity to these sites. This analysis is presented in the Regulatory Impact Analysis (RIA), which is available in the docket.

As discussed in the RIA, of the 775,000 people living within one mile of regulated facilities, approximately 188,000 or 24.3 percent, are under the age of 18. Nationwide, approximately 23.5 percent of the population is under the age of 18. To the extent that environmental conditions surrounding mine and mineral processor sites improve following this rule, the children living in close proximity to mining facilities are likely to benefit.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This proposed rule would establish financial responsibility requirements under CERCLA designed to assure that owners and operators of facilities provide funds to address CERCLA liabilities at their sites, and to create incentives for sound practices that will minimize the likelihood of a need for a future CERCLA response. The proposed rule is not expected to impact energy production, distribution, or consumption.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

The documentation for this decision is contained in the Regulatory Impact Analysis (RIA). A copy of the RIA can be found in the docket for this rule. As discussed in Section 8 of the RIA, EPA examined whether the actions being proposed under the proposed rules present environmental justice concerns for communities surrounding mining facilities.

EPA conducted an analysis of demographic characteristics of populations near hardrock mining and mineral processing facilities to determine whether the benefits of the proposed rule are differentially distributed. For this analysis, the agency analyzed national census population data within one-mile, five-mile, 15-mile, and 25-mile radii from mining facilities, and compared them with the demographic characteristics of states and national levels. Of the 221 hardrock mining/mineral processing facilities in the RIA universe, the total population within one mile of these sites is approximately 775,000 people, of which 260,000 (34 percent), belong to a minority group. In addition, 157,000 (21 percent) live below the Federal Poverty Level. Both of these proportions are roughly comparable to nationwide benchmarks. Nationally, 37 percent of the population belongs to a minority group, and 16 percent of the population lives below the Federal Poverty Level. The analysis also compared the concentrations of minority groups and people living in poverty to state averages. The results show that within one-mile radius, 230 (36 percent) census block groups exceeded the statewide minority average, and 356 (56 percent) census block groups exceeded their respective statewide poverty levels.

EPA expects this proposed rule will, when made final, increase the likelihood that owners and operators will provide funds necessary to address the CERCLA liabilities at their facilities, thus preventing owners or operators from shifting the burden of cleanup to

data only for off-reservation trust lands with the off-reservation trust lands always associated with a specific federally recognized reservation and/or tribal government.''

See U.S. Census Bureau. ''Geographic Terms and Concepts—American Indian, Alaska Native, and Native Hawaiian Areas.'' Accessed August 21, 2015 at: *https://www.census.gov/geo/reference/gtc/gtc_aiannha.html.*

other parties, including the taxpayer. In addition, EPA expects that by adjusting the amount of financial responsibility to account for environmentally safer practices, the proposed rule would provide an incentive for implementation of sound practices at hardrock mining facilities and thereby decrease the need for future CERCLA actions. Groups within the proximity of hardrock mining sites are expected to benefit from the environmental performance improvements, and other benefits of the rule. This analysis shows that the percentage of minority and low-income populations in and near hardrock mining sites are proportionally represented (in some case higher) compared to national and state averages. This analysis indicates that minority and low-income communities are expected to benefit as much as any other group under the proposed rule.

List of Subjects in 40 CFR Part 320

Environmental protection, Financial responsibility, Hardrock mining, Hazardous substances.

Dated: December 1, 2016.

Gina McCarthy,

Administrator.

For the reasons set forth in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended by adding part 320 to read as follows:

PART 320—FINANCIAL RESPONSIBILITY REQUIREMENTS FOR CERCLA LIABILITIES

Subpart A—General Facility Requirements

Sec.

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320.3 Definitions and usage.
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Subpart D—G [Reserved]

Subpart H—Hardrock Mining Facilities

320.60 Applicability
320.61 Timeframes for Compliance
320.62 Definitions
320.63 Determining the Financial Responsibility Amount
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320.65 Third-party Certification.

Subpart A—General Facility Requirements

§ 320.1 Purpose and Scope.

(a) The purpose of this part is to establish requirements under § 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42, U.S.C. 9601, et seq., for current owners and operators of non-transportation-related facilities to establish and maintain evidence of financial responsibility.

(b) The amount of financial responsibility under this part must be consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances at their facilities, and must be available to pay for the response costs, health assessment costs, and natural resource damages under CERCLA for which the owner and operator are responsible.

§ 320.2 Applicability.

(a) The regulations of this part apply to current owners and operators of facilities that are authorized to operate, or should be authorized to operate, on or after the effective date of the rule under which they become subject to this part. The Federal Government and States are exempt from the requirements of this part.

(b) Owners and operators of all facilities within the classes identified in Table A–1 must comply with the applicable requirements of subparts A through C of this part.

(c) Owners and operators of facilities identified in Table A–1 of this section must also comply with the applicable class-specific requirements as specified in Table A–1 of this section.

(d) The requirements of this part apply until EPA releases the owner and operator from the obligation to maintain financial responsibility for its facility in accordance with § 300.25 or § 300.27.

TABLE A–1

Facility class(es)	Effective date	Applicable class-specific requirements
Owners and operators of hardrock mining facilities identified in § 320.60(a).	[Date 30 days after date of publication of Final Rule].	Subpart H.

§ 320.3 Definitions and usage.

(a) As used in this part, words in the singular include the plural; words in the plural include the singular; and words in the masculine gender also include the feminine and neuter genders as the case may require.

(b) When used in this part, the following terms have the meanings given in this paragraph. Terms not defined in this part have the meaning given by CERCLA or the national Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR part 300.

Administrator means the EPA Administrator, or designee thereof.

Authoriz(-ed)(-ation) to operate means the owner or operator has obtained permission through a permit, license, or other legally applicable form of permission to conduct the activities under Federal, state, or local law, and is irrespective of the level of activity at the facility that causes the owner and operator to be subject to this part.

Current § 108(b) financial responsibility amount means the most

recent amount required to be prepared under § 320.20 of this part.

Electronic financial responsibility reporting compliance date means the date that EPA announces in the **Federal Register**, on or after which owners and operators are required to file submissions required by this part in an EPA electronic system, or its successor system.

Enforceable Document means a document issued under a Federal, state, tribal, or local governmental authority, to which the owner or operator is currently subject, and the requirements of which can be enforced against the owner or operator by the issuing authority. An enforceable document can be a permit, a settlement, an order, or any other document that meets the above criteria.

Parent Corporation means a corporation that directly owns at least 50 percent of the voting stock of the corporation which is the facility owner or operator; latter corporation is deemed a subsidiary of the parent corporation.

Substantial Business Relationship means the extent of a business relationship necessary under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A ''substantial business relationship'' must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the Administrator.

§ 320.4 Availability of information; confidential business information.

(a) Any information provided to EPA under this part, or required to be provided to the public by the owner or operator under this part, will be made available to the public to the extent and in the manner authorized by the Freedom of Information Act, 5 USC 552, section 104 of CERCLA, and EPA regulations implementing the Freedom of Information Act and section 104 of CERCLA, as applicable.

(b) Any person who submits information to EPA in accordance with this part, or who is required to provide information to the public under this part, may assert a claim of business confidentiality covering part or all of that information by following the procedures set forth in § 2.203(b). Information covered by such a claim will be disclosed by EPA, or will be required to be released by the owner or operator only to the extent, and by means of the procedures, set forth in part 2, subpart B, of this chapter. However, if no such claim accompanies the information when it is received by EPA, it may be made available to the public without further notice to the person submitting it.

(c) Assertions of claims of business confidentiality will not be considered by EPA if the information is covered by a Class Determination of non-confidentiality.

§ 320.5 Notification requirement.

(a) (1) Each owner and operator that is authorized to operate or should be authorized to operate on the effective date of the final rule under which the facility becomes subject to the requirements of this part must complete the Notification Form in Appendix A of this part, providing all information requested, and submit it to the Administrator within thirty days of the effective date of that regulation.

(2) Owners or operators that become authorized to operate after the effective date of the final rule that makes their facility subject to the requirements of this part must submit the notification form required in paragraph (a)(1) of this section prior to beginning operations.

(b) Within thirty days of receiving notification EPA will:

(1) Provide the owner or operator acknowledgement of receipt of the notification, and

(2) If the facility has not received one, assign and provide an EPA Identification number to the facility.

(c) Owners and operators must notify EPA of changes at their facilities by updating their Notification Form, and/or other documents required under the applicable class-specific subpart, and resubmitting it to EPA within thirty days of the change.

§ 320.6 General information submission requirements.

Owners and operators must submit information as required by this part to support financial responsibility requirements including:

(a) The notification form required in § 320.5;

(b) Information required under the public involvement requirements of § 320.9;

(c) Notifications required under subpart B of this part;

(d) Demonstration of financial responsibility as required under subpart C of this part; and

(e) Information required under class-specific requirements identified in Table 1 of § 320.1(f) as applicable to the facility.

§ 320.7 Requirement for electronic submission of information.

(a) Information submitted to the Administrator under the requirements of this part must be submitted in paper format until the electronic reporting compliance date, defined in § 320.3.

(b) Electronic submissions that are obtained, completed, and transmitted in accordance with this section, and used in accordance with this section, are the legal equivalent of paper submissions bearing handwritten signatures, and satisfy for all purposes any requirement in these regulations to obtain, complete, sign, provide, use, or retain such information.

(c) Where an electronic signature is required, such signature must be a legally valid and enforceable signature under applicable EPA and other Federal requirements pertaining to electronic signatures.

(d) The Administrator may waive the requirement for electronic submission under the following conditions:

(1) *General waiver.* The Administrator may grant a general waiver for a renewable period of one year to owners or operators that cannot comply with the requirement for electronic submission. The owner or operator must submit a written request for a general waiver to the Administrator at least thirty days in advance of the date the first submission that would be subject to the requested general waiver is due to EPA or, for a renewal, thirty days in advance of the expiration of the waiver. The request for a general waiver must describe the conditions(s) in paragraphs (i) through (iv) that prevent electronic submission of information. The Administrator may grant a general waiver upon a finding that:

(i) The owner or operator is unable to gain access to a system allowing electronic reporting because the owner or operator is located in an area with insufficient broadband access;

(ii) Obtaining a system to support electronic submission would impose an undue cost burden on the owner or operator,

(iii) The owner or operator's electronic system is incompatible with the Agency's, or

(iv) Religious practices of the owner or operator prohibit the use of necessary technologies.

(2) *Emergency waiver.* The Administrator may grant a non-renewable emergency waiver for an individual submission required under this part to an owner or operator that would not is unable to comply with the requirement for electronic submission. The owner or operator must submit a written request for an emergency waiver

within ten days of the date the submission was due to EPA. The request for an emergency waiver must describe the condition(s) in paragraphs (i) through (iii) that prevented the electronic submission of information and must be accompanied by a paper copy of the information due. The Administrator may grant an emergency waiver upon a finding that one of the following events occurred that prevented the electronic submission of information by the owner or operator:

(i) A large-scale national disaster (*e.g.,* hurricane);

(ii) A prolonged electronic reporting system outage; or

(iii) A prolonged failure of the owner's and operator's computer system.

§ 320.8 Recordkeeping requirements.

(a) The owner or operator must develop a facility record that contains information related to its compliance with the financial responsibility requirements under this part.

(b) The facility record must include, at a minimum, the information that must be submitted to EPA under § 320.6(a), as applicable, and all notifications received from EPA related to the financial responsibility obligations of the facility.

§ 320.9 Requirements for public notice.

[PROPOSED REGULATORY TEXT FOR APPROACH 1]

(a) Within sixty days of the date it becomes subject to the requirements of this part, the owner or operator must establish and maintain a website titled ''CERCLA Section 108(b) Financial Responsibility Information' and submit to EPA the URL of a location on its company Web site where it will make information available to the public.

(b) Within thirty days of receiving the URL, EPA will post on its website notice to the public that the facility is subject to § 108(b) requirements, and provide the public the facility name, EPA ID, and the URL.

(c) Beginning ninety days after the effective date of the final rule under which the facility becomes subject to the requirements of this part, the owner or operator must make information available to the public on its company website at the URL provided to EPA. The initial posting must include at least the information required under paragraph (d)(1).

(d) The information on the website must include, at a minimum:

(1) The current name and contact information for a person that will provide the public information about the facility's financial responsibility requirement under CERCLA § 108(b);

(2) Information the owner or operator is required to submit, or has submitted, to EPA under this part so long as that information is not successfully claimed as Confidential Business Information under 40 CFR 2.203(b).

(3) Notifications from EPA to the owner or operator.

(e) The owner or operator must assure that the information is readily available to the public by placing it in a prominent position on the company's website, and by assuring that public access is not obstructed by complex or overly burdensome access processes, passwords, or other information requirements.

(f) The owner or operator must update the website with new information including information submitted to EPA in compliance with this part. Information submitted to EPA must be posted on the owner or operator's website within thirty days of submitting it to EPA.

[PROPOSED REGULATORY TEXT FOR APPROACH 2]

(a) EPA will provide the public information related to facilities subject to financial responsibility requirements under this part. That information may include, at a minimum:

(1) The current name and contact information for a person that can provide the public information about the facility's financial responsibility requirement under this part;

(2) Information the owner or operator is required to submit, or has submitted, to EPA under this part so long as that information is not successfully claimed as Confidential Business Information under 40 CFR 2.203(b).

(3) Notifications from EPA to the owner or operator.

Subpart B—General Financial Responsibility Requirements

§ 320.20 Applicable financial responsibility amounts.

Owners and operators must calculate a current amount of financial responsibility at their facilities in accordance with the requirements of this section, and in accordance with applicable class-specific subparts identified in § 320.1(f) Table 1.

§ 320.21 Procedures for establishing financial responsibility.

Owners and operators must submit evidence of financial responsibility and supporting information to EPA in accordance with the requirements of this section, and in accordance with applicable class-specific subparts identified in § 320.2 Table 1.

§ 320.22 Maintenance of instruments.

(a) An owner or operator must recalculate the financial responsibility level three years after the date the owner or operator is first required to submit the full amount of financial responsibility under § 320.61, every three years thereafter, and within sixty days after every successful claim against a CERCLA § 108(b) financial responsibility instrument. The recalculation must use the most current facility information available. The owner or operator must submit the revised financial responsibility amount to EPA, along with supporting documentation.

(b) If the resulting amount of financial responsibility required is greater than the amount of financial responsibility provided by the current CERCLA § 108(b) financial responsibility instrument(s), the owner or operator must submit evidence of the increased value of the instrument(s) within sixty days of the recalculation.

(c) If the resulting amount of financial responsibility required is less than the amount of financial responsibility provided by the current CERCLA § 108(b) financial responsibility instrument(s), the owner and operator may submit a written request to the Administrator to lower the required financial responsibility amount at the facility. The request must include updated information to support the revised financial responsibility amount. The amount of financial responsibility required at the facility may be reduced to the recalculated amount only with written approval by the Administrator.

§ 320.23 Incapacity of owners or operators, corporate guarantors, or financial institutions.

[PROPOSED REGULATORY TEXT FOR OPTION 1 (Preferred Option)]

(a) An owner or operator must notify the Regional Administrator by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator as debtor, within ten days after commencement of the proceeding.

(b) An owner or operator who demonstrates financial responsibility under this part by obtaining a trust fund, surety bond, letter of credit, or insurance policy will be deemed to be without the required financial responsibility in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee

institution to act as trustee or of the institution issuing the surety bond, letter of credit, or insurance policy to issue such instruments. The owner or operator must provide other evidence of financial responsibility within sixty days after such an event.

[PROPOSED REGULATORY TEXT FOR OPTION 2]

(a) An owner or operator must notify the Administrator by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator as debtor, within ten days after commencement of the proceeding. A corporate guarantor of a corporate guarantee as specified in § 320.44, if named as a debtor, must make such a notification, as required under the terms of the corporate guarantee (§ 320.50(f)).

(b) An owner or operator who demonstrates financial responsibility under this part by obtaining a trust fund, surety bond, letter of credit, or insurance policy will be deemed to be without the required financial responsibility in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing the surety bond, letter of credit, or insurance policy to issue such instruments. The owner or operator must provide other evidence of financial responsibility within sixty days after such an event.

§ 320.24 Notification of claims brought against owners, operators, or guarantors.

An owner or operator subject to this part must notify the Administrator by certified mail of the filing of any claim pursuant to CERCLA naming the owner or operator or the owner or operator's guarantor, as defendant, within ten days after commencement of the proceeding. Such notification shall include a copy of any papers filed by the claimant with a court, or other information allowing the Administrator to identify the court, case name and number, and parties.

§ 320.25 Facility transfer.

(a) If a facility, or a portion of a facility, subject to the requirements of this part is sold or otherwise transferred to another owner, or if the operation of a facility is transferred to another operator, the previous owner or operator must maintain financial responsibility for the facility, or transferred portion of the facility, in accordance with this part, until the Administrator releases the previous owner or operator from the obligation to maintain financial responsibility under paragraph (b) of this section.

(b) Any new owner or operator of a facility must provide evidence of financial responsibility as required in this part for the facility or portion of the facility prior to assuming ownership or operation. Upon the new owner or operator's demonstration of financial responsibility in accordance with this part, the Administrator will provide notice to the prior owner and operator that they are no longer required to provide evidence of financial responsibility in accordance with this part.

§ 320.26 Notification of cessation of operations.

The owner or operator must notify the Administrator thirty days prior to:

(1) The date the facility is no longer authorized to operate, or

(2) The date the owner or operator is required under another applicable regulatory program to notify the relevant regulatory authority that the facility is ceasing operations, whichever is earlier.

§ 320.27 Release from financial responsibility requirements.

(a) The owner or operator may petition to be released from its obligations under this part by submitting a request to the Administrator, which must include evidence demonstrating that the degree and duration of risk associated with the production, transportation, treatment, storage and disposal of hazardous substances is minimal. Upon receiving such request, the Administrator will evaluate facility information, including the information submitted by the owner or operator, regarding the degree and duration of risk associated with the production, transportation, treatment, storage, and disposal of hazardous substances at the facility, and make a determination regarding the owner's or operator's request.

(1) If the Administrator determines that the degree and duration of risk associated with the production, transportation, treatment, storage, and disposal of hazardous substances at the facility is minimal, and that the facility should therefore be released from the requirements of this part, the Administrator will post the draft decision on the EPA website, provide the public opportunity to comment on the decision, and post the Agency's final decision, and response to comments received, on the EPA website.

(2) If the Administrator determines (either initially or following consideration of public comment during the procedures described in paragraph (a)(1) of this section), that the degree and duration of risk associated with the production, transportation, treatment, storage, and disposal of hazardous substances is not minimal, the Administrator will not release the owner or operator from the requirement to maintain financial responsibility in accordance with this part. The Administrator will provide notice of the Agency's final decision, and response to comments received, and will provide the owner or operator a detailed written statement explaining the decision.

(3) An owner or operator that petitions the Administrator under the procedures in this section and does not obtain a release from requirements under this part may submit a petition for a renewed determination under this section only if the owner or operator can provide additional, relevant information, not previously considered by the Administrator, demonstrating that there is minimal risk associated with the production, transportation, treatment, storage, and disposal of hazardous substances at the facility.

(b) [Reserved].

Subpart C—Available Financial Responsibility Instruments

[PROPOSED REGULATORY TEXT FOR OPTION 1 (Preferred Option)]

Owners and operators may demonstrate financial responsibility using one or a combination of the financial responsibility instruments provide in §§ 320.40 through 320.43.

[PROPOSED REGULATORY TEXT FOR OPTION 2]

Owners and operators may demonstrate financial responsibility using one or a combination of the financial responsibility instruments provide in §§ 320.40 through 320.45.

§ 320.40 Letter of Credit.

(a) An owner or operator may satisfy the requirements of this part by obtaining an irrevocable standby letter of credit which conforms to the requirements of this section and is issued by an institution which has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or state agency.

(b) The wording of the letter of credit must be identical to the wording specified in § 320.50(b). The letter of credit must either be issued in favor of:

(1) The trustee of a trust fund established by an agreement worded identical to the language in § 320.50(a) and must authorize the trustee to make draws on the letter of credit to

administer the claims process for CERCLA response costs, health assessment costs, and natural resource damages in accordance with the terms of the trust agreement; or

(2) Any and all third-party CERCLA claimants and must provide for payment directly to claimants for CERCLA response costs, health assessment costs, and natural resource damages.

(c) If the letter of credit is issued in favor of the trustee of a trust fund, the owner or operator must submit a certified copy of the letter of credit to the Administrator and submit the original letter of credit to the trustee authorized to make draws on the letter of credit. An acknowledgment of the receipt of the letter of credit from the trustee must be submitted by the owner or operator to the Administrator.

(d) If the letter of credit is issued in the favor of any and all third-party CERCLA claimants, the owner or operator must submit the originally signed letter of credit to the Administrator.

(e) An owner or operator who uses a letter of credit to satisfy the requirements of this part must also establish a trust fund and update Schedule A of the trust agreement within sixty days after a change in the amount of CERCLA § 108(b) financial responsibility. This trust fund must meet the requirements of the trust fund specified in § 320.45, except that:

(1) An originally signed duplicate of the trust agreement must be submitted to the Administrator with the original or the certified copy of the letter of credit; and

(2) Unless the trust fund is funded pursuant to the requirements of this part, including by holding the letter of credit as specified in this section, the following are not required by these regulations:

(i) Payments into the trust fund as specified in § 320.45;

(ii) Annual valuations as required by the trust agreement; and

(iii) Notices of payment as required by the trust agreement.

(f) The letter of credit must be irrevocable and issued for a period of at least one year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator, the trust fund trustee (if the letter is issued in favor of the trustee), and the Administrator by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days will begin on the date when the owner or operator, the trust fund trustee (if applicable), and the Administrator have received the notice, as evidenced by the return receipts. If the issuing institution timely notifies the owner or operator, the trustee, and the Administrator, and the owner or operator fails to submit and obtain the Administrator's approval of alternate financial responsibility within ninety days of the receipt of such notice, the Administrator is authorized to draw on the letter of credit as specified in paragraphs (k) and (l) of this section.

(g) The letter of credit must be issued in an amount at least equal to the current required CERCLA § 108(b) financial responsibility amount, except as provided in § 320.46.

(h) Whenever the required amount of CERCLA § 108(b) financial responsibility increases to an amount greater than the credit, the owner or operator, within sixty days after the increase, must either cause the credit to be increased to an amount at least equal to the CERCLA § 108(b) financial responsibility amount and submit evidence of such increase to the Administrator and the trust fund trustee (if the letter is issued in favor of the trustee), or obtain other financial responsibility as specified in this part to cover the increase. Whenever the required amount of CERCLA § 108(b) financial responsibility decreases, the credit may be reduced to the amount of the current required CERCLA § 108(b) financial responsibility amount following written approval by the Administrator.

(i) If the letter of credit is issued in favor of the trust fund trustee, parties may make claims against the trust fund in accordance with the terms of the trust agreement in order to receive payment from the letter of credit.

(j) If the letter of credit provides for direct payment, claimants may make claims as follows:

(1) Any party that obtains a final judgment from a Federal court awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility against any of the current owners or operators may make a claim against the letter of credit. The party may only make a claim after the thirtieth day after the judgement and if they have not recovered or been paid the funds from any other source.

(2) The Administrator or other authorized Federal agency may make a claim against the letter of credit for payment if payment has not been made as required by a CERCLA settlement associated with the facility between a current owner or operator and EPA or another Federal agency.

(3) The Administrator or another authorized Federal agency may make a claim against the letter of credit requesting payment into a trust fund established pursuant to a CERCLA unilateral administrative order issued to a current owner or operator if performance at the facility as required by the order has not occurred. The Administrator or another Federal agency may only make the claim against the letter of credit if the owner or operator has provided a written statement that the letter of credit may be used to assure the performance of the work required in the order.

(k) If the owner or operator does not establish alternate financial responsibility as specified in this part and obtain written approval of such alternate financial responsibility from the Administrator within ninety days after receipt by the owner or operator, the trust fund trustee (if the letter is issued in favor of the trustee), and the Administrator of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date:

(1) The Administrator will draw on the letter of credit if the letter of credit is issued in favor of any and all third party CERCLA claimants; or

(2) If the letter of credit is issued in favor of the trust fund trustee, the Administrator will inform the trustee of the trust fund that the owner or operator did not establish alternate financial responsibility and obtain written approval of such alternate financial responsibility within ninety days. In accordance with the terms of the trust agreement, this notice will prompt the trustee to draw on the letter of credit and deposit any unused portion of the letter of credit into the trust fund.

(l) The Administrator may delay the drawing or the notification to the trustee of the trust fund that the owner or operator did not establish alternate financial responsibility and obtain written approval of such alternate financial responsibility within ninety days if the issuing institution grants an extension of the term of the credit. During the last thirty days of any such extension the Administrator will draw on the letter of credit or notify the trustee of the trust fund that the owner or operator did not establish alternate financial responsibility and obtain written approval of such alternate financial responsibility if the owner or operator has still failed to provide alternate financial responsibility as specified in this section and obtain

written approval of such financial responsibility from the Administrator.

(m) The Administrator will return the letter of credit to the issuing institution for termination or agree to the termination of the trust holding the letter of credit when:

(1) An owner or operator substitutes alternate financial assurance as specified in this part; or,

(2) The Administrator releases the owner or operator from the requirements of this part in accordance with § 320.27.

§ 320.41 Surety bond.

(a) An owner or operator may satisfy the requirements of this part by obtaining a surety bond which conforms to the requirements of this paragraph and submitting the originally signed bond to the Administrator.

(b) The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

(c) The wording of the surety bond must be identical to the wording specified in § 320.50(c).

(d) A surety bond may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(1) The state in which the surety is incorporated, and

(2) Each state in which a facility covered by the surety bond is located have submitted a written statement to EPA that a surety bond executed as described in this section and § 320.50(c) of this part is a legally valid and enforceable obligation in that state.

(e) The surety bond may be issued by multiple sureties provided that each is liable for its individual vertical percentage share of the total penal sum of the bond.

(f) An owner or operator who uses a surety bond to satisfy the requirements of this part must also establish a standby trust fund and update Schedule A of the trust agreement within sixty days after a change in the amount of CERCLA § 108(b) financial responsibility. This standby trust fund must meet the requirements specified in § 320.45, except that:

(1) An originally signed duplicate of the trust agreement must be submitted to the Administrator with the surety bond; and

(2) Until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(i) Payments into the trust fund as specified in § 320.45;

(ii) Annual valuations as required by the trust agreement; and

(iii) Notices of nonpayment as required by the trust agreement.

(g) The surety bond must guarantee that the owner or operator will:

(1) Make payments or ensure that payments are made for CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility as required in a final court judgment from a Federal court against any current owner or operator within thirty days to the party or parties obtaining the judgment;

(2) Make payments or ensure payments are made as required in a CERCLA settlement associated with the facility between any of the current owners and operators at the facility and EPA or another Federal agency;

(3) Perform or ensure the performance of the work required at the facility by a CERCLA unilateral administrative order issued to any of the current owners or operators by EPA or by another Federal agency for which the owner or operator provides a written statement allowing for the bond to assure performance of the work; and

(4) Provide alternate financial responsibility as specified in this part or ensure that alternate financial responsibility as specified in this part is provided for facilities covered by the bond, and obtain the Administrator's written approval or ensure the Administrator's written approval is obtained of the financial responsibility provided, within ninety days after receipt by both the owner or operator and the Administrator of a notice of cancellation of the bond from the surety.

(h) Under the terms of the surety bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond and must make payment in accordance with the direction of the claimant and the terms of the bond. Provided, however, the liability of the surety will be limited to the penal sum of the bond plus the amount of any investigation or legal defense fees incurred by the surety.

(i) The penal sum of the bond must be in an amount at least equal to the required current CERCLA § 108(b) financial responsibility amount, except as provided in § 320.46.

(j) Whenever the required amount of CERCLA § 108(b) financial responsibility increases to an amount greater than the penal sum, the owner or operator, within sixty days after the increase, must either cause the penal sum to be increased to an amount at least equal to the CERCLA § 108(b) financial responsibility amount and submit evidence of such increase to the Administrator, or obtain other financial assurance as specified in this section to cover the increase. Whenever the required amount of CERCLA § 108(b) financial responsibility decreases, the penal sum may be reduced to the amount of the current required CERCLA § 108(b) financial responsibility amount following written approval by the Administrator.

(k) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Administrator. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Administrator, as evidenced by the return receipts.

(l) The owner or operator may terminate the bond if the Administrator has given prior written authorization based on his receipt of evidence of alternate financial responsibility as specified in this part or the Administrator releases the owner or operator from the requirements of this part in accordance with § 320.27.

§ 320.42 Insurance.

(a) An owner or operator may satisfy the requirements of this part by obtaining insurance for CERCLA response costs, health assessment costs, and natural resource damages that conforms to the requirements of this section. Each insurance policy must be amended by the attachment of a CERCLA § 108(b) endorsement as worded in § 320.50(d).

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(c) The owner or operator must submit a signed duplicate original of the CERCLA § 108(b) financial responsibility endorsement to the Administrator, or regional delegees of the Administrator as applicable if the endorsement covers facilities located in multiple regions. The endorsement must provide coverage effective when required by the compliance schedule in § 320.2.

(d) The owner or operator may obtain insurance from up to four insurers to demonstrate CERCLA § 108(b) financial responsibility. If the owner operator obtained insurance from multiple insurers, an endorsement from each insurer must be submitted and must provide that a claimant may make a claim against each of the insurers providing evidence of financial responsibility for the insurer's proportional share of the CERCLA

§ 108(b) financial responsibility up to the face value of the policy.

(e) The insurance policy must provide coverage for third-party CERCLA claims against all current owners and operators at the facility as required by this part.

(f) An owner or operator who uses insurance to satisfy the requirements of this part must also establish a standby trust fund and update Schedule A of the trust agreement within sixty days after a change in the amount of CERCLA § 108(b) financial responsibility. This standby trust fund must meet the requirements of the trust fund specified in § 320.45, except that:

(1) An originally signed duplicate of the trust agreement must be submitted to the Administrator with the endorsement; and

(2) Unless the standby trust fund is funded pursuant to the requirements of this part, the following are not required by these regulations:

(i) Payments into the trust fund as specified in § 320.45;

(ii) Annual valuations as required by the trust agreement; and

(ii) Notices of payment as required by the trust agreement.

(g) The insurance must provide first dollar coverage irrespective of any deductibles or self-insured retention both of which must be paid by the insurer with a right of reimbursement from the insured. The policy must be issued for a face amount at least equal to the required current CERCLA § 108(b) financial responsibility amount, except as provided in § 320.46, § 320.1(g)(1) and paragraph (d) of this section. The term ''face amount'' means the total amount the insurer is obligated to pay under the policy as required by this section, without sub-limits except for those that specify facility specific amounts of coverage, exclusive of legal defense and investigation costs, and must be segregated and independent from other coverage provided for by the policy that is outside the scope of paragraphs (h), (i), (j), and (l) of this section. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.

(h) The policy must provide for the payment awarded in final court judgments from a Federal court against any of the current owners and operators for CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility to the party obtaining the judgment should such payment not be made within thirty days.

(i) The policy must provide for payment as required by a CERCLA settlement associated with the facility between any of the current owners or operators at the facility and EPA or another Federal government agency should payment as required by the settlement not be made.

(j) The policy must also provide for payment into a trust fund established pursuant to a CERCLA unilateral administrative order issued to any of the current owners or operators at the facility by EPA or another Federal agency in instances where performance at the facility as required by the order does not occur. The owner or operator must have provided a written statement allowing the insurance policy be used to assure performance of the work required in the order.

(k) The endorsement must provide that cancellation, failure to renew, or any other termination of the insurance by the insurer will be effective only upon written notice to the owner operator and the Administrator by certified mail and only after the expiration of 120 days beginning with the date of receipt of the notice by both the Administrator and the owner or operator, as evidenced by the return receipts. Such automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy.

(l) The endorsement must specify that in instances where the owner or operator fails to obtain alternate financial responsibility and obtain written approval of such alternate financial responsibility from the Administrator within ninety days after receipt by both the owner or operator and the Administrator of a notice from the insurer that it has decided to cancel, not renew or otherwise terminate the insurance policy the insurer will be liable up to the face value of the policy for payment into the standby trust following notification by the Administrator.

(m) The endorsement must also provide that in the case of a release or threatened release of (a) hazardous substance(s) from a facility covered by the policy, the insurer acknowledges that any claim authorized by section 107 or section 111 of CERCLA may be asserted directly against the insurer as provided by CERCLA § 108(c)(2). Further, the endorsement must state that the insurer consents to suit with respect to these claims subject to the limitations in section 108(d) of CERCLA.

(n) The owner or operator must maintain the insurance in full force and effect until the Administrator consents to termination of the insurance by the owner or operator as specified in paragraph (p) of this section.

(o) Whenever the required CERCLA § 108(b) financial responsibility amount increases to an amount greater than the face amount of the policy, the owner or operator, within sixty days after the increase, must either cause the face amount of the policy to be increased to an amount at least equal to the required amount and submit evidence of such increase to the Administrator, or obtain other financial responsibility as specified in this section to cover the increase. Whenever the amount of required CERCLA § 108(b) financial responsibility decreases, the face amount may be reduced to the amount of the current required CERCLA § 108(b) amount following written approval by the Administrator.

(p) The Administrator will give written consent to the owner or operator that he or she may terminate the insurance policy when:

(1) An owner or operator substitutes alternate financial responsibility as specified in this part; or

(2) The Administrator releases the owner or operator from the requirements of this section in accordance with § 320.27.

[PROPOSED REGULATORY TEXT FOR § 320.43 OPTION 1 (Preferred Option)]

§ 320.43 [Reserved]

[PROPOSED REGULATORY TEXT FOR § 320.43 OPTION 2]

§ 320.43 Financial Test.

(a) An owner or operator may satisfy the requirements of this section, up to the amount specified in this section, by demonstrating that it passes a financial test.

(1) To cover up to the full amount of financial responsibility required at its facility, the owner or operator must have:

(i) At least one-long term credit rating of AAA, AA+, AA, AA−, A+, A or A− as issued by Standard and Poor's (S&P), or an equivalent as issued by another Nationally Recognized Statistical Rating Organization (NRSRO);

(ii) Tangible net worth at least six times the amount of environmental obligations, including guarantees, covered by a financial test or guarantee, including this financial test and the corporate guarantee in § 320.44; and

(ii) Assets located in the United States amounting to either at least ninety percent of total assets; or at least six times the amount of financial responsibility obligations covered by a financial test or guarantee, including this financial test and the corporate guarantee in § 320.44; and

(2) To cover up to one half of the value of the financial responsibility

amount specified in this section, the owner or operator must have:

(i) At least one-long term credit rating of BBB+ or BBB as issued by S&P, or the equivalents as issued by another NRSRO;

(ii) Tangible net worth at least six times the financial responsibility obligations covered by a financial test or guarantee, including this financial test and the corporate guarantee in § 320.44; and

(ii) Assets located in the United States amounting to either at least ninety percent of the firm's total assets or at least six times the amount of financial responsibility obligations covered by a financial test or guarantee, including this financial test and the corporate guarantee in § 320.44.

(b) To demonstrate that it satisfies this financial test, an owner or operator must post on its website, include in its facility record, and annually submit all of the following:

(1) A letter to the Administrator signed by its chief financial officer (CFO) as worded in § 320.50(e).

(2) A special report of procedures and findings from an independent certified public accountant (CPA) resulting from an agreed-upon procedures engagement in accordance with the American Institute of Certified Public Accountants' (AICPA) Statement on Standards for Attestation Engagements (SSAE) and Related Attestation Interpretations, AT section 201—Agreed Upon Procedures Engagements, or any future superseding standards set by AICPA or any superseding body. The report would be required to describe the procedures performed and related findings as to whether or not there were differences or discrepancies identified between the financial information in the owner's or operator's CFO's letter and the owner's or operator's most recent audited annual financial statements. Where differences or discrepancies were found in the comparison of the owner's or operator's CFO's letter and the owner's or operator's most recent audited annual financial statements, the report of procedures and findings would reconcile any differences or discrepancies.

(3) A copy of the owner's or operators' most recent independently audited annual financial statements prepared in accordance with an accounting standard deemed acceptable by the SEC.

(c) An owner or operator of a facility must submit the three items specified in paragraph (b) of this section to the Administrator within sixty days of the date on which the CERCLA financial responsibility amount is first established.

(d) After the initial submission of the items specified in paragraph (b) of this section, the owner or operator must send annually updated information to the Administrator within sixty days after the close of each succeeding fiscal year. This information must consist of the three items specified in paragraph (b) of this section.

(e) An owner or operator who no longer meets the requirements of paragraph (a) of this section for any portion of his CERCLA financial responsibility requirement must send notice of the intent to establish an alternate financial responsibility instrument as specified in this section to the Administrator to cover the portion of the obligations that can no longer be covered by the financial test. This notice must be sent by certified mail within thirty days. The owner operator must then obtain alternate financial responsibility for the entire amount of required coverage as specified in paragraph (a) of this section. The owner or operator must submit evidence of coverage to the Administrator within 120 days of no longer meeting the requirements.

(f) The Administrator may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (a) of this section for any portion of the CERCLA financial responsibility obligation, require reports of financial condition at any time from the owner or operator in addition to those specified in paragraph (b) of this section. If the Administrator finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraph (a) of this section for any portion of the CERCLA liability financial responsibility obligation, the owner or operator must provide alternate financial responsibility as specified in this section within thirty days after notification of such a finding.

(g) The Administrator may disallow use of this test on the basis of qualifications of opinion given in the independent certified public accountant's report in the agreed upon procedures engagement or the audited financial statements. An adverse opinion or disclaimer of opinion in either report will result in disallowance of the test. The Administrator will evaluate other qualifications on an individual basis. The owner or operator must provide alternate evidence of financial responsibility within thirty days after notification of the disallowance.

(h) The owner or operator is no longer required to submit the items specified in paragraph (b) of this section when:

(1) An owner or operator substitutes alternate financial responsibility as specified in this section; or

(2) The Administrator releases the owner or operator from the requirements of this section in accordance with § 320.27.

[PROPOSED REGULATORY TEXT FOR § 320.44 OPTION 1 (Preferred Option)]

§ 320.44 [Reserved]

[PROPOSED REGULATORY TEXT FOR § 320.44 OPTION 2]

§ 320.44 Corporate guarantee.

(a) An owner or operator may meet the requirements of this part by obtaining a written guarantee, hereinafter referred to as ''guarantee.''

(b) The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a ''substantial business relationship'' with the owner or operator. The guarantor must meet the requirements for owners or operators in § 320.43 (a) through (g) and must comply with the terms of the guarantee.

(c) The wording of the guarantee must be identical to the wording specified in the Corporate Guarantee at § 320.50(f) of this part. A certified copy of the guarantee must accompany the items sent to the Administrator as specified in § 320.43(b). One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, this letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a ''substantial business relationship'' with the owner or operator, this letter must describe this ''substantial business relationship'' and the value received in consideration of the guarantee.

(d) The terms of the guarantee must provide that:

(1) In the event that payment for CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facility required in a final court judgment from a Federal court against one of the current owners or operators is not made within thirty days, the guarantor shall do so;

(2) In the event payment is not made as required in a CERCLA settlement associated with the facility between a current owner or operator and EPA or another Federal government agency, the guarantor shall do so;

(3) In the event that performance at a facility covered by the guarantee does not occur as required under a CERCLA unilateral administrative order issued to a current owner or operator by EPA or another Federal agency and for which the owner or operator provides a written statement allowing the guarantee to serve as financial responsibility assuring the work in the order, the guarantor shall make payment into a trust fund established pursuant to the order;

(4) The corporate guarantee will remain in force unless the guarantor sends notice of termination by certified mail to the owner or operator and to the Administrator. Termination may not occur, however, unless and until the owner or operator obtains, and the Administrator approves alternate financial responsibility complying with the requirements of this part; and

(5) If the owner or operator fails to provide alternate financial responsibility as specified in this part and obtain the written approval of such alternate financial responsibility from the Administrator within ninety days after receipt by both the owner or operator and the Administrator of a notice of termination of the corporate guarantee from the guarantor, the guarantor will provide such alternative financial responsibility, in accordance with the requirements of this part, in the name of the owner or operator.

(e) The guarantee must provide for payment as described in this section up to the required amount of the CERCLA § 108(b) financial responsibility covered by the guarantee.

(f) In the case of a corporation incorporated in the United States, a guarantee may be used to satisfy the requirements of this part only if the Attorneys General or Insurance Commissioners of:

(1) The state in which the guarantor is incorporated, and

(2) Each state in which a facility covered by the guarantee is located have submitted a written statement to EPA that a guarantee executed as described in this section and § 320.50(f) is a legally valid and enforceable obligation in that state.

(g) In the case of a guarantee provided by a corporation incorporated outside the United States, a guarantee may be used to satisfy the requirements of this part only if:

(1) The non-U.S. corporation has identified a registered agent for service of process in each state in which a facility covered by the guarantee is located and in the state in which it has its principal place of business; and

(2) The Attorney General or Insurance commissioner of each state in which a facility covered by this guarantee is located and the state in which the guarantor corporation has its principal place of business has submitted a written statement to EPA that a guarantee executed as described in this section and § 320.50(f) is a legally valid and enforceable obligation in that state.

§ 320.45 Trust fund.

(a) An owner operator may satisfy the requirements of this section by establishing a trust fund that conforms to the requirements of this paragraph, and submitting an originally signed duplicate of the trust agreement to the Administrator. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or state agency.

(b) The wording of the trust agreement must be identical to the wording specified in § 320.50(a)(1), and the trust agreement must be accompanied by a formal certification of acknowledgment (for example, see § 320.50(a)(2)). Schedule A of the trust agreement must be updated within sixty days after a change in the amount of § 108(b) financial responsibility.

(c) Payments into the trust fund must be made so that the value of the trust fund is at least as great as the required CERCLA § 108(b) financial responsibility amount required under § 320.20. The trust must be fully funded within four years of the owner operator being subject to the regulations. This funding amount may include the value of any letters of credit held by the trust in accordance with § 320.40. Receipt from the trustee for these payments must be submitted by the owner or operator to the Administrator.

(d) Whenever the required financial responsibility amount increases, the owner operator must compare the new amount with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the new amount, the owner or operator, within sixty days after the change in the required § 108(b) financial responsibility amount, must either deposit an amount into the fund so that its value after this deposit at least equals the required § 108(b) financial responsibility amount, or obtain other financial assurance as specified in this section to cover the increase.

(e) If the value of the trust fund is greater than the required financial responsibility amount, the owner or operator may submit a written request to the Administrator for release of the amount of in excess of the required CERCLA § 108(b) financial responsibility amount.

(f) If the owner or operator substitutes other financial responsibility as specified in this section for all or part of the trust fund, it may submit a written request to the Administrator for release of the amount in excess of the required amount of CERCLA § 108(b) financial responsibility.

(g) Within sixty days after receiving a request from the owner operator for release of funds as specified in paragraph (e) or paragraph (f) of this section, the Administrator will notify the trustee that the trust fund contains amounts in excess of the required amount. Following this notification, the trustee may release the excess funds in accordance with the terms of the trust agreement.

(h) The trust, up to the value of funds held including letters of credit held in accordance with § 320.40, is required to provide for payment:

(1) To parties that obtain a final court judgment from a Federal court against any of the current owners or operators at the facility for awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with a facility covered by the trust agreement should payment not occur as required by the judgment within thirty days.

(2) As required in a CERCLA settlement associated with the facility between a current owner or operator and EPA or another Federal agency if payment is not otherwise made.

(3) Into a trust fund established pursuant to a CERCLA unilateral administrative order issued to one of the current owners or operators by EPA or another Federal agency in the event the work is not performed at the facility as required by the order. The Administrator or other Federal agency shall only make such a claim if the owner or operator provides written consent for the financial responsibility instrument to assure the obligations under the unilateral administrative order.

(i) The Administrator will agree to the termination of the trust when:

(1) The owner operator substitutes alternate financial assurance as specified in this section; or

(2) The Administrator releases the owner or operator from the requirements of this section in accordance with § 320.27.

§ 320.46 Use of multiple financial responsibility instruments.

(a) An owner or operator may satisfy the requirements of this part by establishing more than one financial instrument per facility.

(b) The instruments must be as specified in §§ 320.40 through 320.45, respectively, except that it is the combination of instruments, rather than the single instrument, which must demonstrate financial responsibility for an amount at least equal to the required CERCLA § 108(b) financial responsibility amount.

(c) An owner or operator using a trust fund in combination with a surety bond, letter of credit or insurance policy, including a trust fund holding a letter of credit, may use the trust fund as the standby trust fund for the other instruments.

(d) A single standby trust fund may be established for two or more instruments. A claimant may make a claim against any of the instruments used to provide evidence of financial responsibility.

§ 320.47 Use of a financial instrument for multiple facilities.

(a) An owner or operator may use a financial responsibility instrument specified in this part to meet the requirements of this section for more than one facility.

(b) Evidence of financial responsibility submitted to the Administrator must include for each facility, the EPA Identification Number, name, address, and the amount of funds for § 108(b) financial responsibility assured by the instrument.

(c) If the facilities covered by the instrument are in more than one Region, identical evidence of financial responsibility must be submitted to and maintained with the regional delegees of the Administrator, as applicable, of all such Regions.

(d) The amount of funds available through the instrument must be no less than the sum of funds that would be available if a separate instrument had been established and maintained for each facility.

§ 320.48 Consolidated form and multiple owners and/or operators.

(a) Where a facility is owned or operated by more than one person, evidence of financial responsibility covering the facility may be established and maintained by one of the owners or operators, or, in consolidated form, by or on behalf of two or more owners or operators.

(b) When evidence of financial responsibility is established in a consolidated form, the proportional share of the cost of demonstrating the financial responsibility for each participant shall be shown in a separate letter to the Administrator.

(c) The evidence shall be accompanied by a statement authorizing the owner or operator submitting the evidence of financial responsibility to act for and on behalf of each participant in submitting and maintaining the evidence of financial responsibility.

§ 320.49 [Reserved]

§ 320.50 Wording of the instruments.

(a)(1) A trust agreement for a trust fund, as specified 40 CFR 320.45 must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

TRUST AGREEMENT

EPA contact information:
[Insert Name, Phone Number, Mailing Address of EPA and Point of Contact(s)]
Account Number: [insert account number]

Trust Agreement (the ''Agreement'') is entered into as of [insert date] by and between [insert name of owner(s)/operator(s)], a business [insert relevant entity (corporation, partnership, association, proprietorship, etc.)], (the ''Grantor'') and [insert name of corporate trustee], [insert ''incorporated in the state of [name of state]'' or ''a national bank''] (the ''Trustee'').

Whereas, the United States Environmental Protection Agency (''EPA'') has established regulations applicable to the Grantor requiring that an owner or operator of a facility subject to the regulations demonstrate financial responsibility as proof that funds will be available when needed for payment of CERCLA response costs, health assessment costs, and natural resource damages at the facility.

Whereas, the Grantor has elected to establish a trust to provide all or part of such financial responsibility and/or to receive the proceeds from a letter of credit to assure all or part of such financial responsibility for the facilities identified herein.

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions as used in this Agreement.

a) ''Grantor'' means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

b) ''Trustee'' means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of Facilities and Financial Responsibility Amounts. This Agreement pertains to the facilities and CERCLA 108(b) financial responsibility amounts identified on attached Schedule A [on Schedule A, for each facility list the EPA Identification Number, name, address, current owners and operators, and the current financial responsibility amount, and portions thereof, for which financial responsibility is being demonstrated by this Agreement.]

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund (the ''Fund'') for the benefit of any and all parties with valid third-party CERCLA claims against the Grantor or other current owners and operators arising from the operation of the facilities covered by this Agreement. The Grantor and Trustee do not intend for the Trustee to qualify as a ''guarantor'' as that term is used in CERCLA sections 101(13) and 108(c)(2), and therefore intend that the Trustee will not be subject to a direct action by Trustee's agreement to act as Trustee for the Fund. The Grantor and Trustee intend for the Fund to qualify as a ''guarantor'' as that term is used in CERCLA sections 101(13) and 108(c)(2), and therefore intend that only the Fund will be subject to any direct action brought pursuant to CERCLA section 108(c)(2). The Fund is established initially as consisting of property, which are acceptable to the Trustee, described in Schedule B attached hereto. Such property, along with any other monies and/or property subsequently transferred to the Trustee, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement, are referred to herein collectively as the Fund. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor under CERCLA.

Section 4. Payments from the Fund. The Trustee shall make payments from the Fund to parties with valid CERCLA claims against the Grantor or other current owners or operators at the facility(-ies). To make these payments, the Trustee shall draw on any letters of credit described in Schedule B and/or make payments from the funds held by the Fund described in Schedule B. The Trustee shall make payment from the Fund for valid third-party CERCLA claims only up to the lesser of: (1) The value of the valid third-party CERCLA claim; or (2) the amount of CERCLA 108(b) financial responsibility provided

for the facility(ies) associated with the claim provided by the Fund as identified in Schedule A.

The Trustee shall satisfy valid unpaid CERCLA claims by making payments on a first come first served basis from the Fund only upon receipt of one or more of the following documents and only in amounts up to the values specified in the document(s):

(i) A final court judgment dated at least 30 days earlier from a Federal court, in favor of the claimant, awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with a facility covered by this Agreement against the Grantor or any of the current owners or operators at a facility covered by this agreement;

(ii) A written signed statement from the EPA Administrator or another Federal government agency requesting payment from the Fund on the grounds that payment has not been made as required by a CERCLA settlement associated with a facility covered by this Agreement and with any of the current owners or operators; or

(iii) A written signed statement from the EPA Administrator or other Federal government agency requesting payment from the Fund into a trust fund established pursuant to a CERCLA unilateral administrative order on the grounds that performance at a facility covered by this Agreement has not occurred as required by a CERCLA unilateral administrative order issued to a current owner or operator that references this trust agreement.

In addition to one of the documents listed above, all claimants must also present the following:

A signed statement from the claimant certifying that these amounts have not been recovered or paid from any other source, including, but not limited to, the owners or operators, insurance, judgments, agreements, and other financial responsibility instruments.

In the event of simultaneous valid claims that exceed the value of the Fund, the Trustee shall pay the claimants a pro rata share of their claim determined by the size of each valid claim.

In addition to the payment instructions above, in the case of a release or threatened release from a facility covered by the Agreement, any claim authorized by section 107 or 111 of CERCLA may be asserted directly against the Fund as provided by CERCLA section 108(c)(2) subject to the limitations in CERCLA section 108(d). The Fund shall be entitled to all rights and defenses provided to guarantors by CERCLA section 108(c). The Fund is available for paying and defending claims in these instances.

In addition, if notified by the EPA Administrator that the trust fund contains amounts in excess of the required CERCLA 108(b) financial responsibility amount, the Trustee shall refund to the Grantor such amounts in excess of the required CERCLA 108(b) financial responsibility amount.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee and/or a standby letter of credit as specified in 40 CFR 320.50(b). In the event of receipt of a notice of a decision not to extend the expiration date of a letter of credit from an institution issuing a letter of credit held by the Fund, the Trustee shall draw on the letter of credit prior to expiration occurring and deposit any unused portion of the credit into the Fund if the EPA Administrator informs the Trustee that the owner operator did not establish alternate financial responsibility and obtain written approval of such alternate financial responsibility from the EPA Administrator within the time frame provided by 40 CFR 320.40(k) and (l).

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with the Grantor's disclosures communicated in writing to the Trustee from time to time of the names of all current owners and operators and their affiliates including issuers of securities or other obligations, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge its duties with respect to the trust fund with undivided loyalty and solely in the interest of the beneficiaries and with the reasonable care, skill, and caution of a prudent investor, in light of the purposes, terms, distribution requirements, and other circumstances of the trust; *except that:*

(i) Securities or other obligations of the Grantor, or any other current owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a–2(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a state government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or state government;

(iii) The Trustee is authorized to hold and draw upon standby letters of credit specified as in 40 CFR 320.50(b); and

(iv) The Trustee is authorized to hold cash awaiting investment or distribution un-invested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Common and Collective Investment Practices. The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be jointly invested with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a–1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To hold and draw upon standby letters of credit that are worded as specified in 40 CFR 320.50(b);

(c) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(d) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depositary even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depositary with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United

States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(e) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or state government;

(f) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses shall be paid directly by the Grantor. All other expenses incurred by the Trustee in connection with the administration of this Trust including fees for legal services rendered to the Trustee, the compensation of the Trustee, and all other proper charges and disbursements of the Trustee not paid directly by the Grantor shall be paid from the Fund.

Section 10. Annual Valuation. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the appropriate EPA Administrator a statement confirming the value of the Trust including the value of any funds held by the Trust and of any letters of credit held by the Trust. Any letters of credit shall be valued at the face amount less the value of any draws. Any securities in the Fund shall be valued at market value as of no more than sixty days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the EPA Administrator shall constitute a conclusively binding assent by the Grantor barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the EPA Administrator, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests, and instructions to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the EPA Administrator to the Trustee shall be in writing, signed by the EPA Administrator, or designee thereof, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or EPA hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or EPA, except as provided for herein.

Section 15. Notices of Payment. If a payment for CERCLA response costs, health assessment costs, and/or natural resource damages is made under Section 4 of this trust, the Trustee shall notify the Grantor of such payments and the amounts thereof within five (5) working days. If the Grantor ceases to exist, such notice shall be provided to the EPA Administrator. Further, the Trustee shall notify the EPA Administrator of all claims against the Fund resulting from a direct action under CERCLA section 108(c).

Section 16. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the EPA Administrator, or by the Trustee and the EPA Administrator if the Grantor ceases to exist.

Section 17. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the EPA Administrator, or by the Trustee and the EPA Administrator, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be paid to the Grantor.

Section 18. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the EPA Administrator issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense. EPA does not indemnify either the Grantor or the Trustee due to the restrictions imposed by the Anti-Deficiency Act, 31 U.S.C. 1341.

Section 19. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the state of [enter name of state].

Section 20. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording

specified in 40 CFR 320.50(a) as such regulations were constituted on the date first above written.

_____
[Signature of Grantor

_____
[Printed Name of Grantor]

[Title]
Attest:
[Title]
[Seal]

_____
[Signature of Trustee]

_____
[Printed Name of Trustee Official]

_____
[Mailing Address, Telephone Number, Email of Trustee Official]

Attest:
[Title]
[Seal]

(2) The following is an example of the certification of acknowledgement which must accompany the trust agreement for a trust fund as specified in 40 CFR 320.45 of this chapter. State requirements may differ on the proper content of this acknowledgement.

State of _____

County of _____

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public] _____

(b) A letter of credit, as specified in 40 CFR 320.40 of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Irrevocable Standby Letter of Credit

IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER: [insert number]
ISSUER: [insert name and address of issuing institution]
ISSUANCE DATE: [insert date]
MAXIMUM AMOUNT: $[insert dollar amount]
APPLICANT:
[Insert name of Owner or Operator of Facility]
[Insert contact person(s), title(s), and contact information (address, phone, email, etc.)]
FACILITY:
[Insert EPA Identification number(s), name(s), address(es) and CERCLA 108(b) financial responsibility amount(s) covered by the letter of credit for facility(ies) to be covered by this instrument]
TO:
[If the letter of credit is established in favor of any and all third-party CERCLA claimants insert: ''Administrator(s)
Region(s) [region numbers]
U.S. Environmental Protection Agency (EPA)
[Insert name and mailing address of Administrator or designee(s)]''
Or,
If letter of credit is established in favor of a trust fund trustee insert the name and mailing address of trustee]
Dear Sir or Madam:

We hereby establish our Irrevocable Standby Letter of Credit No. [insert number] in the favor of [insert either ''any and all third-party CERCLA claimants'' or the name of trustee of the trust fund that will hold the letter of credit], at the request and for the account of [insert name of Owner or Operator of Facility] (the ''Applicant''), in the amount of $[insert amount] (the ''Maximum Amount'') for the [insert name(s) and address(es) of the facility(ies) to be covered by this instrument] (the ''Facility''). The letter of credit is established to assure payment for the current owners or operators' CERCLA response costs, health assessment costs, and/or natural resource damages associated with the facilities covered by this letter. Payment shall be made up to amounts provided above for each facility and not to exceed in total the Maximum Amount, upon presentation of:

[If letter of credit is established in favor of a trust fund trustee insert: ''A demand for payment from [name of trust fund trustee] bearing reference to this letter of credit number No. [insert number]

If letter of credit is issued in favor of any and all third-party CERCLA claimants insert: ''A demand for payment bearing reference to this letter of credit number No. [insert number]; and

A final court judgment dated at least 30 days earlier from a Federal court, in favor of the claimant, awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with a facility covered by the letter of credit against any of the current owners or operators at a facility covered by the letter of credit accompanied by a certification from the claimant that reads as follows: 'I hereby certify that the amount of the demand is payable pursuant to regulations issued under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended.'; or

A certification from the EPA Administrator or another Federal agency that reads as follows: 'I hereby certify that the amount of the demand is payable pursuant to regulations issued under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended.''']

This letter of credit is effective as of [date] and shall expire on [date at least one year later], but such expiration date shall be automatically extended for a period of [at least one year] on [date at least one year later as specified above] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify [If letter of credit is issued in favor of a trust fund trustee insert: ''[name of trustee],''] the EPA Administrator and the Applicant by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event of such notification, any unused portion of the credit shall be paid into the accompanying trust fund issued by [insert name of issuing institution of trust fund] with account number [insert account number of the trust fund] upon presentation by [If issued in favor of any and all third-party CERCLA claimants enter ''the EPA Administrator''; if issued in favor of a trust fund trustee insert name of trustee] of a demand for payment compliant with the terms above within 120 days after the date of receipt of such notification by both you and [owner's or operator's name], as shown on the signed return receipts.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such demand upon presentation to us and shall pay as directed by claimant or the trustee.

[Insert if letter of credit is issued in favor of any and all third-party CERCLA claimants: ''In the case of a release or threatened release of (a) hazardous substance(s) from a facility covered by the letter of credit, we acknowledge that any claim authorized by section 107 or 111 of CERCLA may be asserted directly against us as provided by CERCLA section 108(c)(2). We consent to suit with respect to these claims subject to the limitations in CERCLA section 108(d). We acknowledge that we are entitled to all rights and defenses provided to guarantors by CERCLA section 108(c). We will provide notice of

any such resulting claims and payments to the EPA Administrator.'']

This credit is subject to [insert the most recent edition of either the Uniform Customs and Practice for Documentary Credits or International Standby Practices published and copyrighted by the International Chamber of Commerce.]

We certify that the wording of this letter of credit is identical to the wording specified in 40 CFR 320.50(b) as such regulations were constituted on the date shown immediately below. [Signature(s) and title(s) of official(s) of issuing institution] [Date].

(c) A surety bond, as specified in 40 CFR 320.41 of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

EPA contact information:
U.S. Environmental Protection Agency
[Insert Name, Phone Number, Mailing Address of the Administrator and Points of Contact]

Surety Bond No. [Insert number]
Date bond executed: [Insert date]
Parties [Insert name and address of owner or operator], Principal, incorporated in [Insert state of incorporation] of [Insert city and state of principal place of business] and [Insert name and address of surety company(ies)], Surety Company(ies), of [Insert surety(ies) place of business].
EPA Identification Number, name, address, and CERCLA 108(b) financial responsibility amount, specifying the portion covered by this bond, for each facility guaranteed by this bond:

Total penal sum of bond: _____

Purpose: This is an agreement between the Surety(ies) and the Principal under which the Principal and Surety(ies) hereto are firmly bound to any and all third-party CERCLA claimants , in the above penal sum plus the amount of any investigation or legal defense fees incurred by Surety(ies) for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum ''jointly and severally'' only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such percentage of the total penal sum only as is set forth opposite the name of each Surety plus the amount of any investigation or legal defense fees incurred by Surety, but if no limit of liability is indicated, the limit of liability shall be the total penal sum of the bond plus the amount of any investigation or legal defense fees incurred by Surety. We agree to be responsible for the following:

(1) the satisfaction of valid third-party CERCLA claims against the Principal or the other current owners and operators for CERCLA response costs, health assessment costs, and natural resource damages associated with the facility(ies) covered by this bond in the sums prescribed herein; and

(2) the guarantee that the Principal or other current owners and operators shall obtain alternate financial responsibility as specified in subpart C of 40 CFR 320 for the facility(ies) covered by this bond and obtain written approval of that financial responsibility provided within 90 days of receipt by the EPA Administrator and the Principal of a notice of cancellation of the bond from the Surety(ies).

The aforementioned responsibilities are subject to the governing provisions and the following conditions. Any provision in this bond conflicting with the following governing provisions or conditions shall be deemed deleted herefrom and provisions conforming to such governing provisions or condition shall be deemed incorporated herein.

Governing Provisions:

(1) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended.

(2) Rules and regulations of the U.S. Environmental Protection Agency (EPA), particularly 40 CFR part 320.

Conditions:

(1) The Principal and all the current owners and operators at the facility(ies) covered by this bond are subject to the applicable governing provisions that require the Principal and all the current owners and operators to have and maintain CERCLA § 108(b) financial responsibility to cover CERCLA response costs, health assessment costs, and natural resource damage claims.

(2) This bond assures that the Principal will ensure that at facilities covered by this bond: (a) payments will be made as required by final court judgments from a Federal court against a current owner or operator for CERCLA response costs, health assessment costs, and/or natural resource damages within 30 days; (b) payments will be made when required by a CERCLA settlement with a current owner or operator; (c) work will be performed as required in CERCLA unilateral administrative orders issued to a current owner or operator for which the owner or operator has provided a written statement allowing the bond to assure the performance of the work in the order; and (d) CERCLA 108(b) financial responsibility coverage will be maintained as described in condition 1.

(3) If the Principal fails to perform as described above the Surety(ies) becomes liable on this bond obligation.

(4) The Surety(ies) shall satisfy a valid claim for CERCLA response costs, health assessment costs, and/or natural resource damages only upon the receipt of one of the following documents plus the additional signed statement specified below:

(a) A final court judgment dated at least 30 days earlier from a Federal court, in favor of the claimant, awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with a facility covered by this bond against the Principal or any of the current owners or operators at a facility covered by this bond;

(b) A written signed statement from the EPA Administrator or another Federal government agency requesting payment from the Surety(ies) on the grounds that payment has not been made as required by a CERCLA settlement associated with a facility covered by this bond and with any of the current owners or operators; or

(c) A written signed statement from the EPA Administrator or other Federal government agency requesting payment from the Surety(ies) into a trust fund established pursuant to a CERCLA unilateral administrative order on the grounds that performance at a facility covered by this bond has not occurred as required by a CERCLA unilateral administrative order issued to a current owner or operator.

AND

A signed statement from the claimant certifying that these amounts have not been recovered or paid from any other source, including, but not limited to, the owner operator, insurance, judgments, agreements, and other financial responsibility instruments.

(5) In addition to condition 4, in the case of a release or threatened release of (a) hazardous substance(s) from a facility covered by the bond, the Surety(ies) acknowledge that any claim authorized by section 107 or 111 of CERCLA may be asserted directly against the Surety(ies) as provided by CERCLA section 108(c)(2). The Surety(ies) consent(s) to suit with respect to these claims subject to the limitations in CERCLA section 108(d). The Surety(ies) shall be entitled to all

rights and defenses provided to guarantors by CERLCA section 108(c). The Surety(ies) will provide notice of any such resulting claims and payments to the EPA Administrator.

(6) If upon notice of cancellation by the Surety(ies) the Principal fails to obtain replacement CERCLA financial responsibility consistent with subpart C of 40 CFR 320 and written approval of the EPA Administrator of that replacement financial responsibility within 90 days of receipt of said notice by the EPA Administrator and the Principal the Surety(ies) shall become liable on this bond and shall make payment into the standby trust fund as directed by the EPA Administrator.

(7) The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond. In no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum plus the amount of any investigation or legal defense fees.

(8) The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and the EPA Administrator, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal and the EPA Administrator, as evidenced by the return receipt.

(9) The Principal may terminate this bond by sending written notice to the Surety(ies), provided however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the EPA Administrator.

(10) The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules and regulations and agree(s) that no such amendment shall in any way alleviate its (their) obligation on this bond.

(11) This bond is effective from [insert date] (12:01 a.m., standard time, at the address of the Principal as stated herein) and shall continue in force until cancelled or terminated as described above.

In Witness Whereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 40 CFR 320.50(c), as such regulations were constituted on the date this bond was executed.

PRINCIPAL
[Signature(s)]
[Name(s)]
[Name, Telephone Number, Email of Representative]
[Title(s)]
[Corporate Seal]
CORPORATE SURETY[IES]
[Name and address]
State of incorporation:___
Liability Limit: %___
[Signature(s)]
[Name(s) and title(s)]
[Corporate seal]
[For every co-surety, provide signature(s), corporate seal, liability limit and other information in the same manner as for Surety above.]
Bond premium: $___

(d) A CERCLA § 108(b) insurance endorsement as required in 40 CFR 320.42 must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

CERCLA § 108(b) Financial Responsibility Endorsement

EPA contact information:
[Insert Name, Phone Number, Mailing Address of EPA Administrator and Points of Contact]

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering CERCLA response costs, health assessment costs, and natural resource damages in connection with the insured's obligation to demonstrate financial responsibility under 40 CFR 320. The coverage applies at [list EPA Identification Number, name, address, total CERCLA 108(b) financial responsibility amount for each facility] for CERCLA response costs, health assessment costs, and natural resource damages at a covered facility. The limits of liability are [insert the dollar amount(s) of the limits and the percentage share of the Insurer's liability for each covered facility], exclusive of legal defense and investigation costs.

2. The insurance afforded with respect to such facilities is subject to all of the terms and conditions of the policy; provided, however, that any provision, exclusion, definition, condition, retroactive date, clause, defense, or other term of the policy inconsistent with 40 CFR 320.42, or subsections (a) through (f) of this Paragraph 2 are hereby amended to conform with 40 CFR 320.42 and subsections (a) through (f) below:

(a) The Insurer will make payment only for third-party CERCLA claims as defined in section 101 of CERCLA; the insurance coverage is not available for payments to the insured. The Insurer will make:

i. payments awarded in final court judgments from a Federal court against any of the current owners and operators for CERCLA response costs, health assessment costs, and/or natural resource damages associated with a facility covered by the policy to the party obtaining the judgment should such payments not otherwise be made within 30 days.

ii. payments as required by a CERCLA settlement associated with a facility covered by the policy between EPA or another Federal government agency and any of the current owners and operators should such payments not occur.

iii. payments in instances where performance does not occur at a facility covered by the policy as required by a CERCLA unilateral administrative order issued by EPA or another Federal agency for which the owner or operator has provided a written statement that the policy be used to assure performance of the work required in the order.

iv. payment into a standby trust in instances where the owner or operator fails to obtain alternate financial responsibility and obtain written approval of such alternate financial responsibility from the EPA Administrator within 90 days after receipt by both the insured and the EPA Administrator of a notice from the insurer that it has decided to cancel, terminate or fail to renew the insurance policy beyond the current expiration date as provided for in paragraph (f) below.

(b) In addition to the payment condition in subsection (a), in the case of a release or threatened release of (a) hazardous substance(s) from a facility covered by the policy, the insurer acknowledges that any claim authorized by section 107 or section 111 of CERCLA may be asserted directly against the insurer as provided by section 108(c)(2) of CERCLA. Insurer consents to suit with respect to these claims subject to the limitations in section 108(d) of CERCLA. The Insurer will be entitled to all rights and defenses provided to guarantors by section 108(c) of CERCLA. Insurer will provide notice of any such resulting claims and payments to the EPA Administrator.

(c) Bankruptcy or insolvency of the insured shall not relieve the Insurer of its obligations under the policy to which this endorsement is attached.

(d) The Insurer is liable for the payment of amounts within any

deductible or self-insured retention applicable to the policy, with a right of reimbursement by the insured for any such payment made by the Insurer.

(e) Whenever requested by the Administrator of the U.S. Environmental Protection Agency (EPA), the Insurer agrees to furnish to the EPA Administrator a signed duplicate original of the policy and all endorsements.

(f) Cancellation, failure to renew or any other termination of the insurance by the insurer will be effective only upon written notice to the owner operator and the EPA Administrator by certified mail and only after the expiration of 120 days beginning with the date of receipt of the notice by both the Administrator and the owner or operator, as evidenced by the return receipts.

Attached to and forming part of policy No. __ issued by [name of Insurer], herein called the Insurer, of [address of Insurer] to [name of insured] of [address] this___ day of___, 20__. The effective date of said policy is___ day of ___, 20__.

I hereby certify that the wording of this endorsement is identical to the wording specified in 40 CFR 320.50(d) as such regulation was constituted on the date first above written, and that the Insurer is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

[Signature of Authorized Representative of Insurer]
[Type name]
[Title], Authorized Representative of [name of Insurer]
[Address, Phone Number, Email of Representative]

[PROPOSED REGULATORY TEXT FOR PARAGRAPHS (e) and (f)—Option 2 only]

(e) A letter from the chief financial officer, as specified in § 320.43, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

FINANCIAL TEST

Letter from Chief Financial Officer

[Address to EPA Administrator or Regional delegees for every Region in which facilities for which financial responsibility is to be demonstrated through the corporate financial test are located.]

I am the Chief Financial Officer (''CFO'') of *[insert name and address of firm]* (''firm''). This letter is in support of this firm's use of the financial test to demonstrate Financial Responsibility for CERCLA 108(b) as specified in 40 CFR part 320.43.

[Fill out paragraphs 1–4, *below, and provide supporting documentation, when required as specified below. If your firm has no facilities that belong in a particular paragraph, write* ''*None*'' *in the space indicated.]*

1. This firm is the owner or operator of the facilities, listed below, for which Financial Responsibility is demonstrated through the financial test specified in 40 CFR part 320.43. The current CERCLA § 108(b) Financial Responsibility amount and the amount covered by the financial test are provided for each listed facility:

[For each facility, identify: Facility name; Address; EPA Identification Number; CERCLA § 108(b) financial responsibility amount; and amount covered by financial test]

2. This firm guarantees, through the guarantee specified in 40 CFR part 320.44, financial responsibility of the following facilities owned or operated by the guaranteed party. The current CERCLA § 108(b) financial responsibility amount so guaranteed are shown for each listed facility:

[For each facility, identify: Facility name; Address; EPA Identification Number; CERCLA § 108(b) financial responsibility amount; and amount covered by financial test]

The firm identified above is: *[insert one or more:* (1) The direct or higher-tier parent corporation of the owner or operator; (2) owned by the same parent corporation as the parent corporation of the owner or operator, and receiving the following value in consideration of this guarantee _____ *[insert description of value received] ;* or (3) engaged in the following substantial business relationship with the owner or operator _____ *[insert characterization of relationship] ,* and receiving the following value in consideration of this guarantee_____ *[insert description of value received]].*

[Attach a written description of the business relationship or a copy of the contract establishing such relationship to this letter].

3. The firm, as owner or operator or guarantor, is using a financial test to secure the environmental obligations of the facilities listed below for which financial responsibility is required. These obligations include, but are not limited to: current cost estimates for corrective action, closure, post-closure care, and amounts required for third-party liability for hazardous waste treatment, storage and disposal facilities under 40 CFR 264.101, 264.142, 264.144, 264.147, 265.142, 265.144 and 265.147 and as required by order under section 3008(h) of RCRA, 42 U.S.C. 6928(h); cost estimates for municipal solid waste landfill units under 40 CFR 258.71, 258.72 and 258.73; current plugging and abandonment cost estimates for underground injection control facilities under 40 CFR 144.62; cost estimates for underground storage tanks under 40 CFR 280.93; cost estimates for facilities storing polychlorinated biphenyls under 40 CFR 761.65; cost estimates for underground injection control class VI facilities for corrective action under 40 CFR 146.84, for injection well plugging under 40 CFR 146.92, for post injection facility care and facility closure under 40 CFR 146.93, and emergency and remedial response under 40 CFR 146.94; any financial responsibility required under any CERCLA settlement or order; and any other environmental obligation assured through a financial test or guarantee, excluding those costs represented in paragraphs 1 and 2 listed above. The cost estimates by obligation are provided for each listed facility:

[For each facility, identify: Facility name; Address; EPA Identification Number (if any); and amount covered by financial test]

4. The total of all such environmental obligations the firm is covering with a financial test or for which it issued a corporate guarantee for the listed facilities in paragraphs 1–3 above [sum of the portion covered by the financial test in paragraph 1 plus the sums in paragraphs 2 and 3] is $ *[insert amount],* as of_____ *[insert date].*

5. The firm [*insert* ''*is required*'' *or* ''*is not required*''] to file a Form 10–K or 20–F with the Securities Exchange Commission (SEC) for the latest fiscal year.

6. The fiscal year of the firm ends on [month, day]. The figures for the following items marked with asterisk are derived from this firm's independently audited, year-end financial statements for the latest completed fiscal year, ended [date].

7. The firm has received a qualified or adverse accountant's opinion for the latest completed fiscal year ended *[insert date]* _____ (Yes/ No) _____

8. The firm represents that as of the latest completed fiscal year-end *[insert date]* _____, the Assets located in the United States in the amount of $_____ amount to at least 90% of the firm's total assets. (Yes/No) _____

Test Worksheet:

1. The total of all environmental obligations the firm is covering with a financial test or for which it issued a

corporate guarantee [enter the sum from paragraph 4 above] _____.

2. The firm represents that it holds the following long term credit ratings: [list all ratings and their dates that apply including but not limited to Long-Term Issuer Credit Ratings from Standard and Poor's, Long-Term Corporate Family Ratings from Moody's Investor Services, Long-Term Issuer Default Ratings from Fitch Ratings, and any other long-term credit rating from a Nationally Recognized Statistical Rating Organization (NRSRO)]

*3. Tangible Net Worth $_____

4. Is line 3 at least 6 times line 1? (Yes/No) _____

*5. Total assets in U.S. [required only if the answer in paragraph 8 above is ''No''] $_____

6. Is line 5 at least 6 times line 1? (Yes/No) _____

I hereby certify that the information included in this letter, including all attachments and exhibits, is true and accurate. I further certify that the wording of this letter is identical to the wording specified in 40 CFR 320.50(e) as such regulations were constituted on the date shown immediately below.

[Signature] _____
[Name] _____
[Title] _____
[Date] _____

(f) A corporate guarantee, as specified in § 320.44 must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Corporate Guarantee for CERCLA 108(b) Financial Responsibility

Guarantee made this [date] by [name of guaranteeing entity], a business corporation organized under the laws of [if incorporated within the United States insert ''the State of _____'' and insert name of state; if incorporated outside the United States insert the name of the country in which incorporated, the principal place of business within the United States, and the name and address of the registered agent in the state of the principal place of business], herein referred to as guarantor. This guarantee is made on behalf of the [owner or operator] of [business address], which is [one of the following: ''our subsidiary''; ''a subsidiary of [name and address of common parent corporation], of which guarantor is a subsidiary''; or ''an entity with which guarantor has a substantial business relationship, as defined in 40 CFR 320.3'' to any and all third-party CERCLA claimants.

Recitals

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 40 CFR 320.44 and will report the full amount of CERCLA 108(b) financial responsibility for which it is eligible to cover as determined by the financial test criteria at 40 CFR 320.43 for each facility covered by the guarantee in the letter from its chief financial officer.

2. [Owner or operator] owns or operates the following facilities subject to CERCLA 108(b) financial responsibility requirements covered by this guarantee: [List for each facility: EPA Identification Number, name, address and if guarantor is incorporated outside the United States list the name and address of the guarantor's registered agent in each state.]

3. For value received from [owner or operator], and up to the most current § 108(b) financial responsibility amount required at each facility covered by the guarantee as identified in paragraph 2 of the guarantor's most recent CFO letter submission required under 40 CFR 320.44, and exclusive of any legal defense costs incurred by the guarantor, guarantor guarantees to any and all third-party CERCLA claimants that:

a) in the event that payment for CERCLA response costs, health assessment costs, and/or natural resource damages associated with a facility identified above as required in a final court judgment from a Federal court against one of the current owners or operators is not made within 30 days, the guarantor shall do so;

b) in the event payment is not made as required in a CERCLA settlement associated with a facility identified above between a current owner or operator and EPA or another Federal government agency, the guarantor shall do so; and

c) in the event that performance at a facility covered by the guarantee does not occur as required under a CERCLA unilateral administrative order issued to a current owner or operator by EPA or another Federal agency and for which the owner or operator provides a written statement allowing the guarantee to serve as financial responsibility assuring the work in the order, the guarantor shall make payment into a trust fund established pursuant to the order.

4. The guarantor shall satisfy a third-party CERCLA claim only on receipt of one of the following documents plus the additional signed statement specified below:

(a) A final court judgment dated at least 30 days earlier from a Federal court, in favor of the claimant, awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with a facility covered by this guarantee against any of the current owners or operators at a facility covered by this guarantee;

(b) A written signed statement from an EPA Administrator or another Federal government agency requesting payment from the Guarantor on the grounds that payment has not been made as required by a CERCLA settlement associated with a facility covered by this guarantee and with any of the current owners or operators; or

(c) A written signed statement from the EPA Administrator or other Federal government agency requesting payment from the Guarantor into a trust fund established pursuant to a CERCLA unilateral administrative order on the grounds that performance at a facility covered by this guarantee has not occurred as required by a CERCLA administrative order issued to a current owner or operator.

AND

A signed statement from the claimant certifying that these amounts have not been recovered or paid from any other source, including, but not limited to, the owner operator, insurance, judgments, agreements, and other financial responsibility instruments.

5. In addition to the payment provisions in paragraph 4 of this agreement, in the case of a release or threatened release of (a) hazardous substance(s) from a facility covered by the guarantee, guarantor acknowledges that any claim authorized by section 107 or 111 of CERCLA may be asserted directly against the guarantor as provided by CERCLA section 108(c). Guarantor consents to suit with respect to these claims subject to the limitations in CERCLA section 108(d). Guarantor will be entitled to all defenses provided to guarantors by CERCLA section 108(c). Guarantor agrees to provide notice of any such resulting claims and payments to the EPA Administrator.

6. The guarantor agrees that if, at any time before the termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within 90 days, by certified mail, notice to the EPA Administrator and to [owner or operator] of its intent to provide alternate financial responsibility as specified in subpart C of 40 CFR part 320 in the name of [owner or operator]. Within 120 days after the guarantor fails to meet the financial test criteria, the guarantor shall establish such financial responsibility unless [owner or operator] has done so.

7. The guarantor agrees to notify the EPA Administrator by certified mail, of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

8. Guarantor agrees that within 30 days after being notified by an EPA Administrator of a determination that guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a guarantor, he shall establish alternate financial responsibility as specified in subpart C of 40 CFR part 320, as applicable, in the name of [owner or operator] unless [owner or operator] has done so.

9. Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: enforcement action taken under CERCLA at a covered facility, or any modification or alteration of an obligation of owner or operator pursuant to 40 CFR part 320, or the bankruptcy of an owner or operator at a facility covered by the agreement.

10. Guarantor agrees to remain bound under this guarantee for as long as [owner or operator] must comply with the applicable financial assurance requirements of subpart C of 40 CFR part 320 for the above-listed facilities, except as provided in paragraph 11 of this agreement.

11. Guarantor may terminate this guarantee by sending notice by certified mail to the EPA Administrator and to [owner or operator], provided that this guarantee may not be terminated unless and until [the owner or operator] obtains, and the EPA Administrator approves, alternate financial responsibility complying with subpart C of 40 CFR part 320.

12. Guarantor agrees that if [owner or operator] fails to provide alternate financial assurance as specified in subpart C of 40 CFR part 320 and obtain written approval of such assurance from the EPA Administrator within 90 days after a notice of cancellation by the guarantor is received by the EPA Administrator from guarantor, guarantor shall provide such alternate financial assurance in the name of [owner or operator].

13. Guarantor expressly waives notice of acceptance of this guarantee by the EPA or by [owner or operator]. Guarantor also expressly waives notice of any modification or alteration of an obligation of owner or operator pursuant to 40 CFR part 320.

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR part 320.50(f) as such regulations were constituted on the date first above written.

Effective date: _____

[Name of guarantor] _____

[Authorized signature for guarantor] __

[Name of person signing] _____

[Title of person signing] _____

Signature of witness or notary: _____

Subpart D—G [Reserved]

Subpart H—Hardrock Mining Facilities

§ 320.60 Applicability

(a)(1) The requirements of this subpart apply to owners or operators of hardrock mining facilities within the classes identified in the **Federal Register** notice issued by EPA at 74 FR 37213 (July 28, 2009) that are authorized to operate, or should be authorized to operate, on [Date 30 days after publication of Final Rule], or who become authorized to operate, or should become authorized to operate, after [Date 30 days after publication of Final Rule] except for the classes identified in paragraph (b) of this section.

(2) The requirements of this subpart do not apply to owners or operators of the following classes of hardrock mining facilities identified in the **Federal Register** notice referred to in paragraph (a) of this section:

(i) Mines conducting only placer mining activities

(ii) Mines conducting only exploration activities

(iii) Mines with less than five disturbed acres that are not located within one mile of another area of mine disturbance that occurred in the prior ten-year period, and that do not employ hazardous substances in their processes, and

(iv) Processors with less than five disturbed acres of waste pile and surface impoundment

§ 320.61 Timeframes for compliance.

(a) Owners and operators of hardrock mining facilities that are authorized to operate, or should be authorized to operate, on [Date 30 days after publication of Final Rule] must demonstrate financial responsibility according to the following schedule:

(1) For the amount of the health assessment cost component identified in this subpart by [Date 24 months after promulgation of the final rule];

(2) For fifty percent of the response and natural resource damages cost components amount identified in this subpart by [Date 36 months after promulgation of the final rule]; and

(3) For the full response and natural resource damages component amount identified in this subpart by [Date 48 months after promulgation of the Final Rule].

(b) Owners and operators of hardrock mining facilities that are authorized to operate, or should be authorized to operate, between [Date of publication of final rule] and [Date four years after publication of the final rule] must be incompliance with the schedule in paragraph (a) and continue to comply with that schedule after beginning operations.

(c) Owners or operators of hardrock mining facilities that become authorized to operate, or should become authorized to operate, after [Date four years after the effective date of this rule] must demonstrate financial responsibility for the full financial responsibility amount required under this subpart before beginning or resuming operations.

§ 320.62 Definitions.

When used in this subpart, the following terms are defined as follows:

Critical structure means a feature where a significant or high hazard potential is determined to exist. A significant hazard potential exists where failure or mis-operation is unlikely to cause loss of human life but is could cause economic loss, environmental damage, or other concerns; a high hazard potential exists where failure or mis-operation is likely to cause loss of human life.

Disturbed acreage/acres means the area of land or surface water that has been altered for purposes of accommodating mining and/or processing activities. The term includes the area from which the overburden, tailings, waste materials, ore, or targeted minerals have been removed or placed, and areas where tailings ponds, waste dumps, roads, conveyor systems, load-out facilities, heap leach, dump leach, ponds and impoundments, slag and other mineral processing waste, and all similar excavations or placements that result from the operation are located.

Dump leach means ore or mineralized material that has been stacked without a liner and has been leached, is currently being leached, or has been placed in a pile for the purpose of being leached.

Exploration means activities conducted to ascertain the existence, location, extent and/or quality of a deposit of ore or other mineral and does not include activities where 1000 tons or more of presumed ore have been removed for testing or where development or production has occurred. Exploration does not include activities where material is extracted for commercial use or sale.

Extraction means the sequence of activities intended to physically gain access to and remove ore or a mineral body.

Feature means open pit, underground mine, waste rock pile, tailings impoundment, tailings stack, heap leach pile, dump leach pile, process pond, impoundment, reservoir, slag pile, in-situ leach facility, or other area or feature used for mining or processing activities.

Heap leach means ore or mineralized material that has been stacked on a lined leach pad and has been leached, is currently being leached, or has been placed in a pile for the purpose of being leached.

Heap/dump leach means both heap and valley leach facilities, which are used for gold and sometimes copper processing, or run-of-mine copper leach dumps (or piles), that may have originally been intended for leaching, or originally were waste rock that was later leached in place.

In-situ Leaching means the removal of targeted materials by injection and extraction of an acidic or alkaline solvent solution.

Mine means all areas and equipment used for mining, including but not limited to injection and extraction wells used for in-situ mining or the extraction of mineral-bearing groundwater brines; surface excavations, pits, slopes, and spoil; underground passageways, shafts, stopes, tunnels, adits and workings; waste rock, slag and tailings; piles, ponds, impoundments and reservoirs; retention dams; dump, heap, or other leach facilities; mills, smelters, structures, tanks, equipment, machines, tools, and process components; private roads, ports, transmission lines, pipelines, or any other means of access owned or maintained by the operator; and any other ancillary areas or activities owned or used by the operator and resulting from the work of extracting minerals from their natural deposits. Adjacent and/or noncontiguous properties located within close proximity of the extraction site are part of the mine if those properties are managed under a unified operational control (*e.g.*, under the same owner or operator and with oversight by a unified managerial staff and budget) provided those adjacent and/or noncontiguous properties are engaged in any of the above activities as part of the sequential management of ore, beneficiated ore, mineral concentrate, waste rock or tailings.

Mineral processing means the sequence of activities following extraction of metallic or non-fuel non-metallic minerals to: (1) Separate and concentrate a target metallic or non-fuel non-metallic mineral from the ore, and/or (2) to refine ores or mineral concentrates to extract a target metallic or non-fuel non-metallic material. Mineral processing includes the mechanical, thermal, and/or chemical treatment of naturally occurring earthen materials, either solid or liquid (e.g., rock, ore, mineral or extracted subsurface brine) to recover, purify or create a final mineral product (e.g., dimension stone, expanded vermiculite, or refractory clay) or a feedstock of sufficient purity that it can then be used in further industrial or manufacturing operations.

Mineral processor means all areas and equipment used for mineral processing.

Mining means the extraction of rock and other materials that contain a target ore or mineral deposit from the earth. Mining includes, but is not limited to, in-situ solution mining, extraction of mineral-bearing groundwater brines, and surface or underground excavation of solid earthen materials.

Net precipitation means annual precipitation minus annual pan evaporation, or gross precipitation minus pan evaporation loss. Net precipitation is in inches.

Open pit means any open pits, cuts, or other surface features from which ore was extracted. It does not include borrow pits, sand boxes, or other surface features used for extracting soil, gravel, or sand for any purposes other than ore extraction.

Pile is as defined in 40 CFR 260.10

Placer mining is the extraction or prospecting of materials in unconsolidated deposits using water to excavate, transport, concentrate and recover heavy minerals using beneficiation methods such as screening, hand-panning, sluicing or dredging provided they are otherwise in compliance with applicable state and Federal regulations and do not use CERCLA hazardous substances (e.g., mercury, cyanide) in the concentration or processing of materials.

Pressurized hydraulic head means a discharge from underground mine workings at greater than 100 kPa.

Process pond/reservoir means process ponds, reservoirs, impoundments, ditches, channels or other wet acreage that were used in heap leach, dump leach, metals or minerals processing and other activities that have resulted in deposits of sludge and other potentially toxic and/or hazardous materials within those features.

Qualified professional engineer means an individual who is licensed by a state as a Professional Engineer to practice one or more disciplines of engineering and who is qualified by education, technical knowledge, and experience to make the specific technical certifications required under this subpart. Professional engineers making these certifications must be currently licensed in the state where the hardrock mining facility is located.

Slag pile means the storage location of glass-like particles generated when molten materials produced by a smelter are quenched.

Surface impoundment is as defined in 40 CFR 260.10.

Surface mine means the open pits, adits, general workings, and other features associated with surface extraction of ore.

Tailings means the remaining waste material following the removal of valuable minerals from ore.

Tailings facility means ponds, dams, and other facilities including spillways and associated features used for the deposition of process/beneficiation waste or tailings from either pulp or vat leaching, flotation, or gravity processing facilities. This also includes paste and dry stacks.

Underground mine means adits, portals, shafts, raises, drifts, and general workings (stopes, rooms or caving areas), vents and other features associated with underground extraction of ore.

Waste rock means waste rock and overburden piles, dumps, and other features associated with run-of-mine disposal of waste on the surface whether from open pit or underground mines.

§ 320.63 Determining the financial responsibility amount.

(a) Owners and operators subject to the requirements of this subpart must calculate the financial responsibility amount for their facilities in accordance with this section.

$$TotalFinancialResponsibility_y = \frac{Deflator_{y*}}{D_{eflator2014}} \times \left(\left[\sum_{i=1}^{n} ResponseCost_i \right] \times [1 + OverheadOversight_r] \times StateAdjustmentFactor_s \times 1.134 + \$550{,}000 \right)$$

Where:

$Deflator_y$ = the most recent available GDP Implicit Price Deflator for year *y;* and

$Deflator_{2014}$ = the GDP Implicit Price Deflator for 2014

i = the *i*th response category (*e.g.,* water treatment costs);

n = the total number of relevant response categories;

r = EPA region *r* (*e.g.,* EPA Region 3); and

s = state *s* (*e.g.,* Montana).

(b)(1) Response component—

$$\text{(b)(1) Response component -- } \sum_{i=1}^{n} ResponseCost_i$$

Determine the response component of the financial responsibility amount for the facility by totaling the response category amounts in paragraphs (i) through (xii) for all applicable response categories. Include in the calculation all site features that are authorized to operate, or should have been authorized to operate on [Effective Date of the Final Rule], or on the date the facility first becomes subject to requirements of this part, and have not been released from financial responsibility obligations under § 320.27.

(i) *Open pit category.* The open pit category amount equals: $5.07 \times 10\wedge (4.24 + 1.08 \times \text{Log}_{10}[\textit{Open Pit Disturbed Acres}])$

(ii) *Underground mine category.* The underground mine category amount for an underground mine with a hydraulic head is $4,500,000. The amount for an underground mine without a hydraulic head is $200,000.

(iii) *Waste rock category.* The waste rock category amount equals: $1.85 \times 10\wedge (5.18 + .75 \times \text{Log}_{10}[\textit{Waste Rock Disturbed Acres}])$

(iv) *Heap and dump leach category.* The heap and dump leach category amount equals: $2.29 \times 10\wedge (4.57 + 1.01 \times \text{Log}_{10}[\textit{Heap and Dump Leach Disturbed Acres}])$

(v) *Tailings category.* The tailings category amount equals: $1.71 \times 10\wedge (5.32 + .68 \times \text{Log}_{10}[\text{Tailings Disturbed Acres}])$

(vi) *Process pond and reservoir category.* The process pond and reservoir category amount equals: $1.64 \times 10\wedge (4.29 + 1.03 \times \text{Log}_{10}[\text{Process Pond and Reservoir Disturbed Acres}])$

(vii) *Slag pile category.* The slag pile category amount equals: $64,000 × [Slag Pile Disturbed Acres].

(viii) *Solid and hazardous waste disposal category.* The solid and hazardous waste disposal category amount is $2,600,000.

(ix) *Drainage category.* The drainage category amount equals: $9.56 \times 10\wedge (3.42 + .57 \times \text{Log}_{10}(\textit{Total Disturbed Acres + 1})$

(x) *Short-term O&M and monitoring category.* The short-term O&M and monitoring category amount equals: $\{1.82 \times 10\wedge (4.01 + 0.38 \times \text{Log}_{10}[\text{Total Disturbed Acres} + 1])\} \times \{1/0.0263\} \times \{1 - (1/[1.0263\wedge 10])\}$

(xi) *Interim O&M category.* The interim O&M category amount equals: $\{1.46 \times 10\wedge (6.04 + 0.01 \times [\text{Net Precipitation}] + 0.34 \times \text{Log}_{10}[\text{Heap and Dump Leach Disturbed Acres} + 1] + 0.10 \times \text{Log}_{10}[\text{Tailings Impoundment Disturbed Acres} + 1])\} \times \{1/0.0263\} \times \{1 - (1/[1.0263\wedge 10])\}$

(xii) *Long-term O&M category.* The long-term O&M amount equals: $\{1.64 \times 10\wedge (3.12 + 0.58 \times \text{Log}_{10}[\text{Total Disturbed Acres} + 1])\} /0.0263$

(xiii) *Water treatment category.* The water treatment category amount is: $\{1.16 \times 10\wedge (3.22 + 1.10 \times \text{Log}_{10}[\text{flow}] + .70 \times [\text{In-Situ leach}])\}/.0263$

Where:

Flow = flow in gallons/minute through in-situ leach features + flow in gallons/minute through underground mine features + 0.05 × Precipitation × [Total Disturbed Acres] × 0.05166.

In-situ leach = 1 if present; 0 if not present.

(2) Multiply the response cost amount calculated under paragraph (b)(1) of this section by the following:

(i) Overhead and oversight percentage ([1 + $OverheadOversight_r$]) The applicable $\text{OverheadOversight}_r$ value is the value in Appendix II for the Region in which the largest disturbed acreage of the facility is located.

(ii) State adjustment factor ($StateAdjustmentFactor_s$).The applicable state adjustment factor is the factor in Appendix III for the state in which the largest disturbed acreage at the facility is located.

(iii) Natural resource damage component. The financial responsibility amount for natural resource damages at a facility is 13.4 percent of the total response component.

(3) Add the health assessment component to the amount calculated under paragraph (b)(2) of this section. The financial responsibility amount for the health assessment component is $550,000.

(c) Owners and operators may satisfy requirements of paragraph (b)(i) through (xiii), in whole or in part, by demonstrating that they are subject to, and in compliance with, requirements that will result in a minimum degree and duration of risk associated with the production, transportation, treatment, storage, or disposal, as applicable, of all hazardous substances present at that site feature. A demonstration under this paragraph will reduce the amount of financial responsibility that an owner and operator must demonstrate under this part.

(1) The demonstration must be made individually for each site feature that must be included in the calculation as required by paragraph (b)(1) of this section, and must include, at a minimum:

(i) Evidence that the owner or operator is subject to the requirements described in paragraph (d) of this section,

(ii) Evidence that the owner's or operator's obligation to implement such requirements are imposed in an enforceable document as defined in § 320.61,

(iii) Evidence that the owner or operator has demonstrated, and is required to demonstrate, adequate financial responsibility to assure implementation of the required activities, and

(iv) Certification by the owner or operator that the facility is in

compliance with the requirements described in paragraph (d) of this section.

(2) Information provided to make the demonstration in paragraph (c)(1) of this section must provide sufficient and detailed supporting information adequate to allow EPA to evaluate the adequacy of the financial responsibility and the underlying requirements.

(3) In the event that an owner or operator that reduces the maximum financial responsibility at its facility based on a reduction under paragraph (d) of this section becomes ineligible for that reduction because the facility no longer meets the requirements in paragraph (c)(1)(i) through (iii) of this section, it must recalculate the financial responsibility level at its facility and submit evidence of financial responsibility for the increased amount within thirty days of the date it no longer is eligible. The requirement to recalculate a financial responsibility level and submit evidence of financial responsibility under this paragraph does not affect the owner's or operator's obligations for instrument maintenance under § 320.22.

(d) Reductions to the response component amount.

(1) To satisfy the open pit category component in paragraph (b)(1)(i) of this section:

(i) A plan to address safety by prevention of public access by means of security fencing, or other effective methods.

(ii) Where ponding will occur, a plan that requires:

(A) regrading the bottom surface during closure to a stable configuration that prevents ponding and promotes the conveyance of surface water off the unit

(B) closure of all open pits where public access is not restricted

(C) structures that are considered to be critical structures to be designed for a long-term static factor of safety of 1.5 or greater

(D) structures that are considered to be non-critical structures to be designed for a long-term static factor of safety of 1.3 or greater

(E) units being closed be designed for a factor of safety of 1.1 or greater under pseudostatic analysis, and

(F) a stability analysis to be conducted for the unit and include evaluation for static and seismic induced liquefaction.

(iii) A plan for the management of all stormwater and sediment generated during reclamation and following closure that includes permanent stormwater conveyances, ditches, channels, and diversions, as necessary, designed to convey the peak flow and ponds and other collection devices, and that provides for controls designed to store the volume generated during a 24-hour period by a 200-year return interval storm event.

(iv) Where conditions at the open pit may allow a pit lake to form, or where meteoric water may percolate through the pit rock into groundwater below, and pit lake or any discharges may not meet water quality standards, a plan for the minimization, prevention, or collection and treatment of water in the pit lakes, discharges, and/or seepage, that factors in information on site hydrology, water quality characterization information, and pit lake ecological risk assessment information. The plan must address and provide for capture and treatment at closure consisting of a capture and treatment system that meets a minimum 200-yr life design criteria, and that is designed to either prevent pit lake formation or groundwater contamination exceeding applicable water quality standards to achieve at least a 95 percent capture efficiency of the affected groundwater, and to meet applicable water quality standards.

(v) If prevention/avoidance is relied on, a management plan that demonstrates geochemically active materials will effectively be avoided, and that includes provisions for sampling and monitoring documentation.

(vi) Requirements for concurrent or sequential reclamation of mined areas as they become available prior to final cessation of operations and closure.

(2) To satisfy the underground mine category component in paragraph (b)(1)(ii) of this section:

(i) A plan to address public safety by prevention of public access by means of security fencing, or other effective methods.

(ii) A plan for the minimization, prevention or collection and treatment of discharges and or seepage based on site hydrology and water quality characterization information that provides for necessary additional source controls and/or capture and treatment at closure, all of which meet a minimum 200-year life design criteria, and includes:

(A) If seepage and/or discharge water quality is not expected to meet applicable water quality standards, requirements for a capture and treatment system designed to achieve at least a 95 percent capture efficiency and to meet applicable water quality standards, and

(B) If there will be a pressurized plug as a permanent feature controlling a discharge from underground mine workings at moderate to high heads (100–1,000+ kPa), a requirement to maintain the plug as a permanent feature.

(iii) If prevention/avoidance is relied on, a management plan that demonstrates geochemically active materials will effectively be avoided, and that includes provisions for sampling and monitoring documentation.

(iv) Requirements for concurrent or sequential reclamation of mined areas as they become available prior to final cessation of operations and closure.

(3) To satisfy the waste rock category component in paragraph (b)(1)(iii) of this section:

(i) A plan to address public safety by prevention of public access by means of security fencing, or other effective methods.

(ii) If prevention/avoidance is relied on, a management plan that demonstrates geochemically active materials will effectively be avoided, and that includes provisions for sampling and monitoring documentation.

(iii) Requirements for concurrent or sequential reclamation of mined areas as they become available prior to final cessation of operations and closure.

(iv) Requirements to regrade the surface during closure to a stable configuration that prevents ponding and promotes the conveyance of surface water off the unit, that requires closure of all waste rock piles considered to be critical structures to be designed for a long-term static factor of safety of 1.5 or greater, that requires all non-critical structures to be designed for a long-term static factor of safety of 1.3 or greater; and that requires that the units being closed be designed for a factor of safety of 1.1 or greater under pseudostatic analysis.

(v) Requirements to provide for a stability analysis to be conducted for the unit as part of the original design, and as part of mine modifications during the active life of the mine.

(vi) A plan for the management of all stormwater and sediment generated during operations and during and following closure. For existing units, the plan must provide for permanent stormwater conveyances, ditches, channels and diversions designed to convey the peak flow and ponds and other collection devices designed to store the volume generated during a 24-hour period by a 100-year return interval storm event. For unit that become authorized to operate after [Date of the Final Rule], the plan must provide for controls designed to store the volume generated during a 24-hour

period by a 200-year return interval storm event.

(vii) A plan for the minimization, prevention, or collection and treatment of discharges and/or seepage, based on site hydrology and water quality characterization information, that provides for a cover system of, at a minimum, a store and release earthen cover system with a thickness of at least twelve inches and, if necessary, additional source controls or capture and treatment at closure, all of which meet a minimum 200-year life design criteria. If seepage water quality is not expected to meet applicable Federal and state groundwater and surface water quality standards at the point of compliance, the plan must provide for:

(*A*) Implementation of a containment system that immobilizes hazardous substances to meet applicable water quality standards (e.g., an engineered cover system designed to achieve, at a minimum, a 95 percent reduction in annual net-percolation based on the long-term average to reduce seepage discharges to meet applicable water quality standards;

(*B*) A capture and treatment system designed to achieve at least a 95 percent capture efficiency and meet applicable water quality standards; or a combination of an engineered cover system and a capture and treatment system to achieve at least a 95 percent reduction in discharged load and meet applicable water quality standards at the point of compliance, or

(*C*) A solution containment system to assure seepage flows are collected, contained, conveyed, and treated to achieve at least a 95 percent reduction to meet applicable water quality standards.

(4) To satisfy the heap and dump leach category component in paragraph (b)(1)(v) of this section:

(i) A plan to address public safety by prevention of public access by means of security fencing, or other effective methods.

(ii) A plan to regrade surface during closure to a stable configuration that prevents ponding and promotes the conveyance of surface water off the unit, and that requires closure of all heap leach and dump leach piles considered to be critical structures to be designed for a long-term static factor of safety of 1.5 or greater and all non-critical structures to be designed for a long-term static factor of safety of 1.3 or greater; and requires that the units being closed be designed for a factor of safety of 1.1 or greater under pseudostatic analysis. The plan must also provide for a stability analysis to be conducted for the unit and include evaluation for static and seismic induced liquefaction.

(iii*)* A plan for the management of all stormwater and sediment generated during operations and during and following closure. For existing units, the plan must provide for permanent stormwater conveyances, ditches, channels and diversions designed to convey the peak flow and ponds and other collection devices designed to store the volume generated during a 24-hour period by a 100-year return interval storm event. For unit that become authorized to operate after [Date of the Final Rule], the plan must provide for controls designed to store the volume generated during a 24-hour period by a 200-year return interval storm event.

(iv) A plan for the minimization, prevention, or collection and treatment of discharges and/or seepage, based on site hydrology and water quality characterization information, that provides for a cover system of, at a minimum, a store and release earthen cover system with a thickness of at least twelve inches and, if necessary, additional source controls or capture and treatment at closure, all of which meet a minimum 200-year life design criteria. If seepage water quality is not expected to meet applicable water quality standards, the plan must provide for:

(*A*) Implementation of an engineered cover system designed to achieve at least a 95 percent reduction in annual net-percolation based on the long-term average and reduce seepage discharges to meet applicable water quality standards;

(*B*) A capture and treatment system designed to achieve at least a 95 percent capture efficiency and meet applicable water quality standards; or combination of an engineered cover system and a capture and treatment system to achieve at least a 95 percent reduction in discharged load and meet applicable water quality standards; or

(*C*) A solution containment system to assure seepage flows are collected, contained, conveyed, and treated to achieve at least a percent reduction to meet applicable water quality standards.

(v) (For heap leach) A liner designed to minimize/eliminate releases from the unit based on site specific conditions.

(vi) Requirements for concurrent or sequential reclamation of mined areas as they become available prior to final cessation of operations and closure.

(5) To satisfy the tailings category component in paragraph (b)(1)(v) of this section:

(i) A plan to address public safety by prevention of public access by means of security fencing, or other effective methods.

(ii) A plan to regrade surface during closure to a stable configuration that prevents ponding and promotes the conveyance of surface water off the unit, and that requires closure of all tailings impoundments and stacks considered to be critical structures to be designed for a long-term static factor of safety of 1.5 or greater and all non-critical structures to be designed for a long-term static factor of safety of 1.3 or greater; and requires that the units being closed be designed for a factor of safety of 1.1 or greater under pseudostatic analysis. The plan must also provide for a stability analysis to be conducted for the unit and include evaluation for static and seismic induced liquefaction.

(iii*)* A plan for the management of all stormwater and sediment generated during operations and during and following closure. For existing units, the plan must provide for permanent stormwater conveyances, ditches, channels and diversions designed to convey the peak flow and ponds and other collection devices designed to store the volume generated during a 24-hour period by a 100-year return interval storm event. For unit that become authorized to operate after [Date of the Final Rule], the plan must provide for controls designed to store the volume generated during a 24-hour period by a 200-year return interval storm event.

(iv) A plan for the minimization, prevention, or collection and treatment of discharges and/or seepage, based on site hydrology and water quality characterization information, that provides for a cover system of, at a minimum, a store and release earthen cover system with a thickness of at least twelve inches and, if necessary, additional source controls or capture and treatment at closure, all of which meet a minimum 200-year life design criteria. If seepage water quality is not expected to meet applicable water quality standards, the plan must provide for:

(*A*) Implementation of an engineered cover system designed to achieve at least a 95 percent reduction in annual net-percolation based on the long-term average and reduce seepage discharges to meet applicable water quality standards;

(*B*) A capture and treatment system designed to achieve at least a 95 percent capture efficiency and meet applicable water quality standards; or combination of an engineered cover system and a capture and treatment system to achieve at least a 95 percent reduction in

discharged load and meet applicable water quality standards, or

(*C*) A solution containment system to assure seepage flows are collected, contained, conveyed, and treated to achieve at least a percent reduction to meet applicable water quality standards.

(v) A liner designed to minimize/eliminate releases from the unit based on site specific conditions.

(vi) If prevention/avoidance is relied on, a management plan that demonstrates geochemically active materials will effectively be avoided, and that includes provisions for sampling and monitoring documentation.

(vii) If a wet tailings impoundment is present:

(*A*) A requirement to develop and implement a Tailings Operations, Maintenance and Surveillance (TOMS) manual, or similar plan, that defines and describes roles and responsibilities of personnel assigned to the facility; procedures and processes for managing change; the key components of the facility; procedures required to operate, monitor the performance of, and maintain a facility to ensure that it functions in accordance with its design, meets regulatory and corporate policy obligations, and links to emergency planning and response; downstream notification; and, requirements for analysis and documentation of the performance of the facility.

(*B*) Annual tailings inspection reports by a qualified engineer, and an inspection report by an independent qualified engineer at least every five years.

(viii) Requirements for concurrent or sequential reclamation of mined areas as they become available prior to final cessation of operations and closure.

(6) To satisfy the process pond and reservoir category component in paragraph (b)(1)(vi) of this section:

(i) A plan to address public safety by prevention of public access by means of security fencing, or other effective methods.

(ii) A plan for the design and operation of such ponds and reservoirs to ensure they have adequate freeboard and are designed to prevent discharges of hazardous substances.

(iii) A liner and collection system designed to minimize/eliminate releases from the unit based on site specific conditions.

(iv) A requirement that sludge and the sub-base below the liner be sampled and addressed in a manner that is protective of human health and the environment as part of closure.

(v) Requirements for concurrent or sequential reclamation of mined areas as they become available prior to final cessation of operations and closure.

(vi) A plan for the management of all stormwater and sediment generated during operations and during and following closure. For existing units, the plan must provide for permanent stormwater conveyances, ditches, channels and diversions designed to convey the peak flow and ponds and other collection devices designed to store the volume generated during a 24-hour period by a 100-year return interval storm event. For unit that become authorized to operate after [Date of the Final Rule], the plan must provide for controls designed to store the volume generated during a 24-hour period by a 200-year return interval storm event.

(7) To satisfy the slag pile category component in paragraph (b)(1)(iv) of this section:

(i) A plan to address public safety by prevention of public access by means of security fencing, or other effective methods.

(ii) If prevention/avoidance is relied on, a management plan that demonstrates geochemically active materials will effectively be avoided, and that includes provisions for sampling and monitoring documentation.

(iii) Requirements for concurrent or sequential reclamation of mined areas as they become available prior to final cessation of operations and closure.

(iv) Requirements to regrade surface during closure to a stable configuration that prevents ponding and promotes the conveyance of surface water off the unit, and that requires closure of all waste rock piles considered to be critical structures to be designed for a long-term static factor of safety of 1.5 or greater and all non-critical structures to be designed for a long-term static factor of safety of 1.3 or greater; and requires that the units being closed be designed for a factor of safety of 1.1 or greater under pseudostatic analysis.

(v) Requirements to provide for a stability analysis to be conducted for the unit as part of the original design, and as part of mine modifications during the active life of the mine.

(vi) A plan for the management of all stormwater and sediment generated during operations and during and following closure. For existing units, the plan must provide for permanent stormwater conveyances, ditches, channels and diversions designed to convey the peak flow and ponds and other collection devices designed to store the volume generated during a 24-hour period by a 100-year return interval storm event. For unit that become authorized to operate after [Date of the Final Rule], the plan must provide for controls designed to store the volume generated during a 24-hour period by a 200-year return interval storm event.

(vii) A plan for the minimization, prevention, or collection and treatment of discharges and/or seepage, based on site hydrology and water quality characterization information, that provides for a cover system of, at a minimum, a store and release earthen cover system with a thickness of at least twelve inches and, if necessary, additional source controls or capture and treatment at closure, all of which meet a minimum 200-year life design criteria. If seepage water quality is not expected to meet applicable Federal and state groundwater and surface water quality standards at the point of compliance, the plan must provide for:

(*A*) Implementation of a containment system that immobilizes hazardous substances to meet applicable water quality standards (e.g., an engineered cover system designed to achieve, at a minimum, a 95 percent reduction in annual net-percolation based on the long-term average to reduce seepage discharges to meet applicable water quality standards;

(*B*) A capture and treatment system designed to achieve at least a 95 percent capture efficiency and meet applicable water quality standards; or combination of an engineered cover system and a capture and treatment system to achieve at least a 95 percent reduction in discharged load and meet applicable water quality standards at the point of compliance, or

(*C*) A solution containment system to assure seepage flows are collected, contained, conveyed, and treated to achieve at least a 95 percent reduction to meet applicable water quality standards.

(8) To satisfy the solid and hazardous waste disposal component in paragraph (b)(1)(viii):

(*i*) Requirements for disposal of all solid and hazardous wastes in a manner that is protective of human health and the environment and that is compliance with all applicable Federal, state, and local requirements.

(ii) Requirements for contaminated soil disposal in a manner that is protective of human health and the environment and that is in compliance with all applicable Federal, state, and local requirements.

(iii) Requirements to decontaminate buildings and structures to remove and safely dispose of hazardous substances.

(9) To satisfy the drainage category component in paragraph (b)(1)(ix) of

this section, a plan for the management of all stormwater and sediment generated during operations and during and following closure. For existing units, the plan must provide for permanent stormwater conveyances, ditches, channels and diversions designed to convey the peak flow and ponds and other collection devices designed to store the volume generated during a 24-hour period by a 100-year return interval storm event. For unit that become authorized to operate after [Date of the Final Rule], the plan must provide for controls designed to store the volume generated during a 24-hour period by a 200-year return interval storm event.

(10) To satisfy the short-term O&M category component in paragraph (b)(1)(x) of this section:

(i) A plan for groundwater and surface water monitoring to assure that monitoring wells are located to detect an exceedance(s) or trends towards exceedance(s) of the applicable standards, and are detected at the earliest possible occurrence, so that investigation of the extent of contamination and actions to address the source of contamination may be implemented as soon as possible. The plan must be currently in effect and must cover a period of at least five years.

(ii) A plan for inspection and monitoring of erosion and revegetation to ensure reclamation success.

(iii) A plan for routine maintenance and repairs to roads, stormwater conveyances and collection devices and revegetation maintenance (*e.g.* weed controls) and repairs (*e.g.* areas of revegetation failure).

(11) To satisfy the interim O&M category component in paragraph (b)(1)(xi) of this section:

(i) A plan for the purpose of interim emergency water management to provide information on how process water systems, interceptor wells, seepage collection systems and storm water management systems are operated and maintained to prevent discharges in the event the regulator assumes management of the mine facility. The plan must include process water flow charts showing electrical system requirements, pump operations, seepage collection and interceptor well operations and applicable operation and maintenance requirements. The plan must be updated as major process water system changes occur that would affect the interim emergency water management plan.

(ii) A conceptual engineering document that describes the processes and methods that are expected to be used to reduce the quantities of process water in storage and circulation inventory at the end of mine production until all process solutions are eliminated and steady-state discharge is reached, in preparation for long-term water management or treatment. The document must include:

(A) A description and list of the current or proposed process water management units and inventories of process water;

(B) A description of the modifications to the process water management system required to create an efficient process water reduction system;

(C) The operation and maintenance requirements for the system with material take-offs of sufficient detail to prepare an engineering-level cost estimate; and

(D) An estimate of the required water reduction period based on the water reduction calculations provided in the plan to be used for planning and operation and maintenance cost calculations.

(12) To satisfy the long-term O&M category component in paragraph (b)(1)(xii) of this section:

(*i*) A plan for groundwater and surface water monitoring to assure that additional monitoring wells are located to detect an exceedance(s) or trends towards exceedance(s) of the applicable standards and that they are detected at the earliest possible occurrence, so that investigation of the extent of contamination and actions to address the source of contamination may be implemented as soon as possible. The plan must be currently in effect, and must cover a period of at least 200 years.

(*ii*) A plan for inspection and monitoring of mass stability, erosion and revegetation certified by a professional engineer to ensure reclamation success.

(*iii*) A plan for routine maintenance and repairs to roads, stormwater conveyances and collection devices, cover systems, and revegetation maintenance (*e.g.* weed controls) and repairs (*e.g.* areas of revegetation failure) and monitoring wells.

(13) To satisfy the water treatment category component in paragraph (b)(1)(xiii) of this section:

(i) A plan for closure water management and water treatment consisting of a conceptual engineering document that describes the processes and methods that are expected to be used for long-term management or treatment of seepage and includes an analysis of the expected operational life of each long-term water management or water treatment system, including collection/interceptor systems, until each system is no longer needed to protect water quality and applicable standards are met. The plan must describe whether active or passive treatment is proposed and include all operations and maintenance activities required to support all collection and treatment systems. The plan must describe the long-term water management and water treatment systems with sufficient detail, including locations of key components, expected operational life, material take-offs, and capital, operational and maintenance costs to prepare an engineering-level cost estimate. The plan must be currently in effect and must cover a period of at least 200 years.

(ii) A plan for disposal of wastes produced from water treatment that is protective of human health and the environment and meets applicable Federal, state, and local requirements.

§ 320.64 Information submission and recordkeeping requirements

(a) Owners or operators must submit to EPA information that supports the cost calculation including the maximum financial responsibility amount, final financial responsibility amount, information to support all inputs to the formula, and information to support reductions to the maximum financial responsibility amount in accordance with paragraph (c), including necessary components of applicable enforceable documents. Such information must provide sufficient detail about facility conditions to allow the Administrator to review the formula calculation and determine if the inputs to the formula were accurate, and should include site characterization information and evaluations that support the enforceable documents provided to support reductions.

(b) Owners or operators must retain the calculation of the financial responsibility amount and the information supporting it for a period of three years following submission to EPA.

§ 320.65 Third-Party Certification

The financial responsibility amount submitted by owners or operators in compliance with § 320.63 must be certified by an independent qualified professional engineer as defined in § 320.62.

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Appendix I

OMB#_____; Expires _____

SEND COMPLETED FORM to the EPA Regional Office in which the facility is located.	United States Environmental Protection Agency CERCLA § 108(b) NOTIFICATION FORM							
1. Reason for Submittal	Reason for Submittal: ☐ To provide an Initial Notification that the owner or operator of the facility is subject to CERCLA § 108(b) requirements (first time submitting facility identification information / to obtain an EPA ID number for this location) ☐ To provide a Subsequent Notification (to update facility information for this location)							
2. EPA ID Number	EPA ID Number							
3. Facility Name	Name:							
4. Facility Location Information	Street Address:							
1.	City, Town, or Village:						County:	
1.	State:		Country:				Zip Code:	
5. Facility Land Type	Private	County	District	Federal	Tribal	Municipal	State	Other
6. Facility Mailing Address	Street or P.O. Box:							
1.	City, Town, or Village:							
1.	State:		Country:				Zip Code:	
7. Facility Contact Person	First Name:		MI:	Last:				

8.	Title:		
8.	Street or P.O. Box:		
8.	City, Town or Village:		
8.	State:	Country:	Zip Code:
8.	Email:		
8.	Phone:	Ext.:	Fax:
8. Legal Owner(s) and Operator(s) of the Facility	A. Name of Facility's Legal Owner(s) (include all names under which you do business):		Date Became Owner:
8.	Owner Type: Private County District Federal Tribal Municipal State Other		
8.	Street or P.O. Box:		
8.	City, Town, or Village:		Phone:
8.	State:	Country:	Zip Code:
8.	B. Name of Facility Operator(s) (include all names under which you do business):		Date Became Operator:
8.	Operator Type: Private County District Federal Tribal Municipal State Other		

9. Type of activity requiring CERCLA § 108(b) financial responsibility at your facility:
10. Certification. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Signature of legal owner, operator, or an authorized representative	Name and Official Title (type or print)	Date Signed (mm/dd/yyyy)

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Appendix II

REGION-SPECIFIC OVERHEAD AND OVERSIGHT PERCENTAGES

Region	Total OC percentage
1	48.64
2	47.60
3	51.42
4	49.57
5	50.13
6	48.66
7	47.63
8	48.19
9	48.73
10	48.14

Appendix III

STATE ADJUSTMENT FACTORS

State	State adjustment factor
AK	1.19
AL	0.91
AR	0.87
AZ	0.96
CA	1.17
CO	0.97
CT	1.18
DE	1.10
FL	0.92
GA	0.89
HI	1.19
IA	0.98
ID	0.97
IL	1.15
IN	1.00
KS	0.94
KY	0.99
LA	0.89
MA	1.20
MD	0.99
ME	1.03
MI	1.04
MN	1.12
MO	1.04
MS	0.89
MT	0.97
NC	0.87
ND	0.92
NE	0.97
NH	1.06

STATE ADJUSTMENT FACTORS—Continued

State	State adjustment factor
NJ	1.20
NM	0.92
NV	1.08
NY	1.17
OH	1.02
OK	0.88
OR	1.06
PA	1.09
RI	1.16
SC	0.87
SD	0.87
TN	0.91
TX	0.89
UT	0.95
VA	0.94
VT	1.01
WA	1.05
WI	1.06
WV	1.04
WY	0.92

[FR Doc. 2016–30047 Filed 1–10–17; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 320

[EPA–HQ–OLEM–2016–0212; FRL–9956–56–OLEM]

RIN 2050–AG56

Financial Responsibility Requirements for Facilities in the Chemical, Petroleum and Electric Power Industries

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intent to proceed with rulemakings.

SUMMARY: Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) establishes certain regulatory authorities concerning financial responsibility requirements. Specifically, the statutory language addresses the promulgation of regulations that require classes of facilities to establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. On January 6, 2010, the Environmental Protection Agency (EPA) published an Advance Notice of Proposed Rulemaking (ANPRM) that identified additional classes of facilities within three industry sectors that may warrant the development of financial responsibility requirements under CERCLA section 108(b)—the Chemical Manufacturing industry (NAICS 325), the Petroleum and Coal Products Manufacturing industry (NAICS 324), and the Electric Power Generation, Transmission, and Distribution industry (NAICS 2211). This document formally announces EPA's intention to publish a notice for proposed rulemaking for classes of facilities within the three industries identified in the 2010 ANPRM, as well as gives an overview of some of the comments received on the ANPRM and initial responses to those comments. The announcement in this action is not a determination that requirements are necessary for any or all of the classes of facilities within the three industries, or that EPA will propose such requirements—rather, it is an announcement that EPA intends to move forward with the regulatory process. After that process, EPA will determine whether proposal of requirements for any or all of the classes of facilities within the three industries is necessary.

DATES: January 11, 2017.

FOR FURTHER INFORMATION CONTACT: For more information on this action, contact Peggy Vyas, U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery, Mail Code 5303P, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone (703)

308–5477 or (email) *vyas.peggy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. How can I get copies of this document and other related information?

1. Docket. EPA has established a docket for this action under Docket ID No. EPA–HQ–OLEM–2016–0212. The 2010 Advance Notice of Proposed Rulemaking and its related documents, including background documents and public comments, are under Docket ID No. EPA–HQ–SFUND–2009–0834. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (202) 566–0276. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

2. Electronic Access. You may access this **Federal Register** document electronically from the Government Printing Office under the ''Federal Register'' listings at FDSys (*http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR).*

II. Overview of CERCLA Section 108(b)

CERCLA section 108(b) generally requires that EPA develop requirements that classes of facilities establish and maintain evidence of financial responsibility ''consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.'' [1] CERCLA section 108(b)(2) directs that the level of financial responsibility shall be initially established, and, when necessary, adjusted to protect against the level of risk that EPA in its discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction.

CERCLA section 108(b) also discusses particular instruments for EPA to consider in its regulations. Specifically, paragraph (b)(2) states that financial responsibility may be established by any one, or any combination, of the following: Insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. Paragraph (b)(2) further authorizes EPA to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable in establishing evidence of financial responsibility. Paragraph (b)(2) also requires EPA to cooperate with and seek the advice of the commercial insurance industry to the maximum extent practicable when developing financial responsibility requirements.[2] Paragraph (b)(4) provides direction on how the CERCLA section 108(b) instruments are to address multiple owners and operators at a single facility.[3]

CERCLA section 108(b)(3) requires that regulations promulgated under CERCLA section 108(b) incrementally impose financial responsibility requirements as quickly as can reasonably be achieved, but in no event more than four years after the date of promulgation.[4]

CERCLA section 108(c) also includes a ''direct action'' provision under which any claim authorized by CERCLA section 107 or 111 may be asserted directly against any guarantor providing evidence of financial responsibility under CERCLA section 108(b) if the person is liable under CERCLA section 107 and (1) is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or (2) is likely to be solvent at the time of judgment, but over whom jurisdiction in the Federal courts cannot be obtained with reasonable diligence.[5]

III. *In re Idaho Conservation League*

In August 2014, the groups Idaho Conservation League, Earthworks, Sierra Club, Amigos Bravos, Great Basin Resource Watch, and Communities for a Better Environment filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit, for a writ of mandamus requiring issuance of CERCLA section 108(b) financial responsibility rules for the hardrock mining industry, and for the three additional industries identified by EPA in the ANPRM, that is, Chemical Manufacturing, Petroleum and Coal Products Manufacturing, and Electric Power Generation, Transmission, and Distribution.[6] Following oral arguments, EPA and the petitioners submitted Joint Motion for an Order on Consent, filed on August 31, 2015, which included a schedule for further administrative proceedings under CERCLA section 108(b). The court order granting the motion was issued on January 29, 2016. A copy of the order can be found in the docket for this action.

In addition to requiring EPA to publish a proposed rule on hardrock mining financial requirements by December 1, 2016, the January 2016 Order requires EPA to ''sign for publication in the **Federal Register** a determination whether EPA will issue a action of proposed rulemaking on financial responsibility requirements under CERCLA § 108(b) in the (a) chemical manufacturing industry; (b) petroleum and coal products manufacturing industry; and (c) electric power generation, transmission, and distribution industry by December 1, 2016.'' The publication of this action satisfies that component of the January 2016 order. The order includes the following schedule for these rulemakings:

> ''EPA will sign for publication in the **Federal Register** a notice of proposed rulemaking in the first additional industry by July 2, 2019, and sign for publication in the **Federal Register** a notice of its final action by December 2, 2020.
>
> EPA will sign for publication in the **Federal Register** a notice of proposed rulemaking in the second additional industry by December 4, 2019, and sign for publication in the **Federal Register** a notice of its final action by December 1, 2021.
>
> EPA will sign for publication in the **Federal Register** a notice of proposed rulemaking in the third additional industry by December 1, 2022, and sign for publication in the **Federal Register** a notice of its final action by December 4, 2024.'' [7]

While the January 2016 Order identifies the other industries as being the Chemical Manufacturing industry, the Petroleum and Coal Products Manufacturing industry, and the Electric Power Generation, Transmission and Distribution industry, and sets a rulemaking schedule, it does not specify which industry will be the

[1] Executive Order 12580 delegates the responsibility to develop these requirements to the Administrator of EPA for non-transportation related facilities. 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

[2] 42 U.S.C. 9608(b)(2).

[3] 42 U.S.C. 9608(b)(4).

[4] 42 U.S.C. 9608(b)(3).

[5] 42 U.S.C. 9608(c)(2).

[6] See *In re: Idaho Conservation League,* No. 14–1149. For more information on the lawsuit please refer to the preamble of the ''Financial Responsibility Requirements for the Hardrock Mining Industry'' proposed rule, published elsewhere in this **Federal Register**.

[7] In *Re: Idaho Conservation League,* No. 14–1149 (D.C. Cir. Jan. 29, 2016) (order granting joint motion).

first, second or third. EPA will decide that at a later date. Nor does the January 2016 Order mandate any specific outcome of the rulemakings.[8] The Joint Motion specified that it did not alter the Agency's discretion provided by CERCLA and administrative law.[9] In other words, the substance of any requirements arising out of CERCLA section 108(b) for the additional classes are not established in this action—any such requirements, if they are imposed, will not be established until EPA issues any final rules for these classes. Consequently, this document is not final agency action.

IV. Factors Identified by EPA for Consideration in the Decision To Develop a Proposed Rule for an Additional Industry Sector

On July 28, 2009, EPA published a *Priority Notice* in which we identified classes of facilities in the hardrock mining industry for development of CERCLA section 108(b) financial responsibility requirements. In that action, EPA also announced its intention to consider additional industry sectors. EPA identified the following factors as among those it may consider in the decision whether to propose requirements for an industry sector: (1) The amounts of hazardous substances released to the environment; (2) the toxicity of these substances; (3) the existence and proximity of potential receptors; (4) contamination historically found from facilities; (5) whether the causes of this contamination still exist; (6) experiences from Federal cleanup programs; (7) projected costs of Federal clean-up programs; and (8) corporate structures and bankruptcy potential.[10] EPA also indicated that the Agency intends to consider whether financial responsibility requirements under CERCLA section 108(b) will effectively reduce these risks.[11]

Some of the factors reflect the basic elements of risk evaluation (*i.e.,* the probability of release, exposure, and toxicity); others more closely relate to the severity of consequences that result when risks are realized, such as the releases' duration and the exposures that can result if releases are not prevented or quickly controlled (*e.g.* as a result of economic constraints).

V. Additional Classes Advance Notice of Proposed Rulemaking

On January 6, 2010, EPA published an ANPRM,[12] in which the Agency identified three additional industrial sectors for the development, as necessary, of a proposed CERCLA section 108(b) regulation. To develop the list of additional classes for the 2010 ANPRM, EPA used information from the National Priorities List (NPL), as well as analyzed data from the Biennial Report (BR) and Toxics Release Inventory (TRI). As was discussed in the document, these sources were chosen because ''they are well-established, reliable sources of information on facilities associated with hazardous substances, and were readily available to the Agency.'' [13] In addition to these sources, EPA further evaluated industry sectors by gathering additional information from natural resource damage cases. The result of this analysis is explained in the 2010 ANPRM in detail, with the conclusion that three industries—the Chemical Manufacturing industry (NAICS 325), the Petroleum and Coal Products Manufacturing industry (NAICS 324), and the Electric Power Generation, Transmission, and Distribution industry (NAICS 2211)—should be considered for financial responsibility requirements under CERCLA section 108(b).

EPA specifically requested public comment in the 2010 ANPRM on whether to propose a regulation under CERCLA section 108(b) for any class or classes, or the industry as a whole, including information demonstrating why such financial responsibility requirements would not be appropriate for those particular classes. In addition, the Agency requested information related to the industry categories discussed in the action, including data on facility operations, information on past and expected future environmental responses, use of financial responsibility mechanisms by the industry categories, existing financial responsibility requirements, and other information the Agency might consider in setting financial responsibility levels. Finally, EPA requested information from the insurance and the financial sectors related to instrument implementation and availability, and potential instrument conditions.[14]

EPA received over sixty comments on the ANPRM, which can be found in the docket for that action (*see* Docket ID No. EPA–HQ–SFUND–2009–0834). Several comments offered valuable insight that will help to inform the Agency's approach to the additional classes ANPRM. While the Agency is not obligated to respond to comments received on the ANPRM, EPA has provided general responses to those comments that relate specifically to this announcement that EPA will continue the regulatory process under CERCLA section 108(b).

VI. Comments Received on the 2010 ANPRM

Representatives for the electric utility industry submitted roughly one-third of the comments on the 2010 ANPRM. Representatives for the chemical manufacturing industry, the petroleum industry, the waste management industry, the hardrock mining industry, as well as other interested parties also submitted comments.

The comments on the 2010 ANPRM, which specifically addressed the need for CERCLA section 108(b) regulation for the additional classes, can be divided into four categories: (1) Other laws that the industry complies with that obviate the need for CERCLA section 108(b) regulation; (2) the sources of data EPA used to select the industries; (3) past versus current practices within each industry; and (4) the overall need for financial responsibility for each industry. EPA is broadly addressing these categories of comments in this action.

A. Other Laws

Many commenters cited existing laws that their industries are already complying with to ensure that there are no occurrences of non-permitted releases of hazardous substances. In particular, commenters pointed out that there are already financial responsibility requirements under the Resource Conservation and Recovery Act (RCRA). While EPA appreciates the concern, as was discussed above, CERCLA section 108(b) broadly directs the development of financial responsibility requirements consistent with the degree and duration of risk associated with the production, transportation, treatment, storage or disposal of hazardous substances. These requirements, which are designed to help ensure that CERCLA liabilities are paid if CERCLA claims are made, are distinct from financial responsibility requirements for closure imposed under other statutes, such as RCRA, which are more narrowly designed to assure

[8] In granting the Joint Motion, the court expressly stated that its Order ''merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule—the content of which is not in any way dictated by the [Order].'' *In re Idaho Conservation League,* at 17 (quoting *Defenders of Wildlife* v. *Perciasepe,* 714 F, 3d 1317, 1324 (D.C. Cir. 2013).

[9] *See* Joint Motion at 6 (''Nothing in this Joint Motion should be construed to limit or modify the discretion accorded EPA by CECLA or the general principles of administrative law''.)

[10] *See* 74 FR 37218.

[11] *See* 74 FR 37219.

[12] *See* 75 FR 816.

[13] *See* 75 FR 819.

[14] *See* 75 FR 830–831.

compliance with those closure requirements.

At the same time, the Agency recognizes that compliance with regulatory requirements may reduce the risks at a facility. Thus, as EPA moves forward with developing proposed rules for additional classes of facilities, EPA expects to consider site factors that reduce risks, including those that result from compliance with other regulatory requirements. EPA has taken a similar approach in the CERCLA section 108(b) proposed rule applicable to hardrock mining, which is published elsewhere in this **Federal Register**.

B. Data Used in Developing the ANPRM

In the ANPRM, EPA used data from the Toxics Release Inventory (TRI), and RCRA's national Biennial Report (BR), among other sources, to identify and prioritize which classes of facilities present the highest risk of injury due to exposure, and thus to justify the need to prioritize financial responsibility requirements. The Chemical Manufacturing and Petroleum and Coal Products Manufacturing industries were the top two industries in a ranking of the quantity of hazardous waste generated in 2007. They were responsible for approximately 64 percent of all the hazardous waste reported to the 2007 Biennial Report cycle.[15] The Electric Power Generation, Transmission and Distribution industry was responsible for approximately 0.05 percent hazardous waste generated. This is not unexpected considering that coal combustion residuals (CCRs) are a ''Bevill exempt'' [16] waste under RCRA, and thus not subject to Biennial Reporting requirements. Therefore, the amount of hazardous waste generated is not necessarily a valid representation of the hazardous substances produced by that industry.[17]

The Chemical Manufacturing and Electric Power Generation, Transmission and Distribution industries ranked high on the list of on-site releases reported to TRI in 2007, at number two and three respectively. The Petroleum and Coal Products Manufacturing industry ranked seventh on that list.[18]

Commenters expressed concern that releases reported to TRI are permitted releases, subject to various environmental laws. Commenters also expressed concern that BR data merely shows the quantity of hazardous substances generated and managed, and not any mismanagement of those substances. Neither of these, commenters felt, should be used as indicators of potential risk of exposure due to a release. EPA recognizes the limitations on the extent of information that can be gained from TRI and BR data, however, EPA believes these data do offer insight into the characteristics and management of hazardous substances for facilities in each industry, and that in conjunction with other information, can be used as to evaluate the relative degree of risk posed by a class of facilities and the priority need for financial responsibility regulation under CERCLA section 108(b). As with the hardrock mining rule, for each subsequent industry rule, EPA intends to use other, more industry-specific and more current sources of data to identify risk, and will propose financial responsibility requirements based on the record EPA will develop for each rulemaking. Where the Agency finds risk associated with management of hazardous substances for a class of facilities, it is obligated to promulgate financial responsibility requirements that are consistent with the degree and duration of that risk. None of the commenters submitted data to dissuade the Agency from the path of acquiring additional and more comprehensive information for these industries. The Agency considers quantity and toxicity of hazardous substances released to the environment are good indicators of risk.

C. Past versus Current Industry Practices

Another source of data for the ANPRM was the Superfund National Priorities List (NPL). The NPL is the list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants in the United States. The Agency assigned three-digit NAICS [19] codes that best identified the activities at each site, using available data and best professional judgment. The Chemical Manufacturing industry had a total of 181 sites on the NPL from 1981–2009, the Petroleum and Coal Products Manufacturing industry had 30 sites.[20]

Commenters whose industries had sites listed on the NPL pointed out that many of those sites either did not remain in production, or had practices that were improved based on environmental regulations issued after the initial contamination. Commenters felt that legacy contamination was not a valid indicator of current and future risk. Also at issue was EPA's analysis of the NPL data. Some commenters felt their industry was over-represented based on incorrect analysis of the NPL data.

EPA believes, notwithstanding the commenters' negative assessment of the Agency's analysis, that the NPL assessment is informative. Like the TRI and BR data, NPL data was used to indicate which industries pose potential risk that would warrant pursuing financial responsibility regulation under CERCLA section 108(b). The Agency did not receive evidence that risks do not continue at these sites. Where risk continues, EPA believes it is appropriate to consider site factors that reduce risks, such as current industry practices, in determining the level of financial responsibility required. Consideration will also be given to payment experience of the Fund, commercial insurers, court settlements and judgments, and voluntary claims satisfaction.

D. Need for Financial Responsibility

A common theme in the comments, across all three industries, was that there was no need for financial responsibility since facilities within these industries are not in danger of going bankrupt. Many commenters felt that rather than focus on a few examples of past bankruptcies, EPA should consider the financial health of all the companies in an industry as a group. EPA disagrees with commenters' suggestion that need for financial responsibility should be informed by the financial health of the overall industry. Financial responsibility is imposed on classes within an industry, but is assessed at the facility level, and not the industry as a whole. Economic solvency at an industry-wide level is not a substitute for insurance against the possibility of CERCLA liabilities remaining unsatisfied on a facility-specific basis. Furthermore, CERCLA section 108(b) funds could be used to address releases at currently-operating facilities. It should be noted that, as mentioned in the preamble to the *Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry* proposed rule, the financial responsibility formula

[15] *See* 75 FR 820–821.

[16] The ''Bevill'' exemption is codified at 40 CFR 261.3(a)(2)(i) and (g)(4) and 261.4(b)(7).

[17] This notice does not revisit EPA's Regulatory Determination for CCR disposal units. See Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 FR 21302, April 17, 2015.

[18] *See* 75 FR 821.

[19] North American Industry Classification System (NAICS)—the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. NAICS codes are available at: *http://www.census.gov*.

[20] *See* 75 FR 820.

developed for the hardrock mining industry is intended for that industry only, and is not intended for other industries. In future rulemakings under CERCLA section 108(b) for the additional classes, EPA will evaluate how to determine financial responsibility amounts for each particular industry, and will propose an appropriate methodology.

E. Comments That Support CERCLA Section 108(b) Requirements for Additional Classes

The Agency received two comments on the ANPRM that supported the need for CERCLA section 108(b) regulations for the additional classes. The first commenter provided an example of a facility that required cleanup and where, in the commenter's opinion, had the facility been subject to financial responsibility requirements, remediation would have been achieved much earlier as financial resources would have been available from the outset to carry out the remediation and there would have been less incentive for the responsible party to delay cleanup.

The second commenter supporting the need for financial responsibility requirements for the additional classes cited a 2005 GAO report that the number of sites on the NPL continues to expand, with EPA adding an average of 28 sites to the NPL each year from 1983 to 2003, and the 1995 expiration of CERCLA authority to collect taxes for the Superfund as reasons for EPA to move forward with regulations ''to ensure that facilities generating and handling hazardous substances will remain financially able to clean-up improperly disposed substances that could pose threats to public health and the environment.''

VII. Conclusion

Since the issuance of the 2010 ANPRM, EPA has not received evidence that would demonstrate that regulation under CERCLA section108(b) is not necessary for the Chemical Manufacturing industry (NAICS 325), the Petroleum and Coal Products Manufacturing industry (NAICS 324), and the Electric Power Generation, Transmission, and Distribution industry (NAICS 2211).

EPA has not, at this time, identified sufficient evidence to determine that initiating the rulemaking process is not warranted, nor has EPA identified sufficient evidence to establish the necessary CERCLA section 108(b) requirements, if any. To make a final decision regarding the need for CERCLA section 108(b) requirements, the Agency must gather additional information, and must further evaluate the classes of facilities within the three industry sectors.

Therefore, in response to the January 29, 2016 Court Order, EPA is announcing its intent to proceed with rulemakings according to the schedule stipulated in the order. This announcement does not indicate that EPA has determined that requirements are necessary for any or all of the classes of facilities within the three industries, or that EPA will propose such requirements—rather, this announcement indicates that EPA intends to move forward with the regulatory process. That process will include gathering and analyzing additional information to support the Agency's ultimate decision. At that time, EPA will decide whether proposal of requirements for any or all of the classes of facilities within each industry sector is necessary and, if they are, will propose appropriate requirements. If, however, after a careful evaluation of the information for each industry sector, EPA were to determine that requirements under CERCLA section 108(b) are not necessary, EPA would propose not to impose requirements. In other words, this document does not constitute a rulemaking. It merely indicates the initiation of the rulemaking process rather than being the culmination of such a process.

Dated: December 1, 2016.

Gina McCarthy,

Administrator.

[FR Doc. 2016–30040 Filed 1–10–17; 8:45 am]

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Part III

Environmental Protection Agency

40 CFR Part 141

National Primary Drinking Water Regulations; Announcement of the Results of EPA's Review of Existing Drinking Water Standards and Request for Public Comment and/or Information on Related Issues; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2016–0627; FRL–9957–49–OW]

40 CFR Part 141

RIN 2040–ZA26

National Primary Drinking Water Regulations; Announcement of the Results of EPA's Review of Existing Drinking Water Standards and Request for Public Comment and/or Information on Related Issues

AGENCY: Environmental Protection Agency (EPA).

ACTION: Request for public comments.

SUMMARY: The Safe Drinking Water Act (SDWA) requires the U.S. Environmental Protection Agency (EPA) to conduct a review every six years of existing national primary drinking water regulations (NPDWRs) and determine which, if any, need to be revised. The purpose of the review, called the Six-Year Review, is to evaluate current information for regulated contaminants to determine if there is new information on health effects, treatment technologies, analytical methods, occurrence and exposure, implementation and/or other factors that provides a health or technical basis to support a regulatory revision that will improve or strengthen public health protection. EPA has completed a detailed review of 76 NPDWRs and at this time has determined that eight NPDWRs are candidates for regulatory revision. The eight NPDWRs are included in the Stage 1 and the Stage 2 Disinfectants and Disinfection Byproducts Rules, the Surface Water Treatment Rule, the Interim Enhanced Surface Water Treatment Rule and the Long Term 1 Enhanced Surface Water Treatment Rule. EPA requests comments on the eight NPDWRs identified as candidates for revision and will consider comments and data as it proceeds with determining whether further action is needed. In addition, as part of this Six-Year Review, EPA identified 12 other NPDWRs that were or continue to be addressed in recently completed, ongoing or pending regulatory actions. EPA thus excluded those 12 NPDWRs from detailed review. This document is not a final regulatory decision, but rather the initiation of a process that will involve more detailed analyses of factors relevant to deciding whether a rulemaking to revise an NPDWR should be initiated.

DATES: Comments must be received on or before March 13, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2016–0627, to the *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

Mail: Water Docket, Environmental Protection Agency, Mail code: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

Hand Delivery: EPA Docket Center Public Reading Room, EPA Headquarters West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. Hand deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

FOR FURTHER INFORMATION CONTACT: For technical inquiries contact: Richard Weisman, (202) 564–2822, or Kesha Forrest, (202) 564–3632, Office of Ground Water and Drinking Water, Environmental Protection Agency. For general information about the existing NPDWRs discussed in this action, contact the Safe Drinking Water Hotline. Callers within the United States may reach the Hotline at (800) 426–4791. The Hotline is open Monday through Friday, excluding Federal holidays, from 10 a.m. to 5:30 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

Abbreviations and Acronyms Used in This Action

ADWR—Aircraft Drinking Water Rule
AGI—Acute Gastrointestinal Illness
AOC—Assimilable Organic Carbon
ASDWA—Association of State Drinking Water Administrators
ATSDR—Agency for Toxic Substances and Disease Registry
AWWA—American Water Works Association
BAT—Best Available Technology
CBI—Confidential Business Information
CDC—Centers for Disease Control and Prevention
CFR—Code of Federal Regulations
CT—Concentration × Contact Time
cVOCs—Carcinogenic Volatile Organic Compounds
CWS—Community Water System
DBCP—1,2-Dibromo-3-Chloropropane
DBP—Disinfection Byproducts
D/DBP—Disinfectants/Disinfection Byproducts
D/DBPR—Disinfectants/Disinfection Byproducts Rule
DEHA—Di(2-ethylhexyl)adipate
DEHP—Di(2-ethylhexyl)phthalate
DOC—Dissolved Organic Carbon
DPD—*N,N*-diethyl-*p*-phenylenediamine
EDB—Ethylene Dibromide
EJ—Environmental Justice
EO—Executive Order
EPA—U.S. Environmental Protection Agency
EQL—Estimated Quantitation Level
FAC—Federal Advisory Committee
FBRR—Filter Backwash Recycling Rule
FDA—U.S. Food and Drug Administration
FRN—Federal Register Notice
GAC—Granulated Activated Carbon
GWR—Ground Water Rule
GWUDI—Ground Water Under the Direct Influence of Surface Water
HAA5—Haloacetic Acids (five) (sum of monochloroacetic acid, dichloroacetic acid, trichloroacetic acid, monobromoacetic acid and dibromoacetic acid)
HAAs—Haloacetic Acids
HAV—Hepatitis A Virus
HPC—Heterotrophic Plate Count
IARC—International Agency for Research on Cancer
ICR—Information Collection Request
IESWTR—Interim Enhanced Surface Water Treatment Rule
IRIS—Integrated Risk Information System
LT1—Long-Term 1 Enhanced Surface Water Treatment Rule
LT2—Long-Term 2 Enhanced Surface Water Treatment Rule
MCL—Maximum Contaminant Level
MCLG—Maximum Contaminant Level Goal
MDBP—Microbial and Disinfection Byproducts
MDL—Method Detection Limit
MRDL—Maximum Residual Disinfectant Level
MRDLG—Maximum Residual Disinfectant Level Goal
MRL—Minimum Reporting Level
NAS—National Academy of Sciences
NCWS—Non-Community Water System
NDMA—N-Nitrosodimethylamine
NDWAC—National Drinking Water Advisory Council
NIH—National Institutes of Health
NPDWR—National Primary Drinking Water Regulation
NRC—National Research Council
NTNCWS—Non-Transient Non-Community Water System
NTP—National Toxicology Program
PCBs—Polychlorinated Biphenyls
PCE—Tetrachloroethylene
PHS—U.S. Public Health Service

PT—Proficiency Testing
PQL—Practical Quantitation Limit
PWS—Public Water System
qPCR—Quantitative Polymerase Chain Reaction
RfD—Reference Dose
RICP—Research and Information Collection Partnership
RSC—Relative Source Contribution
RTCR—Revised Total Coliform Rule
SDWA—Safe Drinking Water Act
SMCL—Secondary Maximum Contaminant Level
SOC—Synthetic Organic Chemical
SWTR—Surface Water Treatment Rule
SWTRs—Surface Water Treatment Rules (including SWTR, IESWTR and LT1)
SYR—Six-Year Review
TCE—Trichloroethylene
TC/EC—Total Coliforms/*E. coli*
TCR—Total Coliform Rule
THM—Trihalomethanes
TTHM—Total Trihalomethanes (sum of four THMs: chloroform, bromodichloromethane, dibromochloromethane and bromoform)
TNCWS—Transient Non-Community Water System
TOC—Total Organic Carbon
TT—Treatment Technique
UCFWR—Uncovered Finished Water Reservoirs
UCMR—Unregulated Contaminant Monitoring Rule
USGS—U.S. Geological Survey
UV—Ultraviolet
WBDOSS—Waterborne Disease Outbreak Surveillance System
WHO—World Health Organization

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I. General Information

A. Does this action apply to me?

This action itself does not impose any requirements on individual people or entities. Instead, it notifies interested parties of EPA's review of existing national primary drinking water regulations (NPDWRs) and its conclusions about which of these NPDWRs may warrant new regulatory action at this time. EPA requests public comment on the eight NPDWRs identified as candidates for revision. EPA will consider comments received as the Agency moves forward with determining whether regulatory actions are necessary for the eight NPDWRs.

B. What should I consider as I prepare my comments for EPA?

Please see Section VII for the topic areas related to this document for which EPA requests comment and/or information. EPA will accept written or electronic comments (please do not send both). Instructions for submitting comments can be found in the **ADDRESSES** section of this document. EPA prefers electronic comments. No facsimiles (faxes) will be accepted. Commenters who want EPA to acknowledge receipt of their written comments should also send a self-addressed, stamped envelope.

You may find the following suggestions helpful when preparing your comments:

- Explain your views as clearly as possible.
- Describe any assumptions that you used.
- Provide any technical information and/or data you used that support your views.
- If you estimate potential burden or costs, explain how you arrived at your estimate.
- Provide specific examples to illustrate your concerns.
- Offer alternatives.
- Make sure to submit your comments by the comment period deadline.

To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provide the name, date, and volume/page numbers of the **Federal Register** document you are commenting on.

II. Six-Year Review—Statutory Requirements and Next Steps

Under the Safe Drinking Water Act (SDWA), as amended in 1996, EPA must periodically review existing NPDWRs and, if appropriate, revise them. Section 1412(b)(9) of the SDWA states: ''The Administrator shall, not less often than every six years, review and revise, as appropriate, each national primary drinking water regulation promulgated under this title. Any revision of a national primary drinking water regulation shall be promulgated in accordance with this section, except that each revision shall maintain, or provide for greater, protection of the health of persons.''

Pursuant to the 1996 SDWA Amendments, EPA completed and published the results of its first Six-Year Review (Six-Year Review 1) on July 18, 2003 (68 FR 42908, USEPA, 2003b) and the second Six-Year Review (Six-Year Review 2) on March 29, 2010 (75 FR 15500, USEPA, 2010h), after developing a systematic approach, or protocol, for the review of NPDWRs.

In this document EPA is announcing the results of the third Six-Year Review (Six-Year Review 3). Consistent with the process applied in the Six-Year Review 2, EPA is requesting comments on this document and will consider the public comments and/or any new, relevant data submitted for the eight NPDWRs listed as candidates for revision as the Agency proceeds with determining whether revisions of these regulations are necessary. The announcement whether or not the Agency intends to revise an NPDWR (pursuant to SDWA § 1412(b)(9)) is not a regulatory decision. Instead, it initiates a process that will involve more detailed analyses of health effects, analytical and treatment feasibility, occurrence, benefits, costs and other regulatory matters relevant to deciding whether a rulemaking to revise an NPDWR should be initiated. The Six-Year Review results do not obligate the Agency to revise an NPDWR in the event that EPA determines during the regulatory process that revisions are no longer appropriate and discontinues further efforts to revise the NPDWR. Similarly, the fact that an NPDWR has not been selected for revision means only that EPA believes that regulatory changes to a particular NPDWR are not appropriate at this time for the reasons given in this action; future reviews may identify information that leads to an initiation of the revision process.

The reasons that EPA has identified an NPDWR as a ''candidate for revision''

is that, at a minimum, the revision presents a meaningful opportunity to:

- Improve the level of public health protection, and/or
- Achieve cost savings while maintaining or improving the level of public health protection.

III. Stakeholder Involvement in the Six-Year Review Process

The Agency has involved interested stakeholders in the Six-Year Review 3 process. Below are examples of such involvement:

- In November 2014, EPA briefed the National Drinking Water Advisory Council (NDWAC) on the Six-Year Review protocol and the key elements of that protocol as they relate to the microbial and disinfection byproducts (MDBP) rules. The briefing included information on how EPA is implementing NDWAC's previous recommendations (NDWAC, 2000) on the Six-Year Review process in review of the MDBP rules;
- In January 2015, states provided input (through the Association of State Drinking Water Administrators (ASDWA)) on rule implementation issues related to the NPDWRs being reviewed as part of the Six-Year Review 3 (ASDWA, 2016);
- EPA initiated a series of public stakeholder meetings about the review of the Long Term 2 Enhanced Surface Water Treatment Rule (LT2). These meetings were held in accordance with the recommendation of the MDBP Federal Advisory Committee (FAC) [1] to have public meetings following the first round of monitoring under the LT2, and as a result of the Executive Order (E.O.) 13563 ''Improving Regulation and Regulatory Review.'' [2] E.O. 13563 states that regulations shall be based ''on the open exchange of information and perspectives among state, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.'' Some affected stakeholders recommended that EPA include the LT2 among the Agency's top priorities for review under E.O. 13563. EPA included the LT2 in its ''Improving our Regulations: Final Plan for Periodic Retrospective Review of Existing Regulations'' (USEPA, 2011). EPA agreed to ''assess and analyze new data/information regarding occurrence, treatment, analytical methods, health effects, and risk from all relevant waterborne pathogens to evaluate whether there are new or additional ways to manage risk while assuring equivalent or improved protection, including with respect to the covering of finished water reservoirs'' (USEPA, 2011). EPA hosted three public meetings in Washington, DC, on December 7, 2011, April 24, 2012 and November 15, 2012. EPA presented information about: The LT2 requirements, monitoring data collected under the LT2, analytical methods, forecasts about the second round of monitoring and the treatment technique requirements. In addition to presentations to educate the public, the meetings included public statements, panel discussions, question and answer sessions and requests by EPA to provide data and information about the implementation of the LT2 to inform the regulatory review.

IV. Regulations Included in the Six-Year Review 3

Table IV–1 lists all 88 NPDWRs established to date. The table also reports the maximum contaminant level goal (MCLG) and the maximum contaminant level (MCL). The MCLG is ''set at the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety'' (SDWA § 1412(b)(4)). The MCL is the maximum permissible level of a contaminant in water delivered to any user of a public water system (PWS) and generally ''is as close to the maximum contaminant level goal as is feasible'' (SDWA § 1412(b)(4)(B)).[3] Where it is not ''economically or technically feasible'' to set an MCL, EPA can establish a treatment technique (TT), which must prevent adverse health effects ''to the extent feasible'' (SDWA § 1412(b)(7)(A)). In the case of disinfectants (*e.g.,* chlorine, chloramines and chlorine dioxide), the values reported in the table are not MCLGs and MCLs, but maximum residual disinfectant level goals (MRDLGs) and maximum residual disinfectant levels (MRDLs).

Table IV–1 also includes NPDWRs that EPA identified as candidates for revision in past Six-Year Reviews. During the Six-Year Review 1, EPA identified the Total Coliform Rule (TCR) as a candidate for revision.[4] EPA published the Revised Total Coliform Rule (RTCR) in 2013 (78 FR 10270, USEPA, 2013a). Four additional NPDWRs for acrylamide, epichlorohydrin, tetrachloroethylene (PCE) and trichloroethylene (TCE) were identified as candidates for revision during the Six-Year Review 2. Of the 88 NPDWRs, EPA identified 12 as part of recently completed, ongoing or pending regulatory actions; as a result, these 12 are not subject to a detailed review for the Six-Year Review 3. This action involves the remaining 76 NPDWRs. EPA applied the same protocol used for previous Six-Year Reviews, with minor clarifications (USEPA, 2016f), to the Six-Year Review 3 process. Section V of this action describes the revised protocol used for the Six-Year Review 3 and Section VI describes the results of the review of the NPDWRs.

In addition to the regulated chemicals, radiological and microbiological contaminants included in the previous reviews, this document also includes the review of the MDBP regulations that were promulgated under the following actions: The Ground Water Rule (GWR); the Surface Water Treatment Rules (SWTRs); the Disinfectants and Disinfection Byproducts (D/DBP) Rules; and the Filter Backwash Recycling Rule (FBRR). EPA reviewed the LT2 in response to EO 13563 (USEPA, 2011) and as part of the Six-Year Review 3 process.

TABLE IV–1—NPDWRS INCLUDED IN SIX-YEAR REVIEW 3

Contaminants/parameters	MCLG (mg/L) [1 3]	MCL or TT (mg/L) [1 2 3]	Contaminants/parameters	MCLG (mg/L) [1 3]	MCL or TT (mg/L) [2 3]
Acrylamide	0	TT	Ethylbenzene	0.7	0.7
Alachlor	0	0.002	Ethylene dibromide (EDB)	0	0.00005
Alpha/photon emitters	0 (pCi/L)	15 (pCi/L)	Fluoride	4.0	4.0
Antimony	0.006	0.006	*Giardia lamblia* [4]	0	TT
Arsenic	0	0.010	Glyphosate	0.7	0.7

[1] *https://www.epa.gov/sites/production/files/2015-11/documents/stage_2_m-dbp_agreement_in_principle.pdf.*

[2] E.O. 13563 requires federal agencies to ''consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' The order required each federal agency to develop a plan ''consistent with law and its resources and regulatory priorities.'' *https://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.*

[3] Under limited circumstances, SDWA § 1412(b)(6)(A) also gives the Administrator the discretion to promulgate an MCL that is less stringent than the feasible level and that ''maximizes health risk reduction benefits at a cost that is justified by the benefits.''

[4] The NPDWRs apply to specific contaminants/parameters or groups of contaminants. Historically, when issuing new or revised standards for these contaminants/parameters, EPA has often grouped the standards together in more general regulations, such as the Total Coliform Rule, the Surface Water Treatment Rule or the Phase V rules. In this action, however, for clarity, EPA discusses the drinking water standards as they apply to each specific regulated contaminant/parameter (or group of contaminants), not the more general regulation in which the contaminant/parameter was regulated.

TABLE IV–1—NPDWRS INCLUDED IN SIX-YEAR REVIEW 3—Continued

Contaminants/parameters	MCLG (mg/L) [1 3]	MCL or TT (mg/L) [1 2 3]	Contaminants/parameters	MCLG (mg/L) [1 3]	MCL or TT (mg/L) [2 3]
Asbestos	7 (million fibers/L)	7 (million fibers/L)	Haloacetic acids (HAA5)	n/a [5]	0.060
Atrazine	0.003	0.003	Heptachlor	0	0.0004
Barium	2	2	Heptachlor epoxide	0	0.0002
Benzene	0	0.005	Heterotrophic bacteria [6]	n/a	TT
Benzo[a]pyrene	0	0.0002	Hexachlorobenzene	0	0.001
Beryllium	0.004	0.004	Hexachlorocyclopentadiene	0.05	0.05
Beta/photon emitters	0 (millirems/yr)	4 (millirems/yr)	Lead	0	TT
Bromate	0	0.010	*Legionella*	0	TT
Cadmium	0.005	0.005	Lindane	0.0002	0.0002
Carbofuran	0.04	0.04	Mercury (inorganic)	0.002	0.002
Carbon tetrachloride	0	0.005	Methoxychlor	0.04	0.04
Chloramines	4	4.0	Monochlorobenzene (Chlorobenzene).	0.1	0.1
Chlordane	0	0.002	Nitrate (as N)	10	10
Chlorine	4	4.0	Nitrite (as N)	1	1
Chlorine dioxide	0.8	0.8	Oxamyl (Vydate)	0.2	0.2
Chlorite	0.8	1.0	Pentachlorophenol	0	0.001
Chromium (total)	0.1	0.1	Picloram	0.5	0.5
Copper	1.3	TT	Polychlorinated biphenyls (PCBs).	0	0.0005
Cryptosporidium	0	TT	Radium	0 (pCi/L)	5 (pCi/L)
Cyanide	0.2	0.2	Selenium	0.05	0.05
2,4-Dichlorophenoxyacetic acid (2,4-D).	0.07	0.07	Simazine	0.004	0.004
Dalapon	0.2	0.2	Styrene	0.1	0.1
Di(2-ethylhexyl)adipate (DEHA).	0.4	0.4	2,3,7,8-TCDD (Dioxin)	0	3.00E–08
Di(2-ethylhexyl)phthalate (DEHP).	0	0.006	Tetrachloroethylene	0	0.005
1,2-Dibromo-3-chloropropane (DBCP).	0	0.0002	Thallium	0.0005	0.002
1,2-Dichlorobenzene (o-Dichlorobenzene).	0.6	0.6	Toluene	1	1
1,4-Dichlorobenzene (p-Dichlorobenzene).	0.075	0.075	Total coliforms (under ADWR [7] and RTCR [8]).	n/a	TT
1,2-Dichloroethane (Ethylene dichloride).	0	0.005	Total Trihalomethanes (TTHM).	n/a [9]	0.080
1,1-Dichloroethylene	0.007	0.007	Toxaphene	0	0.003
cis-1,2-Dichloroethylene	0.07	0.07	2,4,5-TP (Silvex)	0.05	0.05
trans-1,2-Dichloroethylene	0.1	0.1	1,2,4-Trichlorobenzene	0.07	0.07
Dichloromethane (Methylene chloride).	0	0.005	1,1,1-Trichloroethane	0.20	0.2
1,2-Dichloropropane	0	0.005	1,1,2-Trichloroethane	0.003	0.005
Dinoseb	0.007	0.007	Trichloroethylene	0	0.005
Diquat	0.02	0.02	Turbidity [6]	n/a	TT
E. coli	0	MCL [10] and TT [8]	Uranium	0	0.030
Endothall	0.1	0.1	Vinyl Chloride	0	0.002
Endrin	0.002	0.002	Viruses	0	TT
Epichlorohydrin	0	TT	Xylenes (total)	10	10

1. MCLG: The maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, allowing an adequate margin of safety.

2. MCL: The maximum level allowed of a contaminant in water which is delivered to any user of a public water system.

TT: An enforceable procedure or level of technological performance which public water systems must follow to ensure control of a contaminant.

3. Units are in milligrams per liter (mg/L) unless otherwise noted. Milligrams per liter are equivalent to parts per million. For chlorine, chloramines and chlorine dioxide, values presented are MRDLG and MRDL.

4. The current preferred taxonomic name is *Giardia duodenalis,* with *Giardia lamblia* and *Giardia intestinalis* as synonymous names. However, *Giardia lamblia* was the name used to establish the MCLG in 1989. Elsewhere in this document, this pathogen will be referred to as *Giardia* spp. or simply *Giardia* unless discussing information on an individual species.

5. There is no MCLG for all five haloacetic acids. MCLGs for some of the individual contaminants are: Dichloroacetic acid (zero), trichloroacetic acid (0.02 mg/L), and monochloroacetic acid (0.07 mg/L). Bromoacetic acid and dibromoacetic acid are regulated with this group, but have no MCLGs.

6. Includes indicators that are used in lieu of direct measurements (*e.g.,* of heterotrophic bacteria, turbidity).

7. The Aircraft Drinking Water Rule (ADWR) 40 CFR part 141 Subpart X, promulgated October 19, 2009, covers total coliforms.

8. Under the RTCR, a PWS is required to conduct an assessment if it exceeded any of the TT triggers identified in 40 CFR 141.859(a). It is also required to correct any sanitary defects found through the assessment.

9. There is no MCLG for total trihalomethanes (TTHM). MCLGs for some of the individual contaminants are: Bromodichloromethane (zero), bromoform (zero), dibromochloromethane (0.06 mg/L), and chloroform (0.07 mg/L).

10. A PWS is in compliance with the *E. coli* MCL unless any of the conditions identified under 40 CFR 141.63(c) occur.

V. EPA's Protocol for Reviewing the NPDWRs Included in This Action

A. What was EPA's review process?

Overview

This section provides an overview of the process the Agency used to review the NPDWRs discussed in this action. The protocol document, ''EPA Protocol for the Third Review of Existing National Primary Drinking Water Regulations,'' contains a detailed description of the process the Agency used to review the NPDWRs (USEPA, 2016f). The foundation of this protocol was developed for the Six-Year Review 1 based on the recommendations of the NDWAC (2000). The Six-Year Review 3 process is very similar to the process implemented during the Six-Year Review 1 and the Six-Year Review 2, with some clarifications to the elements related to the review of NPDWRs included in the MDBP rules. Figure V–1 presents an overview of the Six-Year review protocol and review outcomes.

The primary goal of the Six-Year Review process is to identify and prioritize NPDWRs for possible regulatory revision. The two major outcomes of the detailed review are either:

1. The NPDWR is not appropriate for revision and no action is necessary at this time.
2. The NPDWR is a candidate for revision.

The reasons for a Six-Year Review outcome of ''not appropriate for revision at this time'' can include:

- *Regulatory action—recently completed, ongoing or pending.* The NPDWR was recently completed, is being reviewed in an ongoing action, or is subject to a pending action.
- *Ongoing or planned health effects assessment.* The NPDWR has an ongoing health effects assessment (*i.e.,* especially for those NPDWRs with an MCL set at the MCLG or where the MCL is based on the SDWA cost benefit provision), or EPA is considering whether a new health effects assessment is needed.
- *No new information.* EPA did not identify any new, relevant information that indicates changes to the NPDWR.
- *Data gaps/emerging information.* There are data gaps or emerging information that need to be evaluated.
- *Low priority and/or no meaningful opportunity.* New information indicates a possible change to the MCLG and/or MCL but changes to the NPDWR are not warranted due to one or more of the following reasons: (1) Possible changes present negligible gains in public health protection; (2) possible changes present limited opportunity for cost savings while maintaining the same or greater level of health protection; and (3) possible changes are a low priority because of competing workload priorities, limited return on the administrative costs associated with rulemaking and the burden on states and the regulated community associated with implementing any regulatory change that would result.

Alternatively, the reasons for a Six-Year Review outcome that an NPDWR is a ''candidate for revision'' are that, at a minimum, the revision presents a meaningful opportunity to:

- Improve the level of public health protection, and/or
- Achieve cost savings while maintaining or improving the level of public health protection.

Individual regulatory provisions of NPDWRs that are evaluated as part of the Six-Year Review are: MCLG, MCL, MRDLG, MRDL, TT, other treatment technologies such as best available technology (BAT), and regulatory requirements, such as monitoring requirements.

For example, the microbial regulations include TT requirements because there is no reliable method that is economically and technically feasible to measure the microbial contaminants covered by those regulations. These TT requirements rely on the use of indicators that can be measured in drinking water, such as the concentration of a disinfectant, to provide public health protection. As part of the Six-Year Review 3, EPA evaluated new information related to the use of those indicators to determine if there is a meaningful opportunity to improve the level of public health protection. Results of EPA's review of the MDBP regulations are presented in Sections VI.B.3 and VI.B.4.

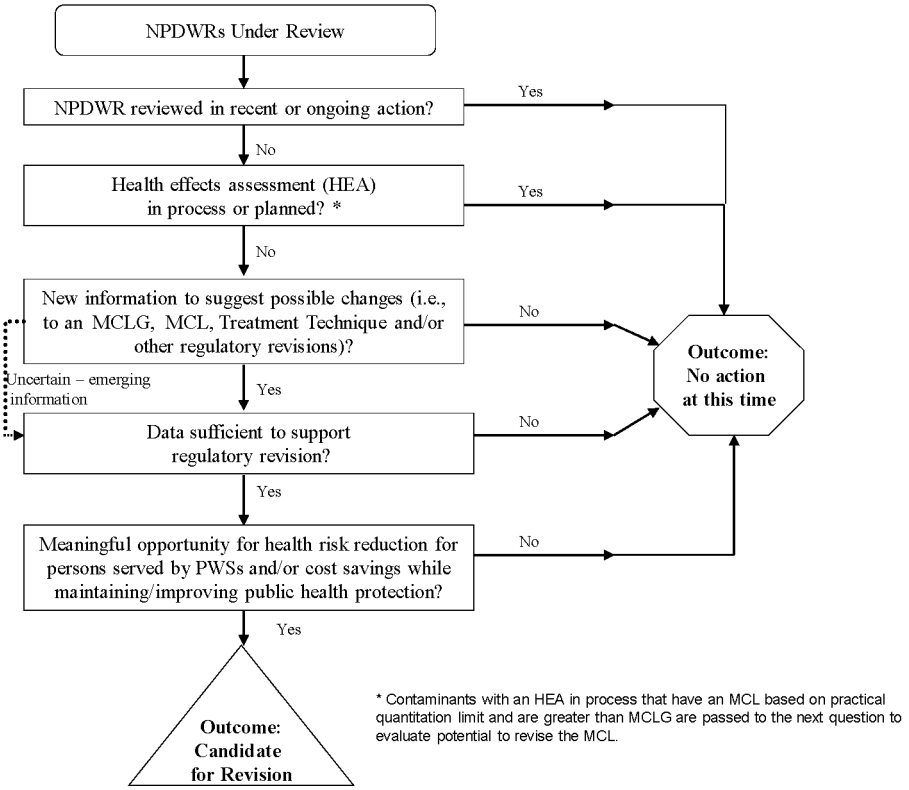
For the purpose of this document (except where noted for clarity), discussions of the review of MCLGs and MCLs should be assumed to also apply to the review of MRDLGs and MRDLs for disinfectants.

Basic Principles

EPA applied a number of basic principles to the Six-Year Review process:

- The Agency sought to avoid redundant review efforts. Because EPA has reviewed information for certain NPDWRs as part of recently completed, ongoing or pending regulatory actions, these NPDWRs are not subject to the detailed review in this document.
- The Agency does not believe it is appropriate to consider revisions to NPDWRs for contaminants with an ongoing or planned health effect assessment and for which the MCL is set equal to the MCLG or based on benefit-cost analysis. This principle stems from the fact that any new health effects information could affect the MCL via a change in the MCLG or the assessment of the benefits associated with the MCL. Therefore, EPA noted that these NPDWRs are not appropriate for revision and no action is necessary at this time if the health effects assessment would not be completed during the review period for each contaminant that has either an MCL that is equal to its MCLG or an MCL that is based on the 1996 SDWA Amendments' cost-benefit provision. If the health effects assessment is completed before the next Six-Year Review, EPA will consider these NPDWRs at that time.
- In evaluating the potential for new information to affect NPDWRs, EPA assumed no change to existing policies and procedures for developing NPDWRs. For example, in determining whether new information affected the feasibility of analytical methods for a contaminant, the Agency assumed no change to current policies and procedures for calculating practical quantitation levels.
- EPA considered new information from health effects assessments that were completed by the information cutoff date. Assessments completed after this cutoff date will be reviewed by EPA during the next review cycle or (if applicable) during the revision of an NPDWR. The information cutoff date for the Six-Year Review 3 was December 2015.
- During the review, EPA identified areas where information is inadequate or unavailable (data gaps) or emerging and is needed to determine whether revision to an NPDWR is appropriate. To the extent EPA is able to fill data gaps or fully evaluate the emerging information, the Agency will consider the information as part of the next review cycle.
- EPA may consider accelerating review and potential revision for a particular NPDWR before the next review cycle when justified by new public health risk information.
- Finally, EPA assured scientific analyses supporting the review were consistent with the Agency's peer review policy (USEPA, 2015a).

Figure V-1. Six-Year Review Protocol Overview and Review Outcomes



B. How did EPA conduct the review of the NPDWRs?

The protocol for the Six-Year Review 3 is broken down into a series of questions that can inform a decision about the appropriateness of revising an NPDWR. These questions are logically ordered into a decision tree. This section provides an overview of each of the review elements that EPA considered for each NPDWR during the Six-Year Review 3, including the following: Initial review, health effects, analytical feasibility, occurrence and exposure, treatment feasibility, risk balancing and other regulatory revisions. The final review combines the findings from all of these review elements to recommend whether an NPDWR is a candidate for revision. Further information about the review elements is described in the protocol document (USEPA, 2016f). Results from the review of these elements are presented in Section VI.

1. Initial Review

EPA's initial review of all the contaminants included in the Six-Year Review 3 involved a simple identification of the NPDWRs that have either been recently completed, or are being reviewed in an ongoing or pending action since the last Six-Year Review (cutoff date was August 2008). In addition, the initial review also identified contaminants with ongoing health effects assessments that have an MCL equal to the MCLG. Excluding such contaminants from the Six-Year Review 3 prevents duplicative agency efforts.

2. Health Effects

The principal objectives of the health effects review are to identify: (1) Contaminants for which a new health effects assessment indicates that a change in the MCLG might be appropriate (*e.g.,* because of a change in cancer classification or a change in reference dose (RfD)), and (2) contaminants for which new health effects information indicates a need to initiate a new health effects assessment.

To meet the first objective, EPA reviewed the results of health effects assessments completed before December 2015, the information cutoff date for the Six-Year Review 3.

To meet the second objective, the Agency conducted an extensive literature review to identify peer-reviewed studies published before December 2015. The Agency reviewed the studies to determine whether there was new health effects information, such as reproductive and developmental toxicity data, that could potentially affect the MCLG, or otherwise change the Agency's understanding of the health effects of contaminants under consideration. EPA then evaluated the need to plan the initiation of a new health effects assessment.

3. Analytical Feasibility

When establishing an NPDWR, EPA identifies a practical quantitation limit (PQL), which is ''the lowest achievable level of analytical quantitation during routine laboratory operating conditions within specified limits of precision and accuracy'', as noted in the November 13, 1985, **Federal Register** proposed rule (50 FR 46880, USEPA, 1985). EPA has a separate process in place to approve new analytical methods for drinking water contaminants; therefore, review and approval of potential new methods is outside the scope of the Six-Year Review protocol. EPA recognizes, however, that the approval and adoption in recent years of new and/or improved analytical methods may enable laboratories to quantify contaminants at lower levels than was possible when NPDWRs were originally promulgated. This ability of laboratories to measure a contaminant at lower levels could affect its PQL, the value at which an MCL is set when it is limited

by analytical feasibility. Therefore, the Six-Year Review process includes an examination of whether there have been changes in analytical feasibility that could possibly change the PQL for the subset of the NPDWRs that reached this stage of the review.

To determine if changes in analytical feasibility could possibly support changes to PQLs, EPA relied primarily on two alternate approaches to develop an estimated quantitation limit (EQL): an approach based on the minimum reporting levels (MRLs) obtained as part of the Six-Year Review 3 Information Collection Request (ICR), and an approach based on method detection limits (MDLs).

An MRL is the lowest level or contaminant concentration that a laboratory can reliably achieve within specified limits of precision and accuracy under routine laboratory operating conditions using a given method. The MRL values provide direct evidence from actual monitoring results about whether quantitation below the PQL using current analytical methods is feasible. An MDL is a measure of analytical method sensitivity. MDLs have been used in the past to derive PQLs for regulated contaminants.

EPA used the EQL as a threshold for occurrence analysis to help the Agency determine if there may be a meaningful opportunity to improve public health protection. It should be noted, however, that the use of an EQL does not necessarily indicate the Agency's intention to promulgate a new PQL. Any revision to PQLs will be part of future rulemaking efforts if EPA has determined that an NPDWR is a candidate for revision.

4. Occurrence and Exposure Analysis

The occurrence and exposure analysis is conducted in conjunction with other review elements to determine if there is a meaningful opportunity to revise an NPDWR by:

- Estimating the extent of contaminant occurrence, *i.e.,* the number of PWSs in which contaminants occur at levels of interest (health-effects-based thresholds or analytical method limits), and
- Evaluating the number of people potentially exposed to contaminants at these levels.

To evaluate national contaminant occurrence under the Six-Year Review 3, EPA reviewed data from the Six-Year Review 3 ICR database (SYR3 ICR database), the UCMR datasets (USEPA, 2016j) and other relevant sources.

For the Six-Year Review 3, EPA collected SDWA compliance monitoring data through use of an ICR (75 FR 6023, USEPA, 2010a). EPA requested that all states and primacy entities (tribes and territories) voluntarily submit their compliance monitoring data for regulated contaminants in public drinking water systems. Specifically, EPA requested the submission of compliance monitoring data and related information collected between January 2006 and December 2011 for regulated contaminants and related parameters (*e.g.,* water quality indicators). Forty-six states plus eight primacy agencies provided data. The assembled data constitute the largest, most comprehensive set of drinking water compliance monitoring data ever compiled and analyzed by EPA to inform decision making, containing almost 47 million records from approximately 167,000 PWSs, serving approximately 290 million people nationally. Through extensive data management efforts, quality assurance evaluations, and communications with state data management staff, EPA established the SYR3 ICR database (USEPA, 2016i). The number of states and PWSs represented in the dataset varies across contaminants because of variability in state data submissions and contaminant monitoring schedules. Except as noted in Section VI, EPA believes that these data are of sufficient quality to inform an understanding of the national occurrence of regulated contaminants and related parameters. Details of the data management and data quality assurance evaluations are available in the supporting document (USEPA, 2016q). The resulting database is available online on the Six-Year Review Web site (*https://www.epa.gov/dwsixyearreview*).

5. Treatment Feasibility

An NPDWR either identifies the BAT for meeting an MCL, or establishes enforceable TT requirements. EPA reviews treatment feasibility to ascertain if there are technologies that meet BAT criteria for a hypothetical more stringent MCL, or if there is new information that demonstrates an opportunity to improve public health protection through revision of an NPDWR TT requirement.

To be a BAT, the treatment technology must meet several criteria such as having demonstrated consistent removal of the target contaminant under field conditions. Although treatment feasibility and analytical feasibility together address the technical feasibility requirement for an MCL, historically, treatment feasibility has not been a limiting factor for MCLs. The result of this review element is a determination of whether treatment feasibility would pose a limitation to revising an MCL or provide an opportunity to revise the TT requirement.

6. Risk-Balancing

EPA reviews risk-balancing to examine how the Six-Year Review can address tradeoffs in risks among different NPDWRs and take into account unregulated contaminants as well. Under this review, EPA considers whether a change to an MCL and/or TT will increase the public health risk posed by one or more contaminants, and, if so, the Agency considers revisions that will balance overall risks. This review element is relevant only to the NPDWRs included in the MDBP rules, which were promulgated to address risk-balancing between microbial and DBP requirements, and among differing types of DBPs. The risk-balancing approach was based on the SDWA requirements that EPA ''minimize the overall risk of adverse health effects by balancing the risk from the contaminant and the risk from other contaminants the concentrations of which may be affected by the use of a TT or process that would be employed to attain the maximum contaminant level or levels'' (SDWA § 1412(b)(5)(B)(i)).

EPA reviewed risk-balancing between microbial and DBP contaminants. For example, EPA considered the potential impact on DBP concentrations should there be a consideration to increase the stringency of microbial NPDWRs. This approach also was used during the development of more recent MDBP rules such as the LT2 rule and the Stage 2 Disinfectants/Disinfection Byproducts Rule (D/DBPR) rule. In addition, EPA reviewed risk-balancing between different types of DBP contaminants. Depending on the stringency of potential DBP regulations, compliance strategies used by the regulated community might have the effect of increasing the concentrations of other types of contaminants, both regulated and unregulated. EPA considered these potential compliance strategies when conducting its Six-Year Review 3 with a goal to balance the overall health risks.

7. Other Regulatory Revisions

In addition to possible revisions to MCLGs, MCLs and TTs, EPA evaluated whether other revisions are needed to regulatory provisions, such as monitoring and system reporting requirements. EPA focused this review element on issues that were not already being addressed through alternative mechanisms, such as a recently completed, ongoing or pending regulatory action. EPA also reviewed implementation-related NPDWR

concerns that were ''ready'' for rulemaking—that is, the problem to be resolved had been clearly identified, along with specific options to address the problem that could be shown to either clearly improve the level of public health protection, or represent a meaningful opportunity for achieving cost savings while maintaining the same level of public health protection. The result of this review element is a determination regarding whether EPA should consider revisions to the monitoring and/or reporting requirements of an NPDWR.

C. How did EPA factor children's health concerns into the review?

The 1996 amendments to SDWA require special consideration of sensitive life stages and populations (*e.g.,* infants, children, pregnant women, elderly and individuals with a history of serious illness) in the development of drinking water regulations (SDWA § 1412(b)(3)(C)(V)). As a part of the Six-Year Review 3, EPA completed a literature search covering developmental and reproductive endpoints (*e.g.,* fertility, embryo survival, developmental delays, birth defects and endocrine effects) for information published as of December 2015 for regulated chemicals that had not been the subject of a health effects assessment during this review period. EPA reviewed the results of the literature searches to identify any studies that might suggest a need to revise MCLGs. These studies were considered in EPA's review of NPDWRs, which is discussed in Section VI.

D. How did EPA factor environmental justice concerns into the review?

Executive Order (E.O.) 12898, ''Federal Actions to Address Environmental Justice in Minority Populations or Low-Income Populations,'' establishes a federal policy for incorporating environmental justice (EJ) into federal agency missions by directing agencies to identify and address disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority and low-income populations. EPA evaluates potential EJ concerns when developing regulations. This Six-Year Review was developed in compliance with E.O. 12898. Should the Six-Year Review lead to a decision to revise an NPDWR, any subsequent rulemakings will include an EJ component and an opportunity for public comment.

VI. Results of EPA's Review of NPDWRs

Table VI–1 lists the results of EPA's review for each of the 76 NPDWRs discussed in this section of this action, along with the principal rationale for the review outcomes. Table VI–1 also includes a list of the 12 NPDWRs that have been recently completed, or have ongoing or pending regulatory actions.

TABLE VI–1—SUMMARY OF SIX-YEAR REVIEW 3 RESULTS

Not Appropriate for Revision at this Time.	Recently completed, ongoing or pending regulatory action.	1,2-Dichloroethane (Ethylene dichloride)	*E. coli.*
		1,2-Dichloropropane	Lead.
		Benzene	Tetrachloroethylene (PCE).
		Carbon Tetrachloride	Total coliforms (under ADWR and RTCR).
		Copper	Trichloroethylene (TCE)
		Dichloromethane (Methylene chloride)	Vinyl chloride.
Not Appropriate for Revision at this Time [2].	Health effects assessment in process (as of December 2015) or contaminant nominated for health assessment.	Alpha/photon emitters	Mercury [1]
		Arsenic	Nitrate [1]
		Atrazine	Nitrite [1]
		Benzo(a)pyrene (PAHs)	o-Dichlorobenzene [1]
		Beta/photon emitters	p-Dichlorobenzene [1]
		Cadmium [1]	Polychlorinated biphenyls (PCBs).
		Chromium	Radium.
		Di(2-ethylhexyl) phthalate (DEHP) [1]	Simazine.
		Ethylbenzene	Uranium [1]
		Glyphosate	
	No new information, NPDWR remains appropriate after review.	1,2-Dibromo-3-chloropropane (DBCP)	Dalapon.
		2,4,5-TP (Silvex)	Di(2-ethylhexyl)adipate (DEHA).
		Antimony	Dinoseb.
		Asbestos	Endrin.
		Bromate	Ethylene dibromide.
		Chloramines (under D/DBPR)	Pentachlorophenol.
		Chlorine (under D/DBPR)	Thallium.
		Chlorine dioxide	trans-1,2-Dichloroethylene.
		Chlorobenzene (monochlorobenzene)	Turbidity.
	Low priority and/or no meaningful opportunity.	1,1,1-Trichloroethane	Epichlorohydrin.
		1,1,2-Trichloroethane	Fluoride.
		1,1-Dichloroethylene	Heptachlor.
		1,2,4-Trichlorobenzene	Heptachlor epoxide.
		2,3,7,8-TCDD (Dioxin)	Hexachlorobenzene.
		2,4-D	Hexachlorocyclopentadiene.
		Acrylamide	Lindane.
		Alachlor	Methoxychlor.
		Barium	Oxamyl (Vydate).
		Beryllium	Picloram.
		Carbofuran	Selenium.
		Chlordane	Styrene.
		cis-1,2-Dichloroethylene	Toluene.
		Cyanide	Toxaphene.
		Diquat	Xylenes.
		Endothall	

TABLE VI–1—SUMMARY OF SIX-YEAR REVIEW 3 RESULTS—Continued

Candidate for Revision	New information	Chlorite	Heterotrophic Bacteria.
		Cryptosporidium (under SWTR, IESWTR, LT1)	*Legionella*.
		Giardia lamblia	TTHM.
		Haloacetic Acids (HAA5)	Viruses (under SWTR).

[1] Contaminants nominated for Integrated Risk Information System (IRIS) assessments per SYR Protocol.
[2] LT2, FBRR, and GWR also identified as not appropriate for revision at this time. See Section VI.B.4 for additional information on the results of EPA's review of these regulations.

A. What are the review result categories?

For each of the 76 NPDWRs discussed in detail in the following sections of this action, the review outcomes fall in one of the following categories:

1. The NPDWR is Not Appropriate for Revision at This Time

The current NPDWR remains appropriate and no action is necessary at this time. In this category, NPDWRs are grouped under the following subcategories:

- Health effects assessment in process (as of December 2015) or contaminant nominated for health assessment,
- No new information and NPDWR remains appropriate after review,
- Data gaps/emerging information, and
- No meaningful opportunity.

2. The NPDWR Is a Candidate for Revision

The NPDWR is a candidate for revision based on the review of new information.

B. What are the detailed results of EPA's third six-year review cycle?

1. Chemical Phase Rules/Radionuclides Rules

Background

The NPDWRs for chemical contaminants, collectively called the Phase Rules, were promulgated between 1987 and 1992 (after the 1986 SDWA amendments). In December 2000, EPA promulgated final radionuclide regulations, which were issued as interim rules in July 1976. Information related to the review for fluoride is discussed separately in Section VI.B.2.

Summary of Review Results

EPA has decided that it is not appropriate at this time to revise any of the NPDWRs covered under the Phase Rules or Radionuclide Rules. These NPDWRs were determined not to be candidates for revision for one or more of the following reasons: There was no new information to suggest possible changes in MCLG/MCL; new information did not present a meaningful opportunity for health risk reduction or cost savings while maintaining/improving public health protection; or there was an ongoing or pending regulatory action. Details related to the review of all Phase Rules and Radionuclide Rules contaminants can be found in the ''Chemical Contaminant Summaries for the Third Six-Year Review of National Primary Drinking Water Regulations'' (USEPA, 2016b).

Initial Review

The initial review identified 12 chemical contaminants with NPDWRs under the Chemical Phase Rules that were being considered as part of ongoing or pending regulatory actions, and 61 chemical or radionuclide NPDWRs were identified as appropriate for review. The NPDWRs with ongoing or pending regulatory actions included eight carcinogenic volatile organic compounds (cVOCs), lead, copper, acrylamide and epichlorohydrin.

In 2011, EPA announced its plans to address a group of regulated and unregulated cVOCs in a single regulatory effort. The eight regulated VOCs being currently evaluated for a potential cVOCs group regulation include: Benzene; carbon tetrachloride; 1,2-dichloroethane; 1,2-dichloropropane; dichloromethane; PCE; TCE; and vinyl chloride. The regulatory revisions to TCE and PCE, initiated as an outcome of the Six-Year Review 2, are also being considered as part of the group regulatory effort. Since a regulatory effort is ongoing for these eight contaminants, they were excluded from a detailed review as part of the third Six-Year Review.

The NPDWRs for acrylamide and epichlorohydrin were also previously identified as candidates for regulatory revision and were pending regulatory action. The polyacrylamides and epichlorohydrin-based polymers available today for water treatment have lower residual monomer content than when EPA promulgated residual content as a TT (USEPA, 2016s). For example, the 90th percentile concentration of acrylamide residual monomer levels was approximately one-half the residual level listed in the current TT and no residual epichlorohydrin was detected. The health benefits associated with the lower impurity levels are already being realized by communities throughout the country; therefore, a regulatory revision will minimally affect health risk. Given resource limitations, competing workload priorities, and administrative costs and burden to states to adopt any regulatory changes associated with the rulemaking, as well as limited potential health benefits, these NPDWRs are considered a low priority and no longer candidates for revision at this time.

EPA is also currently considering Long-Term Revisions to the Lead and Copper Rule; and therefore, evaluation of that NPDWR under the Six-Year Review process would be redundant.

Health Effects

The principal objectives of the health effects review are to identify: (1) Contaminants for which a new health effects assessment indicates that a change in MCLG might be appropriate (*e.g.,* because of a change in cancer classification or an RfD), and (2) contaminants for which the Agency has identified new health effects information suggesting a need to initiate a new health effects assessment.

Before identifying chemical NPDWR contaminants for which an updated MCLG may be appropriate, EPA first identified chemicals with ongoing or planned EPA health effects assessments. As of December 31, 2015, 19 chemical/radiological contaminants reviewed had ongoing or planned formal EPA health effects assessments. Table VI–2 below lists the 19 contaminants with ongoing or planned EPA assessments and the status of those reviews.

TABLE VI–2—SIX-YEAR REVIEW CHEMICAL/RADIOLOGICAL CONTAMINANTS WITH ONGOING OR PLANNED EPA HEALTH ASSESSMENTS

Chemical/radionuclide	Status
Alpha/photon emitters	EPA is conducting a review of alpha and beta photo emitters.
Arsenic, inorganic	Inorganic arsenic is being assessed by the EPA IRIS Program. The assessment status can be found at: (*https://cfpub.epa.gov/ncea/iris2/atoz.cfm*).
Atrazine	Atrazine and simazine are being assessed under EPA's pesticide registration review process.
Benzo(a)pyrene	Benzo(a)pyrene is being assessed by the EPA IRIS Program. The assessment status can be found at: (*https://cfpub.epa.gov/ncea/iris2/atoz.cfm*).
Beta/photon emitters	EPA is conducting a review of alpha and beta photo emitters.
Cadmium	Cadmium is included in the EPA IRIS Multi-Year Agenda.
Chromium (VI) as part of total Cr)	Chromium VI is being assessed by the EPA IRIS Program. The assessment status can be found at: (*https://cfpub.epa.gov/ncea/iris2/atoz.cfm*).
DEHP	DEHP is included in the EPA IRIS Multi-Year Agenda.
Ethylbenzene	Ethylbenzene is being assessed by the EPA IRIS Program. The assessment status can be found at: (*https://cfpub.epa.gov/ncea/iris2/atoz.cfm*).
Glyphosate	GlyphosateGlyphosate is being assessed under EPA's pesticide registration review process.
Mercury	Mercury is included in the EPA IRIS Multi-Year Agenda.
Nitrate	Nitrate is included in the EPA IRIS Multi-Year Agenda.
Nitrite	Nitrite is included in the EPA IRIS Multi-Year Agenda.
o-Dichlorobenzene	o-Dichlorobenzene is included in the EPA IRIS Multi-Year Agenda.
p-Dichlorobenzene	p-Dichlorobenzene is included in the EPA IRIS Multi-Year Agenda.
PCBs	PCBs are being assessed by the EPA IRIS Program. The assessment status can be found at: (*https://cfpub.epa.gov/ncea/iris2/atoz.cfm*).
Radium (226, 228)	EPA is conducting a review of radium.
Simazine	Atrazine and simazine are being assessed under EPA's pesticide registration review process.
Uranium	Uranium is included in the EPA IRIS Multi-Year Agenda.

For chemicals that were not excluded due to an ongoing or planned health effects assessment by EPA, or by the National Academy of Sciences (NAS), commissioned by EPA, a more detailed review was undertaken. Of the chemicals that underwent a more detailed review, EPA identified 21 for which there have been official Agency changes in the RfD and/or in the cancer risk assessment from oral exposure or new relevant non-EPA assessments that might support a change to the MCLG. These 21 chemicals were further evaluated as part of the Six-Year Review 3 to determine whether they were candidates for regulatory revision. Table VI–3 lists the 21 chemicals with available new health effects information and the sources of the relevant new information. As shown in this table, 11 chemical contaminants have information that could support a lower MCLG and 10 contaminants have new information that could support a higher MCLG.

TABLE VI–3—CHEMICALS WITH AVAILABLE NEW HEALTH ASSESSMENT THAT COULD SUPPORT A CHANGE IN MCLG

Chemical	Relevant new assessment
Potential Decrease in MCLG	
Carbofuran	USEPA, 2008a (OPP).
Cyanide	USEPA, 2010e (IRIS).
cis-1,2-Dichloroethyelene	USEPA, 2010d (IRIS).
Endothal	USEPA, 2005f (OPP).
Hexachloropentadiene	USEPA, 2001a (IRIS).
Methoxychlor	CalEPA 2010a.
Oxamyl	USEPA, 2010f (OPP).
Selenium	Health Canada 2014.
Styrene	CalEPA 2010b.
Toluene	USEPA, 2005c (IRIS).
Xylenes	USEPA, 2003a (IRIS).
Potential Increase in MCLG	
Alachlor	USEPA, 2006a (OPP).
Barium	USEPA, 2005b (IRIS).
Beryllium	USEPA, 1998a (IRIS).
1,1-Dichloroethylene	USEPA, 2002b (IRIS).
2,4 Dichlorophenoxy-acetic Acid	USEPA, 2013b (OPP).
Diquat	USEPA, 2002a (OPP).
Lindane	USEPA, 2002d (OPP).
Picloram	USEPA, 1995 (OPP).
1,1,1-Trichloroethane	USEPA, 2007a (IRIS).
1,2,4-Trichlorobenzene	ATSDR, 2010.

Details of the health effects review of the chemical and radiological contaminants are documented in the ''Six-Year Review 3—Health Effects Assessment for Existing Chemical and Radionuclides National Primary Drinking Water Regulations—Summary Report'' (USEPA, 2016h).

Analytical Feasibility

EPA performed analytical feasibility analyses for the contaminants that reached this portion of the review. These contaminants included the 11 chemical contaminants identified under the health effects review as having potential for a lower MCLG and an additional 14 contaminants with MCLs based on analytical feasibility and MCLs higher than the current MCLGs. The document ''Analytical Feasibility Support Document for the Third Six-Year Review of National Primary Drinking Water Regulations: Chemical Phase Rules and Radionuclides Rules'' (USEPA, 2016a) describes the first step in the process EPA used to evaluate whether changes in PQL are possible in those instances where the MCL is limited, or may be limited, by analytical feasibility. The EQL analysis is documented in the '' Development of Estimated Quantitation Levels for the Third Six-Year Review of National Primary Drinking Water Regulations (Chemical Phase Rules)'' (USEPA, 2016d).

Table VI–4 shows the outcomes of EPA's analytical feasibility review for two general categories of drinking water contaminants: Contaminants where health effects assessments indicate potential for lower MCLGs; and contaminants where existing MCLs are based on analytical feasibility.

• *A health effects assessment indicates potential for lower MCLG.* This category includes the 11 contaminants identified in the health effects review as having information indicating the potential for a lower MCLG. EPA reviewed analytical feasibility to determine if analytical feasibility could limit the potential for MCL revisions. For six contaminants (carbofuran, cyanide, endothall, methoxychlor, oxamyl and styrene), the current PQL is higher than the potential new MCLG identified in the health effects review. For these contaminants, the PQL assessment did not support reduction of the current PQL, or data were inconclusive or insufficient to reach a conclusion. Consequently, analytical feasibility could be a limiting factor for setting the MCL equal to the potential new MCLG. The current PQL is not a limiting factor for the remaining five contaminants identified by the health effects review for possible changes in their MCLG (*i.e.,* cis-1,2-dichloroethylene, hexachlorocyclopentadiene, selenium, toluene and xylene).

• *Contaminants for which existing MCLs are based on analytical feasibility.* This category includes 14 contaminants with existing MCLs that are greater than their MCLGs because they are limited by analytical feasibility. Two of the contaminants (thallium and 1,1,2-trichloroethanetrichloroethane) are non-carcinogenic and have a non-zero MCLG and the remaining 12 contaminants are carcinogens with MCLGs equal to zero. EPA evaluated whether the PQL could be lowered for each of these contaminants. For one contaminant, 1,1,2-trichloroethane, EPA concluded that new information from Proficiency Testing (PT) studies, along with MRL and MDL data, indicate the potential to revise the PQL. For two contaminants (dioxin and PCBs), data from PT studies were inconclusive, but MRL and MDL data indicated the potential to revise the PQL. For five contaminants (chlordane, heptachlor, heptachlor epoxide, hexachlorobenzene and toxaphene) data from PT and MRL studies were inconclusive, but MDL data indicate the potential to revise the PQL. For the remaining five contaminants, either EPA did not have sufficient new information to evaluate analytical feasibility or EPA concluded that new information does not indicate the potential for a PQL revision.

Where these evaluations indicated the potential for a PQL reduction, Table VI–4 lists the type of data that support this conclusion. The notation ''PT'' indicates that the PQL reassessment based on PT data (USEPA, 2016a) supports the reduction. The notations ''MRL'' and ''MDL'' indicates that these two approaches support PQL reduction. The findings based on PT offer more certainty. When the PQL reassessment outcome is that the current PQL remains appropriate, Table VI–4 shows the result ''Data do not support PQL reduction.''

TABLE VI–4—NPDWRS INCLUDED IN ANALYTICAL FEASIBILITY REASSESSMENT AND RESULT OF THAT ASSESSMENT

Contaminant	Current PQL (µg/L)	Analytical feasibility reassessment result
11 Contaminants Identified Under the Health Effects Review as Having Potential for Lower MCLG		
Carbofuran	7	Data do not support PQL reduction.
Cyanide	100	Data do not support PQL reduction.
cis-1,2-Dichloroethylene	5	PQL not limiting.
Endothall	90	PQL reduction supported (MRL, MDL).
Hexachlorocyclopentadiene	1	PQL not limiting.
Methoxychlor	10	PQL reduction supported (PT, MRL).
Oxamyl	20	PQL reduction supported (MRL, MDL).
Selenium	10	PQL not limiting.
Styrene	5	PQL reduction supported (PT, MRL, MDL).
Toluene	5	PQL not limiting.
Xylene	5	PQL not limiting.
14 Contaminants With MCLs Based on Analytical Feasibility and Higher Than MCLGs		
Benzo(a)pyrene	0.2	Data do not support PQL reduction.
Chlordane	2	PQL reduction supported (MRL, MDL).
1,2-Dibromo-3-chloropropane (DBCP)	0.2	Data do not support PQL reduction.
Di(2-ethylhexyl)phthalate (DEHP)	6	Data do not support PQL reduction.
Ethylene dibromide (EDB)	0.05	Data do not support PQL reduction.
Heptachlor	0.4	PQL reduction supported (MDL).
Heptachlor Epoxide	0.2	PQL reduction supported (MDL).
Hexachlorobenzene	1	PQL reduction supported (PT, MDL).
Pentachlorophenol	1	Data do not support PQL reduction.

TABLE VI–4—NPDWRS INCLUDED IN ANALYTICAL FEASIBILITY REASSESSMENT AND RESULT OF THAT ASSESSMENT—Continued

Contaminant	Current PQL (µg/L)	Analytical feasibility reassessment result
PCBs	0.5	Data do not support PQL reduction.
Dioxin	3.0×10^{-5}	PQL reduction supported (MRL, MDL).
Thallium	2	Data do not support PQL reduction.
Toxaphene	3	PQL reduction supported (MDL).
1,1,2-Trichloroethane	5	PQL reduction supported (PT, MRL, MDL).

Occurrence and Exposure

Using the SYR3 ICR database, EPA conducted an assessment to evaluate national occurrence of regulated contaminants and estimate the potential population exposed to these contaminants. The details of the current chemical occurrence analysis are documented in ''The Analysis of Regulated Contaminant Occurrence Data from Public Water Systems in Support of the Third Six-Year Review of National Primary Drinking Water Regulations: Chemical Phase Rules and Radionuclides Rules'' (USEPA, 2016p). Based on benchmarks identified in the health effects and analytical feasibility analyses, EPA conducted the occurrence and exposure analysis for 18 contaminants.

This analysis shows that these 18 contaminants occur at levels above the identified benchmark in a very small percentage of systems, which serve a very small percentage of the population, indicating that revisions to NPDWRs are unlikely to provide a meaningful opportunity to improve public health protection across the nation. Therefore, these contaminants were not identified as candidates for regulatory revision. Table VI–5 lists the benchmarks used to conduct the occurrence analysis, the total number of systems with mean concentrations exceeding a benchmark and the estimated population served by those systems.

TABLE VI–5—OCCURRENCE AND POTENTIAL EXPOSURE ANALYSIS FOR CHEMICAL NPDWRS

Contaminant	Benchmark [1] (ug/L)	Number (and percentage) of systems with a mean concentration higher than benchmarks	Population served by systems with a mean concentration higher than benchmarks (and percentage of total population)
Contaminants Identified Under the Health Effects Review as Having Potential for Lower MCLG			
Carbofuran	>5	1 (0.00%)	993 (0.0004%)
Cyanide	>50	98 (0.27%)	574,038 (0.27%)
cis-1,2-Dichloroethylene	>10	4 (0.01%)	5,569 (0.00%)
Endothall	>50	1 (0.01%)	993 (0.001%)
Hexachlorocyclopentadiene	>40	0 (0.00%)	0 (0.00%)
Methoxychlor	>1	1 (0.003%)	993 (0.000%)
Oxamyl	>9	2 (0.01%)	9,742 (0.004%)
Selenium	>40	49 (0.10%)	135,685 (0.05%)
Styrene	>0.5	117 (0.210%)	571,425 (0.217%)
Toluene	>600	0 (0.00%)	0 (0.00%)
Xylene	>1,000	2 (0.004%)	825 (0.0003%)
Contaminants With MCLs Based on Analytical Feasibility and Higher Than MCLGs			
Chlordane	>1	3 (0.01%)	1,353 (0.001%)
Heptachlor	>0.1	3 (0.01%)	1,643 (0.00%)
Heptachlor Epoxide	>0.04	14 (0.04%)	11,659 (0.005%)
Hexachlorobenzene	>0.1	6 (0.016%)	8,703 (0.004%)
2,3,7,8-TCDD (Dioxin)	>0.000005	2 (0.06%)	1,450 (0.002%)
Toxaphene	>1	6 (0.02%)	715,106 (0.32%)
1,1,2-Trichloroethane	>3	0 (0.00%)	0 (0.00%)

In addition, EPA performed a source water occurrence analysis for the 10 chemical contaminants in which updated health effects assessments indicated the possibility to increase (*i.e.,* render less stringent) the MCLG values. EPA conducted this analysis to determine if there was a meaningful opportunity to achieve cost savings while maintaining or improving the level of public health protection. The data available to characterize contaminant occurrence was limited because there is no comprehensive dataset that characterizes source water quality for drinking water systems. Data from the U.S. Geological Survey (USGS) National Water Quality Assessment program and the U.S. Department of Agriculture Pesticide Data Program water monitoring survey provide useful insights into potential contaminant occurrence in source water. The analysis of the available contaminant occurrence data for potential drinking water sources indicated relatively low contaminant occurrence in the concentration ranges of interest. As a consequence, EPA could not conclude that there is a meaningful opportunity for system cost savings by increasing the MCLG and/or MCL for these 10 contaminants. The results of this

analysis were documented in ''Occurrence Analysis for Potential Source Waters for the Third Six-Year Review of National Primary Drinking Water Regulations'' (USEPA, 2016e).

Treatment Feasibility

Currently, all of the MCLs for chemical and radiological contaminants are set equal to the MCLGs or PQLs or are based on benefit-cost analysis; none are currently limited by treatment feasibility. EPA considers treatment feasibility after identifying contaminants with the potential to lower the MCLG/MCL that constitute a meaningful opportunity to improve public health. No such contaminants were identified in the occurrence and exposure analysis described above.

Other Regulatory Revisions

In addition to possible revisions to MCLGs, MCLs and TTs, EPA considered whether other regulatory revisions are needed to address implementation issues, such as revisions to monitoring and system reporting requirements, as a part of the Six-Year Review 3. EPA used the protocol to evaluate which implementation issues to consider (USEPA, 2016f). EPA's protocol focused on items that were not already being addressed, or had not been addressed, through alternative mechanisms (*e.g.,* as a part of a recent or ongoing rulemaking).

Implementation Issues Identified for the Six-Year Review 3

EPA compiled information on implementation related issues associated with the Chemical Phase Rules. EPA also identified unresolved implementation issues/concerns from previous Six-Year Reviews. EPA shared the list of identified potential implementation issues with a group of state representatives convened by ASDWA to obtain input from state drinking water agencies concerning the significance and relevance of the issues (ASDWA, 2016). The complete list of implementation issues related to the Phase Rules and Radionuclide Rules is presented in ''Consideration of Other Regulatory Revisions in Support of the Third Six-Year Review of the National Primary Drinking Water Regulations: Chemical Phase Rules and Radionuclide Rules'' (USEPA, 2016c).

The Agency determined that the following three issues, identified by state stakeholders, were within the scope of NPDWR review and were the most substantive:

a. Nitrogen monitoring in consecutive systems and the distribution system,

b. Alternative nitrate-nitrogen MCL of 20 mg/L for non-community water systems (NCWSs), and

c. Synthetic organic chemical (SOC) detection limits.

Table VI–6 provides a brief description of the three issues and the Agency's findings to date.

TABLE VI–6—CHEMICAL RULE IMPLEMENTATION ISSUES IDENTIFIED THAT FALL WITHIN THE SCOPE OF AN NPDWR REVIEW

Implementation issue	Description and findings
Nitrogen Monitoring in Consecutive Systems and the Distribution System.	Current nitrite and nitrate standards are measured at the point of entry to the distribution system. Under some conditions, nitrification of ammonia in water system distribution networks could potentially result in increased total nitrite or nitrate concentrations at the point of use. To address the concern, certain water systems could develop and implement a nitrification monitoring program, which would include changing or adding additional monitoring locations. Research is needed to further evaluate the extent of this potential issue, including development of criteria to identify the specific systems where distribution system monitoring could be targeted. If the outcome of the research suggests that the magnitude of the problem represents a meaningful opportunity to improve public health protection, the regulation could be considered for revision.
Alternative Nitrate-Nitrogen MCL of 20 mg/L for NCWS.	EPA evaluated the possibility of removing or further restricting the option for some NCWSs to use an alternative nitrate-nitrogen MCL of up to 20 mg/L. The nitrate-nitrogen MCL in PWSs is 10 mg/L. However, § 141.11 of the Code of Federal Regulations (CFR) provides that states have the discretion to allow some NCWSs to use an alternative nitrate-nitrogen MCL of up to 20 mg/L if certain conditions are met, including conditions where water will not be available to children under six months of age. Other provisions related to this issue are included in § 141.23 of the CFR, which pertains to monitoring. This section states: ''Transient, non-community water systems shall conduct monitoring to determine compliance with the nitrate and nitrite MCL in §§ 141.11 and 141.62 (as appropriate) in accordance with this section.'' The monitoring section does not address non-transient non-community water systems (NTNCWSs) eligibility to use an alternative nitrate MCL. Two potential concerns identified with the current rule provisions are: • Potential health concerns other than methemoglobinemia associated with the ingestion of nitrate-nitrogen, such as possible effects on fetal development. • The fact that the alternative MCL was initially intended to be used by entities such as industrial plants that do not provide drinking water to children under six months of age (44 FR 42254, USEPA, 1979). Industrial plants are generally considered to be NTNCWSs. Therefore, it is possible the alternative MCL was intended to apply specifically to NTNCWSs and not transient non-community water systems (TNCWSs). The Agency has nominated nitrate and nitrite for an IRIS assessment as a result of the Six-Year Review process, and both of these contaminants are listed in the IRIS multi-year plan. An updated assessment is needed that evaluates health effects other than methemoglobinemia. Specifically, an assessment is needed that evaluates potential health effects of nitrate-nitrogen at levels between 10 and 20 mg/L on adult populations. When completed, the IRIS assessment may support initiation of a rule revision if potential adverse health effects were identified at drinking water concentrations below the alternative nitrate MCL of 20 mg/L for populations other than infants less than six-months of age.

TABLE VI–6—CHEMICAL RULE IMPLEMENTATION ISSUES IDENTIFIED THAT FALL WITHIN THE SCOPE OF AN NPDWR REVIEW—Continued

Implementation issue	Description and findings
Synthetic Organic Chemical (SOC) Detection Limits.	According to states, some laboratories have reported difficulty in achieving the detection limits for some SOCs on a regular basis. Section 40 CFR 141.24(h)18 provides detection limits for the SOCs, including some pesticides. PWSs that do not detect a SOC contaminant above these concentrations may qualify for reduced monitoring frequency for individual contaminants. It was reported that some SOCs may have detection limits that are lower than levels that can be economically and efficiently achieved by laboratories using approved methods. Thus, some water systems may not be able to qualify for reduced monitoring if the laboratories cannot achieve the listed detection limits. This issue was also identified as a concern by the states during the Six-Year Review 2. To address the SOC method detection limits, the Agency investigated the MRL values for SOCs from the SYR 3 ICR and found there was an existing approved analytical method for each SOC that laboratories can use to achieve the appropriate detection limits in order to reduce monitoring requirements. Using the MRL values, the Agency evaluated the percentage of records in the ICR database at or below the detection limit. EPA considered this percentage as an indication of laboratories' collective ability to detect contaminant concentrations at or below these levels. The Agency found that for most of the SOCs, nearly half of the records were at or below the detection limit listed in the regulation while other SOCs had a sufficient number of records below the detection limit to determine that there was an approved analytical method that could be used.

2. Fluoride

Background

Fluoride can occur naturally in drinking water as a result of the geological composition of soils and bedrock. Some areas of the country have high levels of naturally occurring fluoride. EPA established the current NPDWR to reduce the public health risk associated with exposure to high levels of naturally occurring fluoride in drinking water sources.

Low levels of fluoride are frequently added to drinking water systems as a public health protection measure for reducing the incidence of cavities. The decision to fluoridate a community water supply is made by the state or local municipality, and is not mandated by EPA or any other federal entity. The U.S. Public Health Service (PHS) recommendation for community water fluoridation is 0.7 mg/L (U.S. Department of Health and Human Services, 2015). Fluoride is also added to various consumer products (such as toothpaste and mouthwash) because of its beneficial effects at low level exposures.

EPA published the current NPDWR on April 2, 1986 (51 FR 11396, USEPA, 1986) to reduce the public health risk associated with exposure to high levels of naturally occurring fluoride in drinking water sources. The current NPDWR established an MCLG and MCL of 4.0 mg/L to protect against the most severe stage of skeletal fluorosis (referred to as the ''crippling'' stage) (NRC, 2006a). EPA also established a secondary maximum contaminant level (SMCL) for fluoride of 2.0 mg/L to protect against moderate and severe dental fluorosis, which was considered at the time to be a cosmetic effect. As provided under the statute, the SMCL is not enforceable in the same manner as the MCL. Public notification is required when PWSs exceed the MCL or SMCL.

EPA has reviewed the NPDWR for fluoride in previous Six-Year Review cycles. As a result of the first Six-Year Review (68 FR 42908, USEPA, 2003b), EPA requested that the National Research Council (NRC) of the National Academies of Sciences (NAS) conduct a review of the health and exposure data on orally ingested fluoride. In 2006, the NRC published the results of its review and concluded that severe dental fluorosis is an adverse health effect when it causes both a thinning and pitting of the enamel, a situation that compromises the function of the enamel in protecting against decay and infection (NRC, 2006a). The NRC recommended that EPA develop a dose-response assessment for severe dental fluorosis as the critical effect and update an assessment of fluoride exposure from all sources.

During the Six-Year Review 2, the Agency was in the process of developing a dose-response assessment of the non-cancer impacts of fluoride on severe dental fluorosis and the skeletal system. In addition, EPA was in the process of updating its evaluation of the relative source contribution (RSC) of drinking water to total fluoride exposure considering the contributions from dental products, foods, pesticide residues, and other sources such as ambient air and medications. These assessments were not completed at the time of the Six-Year Review 2; thus, no action was taken under the Six-Year Review 2 (75 FR 15500, USEPA, 2010h).

In 2010, EPA published fluoride health assessments. The ''Dose Response Analysis for Non-Cancer Effects'' (USEPA, 2010b) identified an oral RfD for fluoride of 0.08 milligrams per kilograms per day (mg/kg/day) based on studies of severe dental fluorosis among children in the six months to 14 year age group (USEPA, 2010b). The ''Exposure and Relative Source Contribution Analysis'' (USEPA, 2010c) concluded that the RSC values for drinking water range from 40 to 70 percent, with the higher values associated with infants fed with powdered formula or concentrate reconstituted with residential tap water (70%) and with adults (60%). The major contributors to total daily fluoride intakes for these age groups are drinking water, commercial beverages, solid foods and swallowed fluoride-containing toothpaste (USEPA, 2010c).

Summary of Review Results

The Agency has determined that a revision to the NPDWR for fluoride is not appropriate at this time. EPA acknowledges information regarding the exposure and health effects of fluoride (as discussed later in the ''Health Effects'' and ''Occurrence and Exposure'' sections). However, with EPA's identification of several other significant NPDWRs as candidates for near-term revision (see Sections VI.B.3 and VI.B.4), potential revision of the fluoride NPDWR is a lower priority that would divert significant resources from the higher priority candidates for revision that the Agency has identified, as well as other high priority work within the drinking water office. These other candidates for revision include the Stage 1 and Stage 2 Disinfectants and Disinfection Byproducts Rules (D/DBPRs) that apply to approximately 42,000 PWSs, and for which EPA has identified the potential to further reduce

bladder cancer risks attributed to exposure to DBPs; the Surface Water Treatment Rules, for which the Agency has identified the potential to further reduce risks from a myriad of serious waterborne diseases (*e.g.,* giardiasis, cryptosporidiosis, legionellosis, hepatitis, meningitis and encephalitis) for approximately 12,000 surface water systems; and the pending revisions to the lead and copper NPDWR which apply to approximately 68,000 PWSs.

While EPA has evaluated the available health effects and exposure information related to fluoride (as discussed later in the ''Health Effects'' and ''Occurrence and Exposure'' sections), the Agency also recognizes that new studies on fluoride are currently being performed. These include new studies that address health endpoints of concern other than dental fluorosis. Based on the NRC recommendations, EPA evaluated dental fluorosis for the purposes of this action. EPA will continue to monitor the evolving science, and, when appropriate, will reconsider the fluoride NPDWR's relative priority for revision and take any other available and appropriate action to address fluoride risks under SDWA.

Finally, most community water systems (CWSs) that provide fluoridation of their drinking water have already lowered their fluoridation level to a single level of 0.7 mg/L from a previous range of 0.7 to 1.2 mg/L to accommodate the updated PHS recommendation (U.S. Department of Health and Human Services, 2015). The U.S. Food and Drug Administration (FDA) also issued a letter to bottled water manufacturers recommending that they not add fluoride to bottled water in excess of the revised PHS recommendations (FDA, 2015). In addition, the FDA stated it intends to revise the quality standard regulation for fluoride added to bottled water to be consistent with the updated PHS recommendation. Therefore, EPA anticipates that a significant portion of the population's exposure to fluoride in drinking water, as well as some commercial beverages that use fluoridated water from CWSs and certain bottled water, has already been or will be reduced. Notwithstanding this action's decision, EPA will continue to address risk associated with fluoride in drinking water, with a specific focus on the small systems with naturally occurring fluoride in their source waters.

Initial Review

EPA did not identify any recent, ongoing or pending action on fluoride that would exclude fluoride from the Six-Year Review 3.

Health Effects

The NRC (2006a) evaluated the impact of fluoride on reproduction and development, neurotoxicity and behavior, the endocrine system, genotoxicity, cancer and other effects, in addition to the tooth and bone effects. At fluoride levels below 4.0 mg/L, the NRC found no evidence substantial enough to support adverse effects other than severe dental fluorosis and skeletal fractures. The NRC concluded that the available data were inadequate to determine if a risk of effects on other endpoints exists at an MCLG of 4.0 mg/L and made recommendations for additional research.

EPA assessments (USEPA, 2010b; 2010c) found that the RSC values are lower than the RSC of 100 percent used to derive the original MCLG of 4.0 mg/L, where EPA assumed that drinking water was the sole source of exposure to fluoride. EPA has concluded that information on the dose-response and exposure assessment may support lowering the MCLG to reflect levels that would protect against risk of severe dental fluorosis and skeletal fractures.

As part of this Six-Year Review, EPA reviewed health effects data on the impact of fluoride on reproduction and development, neurotoxicity and behavior, the endocrine system, genotoxicity, cancer and other effects that were identified by the NRC as requiring additional research (NRC, 2006a). EPA noted limitations in some of these studies such as lack of details and confounding factors. Overall, the new data were insufficient to alter the NRC conclusion that severe dental fluorosis is the critical health effects endpoint for the MCLG.

Based upon the recommendations of the NRC, EPA has evaluated dental fluorosis as a critical endpoint of concern for this Six-Year Review (USEPA, 2010b; 2010c). However new studies are underway to examine other health endpoints (*i.e.,* developmental neurobehavior effects, endocrine disruption and genotoxicity). One example is an ongoing National Toxicology Program (NTP) systematic review of animal studies that examined the impact of fluoride on learning and memory (NTP, 2016). For more information about fluoride developmental neurotoxicity visit the National Toxicology Program Web site at *https://ntp.niehs.nih.gov/pubhealth/hat/noms/fluoride/neuro-index.html.* Additional information related to the review of the fluoride NPDWR is provided in the ''Six-Year Review 3 Health Effects Assessment Summary Report'' (USEPA, 2016h).

Analytical Feasibility

The current PQL for fluoride is 0.5 mg/L (USEPA, 2009a). EPA has not identified any changes in analytical feasibility that could limit its ability to revise the MCL/MCLG for fluoride.

Occurrence and Exposure

EPA analyzed fluoride occurrence using the SYR3 ICR database, which contains fluoride analytical results from approximately 47,000 PWSs in 49 states/entities from 2006 to 2011. Sample records for fluoridated water (*i.e.,* in which a system adds fluoride to maintain a concentration in the 0.7 to 1.2 mg/L range) were omitted from the analysis because the fluoridated systems would not be impacted by revisions to the fluoride NPDWR. EPA estimated the number and percent of systems that have mean fluoride concentrations exceeding various benchmarks and the corresponding estimates of population served by those systems. The data indicated that about 130 systems (0.3 percent), serving approximately 60,000 people (0.03 percent), had an estimated system mean concentration exceeding the current MCL of 4.0 mg/L, whereas more than 900 systems (2 percent), serving approximately 1.5 million people (0.8 percent), had an estimated system mean concentration greater than the SMCL of 2.0 mg/L. Among these systems, many are small systems (serving fewer than 10,000 people) and very small systems (serving fewer than 500 people). Evaluations based on mean (or average) fluoride concentrations generally reflect an approximation of chronic (long-term) exposure. It is important to note that these average concentration-based evaluations help to inform Six-Year Review results, but do not assess compliance with regulatory standards nor should be viewed as compliance forecasts for PWSs.

Treatment Feasibility

A BAT or small system compliance technology for fluoride was not established in the Code of Federal Regulations (40 CFR 141.62). However, EPA (1998d) identified activated alumina and reverse osmosis as BATs for fluoride.

Activated alumina is the most commonly used treatment technology for fluoride removal. It is capable of removing fluoride to concentrations well below the MCL of 4.0 mg/L, but with a shortened media life at lower target concentrations. Membrane technologies, such as reverse osmosis, nanofiltration, and electrodialysis, are

also capable of removing fluoride to very low levels (<0.3 mg/L). They are often used to remove fluoride along with other contaminants such as total dissolved solids, arsenic, and uranium. In general, these technologies are costly and complex to operate—and thus likewise present potential challenges for small water systems (USEPA, 2014a).

3. Disinfectants/Disinfection Byproducts Rules (D/DBPRs)

Background

The D/DBPRs were promulgated in two stages—Stage 1 in 1998 (63 FR 69390, USEPA, 1998b) and Stage 2 in 2006 (71 FR 388, USEPA, 2006d). Disinfection byproducts (DBPs) are formed when the disinfectants commonly used in PWSs to kill microorganisms react with organic and inorganic matter in source water. DBPs have been associated with potential adverse health effects, including cancer and developmental and reproductive effects. Monitoring parameters within the D/DBPRs consist of the following: DBPs—TTHM, HAA5, bromate and chlorite; disinfectants—chlorine, chloramines and chlorine dioxide; and water quality indicators—total organic carbon (TOC) and alkalinity. The rules include MCLGs/MRDLGs, as well as MCLs/MRDLs and TT requirements, which were developed for individual parameters considering their health risks.

For organic DBPs, the concern is potential increased risk of cancer and short-term adverse reproductive and developmental effects. For bromate, the concern is potential increased risk of cancer. Chlorite (a regulated DBP) and chlorine dioxide (a disinfectant) are associated with methemoglobinemia, and for infants, young children and pregnant women, effects on the thyroid are also of concern. For chlorine and chloramines, health effects include eye/nose irritation and stomach discomfort (for chloramines, also anemia).

The D/DBPRs apply to all sizes of CWSs and non-transient non-community water systems (NTNCWSs) that chemically disinfect their water or receive chemically disinfected water (that is, involving any disinfectants other than ultraviolet (UV) light), as well as transient non-community water systems (TNCWSs) that add chlorine dioxide. The rules require that these systems comply with established MCLs, TTs, operational evaluation levels for DBPs and MRDLs for disinfectants.

A major challenge for water suppliers is balancing the risks from microbial pathogens and DBPs. The risk-balancing tradeoff approach was intended to lower the overall risks from DBP mixtures while continuing to provide public health protection from microbial risks.

Summary of Review Results

EPA has identified the following NPDWRs within the D/DBPRs as candidates for revision under this Six-Year Review cycle because of the opportunity to further reduce public health risk from exposure to DBPs: Chlorite, HAA5 and TTHM. This result is based on a scientific review of publicly available information. EPA's review process follows the protocol described in Section V of this document. New information has strengthened the weight of evidence supporting an association between chlorination DBPs and bladder cancer risk compared to the information available during development of the existing D/DBPRs. New information also is available related to the reproductive/developmental effects discussed in the Stage 2 D/DBPR. In addition, new toxicological data are available to support the development of MCLGs for some individual DBPs currently lacking MCLGs (for example, dibromoacetic acid).

This result will also provide for additional opportunity to address concerns with unregulated DBPs: For example, nitrosamines and chlorate. In the **Federal Register** document for Preliminary Regulatory Determination 3 (79 FR 62715, USEPA, 2014b), the Agency stated that ''because chlorate and nitrosamines are DBPs that can be introduced or formed in PWSs partly because of disinfection practices, the Agency believes it is important to evaluate these unregulated DBPs in the context of the review of the existing DBP regulations. DBPs need to be evaluated collectively, because the potential exists that the strategy used to control a specific DBP could increase the concentrations of other DBPs. Therefore, the Agency is not making a regulatory determination for chlorate and nitrosamines at this time.''

Chlorate and chlorite are two different oxidation states of chlorine and are chemically inter-convertible. They occur, and can co-occur, when hypochlorite solution and/or chlorine dioxide are applied during the drinking water treatment process. Chlorite is a regulated DBP. New information has shown that the relative source contribution for chlorite could be lower than previously estimated in the existing D/DBPRs, which could lead to a lower MCLG, and that there are common health endpoints associated with exposure to chlorite and chlorate.

Compliance monitoring data evaluated for the Six-Year Review 3 show widespread occurrence of DBPs and their organic precursors (as measured as TOC) in drinking water. Research that has been published since the development of the Stage 2 D/DBPR has improved EPA's understanding of the effectiveness of and limitations associated with various treatment approaches, such as those for removal of precursors, use of disinfectants other than chlorine and localized treatment.

Given that this is the first time EPA is conducting a Six-Year Review of the D/DBPRs, extensive information about review findings is provided below, with further information provided in EPA's ''Six-Year Review 3 Technical Support Document for Disinfectants/Disinfection Byproducts Rules'' (USEPA, 2016l). Additional information related to the review of D/DBPRs is provided in the ''Six-Year Review 3 Technical Support Document for Chlorate'' (USEPA, 2016k) and the ''Six-Year Review 3 Technical Support Document for Nitrosamines'' (USEPA, 2016o).

Initial Review

There are no recently completed, ongoing or pending regulatory actions on the D/DBPRs that would exclude them from the Six-Year Review 3.

Health Effects

Under the Stage 1 and 2 D/DBPRs, toxicology studies for specific DBPs and disinfectant residuals were used to inform MCLGs (and cancer potency factors where MCLGs are zero) and MRDLGs. Epidemiology studies were used to estimate potential risks from DBP mixtures (due to cancer and developmental/reproductive effects) and support the benefits analysis. Epidemiology studies supported a potential association between exposures to elevated THM4 levels in chlorinated drinking water and cancer, but the evidence was insufficient to establish a causal relationship. The most consistent evidence was for bladder cancer. For the development of the benefits analysis for both the Stage 1 and the Stage 2 D/DBPRs, EPA used five bladder cancer case-control epidemiology studies that were conducted in the 1980s and 1990s (Cantor et al., 1985; 1987; McGeehin et al., 1993; King and Marrett, 1996; Freedman et al., 1997; Cantor et al., 1998). In addition, EPA used one meta-analysis (Villanueva et al., 2003) and one pooled analysis (Villanueva et al., 2004). The five case-control studies used similar (though not identical) exposure metrics based on years of exposure to chlorinated drinking water (primarily chlorinated surface water) to

estimate odds ratios. All five studies showed an increase in the odds ratio for bladder cancer incidence with an increased duration of exposure. Using the published odds ratio results from these five studies, EPA calculated an estimate for the lifetime cancer risk (population attributable risk) that ranged from 2 to 17 percent; between 2 and 17 percent of bladder cancers occurring in the U.S. could be attributed to long-term exposure to chlorinated drinking water at the time of the Stage 1 D/DBPR. Detailed explanations of these calculations can be found in the benefits analysis for the Stage 2 D/DBPR (USEPA, 2005a). The evidence from the studies in 1985 to 1998, the meta-analysis in 2003 and the pooled analysis in 2004 was strong enough to support the benefit analysis with several thousand potential bladder cancer cases per year estimated as being avoided from the combined effects of the Stage 1 and Stage 2 D/DBPRs (USEPA, 2005a).

Studies from the 1970s to 2005 also suggested a possible association between adverse developmental/reproductive health effects and exposure to chlorinated drinking water. Effects were observed in all areas but lacked consistency across studies and did not provide enough of a basis to quantify risks or benefits. The adverse developmental/reproductive effects consisted of effects on fetal growth (small for gestational age, low birth weight and pre-term delivery), effects on viability (spontaneous abortion, stillbirth) and malformations (neural tube, oral cleft, cardiac or urinary defects).

Since the development of the Stage 2 D/DBPR, EPA has identified additional sources of information related to health effects of DBPs. New toxicological information could be used to develop MCLGs for the following regulated DBPs (within HAA5): Dibromoacetic acid (NTP, 2007), other brominated haloacetic acids not currently regulated, including bromochloroacetic acid (NTP, 2009) and bromodichloroacetic acid (NTP, 2014), plus additional unregulated DBPs such as nitrosamines and chlorate (USEPA, 2016k; 2016o).

EPA has identified new epidemiological, pharmacokinetic and pharmacodynamic studies that, considered together with studies available during the development of the Stage 2 D/DBPR, add to the weight of evidence for bladder cancer being associated with exposure to chlorination DBPs (notably those containing bromine) in drinking water.

Pharmacokinetic and pharmacodynamic studies (Ross and Pegram, 2003; 2004; Leavens et al., 2007; Stayner et al., 2014; Kenyon et al., 2015), in conjunction with epidemiology studies (Villanueva et al., 2007; Kogevinas et al., 2010; Cantor et al., 2010), indicate that non-ingestion routes of exposure (dermal and inhalation) from some brominated DBPs may play a significant role in influencing increased bladder cancer risk, and that there may be greater concern about sub-populations with certain genetic characteristics (polymorphisms). EPA's ''Six-Year Review 3 Technical Support Document for Disinfectants/Disinfection Byproducts Rules'' (USEPA, 2016l) characterizes the research that informs the mode of action by which brominated DBPs may be contributing to bladder cancer.

While uncertainties remain regarding the degree to which specific DBPs contributed to the bladder cancer incidence observed in epidemiology studies, the collective data suggest a stronger case for causality than when the Stage 2 D/DBPR was promulgated (Regli et al., 2015; USEPA, 2016l). However, the Agency recognizes there are also different perspectives on this issue, including suggestions about areas for additional research (Hrudey et al., 2015).

Further, the Agency has identified new information about health effects from unregulated DBPs. This includes health effects information on chlorate and nitrosamines that, along with occurrence/exposure information, was previously noted in the Preliminary Regulatory Determination 3 (79 FR 62715, USEPA, 2014b). The Agency is considering the health effects of chlorate and nitrosamines within the broader context of the health effects of regulated DBPs (USEPA, 2016k; 2016o).

EPA also identified information about the relative cytotoxicity and genotoxicity of many other unregulated DBPs (Richardson et al., 2007; Richardson et al., 2008; Plewa and Wagner 2009; Plewa et al., 2010; Fernández et al., 2010; Richardson and Postigo, 2011; Yang et al., 2014). Data from *in vitro* mammalian cell testing, which compared the cytotoxicity and genotoxicity of iodinated, brominated, and chlorinated DBPs, showed that the iodinated DBPs (those containing iodine) were generally more toxic than the brominated DBPs (those containing bromine), which were in turn more toxic than the chlorinated DBPs (those containing chlorine). Nitrogen-containing DBPs, including haloacetonitriles, haloacetamides and halonitromethanes, were more cytotoxic and genotoxic than the haloacids and halomethanes that did not contain nitrogen.

Approximately 40 new studies about developmental/reproductive effects have become available since the development of the Stage 2 D/DBPR. These studies address endpoints such as fetal growth (low birth weight, small for gestational age and pre-term delivery), congenital anomalies and male reproductive outcomes. These studies continue to support a potential health concern, though, as discussed above, the relationship of DBP exposure to these types of adverse outcomes may not be well enough understood to permit quantification of risks or benefits. A recent ''four-lab study'' on the effects of DBP mixtures on animals, conducted by EPA researchers (Narotsky et al., 2011; 2013; 2015), suggests diminished concern for many developmental/reproductive endpoints.

EPA also examined data about health effects for inorganic DBPs, including information showing that the RSC for chlorite could be lower than 80 percent (which could potentially support lowering the MCLG) because there is more dietary exposure than previously assumed due to the increased use of chlorine dioxide and acidified sodium chlorite as disinfectants in the processing of foods (U.S. EPA, 2006e; WHO, 2008). In addition, chlorate, chlorite and chlorine dioxide may share common health endpoints, namely hematological and thyroid effects (Couri and Abdel-Rahman, 1980; Bercz et al., 1982; Moore and Calabrese, 1982; Abdel-Rahman et al., 1984; Khan et al., 2005; Orme et al., 1985; NTP, 2005; USEPA, 2006e; WHO, 2008; Lee et al, 2013; Nguyen et al, 2014).

The Agency did not identify any relevant data that suggest an opportunity to revise the MCLG for bromate, or the MRDLG for chlorine or chloramines.

Analytical Feasibility

The Agency has not identified any improvements to analytical feasibility that could lead to improvements to the NPDWRs included in the D/DBPRs. Development of these rules was not constrained by the availability of analytical methods, and new EPA-approved methods that would revise this finding have not been identified. Should new, EPA-approved methods for one or more D/DBPRs be identified, that information might be able to help inform potential future regulatory development efforts.

Occurrence and Exposure

In this Six-Year Review evaluation of D/DBP occurrence and exposure, EPA

evaluated compliance monitoring information collected under the SYR3 ICR, which was previously discussed in Section V.B.4. EPA also evaluated information from the DBP ICR database (USEPA, 2000a) that had been used to prepare the original D/DBPRs. Additionally, EPA used data from the third monitoring cycle of the Unregulated Contaminant Monitoring Rule (UCMR3) to evaluate chlorate occurrence in 2013–2015, and data from the UCMR2 to evaluate nitrosamine occurrence in 2008–2010. This information is briefly described below, with additional information in EPA's ''Six-Year Review 3 Technical Support Document for Disinfectants/Disinfection Byproducts Rules'' (USEPA, 2016l).

It is important to note that the information collected through the SYR3 ICR spans the years 2006–2011. As such, it primarily reflects occurrence following the effective date for the Stage 1 D/DBPR, but prior to the effective date for the Stage 2 D/DBPR. These evaluations help to inform Six-Year Review results but do not assess compliance with regulatory standards.

New information since the promulgation of the Stage 2 D/DBPR has improved our understanding on DBP formation and occurrence. As part of this Six-Year Review, EPA has identified literature describing more than 600 specific DBPs that have been found in drinking water (*e.g.,* Richardson et al., 2007); these include chlorinated, brominated and iodinated DBPs, as well as nitrogenous compounds. Additionally, EPA identified literature on the sources of precursors (both organic and inorganic), as well as the influence that different precursors have on DBP formation. For example, some of this literature discusses the extent to which brominated or iodinated DBPs might form as a result of source water bromide or iodide concentrations (Nguyen et al., 2005; Duirk et al, 2011; Lui et al., 2012; Zhang et al., 2012; Callinan et al., 2013; Emelko et al., 2013; Mikkelson et al., 2013; Rice et al., 2013; Samson et al., 2013; Rice and Westerhoff, 2014).

Overview of DBP Occurrence

EPA collected occurrence information for THMs (includes TTHM along with information on four individual species), HAAs (includes HAA5 along with information on five individual species), bromate and chlorite as part of the SYR3 ICR.

Data from the SYR3 ICR show that concentrations at or above the MCLs for TTHM and HAA5 were found in many surface water systems and, to a lesser degree, in ground water systems. Approximately 32 percent of surface water systems and five percent of ground water systems reported at least one instance of TTHM occurrence at a concentration greater than or equal to the MCL of 80 μg/L. For HAA5, approximately 19 percent of surface water systems and two percent of ground water systems reported at least one instance of occurrence at a concentration greater than or equal to the MCL of 60 μg/L. EPA anticipates that many of these peak concentrations will have been significantly lowered based on implementation of the 2006 Stage 2 D/DBPR, which was designed, in part, to lower such occurrences.

Approximately nine percent of systems had one or more samples that were greater than or equal to the bromate MCL of 10 μg/L. Approximately four percent of systems had one or more samples that were greater than or equal to the chlorite MCL of 1,000 μg/L.

The occurrence of six nitrosamine species was evaluated by EPA using data from the UCMR2. These data showed elevated concentrations of nitrosamines (relative to their health reference levels) in multiple drinking water systems, especially N-nitrosodimethylamine (NDMA) in systems that use chloramines (USEPA, 2016o). The Agency is seeking public comment regarding potential approaches that provide enhanced protection from health risks posed by nitrosamines in drinking water systems.

The occurrence of chlorate was evaluated by EPA using data from the UCMR3 (USEPA, 2016j). These data showed that chlorate levels above the health reference level of 210 μg/L occurred frequently in systems that use hypochlorite, chlorine dioxide or chloramines. In addition, EPA evaluated the co-occurrence of chlorite and chlorate and noted that these contaminants often co-occur (USEPA, 2016k). The Agency is seeking public comment regarding potential approaches that provide enhanced protection from health risks posed by chlorite, chlorate and chlorine dioxide. See Section VII for more information.

The American Water Works Association (AWWA), through the Water Industry Technical Action Fund #266, conducted its own survey of post-Stage 2 D/DBPR occurrence for systems that serve more than 100,000 people. Results from the AWWA survey (Samson, 2015) provide an overview of DBP occurrence for 395 systems across 44 states, covering a time period from 1980 to 2015.

In December 2015, EPA issued a proposal for the fourth cycle of the UCMR (80 FR 76897, USEPA, 2015b). That proposal includes provisions for collection of data about unregulated haloacetic acids and related precursors. Such data would help EPA to develop a better understanding of patterns of occurrence for those contaminants.

Overview of Water Quality Indicator Occurrence

The Stage 1 D/DBPR requires that DBP precursors (measured as TOC) be monitored in source and treated drinking water. EPA evaluated compliance monitoring data from surface water systems for TOC in source and treated water, using the SYR3 ICR database. Data from 2011 showed that approximately 70 percent of all plants had average TOC concentrations greater than 2 mg/L in their source water and that approximately 29 percent of plants had average TOC concentrations greater than 2 mg/L in their treated water. Under the Stage 1 D/DBPR, a system is not required to further remove TOC when its treated water TOC level, prior to the point of continuous chlorination, is less than 2 mg/L. The reader is referred to later portions of this document under ''DBP Precursor Removal'' for information about EPA's evaluation of TOC data relative to the Stage 1 D/DBPR TOC removal requirement.

As discussed in the background portion of this section, the D/DBPRs require systems to maintain disinfectant residual levels (reported as free and/or total chlorine) in accordance with the MRDL requirements. EPA evaluated free and total chlorine measurements (collected during coliform sampling) from the SYR3 ICR database and found that very few records exceeded 4.0 mg/L (the MRDL for chlorine and chloramine residuals). Additional information is provided in ''Six-Year Review 3 Technical Support Document for Disinfectants/Disinfection Byproducts Rules'' (USEPA, 2016l).

Treatment Feasibility

During the development of the Stage 1 and Stage 2 D/DBPRs, a variety of technologies were evaluated for their effectiveness, applicability, unintended consequences and overall feasibility for achieving compliance with the TT requirements and MCLs, as well as providing a basis for the BATs (63 FR 69390; 71 FR 388; USEPA, 1998b; 2005a; 2005g; 2006d; 2007b).

Since the Stage 2 D/DBPR, the Agency has identified information that improves our understanding of technologies available for lowering occurrence of and exposure to regulated and unregulated DBPs. The information addresses the full spectrum of drinking water system

operations, including removal of organic precursors to DBPs (measured as TOC), disinfection practices, source water management and localized treatment. The information is briefly discussed below, with additional information in EPA's ''Six-Year Review 3 Technical Support Document for Disinfectants/Disinfection Byproducts Rules'' (USEPA, 2016l). Overall, the information collectively indicates that: (1) Greater removals of DBP precursors can and are being achieved compared to the TT requirement under the Stage 1 D/DBPR; and (2) occurrence of DBPs can be further controlled.

DBP Precursor Removal

The SYR3 ICR database (USEPA, 2016i) includes paired source and treated water TOC data. This information was used to evaluate the extent to which TOC was removed from source waters (*i.e.,* percent removal) relative to the Stage 1 D/DBPR TOC removal requirement (*i.e.,* requirement per the 3x3 matrix, which was established based on three different ranges of raw water TOC and alkalinity levels, respectively). This TT requirement is applicable to surface water systems that have conventional treatment plants, unless such systems meet the alternative criteria (63 FR 69390, USEPA, 1998b). The analytical results of TOC removal (*i.e.,* comparing TOC levels from source water to treated water) can help to characterize national treatment baselines among these treatment plants.

The data show a wide range of percent TOC removal for each combination of raw water TOC and alkalinity levels provided in the Stage 1 D/DBPR TT requirement. The data also indicate that the mean removal for each element of the 3x3 matrix was six to 19 percent greater than the requirement. These observations are consistent with the notion that ''since the Stage 1 D/DBPR does not require that all coagulable dissolved organic matter be removed, there is a potential for additional removal of organic matter beyond that required by the 3x3 matrix'' (McGuire et al., 2014).

Some of the TOC removal greater than the Stage 1 D/DBPR requirement may reflect operational optimization of conventional treatment, including use of innovative coagulants/coagulant aids and/or use of biofiltration (Yan et al., 2008; Hasan et al., 2010; McKie et al., 2015; Azzeh et al., 2015; Delatolla et al., 2015; Pharand et al., 2015). Studies have shown that biological filtration can also reduce precursors of the DBPs other than TTHM/HAA5 (Sacher et al., 2008; Farré et al., 2011; Liao et al., 2014; Krasner et al., 2015). As noted by McGuire et al. (2014), if the removal of precursors for DBPs other than TTHM/HAA5 becomes part of the treatment goals, then performance parameters in addition to TOC may also be needed (*e.g.,* parameters indicating both vulnerability and nitrosamine formation potential).

As was known during development of the Stage 1 and the Stage 2 D/DBPRs, granular activated carbon (GAC) and membranes can be added to existing treatment trains to achieve additional reductions of DBP formation potential. One longstanding issue has been the extent to which organic precursor removal may cause a shift of chlorinated species to more brominated species (as described earlier in this Section under the ''Health Effects'') when the bromide level is relatively high in source water (Summers et al., 1993; Symons et al., 1993). The ICR Treatment Study database (USEPA, 2000b) provides extensive bench- and pilot-scale data by which to evaluate the effects of GAC and membrane removal of TOC and resulting shifts in brominated THMs. EPA's recent analysis of these data generally shows increased percent reduction of brominated THMs as TOC removal by GAC increases (*e.g.,* from a target effluent level of two mg/L to one mg/L), especially for source waters with high bromide concentrations (USEPA, 2016l). It also shows that bromoform formation increases as bromide concentrations increase and that bromoform becomes the dominating species when source water bromide concentrations exceed 200 μg/L.

Disinfection Practices

Various combinations of disinfectants and precursor removal processes have been used to achieve DBP MCLs, while also meeting the requirements of the microbial standards. Data from successive national drinking water datasets (including the DBP ICR, UCMR2 and UCMR3 datasets) show that the percentage of systems using disinfectants other than chlorine has increased during the past two decades, as had been forecasted in the ''Economic Analysis of Stage 2 D/DBPR'' (USEPA, 2005a). For example, data from the UCMR3 (2013–2015) and the DBP ICR (1998) have shown a relative increase in use of chloramines, which is associated with the formation of nitrosamines, as a disinfection practice.

EPA reviewed information related to the extent to which different types of DBPs may form when disinfectants are applied at different points in the treatment train and/or in combination with other disinfectants. EPA recognized that the extent to which occurrence and associated health effects data may be lacking for one group of DBP contaminants versus another, as well as for DBP mixtures, may make treatment decisions challenging when trying to evaluate DBP risk tradeoffs.

Source Water Management

New information shows that source waters with relatively elevated sewage contributions have been associated with increased nitrosamine formation (Westerhoff et al., 2015; Krasner et al., 2013) and that source waters with elevated bromide levels from industrial discharges have been associated with increased brominated THMs (McTigue et al., 2014; States et al., 2013). Such factors as these impacts can increase the challenge of controlling DBPs during treatment and distribution. Weiss et al. (2013) developed a model for making source water selection decisions based on real-time DBP precursor concentrations.

Information shows that bank filtration can reduce dissolved organic carbon (DOC) and nitrogenous DBP precursors (Brown et al., 2015; Krasner et al., 2015), as well as removing pathogens (USEPA, 2016m).

Localized Treatment

Localized treatment in distribution systems, such as aeration in storage tanks, sometimes with the addition of GAC, has also been shown to reduce elevated levels of THMs (Walfoort et al., 2008; Fiske et al., 2011; Brooke and Collins, 2011; Johnson et al., 2009; Duranceau, 2015). Aeration approaches have been most successful in reducing concentrations of chloroform and the more volatile brominated species but may have little impact on less volatile species (Johnson et al., 2009; Duranceau, 2015).

Risk-Balancing

The Agency has considered the risk-balancing aspects of the MDBP rules and has determined that potential revisions to the D/DBPRs could provide greater protection of public health while still being protective of microbial risks. The risk-balancing activities considered by the Agency include those between the microbial and disinfection byproduct rules, as well as those between different groups of DBPs. This includes risk-balancing for the THMs and HAAs included in the D/DBPRs, additional brominated HAAs, nitrosamines identified in the **Federal Register** document for the Preliminary Regulatory Determination 3 (79 FR 62715, USEPA, 2014b) and other DBP groups such as iodinated DBPs. It also

includes risk-balancing for inorganic DBPs such as chlorite and chlorate (79 FR 62715, USEPA, 2014b).

Potential revisions could offer enhanced protection from both regulated and unregulated DBPs. Potential revisions that consider areas such as further constraints on precursors, and/or more targeted constraints on precursors (*e.g.,* based on watershed vulnerabilities), could minimize the formation of harmful DBPs without compromising protection against microbial risks. These potential revisions were identified based on a preliminary, qualitative assessment; it is important to note that further assessment would be an important component of any further rulemaking activities. For example, a watershed vulnerability characterization that includes information about wastewater (*i.e.,* sewage) contributions, land use (point/non-point sources of pollution), and streamflow variations over time (for example, sewage contributions during low flow conditions), could help to inform considerations about DBP formation potentials and possible control strategies.

The Agency is seeking public comment regarding potential revisions to D/DBPR. See Section VII for more information. Further discussion about potential revisions to existing D/DBPRs will occur as part of a separate regulatory development process.

Other Regulatory Revisions

In addition to evaluating information about health effects, analytical feasibility, occurrence and exposure, treatment feasibility and risk-balancing related to the NPDWRs included in the D/DBPRs, EPA considered whether other regulatory revisions are needed, such as revisions to monitoring and system reporting requirements, as a part of the Six-Year Review 3. EPA used the protocol to evaluate which of these implementation issues to consider (USEPA, 2016f). As with the Chemical Phase Rules/Radionuclides Rules, EPA shared the list of identified potential implementation issues with the ASDWA to obtain input from state drinking water agencies concerning the significance and relevance of the issues (ASDWA, 2016). Implementation issues will be considered as part of the activities associated with potential future rulemaking efforts; some of these might be addressed through regulatory revision or clarification, while others might be handled through guidance.

Examples of implementation-related considerations include the following:

Stage 2 D/DBPR Consecutive System Monitoring

Monitoring in some combined distribution systems may be insufficient to adequately characterize DBP exposure. Some large, hydraulically complex combined water distribution systems may be conducting monitoring that is not adequate to characterize exposure throughout the distribution system.

Stage 2 D/DBPR Compliance Monitoring—Chlorine Burn

Compliance monitoring for DBPs in some systems may not fully capture DBP levels to which customers may be exposed during certain portions of the year. Systems that use chloramines as a residual disinfectant (generally as part of a compliance strategy to meet DBP MCLs) often temporarily switch to free chlorine as the residual disinfectant for a period (from two to eight weeks) in order to control nitrification in the distribution system. This practice is commonly called a ''chlorine burn.'' During the chlorine burn, higher levels of DBPs are expected to be formed. Systems often conduct their compliance monitoring outside of the chlorine burn period; and therefore, potentially higher TTHM and HAA5 levels may not be included in compliance calculations.

4. Microbial Contaminants Regulations

Background

Except for the 1989 Total Coliform Rule, which was reviewed under the Six-Year Review 1, this is the first time EPA is conducting a Six-Year Review of the following microbial contaminant regulations:

- Surface Water Treatment Rule (SWTR),
- Interim Enhanced Surface Water Treatment Rule (IESWTR),
- Long Term 1 Enhanced Surface Water Treatment Rule (LT1),
- Long Term 2 Enhanced Surface Water Treatment Rule (LT2),
- Filter Backwash Recycling Rule (FBRR), and
- Ground Water Rule (GWR).

As discussed in Section V, the Initial Review branch of the protocol identifies NPDWRs with recent or ongoing actions and excludes them from the review process to prevent duplicative agency efforts. The cutoff date for the NPDWRs reviewed under the Six-Year Review 3 was August 2008. Based on the Initial Review, EPA excluded the Aircraft Drinking Water Rule, which was promulgated in 2009, and the Revised Total Coliform Rule (RTCR) (the revision of the 1989 TCR), which was promulgated in 2013.

In this document, the SWTR, the IESWTR and the LT1 are collectively referred to as the SWTRs because of the close association among the three rules (IESWTR and LT1 were amendments to the SWTR—additional information provided in Section VI.B.4.a). The LT2 is discussed separately in this document because EPA reviewed the LT2 in accordance with the Six-Year Review requirements and the Executive Order 13563 ''Improving Regulation and Regulatory Review'' (also known as Retrospective Review). Background information on each of the microbial contaminants regulations is presented in the subsequent sections.

The microbial contaminants regulations establish treatment technique (TT) requirements in lieu of MCLs. The review elements of the microbial contaminants regulations are: initial review, health effects, analytical feasibility, occurrence and exposure, treatment feasibility, risk-balancing and other regulatory revisions.

At this time, the SWTRs are being identified as a candidate for regulatory revision, but the LT2, the FBRR and the GWR are not. A summary of review findings of each rule is described in the subsequent sections. Additional information is provided in the ''Six-Year Review 3 Technical Support Document for Microbial Contaminant Regulations'' (USEPA, 2016n) and the ''Six-Year Review 3 Technical Support Document for Long-Term 2 Enhanced Surface Water Treatment Rule'' (USEPA, 2016m).

a. SWTRs

Background

EPA promulgated the SWTR in June 1989. It requires all water systems using surface water sources or ground water under the direct influence of surface water (GWUDI) sources (also known as Subpart H systems) to remove (via filtration) and/or inactivate (via disinfection) microbial contaminants (54 FR 27486, USEPA, 1989). Under the SWTR, EPA established NPDWRs for *Giardia,* viruses, *Legionella,* turbidity and heterotrophic bacteria and set MCLGs of zero for *Giardia lamblia,* viruses and *Legionella.* Under the IESWTR (63 FR 69477, USEPA, 1998c) and the LT1 (67 FR 1812, USEPA, 2002c), EPA established an NPDWR for *Cryptosporidium* and set an MCLG of zero.

The SWTRs established TT requirements in lieu of MCLs in these NPDWRs. The 1989 SWTR established TT requirements for systems to control *G. lamblia* by achieving at least 99.9 percent (3-log) removal/inactivation by

filtration and/or disinfection, and to control viruses by achieving at least 99.99 percent (4-log) removal/inactivation (54 FR 27486, USEPA, 1989). For a few systems able to meet source water criteria and site-specific conditions (*e.g.,* protective watershed control program and other conditions), they were permitted to achieve the TT requirements by using disinfection only.

The SWTR also established TT requirements for disinfectant residuals (54 FR 27486, USEPA, 1989). The residual disinfectant concentration at the entry point to the distribution system may not be less than 0.2 mg/L for more than four hours. The residual disinfectant concentration in the distribution system ''cannot be undetectable in more than 5 percent of the samples each month, for any two consecutive months that the system serves water to the public.'' (40 CFR 141.72). A detectable residual may be established by: (1) an analytical measurement or (2) having a heterotrophic bacteria concentration less than or equal to 500 per mL measured as heterotrophic plate count (HPC). The purpose of these disinfectant residual requirements was to:

- Ensure that the distribution system is properly maintained and identify and limit contamination from outside the distribution system when it might occur,
- Limit growth of heterotrophic bacteria and *Legionella* within the distribution system, and
- Provide a quantitative limit, which if exceeded would trigger remedial action.

The SWTR also established sanitary survey requirements. The purpose of the sanitary survey requirements, which include consideration of distribution system vulnerabilities, is to identify water system deficiencies that could pose a threat to public health and to permit correction of such deficiencies.

As part of the development of the SWTR, EPA needed to clarify which systems would be regulated under Subpart H. In particular, EPA needed to clarify when systems that could be considered as ground water systems were more appropriate to regulate as surface water systems (for example, systems where the drinking water intake was in a riverbed, not in the river). Thus, to identify a system as either ground or surface water, the SWTR defined ''ground water under the direct influence of surface water (GWUDI).'' GWUDI is any water beneath the surface of the ground with: (1) significant occurrence of insects or other macroorganisms, algae or large-diameter pathogens such as *Giardia lamblia,* or (2) significant and relatively rapid shifts in water characteristics such as turbidity, temperature, conductivity or pH that closely correlate to climatological or surface water conditions. The final SWTR defined GWUDI as being regulated as surface waters because *Giardia* contamination of infiltration galleries, springs and wells have been found (Hoffbuhr et al., 1986; Hibler et al., 1987). Some contamination of springs and wells have resulted in giardiasis outbreaks (Craun and Jakubowski, 1986). Direct influence was to be determined for individual sources in accordance with criteria established by the state (54 FR 27486, USEPA, 1989). The GWUDI designation identifies PWSs using ground water that must be regulated as if they are surface water systems. All other PWSs using ground water are regulated by the GWR.

Surface water and GWUDI systems use concentration x time (CT) tables published by EPA to determine log-inactivation credits for the use of a disinfectant to meet the disinfection TT requirements. The ''SWTR Guidance Manual'' provides CT tables for *Giardia* and virus inactivation by free chlorine, chloramines, ozone and chlorine dioxide (USEPA, 1991). EPA obtained these CT values from bench-scale experiments with hepatitis A virus (HAV).

The IESWTR applies to all PWSs using surface water, or GWUDI, which serve 10,000 or more people. The IESWTR established TT requirements for *Cryptosporidium* by requiring filtered systems to achieve at least a 99 percent (two-log) removal, revising the definition of GWUDI and watershed control program under the SWTR to include *Cryptosporidium,* requiring sanitary surveys for all surface water and GWUDI systems, and setting disinfection profiling and benchmarking requirements to prevent increases in microbial risk while systems complied with the Stage 1 D/DBPR. The LT1 (67 FR 1812, USEPA, 2002c) extended the requirements from the IESWTR to systems serving fewer than 10,000 people.

Summary of Review Results

EPA identified the following NPDWRs under the SWTR as candidates for revision under the Six-Year Review 3 because of the opportunity to further reduce residual risk from pathogens (including opportunistic pathogens such as *Legionella*) beyond the risk addressed by the current SWTR:

- *Giardia lamblia,*
- heterotrophic bacteria,
- *Legionella,*
- viruses, and
- *Cryptosporidium* (also under IESWTR and LT1).

This result is based on a scientific review of available information, following the protocol described in Section V. Based on the availability of new information, the review focused on the following major provisions of the SWTRs:

- Requirements to maintain a minimum disinfectant residual in the distribution system,
- GWUDI classification, and
- CT criteria for virus disinfection.

Collectively, the new information suggests an opportunity to revise the TT provisions of the SWTRs to provide greater protection of public health. More detailed information about the review results related to the major provisions of the SWTRs is provided in the following subsections.

Requirements To Maintain a Minimum Disinfectant Residual in the Distribution System

EPA evaluated information related to the maintenance of a minimum disinfectant level in the distribution system and determined that there is an opportunity to reduce residual risk from pathogens (includes opportunistic pathogens such as *Legionella*) beyond the risk addressed by the SWTRs. The detectable concentration of disinfectant residual in the distribution system may not be adequately protective of microbial pathogens because of concerns about analytical methods and the potential for false positives (Wahman and Pressman, 2015; Westerhoff et al., 2010). Maintaining a disinfectant residual above a set numerical value in the distribution system may improve public health protection from a variety of pathogens. Such a change could have benefits for controlling occurrence of all types of pathogens in distribution systems, except for those most resistant to disinfection, such as *Cryptosporidium.*

Given our understanding of the distribution system vulnerabilities (*e.g.,* NRC, 2006b), there may be opportunities to enhance the criteria for indicating distribution system integrity, as well as the potential health risk that may be associated with pathogens potentially growing and released from biofilms. These opportunities include revisiting the distribution system disinfectant residual criteria and revisiting the existing alternative HPC criteria. The NRC report (2006b) describes that water quality integrity is an important factor that water professionals must take into account for the protection of public health, and that the sudden loss of disinfectant residuals

can indicate a change in water quality or system characteristics. However, the report was inconclusive on the level of disinfectant residual that should be provided in distribution systems.

GWUDI Classification

EPA reviewed information on disease outbreaks, a randomized controlled intervention study, pathogenic protozoan occurrence data and studies evaluating parasitic protozoan removal surrogates and hydrogeologic studies, all of which were completed since the SWTR was published. The information suggests that there is an opportunity to provide greater public health protection by improved identification of unrecognized GWUDI PWSs. The data suggest that the SWTR regulation and guidance has performed well in identifying GWUDI for the PWS systems most at risk from *Giardia* and *Cryptosporidium* presence in ground water. However, the information (*e.g.,* Colford et al., 2009) suggests that a subset of GWUDI systems are also at risk but are potentially misclassified as ground water systems, and therefore, not subject to requirements that provide protection against parasitic protozoans. Improved public health protection may result if there is improved recognition of GWUDI systems, including those that may disinfect but do not provide engineered filtration or have not conducted a demonstration of performance to document the necessary *Cryptosporidium* alternative treatment and removal required under the LT2. The potential public health improvement is most relevant to those systems that have a large surface water component and poor subsurface removal capabilities but are not yet recognized as GWUDI and warrants further examination in any rulemaking activities.

EPA suggests that the number of potentially misclassified GWUDI PWSs may be estimated by: (1) waterborne disease outbreak compilations, (2) the UCMR3 occurrence data (aerobic spore detections and concentrations), and (3) the SYR2 ICR and the SYR3 ICR (total coliform detections). EPA's preliminary characterization of the number of the potentially misclassified GWUDI PWSs is described in the ''Six-Year Review 3 Technical Support Document for Microbial Contaminant Regulations'' (USEPA, 2016n).

CT Criteria for Virus Disinfection

EPA evaluated whether the current CT criteria based on hepatitis A virus (HAV) are sufficiently protective against other types of viruses. EPA reviewed disinfection studies relevant to the CT tables published in the ''1991 SWTR Guidance Manual'' (USEPA, 1991). Over the years, many studies have indicated that HAV is less chlorine-resistant than some enteroviruses, such as Coxsackie virus B5 (Black et al., 2009; Cromeans et al., 2010; Keegan et al., 2012), and also less chloramine-resistant than adenovirus (Sirikanchana et al., 2008; Hill and Cromeans, 2010). Based on this review, EPA identified a potential need to update CT values for virus inactivation by free chlorine or chloramines, particularly for water with a relatively high pH. This assessment is also relevant to the LT2 and the GWR, which refer to the same CT tables in the original ''1991 SWTR Guidance Manual.''

Health Effects

This section summarizes EPA's review of the information related to human health risks from exposure to microbial contaminants in drinking water. EPA evaluated whether any new toxicological data, or waterborne endemic infection or infectious disease information, would justify modifying the MCLGs. EPA reviewed information that included data from the Waterborne Disease and Outbreak Surveillance System (WBDOSS) collected by the Centers for Disease Control and Prevention (CDC) (*http://www.cdc.gov/healthywater/surveillance/drinking-surveillance-reports.html*) and other available data that documents drinking water-associated outbreaks.

MCLGs

The SWTRs set MCLGs of zero for *Giardia lamblia,* viruses, *Cryptosporidium,* and *Legionella* since any exposure to these microbial pathogens presents a potential health risk. In the Six Year Review 3, EPA did not identify new information related to potentially revising these MCLGs. New dose-response data from some waterborne pathogens are available from both human and animal exposure studies (Teunis et al., 2002a; 2002b; Armstrong and Haas, 2007; 2008; Buse et al., 2012). Concurrently, new models seek to use the new data to provide improved infectivity, morbidity and mortality predictions (Messner et al., 2014; USEPA, 2016m). The newer models are specifically designed to address low dose exposure typical of drinking water rather than high dose exposure typical of food ingestion or vaccine studies.

Waterborne Disease Outbreaks Associated With Drinking Water

EPA reviewed information from the Waterborne Disease and Outbreaks Surveillance System about the occurrences and causes of drinking water-associated outbreaks. This surveillance system is the primary source of data concerning such outbreaks in the U.S. (Beer et al., 2015). The drinking water-associated outbreak data from 1971–2012 illustrate that there is an observable reduction of reported outbreaks over that time frame, which may be, at least in part, due to the implementation of the TCR and the SWTR beginning in 1991.

Although the historic number of drinking water-associated outbreaks is declining, CDC notes that the level of surveillance and reporting activity, as well as reporting requirements, varies across states and localities. For these reasons, outbreak surveillance data likely underestimate actual values, and should not be used to estimate the total number of outbreaks or cases of waterborne disease (Beer et al., 2015).

Deficiencies at private wells and premise plumbing systems are increasingly responsible for disease outbreaks associated with drinking water (Beer et al., 2015). Premise plumbing is the portion of the distribution system from the water meter to the consumer tap in homes, schools, and other buildings (NRC, 2006b). In 2011–2012, the two most frequent deficiencies related to drinking-water-associated outbreaks were *Legionella* in premise plumbing systems (66 percent) and untreated ground water (13 percent) (Beer et al., 2015).

In addition to epidemic illness, sporadic illness (*i.e.,* isolated cases not associated with an outbreak) accounts for an unknown but probably significant portion of waterborne disease and is more difficult to recognize (71 FR 65573, USEPA, 2006b).

Collectively, the data indicate that outbreaks associated with drinking water may have been reduced as a result of drinking water regulations. However, opportunities remain to address disease outbreaks associated with distribution systems and untreated ground water and, at the same time, to potentially address some of the waterborne disease outbreaks associated with little to no disinfectant residual in the distribution system (Geldreich et al., 1992; Bartrand et al., 2014).

The precise burden of disease is not well quantified. Five primarily waterborne diseases (giardiasis, cryptosporidiosis, Legionnaires' disease, otitis externa, and non-tuberculous mycobacterial infection) were responsible for over 40,000 hospitalizations per year at a cost of nearly $1 billion per year (Collier et al.,

2012). Given this information, there are opportunities for substantial cost savings if such incidence can be reduced through better risk management. Most of these costs are attributed to *Legionella* and non-tuberculous mycobacteria. These bacteria can proliferate under favorable conditions at locations in the premise plumbing and in some parts of the distribution system that are further from the central parts of the system, where water has aged the longest and where there may be very little to no disinfectant residual. Further, the quality of the water delivered to building systems and households can affect these pathogens' ability for growth and disease transmission. There are opportunities to enhance the current disinfectant residual requirements to more effectively kill pathogens or contain their growth, and to better indicate, through a stronger signal of the absence of a residual, when targeted improvements to treatment practices or distribution conditions may provide greater public health protection.

GWUDI-Related Disease Outbreaks

Wallender et al. (2014) summarized CDC outbreak data for the years 1971–2008 and determined that GWUDI was a ''contributing factor'' in 11 percent (six percent with *Giardia* etiology) of all outbreaks using untreated ground water. The total number of untreated ground water outbreaks during this time period was 248. Three quarters of the outbreaks involved PWSs. These findings indicate that some of the ground water systems examined by CDC that are not currently required to disinfect are contaminated with pathogens. Reclassifying these potentially ''unrecognized'' GWUDI PWSs may provide greater public health protection against microbial contamination because these PWSs would be subject to stricter requirements. As an example, a 2007 outbreak of giardiasis occurred in a New Hampshire community (205 homes) using untreated ground water (Daly et al., 2010). This GWUDI misclassification-related outbreak was the largest giardiasis drinking water-associated outbreak in the preceding 10 years.

Randomized Controlled Intervention Study

A randomized, controlled, triple-blinded drinking water intervention study was conducted in Sonoma County, California (Colford et al., 2009). The purpose of the study was to determine the proportion of acute gastrointestinal illnesses (AGI) attributable to drinking water. Sonoma County obtained water from five horizontal collector wells along the Russian River, four regulated as ground water and one regulated as GWUDI (part of the year). Colford et al. (2009) found that highly credible AGI in the population aged 55 and over was attributable to drinking water exposure. Illness occurred even though the water utility met all federal, state and local drinking water regulations.

Pathogenic Protozoa Occurrence in Ground Water

In a karst aquifer in France, 18 ground water samples were taken from the Norville (Haute-Normandie) public water supply well (5,000 customers, chlorine treatment) and tested for *Cryptosporidium* oocysts. Thirteen of the 18 samples were found to be *Cryptosporidium* positive by solid-phase cytometry; the maximum concentration was four oocyst per 100 L (Khaldi et al., 2011). These data show that *Cryptosporidium* in karst ground water includes, for some highly vulnerable systems, *Cryptosporidium* occurrence resulting from poor *Cryptosporidium* removal during infiltration from the surface rather than poor removal during induced infiltration from nearby surface water. Because the SWTR definition assumes that all *Cryptosporidium* in PWS wells is transported from adjacent surface water, it is silent on the issue of *Cryptosporidium* transport directly from the surface, as apparently was the case in Norville, France. Karst aquifers are a vital ground water resource in the U.S. According to the USGS, about 40 percent of the ground water used for drinking water comes from karst aquifers (USGS, 2004).

Analytical Feasibility

Analytical Methods for Chlorine Residuals

Because of concerns about analytical methods and the potential for false positives, the detectable concentration of disinfectant residuals in the distribution system may not be adequately protective of microbial pathogens. To further inform these concerns, EPA reviewed analytical methods that have been approved for free chlorine, total chlorine and chlorine dioxide under the SWTR and the D/DBPRs. Nearly all utilities use either the DPD (*N,N*-diethyl-*p*-phenylenediamine) or amperometric titration methods to measure distribution system disinfectant residual, and these measurements are generally performed in the field (Wahman and Pressman, 2015). A number of constituents can interfere with measurements of disinfectant residuals. In general, most strong oxidants will interfere with measurement of chlorine. In addition, color, turbidity and particles will also interfere with colorimetric techniques such as DPD.

For some systems using chloramines (a mixture of biocidal inorganic chloramines, of which monochloramine is the most effective), the presence of organic chloramines can be problematic since these related compounds have minimal biocidal properties, they can interfere with residual monitoring, and they can give the false impression that the finished water contains more active disinfectant than is actually present (Wahman and Pressman, 2015; Westerhoff et al., 2010). Organic chloramines will continue to form in the distribution system while inorganic chloramines decay, and thus areas of the distribution system with relatively high water ages may have residuals containing a significant amount of organic chloramines (Wahman and Pressman, 2015).

In addition, EPA reviewed research published regarding potential improvements to methods or technologies used in the determination of free or total chlorine (Dong et al., 2012; Tang et al., 2014; Saad et al., 2005). Analytical methods that can measure inorganic chloramines without the organic chloramine interferences are available, but not approved for determining compliance with NPDWRs. Field test kits based on the indophenol method are available that can specifically measure monochloramine without inclusion of mass from dichloramine or organic chloramines (Lee et al., 2007).

Use of Aerobic Spores as Pathogenic Protozoa Surrogates

EPA's existing microbial contaminants regulations require monitoring of pathogenic protozoa in source water (*e.g., Cryptosporidium*) and microorganisms that indicate a possible pathway for contamination (*e.g.,* total coliform, *E. coli*). In this Six-Year Review, EPA evaluated additional microorganisms that could be used to identify PWSs most at risk from *Cryptosporidium* in ground water. New data suggest that aerobic spores are useful surrogates for *Cryptosporidium* occurrence and removal. Aerobic spores originate in shallow soil. The spore presence in a sample from a PWS well indicates that there is a pathway for water infiltration into the well, either vertically from the surface or horizontally from nearby surface water.

EPA previously used aerobic spores as surrogate measures of *Cryptosporidium* removal by alternative treatment in a demonstration of field performance (USEPA, 2010f). Field demonstrations showed that the spores performed well in demonstrating two-log removal of *Cryptosporidium* at Casper, Wyoming, and Kennewick, Washington (USEPA, 2010f). Spores also performed well in demonstrating that a Nebraska PWS was unable to achieve better than two-log removal of *Cryptosporidium,* and that UV or other engineered treatment would be required (State of Nebraska, 2013). Headd and Bradford (2015) summarized the relevant scientific literature, conducted spore and *Cryptosporidium* laboratory experiments, and performed porous media transport modeling. They found that spores are suitable *Cryptosporidium* surrogates in ground water. These new data suggest that aerobic spores are useful as surrogates for *Cryptosporidium* removal estimates via subsurface passage (USEPA, 2010f) and may be useful as supplemental surrogates to improve recognition of GWUDI systems.

Locas et al. (2008) found that aerobic spores were present in six of nine wells sampled in Quebec, Canada, and in 45 of 109 samples taken. The authors conclude that aerobic spore presence is an indicator of a change in water quality and warrants further investigation to determine the source of potential contamination.

In EPA's investigation of virus occurrence in untreated PWS wells under the UCMR3, 252 of 793 wells (317 of 1,047 samples) were positive for aerobic spores (USEPA, 2016j). Measured concentrations spanned three orders of magnitude, with about three percent having over 100 spore-forming units per 100 ml). Because aerobic spores originating in soil are found in GWUDI and ground water PWS wells, the UCMR3 data suggest that aerobic spores could be used as an indicator of the susceptibility of PWS wells to surface water infiltration. Together with other indicators and/or parasitic protozoa data from PWS wells, newer methods including spores (occurrence, concentration, and/or removal estimates) might be useful in identifying unrecognized GWUDI PWS wells. The LT2 Toolbox Guidance Manual identified aerobic spores as the indicator to determine *Cryptosporidium* removal for systems using bank filtration for LT2 additional treatment requirements (USEPA, 2010f).

Occurrence and Exposure

Coliform and/or *E. coli* occurrence can be an indication of conditions supporting bacterial growth or an intrusion event into the distribution system. On the other hand, the absence of coliforms and/or *E. coli* does not necessarily mean the absence of pathogens that are more resistant to the disinfectant residual. Detection of coliform bacteria is commonly associated with low distribution system disinfectant residuals. According to LeChevallier et al. (1996), disinfectant residuals of 0.2 mg/L or more of free chlorine, or 0.5 mg/L or more of total chlorine, are associated with reduced levels of coliform bacteria.

To assess the relationship between disinfectant residual and occurrence of indicators for pathogens in distribution systems, EPA evaluated information about chlorine residuals and total coliforms and *E. coli* (TC/EC) using compliance monitoring data from the SYR3 ICR database. EPA paired TC/EC results with field chlorine residual data collected at the same time and location. It is important to note that these evaluations help to inform the SYR3 results, but do not assess compliance with regulatory standards.

EPA found that there was a lower rate of occurrence of both TC and EC as the free or total chlorine residual increased to higher levels (note: total chlorine is often used as a measure for systems that use chloramines). For example, the TC positive rate was less than one percent when chlorine residuals were equal to or greater than 0.2 mg/L of free chlorine or 0.5 mg/L of total chlorine. This relationship between chlorine residuals and occurrence of TC and EC was similar to that reported by the Colorado Department of Public Health and Environment (Ingels, 2015).

A disinfectant residual also serves as an indicator of the effectiveness of distribution system best management practices. Best management practices include flushing, storage tank maintenance, cross-connection control, leak detection and effective pipe replacement and repair practices. The effective implementation of best management practices helps water suppliers to lower chlorine demand and maintain an adequate disinfectant residual throughout the distribution system. These same practices can also help control DBP formation.

Treatment Feasibility

EPA reviewed new information related to the TT requirements in the SWTR and identified the following treatment-related topics that support potential revisions to the SWTRs to improve public health protection:

- Detectable residual for systems using chloramine disinfection,
- State implementation of disinfection residual requirements,
- Disinfectant residuals for control of *Legionella* in premise plumbing systems,
- HPC alternative to detectable residual measurement, and
- CT criteria for viruses.

In addition, EPA reviewed key findings by the Research and Information Collection Partnership (RICP) on drinking water distribution system issues and research and information needs. The RICP is a working group formed on the recommendation of the Total Coliform Rule Distribution System Advisory Committee to identify specific high-priority research and information collection activities and to stimulate water distribution system research and information collection (USEPA, 2008b; USEPA and Water Research Foundation, 2016).

Detectable Residual for Systems Using Chloramine Disinfection

As discussed in the background portion of this section, for surface water systems or GWUDI systems, the SWTR requires that a disinfectant residual cannot be undetectable in more than five percent of samples each month for any two consecutive months.

EPA identified two issues that have implications for the protectiveness of allowing a detectable residual as a surrogate for bacteriological quality: Organic chloramines and nitrification. Organic chloramines affect the effectiveness of disinfectant residuals because they: (1) Form during the use of free chlorine or chloramines, (2) interfere with commonly used analytical methods for free and total chlorine measurements, and (3) are poor disinfectants compared to free chlorine and monochloramine (Wahman and Pressman, 2015).

Because chloramination involves introduction of ammonia into drinking water, and decomposition of chloramines can further release ammonia in the distribution system, chloramine use comes with the risk of distribution system nitrification (*i.e.,* the biological oxidation of ammonia to nitrite and eventually nitrate). Drinking water distribution system nitrification is undesirable and can result in water quality degradation. Information shows that maintaining a high enough level of total chlorine or monochloramine residuals in the distribution system can help prevent both nitrification and residual depletion (Stanford et al, 2014).

State Implementation of Disinfectant Residual Requirements

States may adopt federal drinking water regulations or promulgate more stringent drinking water requirements, including those for disinfectant residuals. Preliminary information shows that 26 states require a detectable disinfectant residual in the distribution system. Twenty of these 26 states require a minimum free chlorine residual of 0.2 mg/L or more (Ingels, 2015; Wahman and Pressman, 2015). Five of the 20 states set standards even more stringent than 0.2 mg/L: Louisiana requires at least 0.5 mg/L free chlorine in its emergency rule, while Florida, Illinois, Iowa, and Delaware require 0.3 mg/L. For minimum total chlorine residual, state requirements vary from 0.05 mg/L (New Jersey) to 1.00 mg/L or higher (Kansas, Oklahoma, Iowa, Ohio, and North Carolina). North Carolina has a numeric requirement for total chlorine residual but not for free chlorine residual.

Colorado has amended its minimum disinfectant residual requirements in the distribution system to be greater than or equal to 0.2 mg/L, effective April 1, 2016 (Ingels, 2015). Pennsylvania recently proposed to strengthen its disinfectant residual requirements by increasing the minimum disinfectant residual in the distribution system to 0.2 mg/L free or total chlorine (Pennsylvania Bulletin, 2016). Louisiana's Emergency Distribution Disinfectant Residual Rule was established in 2013 to control *Naegleria fowleri,* an amoeba found in several PWSs. That rule requires a minimum free or total chlorine disinfectant level of 0.5 mg/L to be maintained at all times in finished water storage tanks and the entire distribution system (Louisiana Department of Health and Hospitals, 2013). The state agency intends to continue to renew the Emergency Rule until a final rule can be promulgated (Louisiana Department of Health and Hospitals, 2014).

Disinfectant Residuals for Control of *Legionella* in Premise Plumbing Systems

Since the reporting of disease outbreaks due to *Legionella* began in 2001, *Legionella* has been shown to cause more drinking-water-related outbreaks than any other microorganism. Addressing premise plumbing issues is particularly challenging. Premise plumbing may be largely outside of water utilities' operations and management control. Also, the characteristic features of premise plumbing (*e.g.,* low disinfectants residuals, stagnation, and warm temperature) tend to support growth and persistence of opportunistic pathogens.

Studies indicate that distribution systems can play a role in influencing the transmission and contamination of *Legionella* in premise plumbing systems (Lin et al., 1998; States et al., 2013). Hospitals served by PWSs using chloramines reported fewer outbreaks of legionellosis than those using free chlorine (Kool et al., 1999; Heffelginger et al., 2003). Some building systems supplied by PWSs which have switched to chloramines have seen marked reduction in the colonization of *Legionella* (Flannery et al., 2006; Moore et al., 2006). One implication of these studies is the importance of being able to reliably measure and sustain chloramine residuals to increase the likelihood of its effectiveness at controlling *Legionella* in premise plumbing systems. On the other hand, some studies have indicated that the occurrence of another pathogen, non-tubercular *Mycobacterium,* may increase under chloramination conditions (Pryor et al., 2004; Moore et al., 2006; Duda et al., 2014).

Legionella species can multiply in warm, stagnant water environments, such as in community water storage tanks with low disinfectant residuals during warm months. Cohn et al. (2014) observed increased incidence of legionellosis among institutions and private homes near a community water storage tank when the disinfectant residual in the storage tank dropped (from greater than 0.2 mg/L to less than 0.2 mg/L) during hot summer months. Based on these findings, the authors recommended that, regardless of total coliform occurrence, remedial actions be taken (*e.g.,* flushing of mains, checking for closed valves that can result in hydraulic dead-ends, and possibly installing re-chlorination stations) when low chlorine residuals are observed during hot summer months. They also noted that this storage tank had been cleaned subsequent to the outbreak (Cohn et al., 2014; Ashbolt, 2015).

To help address concerns about *Legionella,* EPA developed a document entitled ''Technology for Legionella Control in Premise Plumbing Systems: Scientific Literature Review'' (USEPA, 2016r). The document summarizes information about the effectiveness of different approaches to control *Legionella* in a building's premise plumbing system. EPA expects that use of this document will further improve public health by helping primacy agencies, facility maintenance operators, and facility owners make science-based risk management decisions regarding treatment and control of *Legionella* in buildings.

EPA also reviewed the scientific literature on the effectiveness of disinfectant residuals at controlling biofilm growth. Many factors influence the concentration of the disinfectant residual in the distribution system; and therefore, the ability of the residual to control microbial growth and biofilm formation. These factors include the level of assimilable organic carbon (AOC), the type and concentration of disinfectant, water temperature, pipe materials, and system hydraulics.

Problems associated with biofilms in distribution systems include enhanced corrosion of pipes and deterioration of water quality. Biofilms can provide ecological niches that are suited to the potential survival of pathogens (Walker and Morales, 1997; Baribeau et al., 2005; Behnke et al., 2011; Wang et al., 2012; Biyela et al., 2012; Revetta et al., 2013; Ashbolt, 2015). The biofilm can protect microorganisms from disinfectants and can enhance nutrient accumulation and transport (Baribeau et al., 2005).

HPC Alternative to Detectable Residual Measurement

Under the SWTR, a system may demonstrate that its HPC levels are less than 500 per mL, at any sampling locations, in lieu of demonstrating the presence of a detectable disinfectant residual at that location, per primacy agency approval. EPA reviewed new information that suggests development of criteria which may be more protective than the HPC criterion. For example, criteria used in the Netherlands for systems operating without a distribution system disinfectant residual provides an example of an alternative criteria than the HPC criterion. In the Netherlands, chlorine is not used routinely for primary or secondary disinfection. Dutch water systems use the following general approach to control microbial activity in the distribution system without a disinfectant residual (Smeets et al., 2009): Produce a biologically stable drinking water; use distribution system materials that are non-reactive and biologically stable; and optimize distribution system operations and maintenance practices to prevent stagnation and sediment accumulation. For the determination of a biologically stable water they use AOC as an indicator.

CT Criteria for Virus Disinfection

EPA reviewed new disinfection studies published since the release of the original CT tables. Collectively, the data in the recent literature indicate that

EPA CT values for free chlorine disinfection are sufficient to inactivate most enteric viruses in drinking water, except for Coxsackie virus B5 at a pH higher than 7.5 (Black et al., 2009; Cromeans et al., 2010; Keegan et al., 2012).

EPA's CT values for chlorine incorporate a safety factor of three to account for differences between dispersed and aggregated hepatitis A virus and between buffered, demand-free water and environmental water. In light of new information about the hepatitis A virus and the effects of source water quality on chlorine disinfection, EPA concludes that the safety factor of three should be re-evaluated to ensure its adequacy. A larger safety factor (thus higher EPA CT values) is expected to enhance waterborne pathogen control but could lead to higher DBP formation and warrants further examination in any rulemaking activity.

Adenovirus is the virus that is most resistant to chloramines, through it is very susceptible to free chlorine disinfection. Several studies revealed that monochloramine disinfection might not provide adequate control of adenovirus in drinking water, particularly in waters with relatively high pH and at low temperature (Sirikanchana et al., 2008; Hill and Cromeans, 2010).

Research and Information Collection Partnership Findings

The RICP partners are EPA and Water Research Foundation. EPA examined information from the 10 high priority RICP areas in the context of the Six-Year Review, particularly information related to the effectiveness of sanitary survey and corrective action requirements under the IESWTR. However, EPA found limited information that would shed light on the frequency and magnitude of distribution system vulnerability events (*e.g.,* backflow events, storage tank breeches), associated risk implication, and costs for preventing such events from occurring. The RICP report identifies potential follow-up research areas that could help to address these gaps (USEPA and Water Research Foundation, 2016).

Risk-Balancing

The Agency has considered the risk-balancing aspects of the MDBP rules and has determined that potential revisions to the SWTRs could provide improved health protection. The risk-balancing activities considered by the Agency include those between the microbial and disinfection by-product rules, as well as those between different groups of DBPs. This includes balancing the reduction in risks from microbial pathogens should there be additional requirements to maintain a disinfectant residual with the increased risk from D/DBPs resulting from such requirements. EPA also considered the potential impact of further constraints on DBP precursors on the reduction of demand for disinfectant residual. The risk-balancing review was based on a preliminary, qualitative assessment of unintended consequences; it is important to note that further assessment of such consequences would be an important component of any further rulemaking activities.

b. LT2

Background

EPA promulgated the LT2 on January 5, 2006 (71 FR 654, USEPA, 2006c). The LT2 applies to all PWSs that use surface water or ground water under the direct influence of surface water as drinking water. The LT2 builds upon the IESWTR and the LT1 by improving control of microbial pathogens, specifically the contaminant *Cryptosporidium.* The purpose of the LT2 is to reduce illness linked with the contaminant *Cryptosporidium* and other disease-causing microorganisms in drinking water. The LT2 supplements the IESWTR and the LT1 regulations by establishing additional *Cryptosporidium* treatment requirements for higher-risk systems. The LT2 requires source water occurrence monitoring which is used to determine additional treatment requirements. The LT2 rule provides for additional CT credits for *Cryptosporidium* inactivation by ozone and chlorine dioxide. The LT2 also provides UV treatment credits for *Cryptosporidium, Giardia* and virus inactivation. EPA recognized that research in the field of *Cryptosporidium* inactivation is ongoing and included a provision in the rule that allows unfiltered systems using a disinfectant other than chlorine to demonstrate the log inactivation that can be achieved.

The LT2 also contains provisions to reduce risks from uncovered finished water reservoirs (UCFWRs).[5] The rule ensures that systems maintain microbial protection when they take steps to decrease the formation of disinfection byproducts in systems that add a chemical disinfectant (*i.e.,* other than UV light) or receive a chemically disinfected water. Storage of treated drinking water in open reservoirs can lead to significant water quality degradation and health risks to consumers (USEPA, 1999). Examples of such water quality degradation include increases in algal cells, coliform bacteria, heterotrophic bacteria, particulates, disinfection byproducts, metals, taste and odor, insect larvae, *Giardia, Cryptosporidium* and nitrate (USEPA, 1999). Contamination of reservoirs occurs through surface water runoff, bird and animal wastes, human activity, algal growth, airborne deposition and insects and fish.

The LT2 requires PWSs using uncovered finished water storage facilities to either cover the storage facility or treat the storage facility discharge (*i.e.,* prior to entering the distribution system) to achieve inactivation and/or removal of 4-log virus, 3-log *G. lamblia,* and 2-log *Cryptosporidium* spp. on a state-approved schedule.

Under the LT2, PWSs were required to notify their state/primacy agency by April 1, 2008, if they used UCFWRs. Additionally, the LT2 required all PWSs to either meet the requirement to cover the UCFWR, or treat the UCFWR discharge to the distribution system or be in compliance with a state-approved schedule for meeting these requirements no later than April 1, 2009. Under this review, EPA evaluated published information to assess whether allowing a state-approved risk management plan would justify revisions to the LT2.

Summary of Review Results

Information available since promulgation of the LT2 either supports the current regulatory requirements or does not justify a revision. EPA determined that no regulatory revisions to the UCFWR requirements of the LT2 are warranted at this time based on the review of available information.

Health Effects

EPA reassessed the health risks resulting from exposure to *Cryptosporidium* spp., *Giardia lamblia* and viruses, as well as other potential microbiological risks to human health. The Agency also reviewed new information on other pathogens of potential concern to determine whether additional measures are warranted to provide greater public health protection from these pathogens, particularly in the context of the UCFWR provisions of the LT2.

The principal objectives of this health effects review were to: (1) Evaluate whether there are new or additional ways to estimate risks from *Cryptosporidium* and other pathogenic microorganisms in drinking water and

[5] LT2 uses the term 'facilities'' instead of 'reservoirs'. The term reservoirs is used in this document.

(2) evaluate surveillance and outbreak data on *Cryptosporidium* and other contaminants of potential concern. Based on the review, the new information does not justify a revision to the health basis for the LT2 at this time. For more information regarding EPA's review of health effects, see the ''Six-Year Review 3 Technical Support Document for Long-Term 2 Enhanced Surface Water Treatment Rule'' (USEPA, 2016m).

Analytical Feasibility

The LT2 specifies approved analytical methods to determine the levels of *Cryptosporidium* in source waters for the identification of additional treatment needs. The LT2 requires systems and/or laboratories to use either ''Method 1622: *Cryptosporidium* in Water by Filtration/IMS/FA'' (EPA 815–R–05–001, USEPA, 2005d) or ''Method 1623: *Cryptosporidium* and *Giardia* in Water by Filtration/IMS/FA'' (EPA 815–R–05–002, USEPA, 2005e). EPA Methods 1622 or 1623 is used in monitoring programs to characterize *Cryptosporidium* levels in the source water of PWSs for the purposes of risk-targeted treatment requirements under the LT2. Method recoveries of more than 3,000 matrix spiked samples from the first round of monitoring for the LT2 indicated an average recovery of oocysts with Methods 1622 and 1623 to be 40 percent. In addition to evaluating the results from the first round of monitoring, EPA gathered new information on *Cryptosporidium* analytical methods by investigating improvements to Methods 1622 and 1623. EPA evaluated whether the required use of a revised method (Method 1623.1) would be justified for Round 2 monitoring under the LT2. Though new information is available that indicates the potential for a regulatory revision, the Agency does not believe it is appropriate to revise the rule to require the use of Method 1623.1, since the Agency believes such a change would not provide substantially greater protection of public health at the national level. The use of Method 1623.1 during the LT2 Round 2 monitoring is optional, and not required. Since EPA is not planning changes to the methods required under the LT2, the schedule for the LT2 Round 2 monitoring remains the same as described in the final LT2, which is scheduled to be completed no later than 2021 for all PWSs.

Occurrence and Exposure

The LT2 requires PWSs using surface water or ground water under the direct influence of surface water to monitor their source waters for *Cryptosporidium* spp. (and/or *E. coli*) to identify additional treatment requirements. PWSs must monitor their source water (*i.e.,* the influent water entering the treatment plant) over two different timeframes (Round 1 and Round 2) to determine the *Cryptosporidium* level. Monitoring results determine the extent of *Cryptosporidium* treatment requirements under the LT2.

Under the LT2, the date for PWSs to begin monitoring is staggered by PWS size, with smaller PWSs starting at a later time than larger systems. According to the LT2 rule requirements, all PWSs were expected to complete Round 1 in 2012.

To reduce monitoring costs, small filtered PWSs (serving fewer than 10,000 people) initially monitor for *E. coli* for one year as a screening analysis and are required to monitor for *Cryptosporidium* only if their *E. coli* levels exceed specified trigger values. Small filtered PWSs that exceed the *E. coli* trigger, as well as small unfiltered PWSs, must monitor for *Cryptosporidium* for one or two years, depending on the sampling frequency.

Based on the source water monitoring results, filtered systems were classified in one of four risk categories to determine additional treatment needed (Bins 1–4). Systems in Bin 1 are required to provide no additional *Cryptosporidium* treatment. Filtered systems in Bins 2–4 must achieve 1.0–2.5 log of treatment (*i.e.,* 90 to 99.7 percent reduction) for *Cryptosporidium* over and above that provided by conventional treatment, depending on the *Cryptosporidium* concentrations. Filtered PWSs must meet the additional *Cryptosporidium* treatment requirements in Bins 2, 3, or 4 by selecting one or more technologies from the microbial toolbox of options for ensuring source water protection and management, and/or *Cryptosporidium* removal or inactivation. All unfiltered water systems must provide at least 99 or 99.9 percent (2 or 3-log) inactivation of *Cryptosporidium,* depending on the results of their monitoring. Additionally, all filtered systems that provide, or will provide, 5.5 log treatment for *Cryptosporidium* are exempt from monitoring and subsequent bin classification. Systems providing 5.5 log *Cryptosporidium* treatment must notify the state no later than the date by which the system must submit a sampling plan.

Six years after the initial bin classification, filtered systems must conduct a second round of monitoring. Round 2 monitoring is in place to understand year-to-year occurrence variability. The difference observed between occurrence at the time of the ICR Supplemental Surveys (USEPA, 2000c) and the LT2 Round 1 monitoring indicates year-to-year variability. Round 2 monitoring began in 2015. Under this review, EPA considered whether a third round of monitoring would be justified at this time, in particular, requiring the use of Method 1623.1. EPA also considered whether a modification to the action bin boundaries should be made based on requiring Method 1623.1.

Because of the relatively modest gains in public health protection predicted by the Round 2 monitoring EPA does not believe a third round of monitoring is justified at this time, even if the Agency were to require the use of Method 1623.1 for this monitoring. Round 1 *Cryptosporidium* occurrence was lower than expected (3.3–5.3 percent of Bin 1 systems from Round 1 would be moved to a higher bin). As mentioned earlier, EPA will not require the use of Method 1623.1 for *Cryptosporidium* monitoring. Therefore, EPA will not make changes to the action bin boundaries at this time.

Treatment Feasibility

LT2 includes a variety of treatment and control options, collectively termed the ''microbial toolbox,'' that PWSs can implement to comply with the LT2's additional *Cryptosporidium* treatment requirements. Most options in the microbial toolbox carry prescribed credits toward *Cryptosporidium* treatment and control requirements. The LT2 Toolbox Guidance Manual (USEPA, 2010f) provides guidance on how to apply the toolbox options.

The LT2 also requires all unfiltered PWSs to provide at least 2 to 3-log (*i.e.,* 99 to 99.9 percent) inactivation of *Cryptosporidium.* Further, under the LT2, unfiltered PWSs must achieve their overall inactivation requirements (including *Giardia* and virus inactivation as established by earlier regulations) using a minimum of two disinfectants.

EPA reviewed information available since the promulgation of the LT2 on the use of the microbial toolbox to determine if the information would support a potential change to the prescribed credits or the associated design and operational criteria. In addition, EPA searched for information on new and emerging tools that would support their potential addition to the toolbox. The Agency also received input on the use and effectiveness of the microbial toolbox tools through public meetings, research of publicly available information and by actively communicating with some systems. EPA

also considered benefits and/or difficulties observed by the PWSs when using the available tools.

EPA also examined information from some PWSs with UCFWRs to evaluate the potential effectiveness of risk management measures taken by those PWSs for protecting the finished water in the UCFWRs from contamination. The New York City Department of Environmental Protection (NYC DEP) has undertaken more activities than any other PWS to protect their Hillview Reservoir from contamination. These activities include wildlife management (*e.g.,* bird harassment and deterrents, mammal relocation), security measures, runoff control, public health surveillance, microbial monitoring (*e.g., Cryptosporidium, E. coli*) and a *Cryptosporidium* and *Giardia* action plan.[6] EPA reviewed information pertaining to these activities and concluded that the information is inadequate to support regulatory changes at the national level. The data is also insufficient to demonstrate that risk management activities provide equivalent public health protection compared to covering the reservoir or treating the outflow from the reservoir.

The LT2 includes disinfection profile and benchmark requirements to ensure that any significant change in disinfection, whether for disinfection byproducts control under the Stage 2 D/DBPR, improved *Cryptosporidium* control under the LT2, or both, does not significantly compromise existing *Giardia* and virus protection. The profiling and benchmarking requirements under the LT2 are similar to those promulgated under the IESWTR and the LT1 (USEPA, 2002c) and are applicable to systems that make a significant change to their disinfection practices.

EPA did not identify information that would support a potential change to the methodology and calculations for developing the disinfection profile and benchmark under the LT2. However, EPA identified information that would support a potential change to the CT values required for virus disinfection (as discussed in the Section VI.B.4.a. ''SWTRs''). EPA is considering this information in the review of the overall filtration and disinfection requirements in the SWTR.

Based on the outcome of this review, EPA determined that no regulatory revisions to the microbial toolbox options are warranted at this time. Any new information available to the Agency either supports the current regulatory requirements or does not justify a revision. For more information regarding EPA's review of treatment feasibility see the ''Six-Year Review 3 Technical Support Document for Long-Term 2 Enhanced Surface Water Treatment Rule'' (USEPA, 2016m).

c. FBRR

Background

EPA promulgated the FBRR in 2001 (66 FR 31086, USEPA, 2001b). It requires PWSs to review their backwash water recycling practices to ensure microbial control is not compromised, and it requires PWSs to recycle filter backwash water.

Summary of Review Results

EPA reviewed this rule as part of the Six-Year Review 3, and the result is to take no action on the basis that EPA did not identify any relevant information that indicate changes to the NPDWR.

d. GWR

Background

EPA promulgated the GWR in 2006 (71 FR 65573, USEPA, 2006b) to provide protection against microbial pathogens in PWSs using ground water sources. The rule establishes a risk-based approach to target undisinfected ground water systems that are vulnerable to fecal contamination. If a system has an initial total coliform positive in the distribution system (based on routine coliform monitoring under the RTCR), followed by a fecal indicator positive (*E. coli,* enterococci or coliphage) in a follow-up source water sample, it is considered to be at risk of fecal contamination. Systems at risk of fecal contamination must take corrective action to reduce potential illness from exposure to microbial pathogens. Disinfecting systems that can demonstrate 4-log virus inactivation are not subject to the monitoring requirements.

In addition to the protection provided by the Revised Total Coliform Rule (RTCR) and GWR monitoring requirements, systems that do not disinfect are also protected by the sanitary survey provisions of the GWR and the Level 1 assessment provisions of the RTCR.

Summary of Review Results

EPA has not identified the GWR as a candidate for revision under the Six-Year Review 3 because EPA needs to evaluate emerging information from full implementation of the GWR (71 FR 65573, USEPA, 2006b) and the RTCR (78 FR 10270, USEPA, 2013a) before determining if there is an opportunity to improve public health protection. Implementation of the GWR was not yet completed for the period of time covered by the SYR3 ICR. The RTCR was promulgated in 2013 and became effective on April 1, 2016. EPA expects that implementation on the RTCR may impact the percent of ground water systems that will be triggered into source water monitoring and taking any corrective actions under the GWR. Therefore, the effects of the GWR and the RTCR implementation in addressing vulnerable ground water systems are not yet known. EPA notes that the GWR was also recently reviewed under Section 610 of the Regulatory Flexibility Act, which required federal agencies to review regulations that have significant economic impact on a substantial number of small entities within 10 years after their adoption as final rules. The 610 Review of the GWR was recently completed; three comments were received. A report is available discussing the 610 Review, comments received, and EPA's response to major comments (USEPA, 2016g).

Health Effects

Borchardt et al. (2012) studied the health effects associated with enteric virus occurrence in undisinfected PWS wells in 14 communities in Wisconsin. Drinking water samples were assayed for a suite of viral pathogens using quantitative polymerase chain reaction (qPCR). Community members kept daily diaries to self-report AGI. The study found a statistically significant association between enteric virus occurrence in the drinking water and AGI incidences in the communities.

Using the 2005 data, EPA estimated a national average TC detection rate of 2.4 percent for routine samples from undisinfected CWSs with populations less than 4,100 people (USEPA, 2012). The 14 communities (with undisinfected PWS wells) studied by Borchardt et al. (2012) had TC detections of 2.3 percent. These data suggest that the 14 communities studied by Borchardt et al. (2012) had TC detection rates no different from an average undisinfected community PWS in the U.S.

Analytical Methods

Since the promulgation of the GWR in 2006, EPA has approved several new methods for the analysis of TC samples used as a trigger for GWR source water monitoring, or for source water fecal indicators used under the GWR. These methods can be found on the EPA Web site (*https://www.epa.gov/dwanalyticalmethods/approved-*

[6] *http://www.nyc.gov/html/dep/pdf/reports/fad_4.1_waterfowl_managementprogram_annual_report.07-12.pdf.*

drinking-water-analytical-methods). However, PWSs are not required to use these new methods. Additionally, EPA did eliminate the use of fecal coliforms from the RTCR as an indicator of fecal contamination.

Occurrence and Exposure

New information suggests that total coliform occurrence varies among small undisinfected ground water systems, depending upon whether the system is a community, non-transient non-community or transient non-community PWS (USEPA, 2016n). Statistical modeling of 2011 data (about 60,000 systems based on occurrence data collected from undisinfected ground water systems) shows that undisinfected transient non-community ground water systems have the highest occurrence, at approximately four percent median routine TC positive occurrence as compared with three percent for undisinfected non-transient non-community ground water systems and two percent for undisinfected community ground water systems (USEPA, 2016n). These occurrence levels are similar to those estimated during the development of the RTCR using 2005 data (USEPA, 2012). Additionally, according to the 2005 and 2011 datasets, the smaller systems had higher median TC occurrence than the larger systems. All positive total coliform samples were assayed for *E. coli;* about one in 20 were *E. coli* positive.

A small percentage of undisinfected ground water systems have higher TC detection rates. For example, of the 52,000 undisinfected transient, non-community ground water systems serving populations less than 101 people (the total count is from USEPA, 2006b), EPA (2012) estimated that about 2,600 (five percent) of those systems (4.6 percent for the 2005 data set) had TC detection rates of 20 percent or more.

Under the third monitoring cycle of the Unregulated Contaminant Monitoring Rule (UCMR3), EPA sampled about 800 randomly selected undisinfected ground water systems serving fewer than 100 people for virus and virus indicators. These data show that only a small number of samples were virus positive by qPCR (16 out of 1,044 or two percent) (USEPA, 2016j). This result contrasts significantly with the virus positive sample rate from Borchardt et al. (2012) (287 out of 1,204 or 24 percent). One difference is that Borchardt et al. (2012) sampled prior to any treatment in the undisinfected wells (*e.g.,* softening, iron/manganese removal). In contrast, many wells in the UCMR3 virus study were sampled after softening or other treatment. The UCMR3 monitoring results are available online at: *https://www.epa.gov/dwucmr/data-summary-third-unregulated-contaminant-monitoring-rule.*

VII. EPA's Request for Comments and Next Steps

EPA invites commenters to submit any relevant data or information pertaining to the NPDWRs identified in this action as candidates for revision, as well as other relevant comments. EPA will consider the public comments and/or any new, relevant data submitted for the eight NPDWRs listed as candidates for revision as the Agency moves forward in determining whether regulatory revisions for these NPDWRs are necessary. The announcement whether or not the Agency intends to revise an NPDWR (pursuant to SDWA § 1412(b)(9)) is not a regulatory decision.

Relevant data include studies/analyses pertaining to health effects, analytical feasibility, treatment feasibility and occurrence/exposure. This information will inform EPA's evaluation as the Agency moves forward determining whether regulatory revisions for these NPDWRs are necessary. The data and information requested by EPA include peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices, and data collected by accepted methods or best available methods (if the reliability of the method and the nature of the review justifies use of the data).

Peer-reviewed data are studies/analyses that have been reviewed by qualified individuals (or organizations) who are independent of those who performed the work, but who are collectively equivalent in technical expertise (*i.e.,* peers) to those who performed the original work. A peer review is an in-depth assessment of the assumptions, calculations, extrapolations, alternate interpretations, methodology, acceptance criteria and conclusions pertaining to the specific major scientific and/or technical work products and the documentation that supports them (USEPA, 2015a).

Specifically, EPA is requesting comment and/or information related to the following aspects of potential revisions to the MDBP NPDWRs:

- Potential approaches that could enhance protection from DBPs, including both those that are regulated and those currently unregulated (*e.g.,* nitrosamines). Specifically, commenters are requested to provide information about requiring greater removal of precursors (*e.g.,* TOC), and/or more targeted constraints on precursors (*e.g.,* based on watershed vulnerabilities) that could provide for an improvement in health protection from mixtures of DBPs while considering risk-balancing. For example, commenters are requested to provide information about an approach that provides for an option to either control source water vulnerabilities (*e.g.,* de facto reuse) or to further constrain precursors associated with unregulated DBPs. In addition, commenters are requested to provide information that considers a comprehensive analysis of source waters for the formation of a wide variety of byproducts (*e.g.,* TTHM, HAA5, and unregulated DBPs such as nitrosamines, brominated and iodinated compounds).
- Potential approaches that could enhance protection from chlorite, chlorate, and chlorine dioxide. Specifically, commenters are requested to provide information about approaches that could involve, for example: Setting standards for systems using hypochlorite that address combined exposure to chlorite and chlorate; and setting standards for systems using chlorine dioxide (alone or in combination with other disinfectants) that address combined exposure from chlorite, chlorate, and chlorine dioxide.
- Potential approaches that could provide increased protection from microbial pathogens and that take into consideration the issues noted about disinfection residual requirements, while considering the risk-balancing aspects of the MDBP rules. In addition, commenters are requested to provide information about approaches that could offer enhanced protection without the use of a chlorine-based disinfectant residual in the distribution system, including technology and management systems associated with those approaches.
- Information about how frequently PWS monitor for DBPs during chlorine burn periods, including revised monitoring schedules for DBPs, taking into account occurrence and exposure to DBPs during chlorine burn periods, and related short-term health effects on sensitive populations.

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Gina McCarthy,

Administrator.

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Part IV

Environmental Protection Agency

40 CFR Part 62

Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–HQ–OAR–2016–0664; FRL–9957–11–OAR]

RIN 2060–AT28

Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action proposes the federal plan for existing commercial and industrial incineration (CISWI) units. This proposed action implements the Environmental Protection Agency's (EPA) emission guidelines (EG) adopted on February 7, 2013, as amended on June 23, 2016, in states that do not have an approved state plan implementing the EG in place by the effective date of this federal plan. The federal plan will result in emissions reductions of certain pollutants from all affected units covered.

DATES: *Comments.* Comments must be received on or before February 27, 2017.

Public Hearing. A public hearing will be held if requested by January 17, 2017.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2016–0664 at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, Cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Dr. Nabanita Modak Fischer, Fuels and Incineration Group, Sector Policies and Programs Division (E143–05), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5572; fax number: (919) 541–3470; email address: *modak.nabanita@epa.gov.*

SUPPLEMENTARY INFORMATION:

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2016–0664. All documents in the docket are listed in the *Regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *Regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2016–0664. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.*

Public Hearing. A public hearing will be held, if requested by January 17, 2017, to accept oral comments on this proposed action. If a hearing is requested, it will be held at the EPA WJC East Building, Room 1117A, located at 1201 Constitution Avenue NW., Washington, DC. The hearing, if requested, will begin at 9:00 a.m. (local time) and will conclude at 4:00 p.m. (local time) on January 30, 2017, or, January 26, 2017, whichever date is later. To request a hearing, to register to speak at a hearing, or to inquire if a hearing will be held, please contact Aimee St. Clair at (919) 541–1063 or by email at *stclair.aimee@epa.gov.* The last day to pre-register to speak at a hearing, if one is held, will be January 24, 2017. Additionally, requests to speak will be taken the day of the hearing at the hearing registration desk, although preferences on speaking times may not be able to be fulfilled. Please note that registration requests received before the hearing will be confirmed by the EPA via email.

The EPA will make every effort to accommodate all speakers who arrive and register. Because the hearing will be held at a U.S. governmental facility, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please note that the REAL ID Act, passed by Congress in 2005, established new requirements for entering federal facilities. If your driver's license is issued by Alaska, American Samoa, Arizona, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New York, Oklahoma or the state of Washington, you must present an additional form of identification to enter the federal building. Acceptable alternative forms of identification include: Federal employee badges, passports, enhanced driver's licenses and military identification cards. In addition, you will need to obtain a property pass for any personal belongings you bring with you. Upon leaving the building, you will be required to return this property pass to the security desk. No large signs will be allowed in the building, cameras may only be used outside of the building and demonstrations will not be

allowed on federal property for security reasons.

Please note that any updates made to any aspect of the hearing, including whether or not a hearing will be held, will be posted online at *https://www.epa.gov/stationary-sources-air-pollution/commercial-and-industrial-solid-waste-incineration-units-ciswi-new.* We ask that you contact Aimee St. Clair at (919) 541–1063 or by email at *stclair.aimee@epa.gov* or monitor our Web site to determine if a hearing will be held. The EPA does not intend to publish a document in the **Federal Register** announcing any such updates. Please go to *https://www.epa.gov/stationary-sources-air-pollution/commercial-and-industrial-solid-waste-incineration-units-ciswi-new* for more information on the public hearing.

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document.

AG Attorney General
CAA Clean Air Act
CBI Confidential business information
Cd Cadmium
CFR Code of Federal Regulations
CISWI Commercial and industrial solid waste incineration
CO Carbon monoxide
CPMS Continuous parameter monitoring system
dscm Dry standard cubic meter
EG Emission Guidelines
EPA U.S. Environmental Protection Agency
ERU Energy recovery unit
ESP Electrostatic precipitator
FF Fabric filter
HAP Hazardous air pollutants
HCl Hydrogen chloride
Hg Mercury
IBR Incorporation by reference
ICR Information collection request
MACT Maximum achievable control technology
mg/dscm Milligrams per dry standard cubic meter
NAICS North American Industrial Classification System
NESHAP National emission standards for hazardous air pollutants
ng/dscm Nanograms per dry standard cubic meter
NO_X Nitrogen oxides
NSPS New source performance standards
NTTAA National Technology Transfer and Advancement Act
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
Pb Lead
PCB Hydrocarbons and polychlorinated biphenyls
PCDD Polychlorinated dibenzo-p-dioxins
PCDF Polychlorinated dibenzofurans
PM Particulate matter (filterable, unless otherwise specified)
$PM_{2.5}$ Particulate matter (diameter less than or equal to 2.5 micrometers)
ppm Parts per million
ppmv Parts per million by volume
ppmvd Parts per million by dry volume
PS Performance Specification
RCRA Resource Conservation and Recovery Act
RIN Regulatory Information Number
SO_2 Sulfur dioxide
The Court United States Court of Appeals for the District of Columbia Circuit
Tpy Tons per year
ug/dscm Micrograms per dry standard cubic meter
UMRA Unfunded Mandates Reform Act
U.S.C. United States Code
VCS Voluntary consensus standards

Organization of This Document. The following outline is provided to aid in locating information in this preamble.

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I. General Information

A. Does the proposed action apply to me?

Regulated Entities. Owners or operators of existing CISWI units that are subject to the existing federal plan implementing the December 1, 2000 EG, and units not already subject to an EPA-approved and effective state plan implementing the February 7, 2013, EG, may be regulated by this final action. Existing CISWI units are those that commenced construction on or before June 4, 2010 or that commenced modification or reconstruction after June 4, 2010 but no later than August 7, 2013. Regulated categories and entities include those that operate CISWI units. Although there is no specific North American Industry Classification System (NAICS) code for CISWI units, these units may be operated by the categories of sources listed in Table 1:

TABLE 1—EXAMPLES OF POTENTIALLY REGULATED ENTITIES

Category	NAICS [1] Code	Examples of potentially regulated entities
Any industrial or commercial facility using a solid waste incinerator.	211, 212, 486	Mining; oil and gas exploration operations; pipeline operators.
	221	Utility providers.
	321, 322, 337	Manufacturers of wood products; manufacturers of pulp, paper and paperboard; manufacturers of furniture and related products.
	325, 326	Manufacturers of chemicals and allied products; manufacturers of plastics and rubber products.
	327	Manufacturers of cement; nonmetallic mineral product manufacturing.
	333, 336	Manufacturers of machinery; manufacturers of transportation equipment.
	423, 44	Merchant wholesalers, durable goods; retail trade.

[1] North American Industrial Classification System.

This table is not intended to be exhaustive, but rather provides a general guide for identifying entities likely to be affected by the proposed action. To determine whether a facility would be affected by this action, please examine the applicability criteria in 40 CFR 62.14510 to 62.14525 of subpart III being proposed here. Questions regarding the applicability of this action to a particular entity should be directed to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What should I consider as I prepare my comments?

Submitting CBI. Do not submit information that you consider to be CBI electronically through *http://www.regulations.gov* or email. For comments on the CISWI Federal Plan proposal, send or deliver information identified as CBI to only the following address: OAQPS Document Control Officer (Room C404–02), U.S. EPA, Research Triangle Park, North Carolina 27711, Attn: Docket ID No. EPA–HQ–OAR–2016–0664.

Clearly mark the part or all of the information that you claim to be CBI. For CBI on a disk or CD–ROM that you mail to the EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

World Wide Web (WWW). In addition to being available in the docket, an electronic copy of the proposed action is available on the Internet through the Technical Air Pollution Resources Web site. Following signature by the Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/commercial-and-industrial-solid-waste-incineration-units-ciswi-new.* The Technical Air Pollution Resources Web site provides information and technology exchange in various areas of air pollution control. Additional information is also available at the same Web site.

II. Background Information

A. What is the regulatory development background for this proposed rule?

Section 129 of the Clean Air Act (CAA), titled, ''Solid Waste Combustion,'' requires the EPA to develop and adopt standards for solid waste incineration units pursuant to CAA sections 111 and 129.

On March 21, 2011, the EPA promulgated revised new source performance standards (NSPS) and EG for CISWI units. Following this action, the Administrator received petitions for reconsideration that identified certain issues that warranted further opportunity for public comment. In response to the petitions, the EPA reconsidered and requested comment on several provisions of the February 2011 final NSPS and EG for CISWI incineration units. The EPA published the proposed revisions to the NSPS and EG for CISWI units on December 23, 2011 (76 FR 80452).

On February 7, 2013, the EPA promulgated the final reconsidered NSPS and EG for CISWI units (78 FR 9112). The final rule made some revisions to the December 2011 proposed reconsideration rule in response to comments and additional information received. Following that action, the EPA again received petitions for reconsideration. These petitions stated certain provisions should be reconsidered and that the public lacked sufficient opportunity to comment on some of the provisions contained in the final 2013 CISWI rule. On January 21, 2015, the EPA reconsidered and requested comment on four provisions of the 2013 final NSPS and EG for CISWI units. Additionally, the EPA proposed clarifying changes and corrections to the final rule, some of which were raised in petitions for reconsideration of the 2013 CISWI rule. On June 23, 2016, the EPA promulgated the final reconsidered NSPS and EG for CISWI units (81 FR 40956). For a more detailed background and additional information on how this rule is related to other CAA combustion rules issued under CAA section 112 and the Resource Conservation and Recovery Act (RCRA) definition of solid waste, refer to prior documents (76 FR 15704, 78 FR 9112).

Sections 111(b) and 129(a) of the CAA address emissions from new units (*i.e.,* NSPS), and CAA sections 111(d) and 129(b) address emissions from existing units (*i.e.,* EG). The NSPS are federal regulations directly enforceable upon CISWI units, and, under CAA section 129(f)(1), become effective 6 months after promulgation. Unlike the NSPS, the EG provide direction for developing state plans; however, the EG are not themselves directly enforceable. The EG are implemented and enforced under an EPA approved state or tribal plan or EPA adopted federal plan once the state, tribal, or federal plan has become effective.

Section 129(b)(2) of the CAA directs states with existing CISWI unit(s) subject to the EG to submit plans to the EPA that implement and enforce the EG. The deadline for states to submit state plans to the EPA for review was February 7, 2014 (*see* 78 FR 9121–2, February 7, 2013).[1] Sections 111 and 129(b)(3) of the CAA and 40 CFR 60.27(c) and (d) require the EPA to develop, implement and enforce a federal plan for CISWI units in any state without an approvable state plan within

[1] Several states did not submit plans to the EPA by this date.

2 years after promulgation of the EG. This action proposes the CISWI Federal Plan. In this proposal, the EPA is soliciting comment only on the implementation of the final CISWI EG through the proposed federal plan. The EPA is not reopening the underlying CISWI rule for public comment and does not intend to address any comments on the underlying CISWI rule.[2]

The EPA anticipates that facilities in approximately eight states and four U.S. territories will need to rely on the CISWI Federal Plan.

B. What is the purpose of this proposed rule?

Section 129(b)(2) of the CAA requires states to implement the EG for existing solid waste incineration units, including CISWI units. States with existing CISWI units were required to submit to the EPA within 1 year following promulgation of the EG (by February 7, 2014) state plans that are at least as protective as the EG. Sections 111 and 129 of the CAA and 40 CFR 60.27(c) and (d) require the EPA to develop, implement, and enforce a federal plan in states which have not submitted an approvable plan. The EPA is proposing the CISWI Federal Plan so that a promulgated federal plan will be effective in any state that fails to provide an approvable state plan, thus, ensuring implementation and enforcement of the final CISWI EG.

The regulations require states without any existing CISWI units to submit to the Administrator a letter of negative declaration certifying that there are no CISWI units in the state (*See* 40 CFR 62.06). No plan is required for states that do not have any CISWI units. CISWI units located in states that mistakenly submit a letter of negative declaration are subject to the federal plan, once effective, until a state plan regulating those CISWI units is approved. State plans that have been submitted to implement the final CISWI EG,[3] have either been approved or are currently undergoing EPA review. This proposed CISWI Federal Plan will implement the final CISWI EG in those states that do not have an approved state plan in place by the effective date of this federal plan. If a state or tribal plan is approved in part, the federal plan will apply to the affected CISWI units in lieu of the disapproved portions of the state plan until the state or tribe addresses the deficiencies in the state plan and the revised state plan is approved by the EPA. Prior to any disapproval, the EPA will work with states and tribes to attempt to reconcile areas of the plan that remain inconsistent with the EG.

Incineration of solid waste at commercial and industrial facilities causes the release of a wide array of air pollutants, some of which exist in the waste feed material and are released unchanged during combustion, and some of which are generated as a result of the combustion process itself.[4] The EPA estimated in the 2013 rule that once the state plans and federal plan become effective, a total emissions reduction of the regulated pollutants would occur as follows: Acid gases (*i.e.,* hydrogen chloride (HCl) and sulfur dioxoide (SO_2)), about 7,046 tons per year (tpy); particulate matter (PM) about 2,401 tpy; non-Hg metals (*i.e.,* lead (Pb) and cadmium (Cd)) about 4.5 tpy; carbon monoxide (CO) about 20,000 tpy; nitrogen oxide (NO_X) about 5,399 tpy; and mercury (Hg) about 688 pounds per year. The EPA also estimated that air pollution control devices installed to comply with the 2013 rule would also effectively reduce emissions of pollutants such as 7-polycyclic aromatic hydrocarbons and polychlorinated biphenyls (PCB).[5] The 2016 rule did not significantly change the emission reduction estimates presented in the 2013 rule, other than estimating slightly less in PM reductions for the waste-burning kiln subcategory (*See* 81 FR 40969, June 23, 2016).

C. What is the status of state plan submittals?

Sections 111(d) and 129(b)(3) of the CAA, 42 U.S.C. 7411(d) and 7429(b)(3), authorize and require the EPA to develop and implement a federal plan for CISWI units located in states with no approved and effective state plan. Table 2 below lists the status of state plans as of the signature date for this proposal. Additionally, Table 2 lists states and local agencies that submitted negative declarations and/or those which have indicated that they intend to take delegation of the federal plan.

TABLE 2—STATUS OF STATE AND TERRITORY PLANS

Status	States
I. EPA-Approved Implementation Plans	None so far.
II. Indicated intent to Submit Negative Declarations to the EPA	Massachusetts; Delaware; Maryland; North Carolina; Georgia; Mississippi; Minnesota; Arizona; California; Hawaii; Idaho.
III. Negative Declaration Submitted to the EPA	Connecticut; New Hampshire; Vermont; Rhode Island; Virgin Islands; District of Columbia; New Mexico; City of Albuquerque; Montana.
IV. Final Implementation Plans Submitted to the EPA	Alabama; Florida; South Carolina; North Dakota; Oregon.
V. Draft Implementation Plans Submitted to the EPA	West Virginia; Virginia.
VI. EPA Has Not Received a Draft or Final Implementation Plan or Negative Declaration.	New York; Illinois; Indiana; Texas; Louisiana; Oklahoma; Arkansas; Kansas; Missouri; Nebraska; Utah; Wyoming; South Dakota; Washington.
VII. Indicated Intent to Submit State Implementation Plan to the EPA	Kentucky; Tennessee; Michigan; Colorado.
VIII. Indicated Intent to Accept Delegation of Federal Plan	Maine; New Jersey; Puerto Rico; Pennsylvania.
IX. Indicated Intent to Accept Federal Plan Implementation by the EPA	Ohio; Wisconsin; Iowa; Nevada; American Samoa; Guam; Alaska; Commonwealth of the Northern Mariana Islands.

[2] Many aspects of the CISWI rule were challenged in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit or Court) in *American Forest and Paper Association (AFPA)* v. *EPA,* and the Court rejected all challenges to the standards and other provisions being implemented in this federal plan. *See AFPA* v. *EPA,* 830 F.3d 579 (D.C. Cir. 2016).

[3] The ''final CISWI EG'' means the provision of 40 CFR part 60, subpart DDDD, including the revisions published on June 23, 2016 (81 FR 40956). As noted in the June 23 2016 preamble, the final CISWI EG action granted reconsideration and addressed certain aspects of the February 7 2013, rule, which itself was issued to grant reconsideration of aspects of the March 21 2011, rule. *See* Section II.A of this preamble for more discussion on the background of the final CISWI EG.

[4] *See* 78 FR 9131–9133 to reference the impacts of the EG adopted on February 7, 2013.

[5] *See* 75 FR 31970 (June 4, 2010), where polycyclic organic matter (POM) and polychlorinated biphenyl (PCB) emission reductions are discussed.

As the EPA Regional offices approve implementation plans, they will also, in the same action, amend the appropriate subpart of 40 CFR part 62 to codify their approvals. The EPA will maintain a list of implementation plan submittals and approvals on the Technical Air Pollution Resources Web site at *https://www.epa.gov/stationary-sources-air-pollution/commercial-and-industrial-solid-waste-incineration-units-ciswi-new.* The list will help CISWI unit owners or operators determine whether their CISWI units are affected by a state plan or the federal plan.

CISWI owners or operators can also contact the EPA Regional office for the state in which their CISWI units are located to determine whether there is an approved and effective state plan in place. Table 3 lists the names, email addresses, and telephone numbers of the EPA Regional office contacts and the states and territories that they cover.

TABLE 3—REGIONAL OFFICE CONTACTS

Region	Regional contact	Phone	States and territories
Region I	Patrick Bird, *bird.patrick@epa.gov*	(617) 918–1287	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, Vermont.
Region II	Ted Gardella, *gardella.anthony@epa.gov*	(212) 637–3892	New York, New Jersey, Puerto Rico, Virgin Islands.
Region III	Mike Gordon, *gordon.mike@epa.gov*	(215) 814–2039	Virginia, Delaware, District of Columbia, Maryland, Pennsylvania, West Virginia.
Region IV	Keith Goff, *goff.keith@epa.gov*	(404) 562–9137	Florida, Georgia, North Carolina, Alabama, Kentucky, Mississippi, South Carolina, Tennessee.
	Jason Dressler, *Dressler.jason@epa.gov*	(404) 562–9208	
	Mark Bloeth, *Bloeth.mark@epa.gov*	(404) 562–9013	
Region V	Margaret Sieffert, *sieffert.margaret@epa.gov.*	(312) 353–1151	Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio.
Region VI	Kenneth Boyce, *boyce.kenneth@epa.gov*	(214) 665–7259	Arkansas, Louisiana, New Mexico, Oklahoma, Texas.
Region VII	Lisa Hanlon, *hanlon.lisa@epa.gov*	(913) 551–7599	Iowa, Kansas, Missouri, Nebraska.
Region VIII	Ethan Aumann, *aumann.ethan@epa.gov*	(303) 312–6773	Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming.
Region IX	Shaheera Kelly, *Kelly.shaheerah@epa.gov*	(415) 972–3943	Arizona, California, Hawaii, Nevada, American Samoa, Guam, Northern Mariana Islands.
	Mark Sims, *sims.mark@epa.gov*	(415) 972–3965	
Region X	Katharine Owens, *owens.katharine@epa.gov.*	(206) 553–1023	Washington.
	John Pavitt, *Pavitt.john@epa.gov*	(907) 271–3688	Alaska.
	Madonna Narvaez, *narvaez.madonna@epa.gov.*	(206) 553–2117	Idaho, Oregon.

III. Affected Facilities

A. What is a CISWI unit?

A ''CISWI'' unit is any unit located at a commercial or industrial facility that combusts any amount of solid waste, as defined in 40 CFR part 241, that is not otherwise exempted from CISWI. *See* 40 CFR 60.2555 (listing solid waste incineration units that are not subject to CISWI). The affected facility under CISWI is each individual CISWI unit. This proposed federal plan defines four subcategories for existing CISWI units in 40 CFR part 62.14840 of subpart III: Incinerators (*i.e.,* units designed to burn discarded waste materials for the purpose of disposal); small, remote incinerators; energy recovery units (ERUs) (*i.e.,* units that would be boilers or process heaters if they did not combust solid waste); and waste burning kilns (*i.e.,* units that would be cement kilns if they did not combust solid waste). We have further subcategorized ERUs into three subcategories and waste burning kilns into two subcategories for CO emission limits only.

B. Does the federal plan apply to me?

The federal plan will apply to the owner or operator of an existing CISWI unit that was constructed on or before June 4, 2010, or commenced modification or reconstruction after June 4, 2010, but no later than August 7, 2013, and that is not subject to an approved and effective state plan as of the effective date of the final federal plan notice.[6] The federal plan would apply to the CISWI unit until the EPA approves a state plan that regulates the CISWI unit and that state plan becomes effective.[7] If the construction of a CISWI unit began after June 4, 2010, or modification of a CISWI unit began after August 7, 2013, the unit is a new CISWI unit and would be subject to the NSPS at 40 CFR part 60, subpart CCCC. The specific applicability of the proposed federal plan is described at 40 CFR 62.14510 through 62.14531 of subpart III in the proposed rule.

This action will not preclude states from submitting a state plan at a later time. If a state submits a plan after the promulgation of the CISWI Federal Plan, the EPA will review and approve or disapprove the state plan.[8] If the EPA approves a plan, then the CISWI Federal Plan will no longer apply to CISWI units covered by the state plan. If a CISWI unit was overlooked by a state and the state submitted a negative declaration letter, or if an individual CISWI unit was not covered by an approved and effective state plan, the CISWI unit would be subject to the federal plan after the effective date of the final plan.

C. How do I determine if my CISWI unit is covered by an approved and effective state plan?

Part 62 of Title 40 of the CFR identifies the status of approval and promulgation of CAA section 111(d) and CAA section 129(b) state plans for designated facilities in each state. However, the print version of 40 CFR part 62 is updated only once per year. Thus, if 40 CFR part 62 does not indicate that a state has an approved and effective plan, please contact the state environmental agency's air director or the EPA's Regional office (*see* Table 3 in section II.C of this preamble) to determine if a state plan was approved since publication of the most recent version of 40 CFR part 62. Also note that the Electronic Code of Federal

[6] The federal plan will become effective 30 days after final promulgation.

[7] A state plan is effective on the date specified in the document published in the **Federal Register** announcing the EPA's approval of the plan.

[8] An approved state plan is a plan developed by a state that the EPA has reviewed and approved based on the requirements in 40 CFR part 60, subpart B, to implement 40 CFR part 60, subpart DDDD.

Regulations (*http://www.ecfr.gov/cgi-bin/ECFR?page=browse*) is updated periodically, so may be a better source to obtain an update on state plan status.

IV. Elements of the CISWI Federal Plan

Sections 111(d) and 129 of the CAA, as amended, 42 U.S.C. 7411(d) and 7429(b)(2), require states to develop and implement state plans for CISWI units to implement and enforce the final EG. Accordingly, subpart DDDD of 40 CFR part 60 requires states to submit state plans that include specified elements. Because this proposed federal plan will establish standards in the absence of an approved and effective state plan, this proposed plan includes the same essential elements as a state plan: (1) Identification of legal authority and mechanisms for implementation; (2) inventory of CISWI units; (3) emissions inventory; (4) compliance schedules; (5) emissions limits and operating limits; (6) operator training and qualification; (7) testing, monitoring, recordkeeping, and reporting; (8) public hearing; and (9) progress reporting. *See* Proposed regulations at 40 CFR part 62, subpart III and sections 111 and 129 of the CAA. Below, we explain the proposed federal plan elements in detail.

A. Legal Authority and Enforcement Mechanism

Sections 111(d) and 129(b)(3) of the CAA direct the EPA to develop a federal plan for states that do not submit approvable state plans. Sections 111 and 129 of the CAA provide the EPA with the authority to implement and enforce the federal plan in cases where the state fails to submit a satisfactory state plan. Pursuant to section 129(f)(2), compliance with the EG cannot be later than 5 years after the relevant EG are promulgated (*i.e.,* by February 7, 2018).[9]

B. Inventory of Affected CISWI Units

The docket for the proposed federal plan includes an inventory of the CISWI units that may potentially be covered by this federal plan in the absence of approved state plans. (*See* Docket ID No. EPA–HQ–OAR–2016–0664 and 40 CFR 62.14521.) This inventory contains 106 CISWI units in 28 states. It is based on information collected from EPA Regions, states, CISWI facilities, and review of existing CISWI inventories, title V permits, emissions test reports, and facility Web sites. The EPA recognizes that this list may not be complete. Therefore, sources potentially subject to this proposed federal plan may include, but are not limited to, the CISWI units listed in Docket No. EPA–HQ–OAR–2016–0664. Any unit that meets the applicability criteria in the proposed federal plan rule will be subject to the federal plan, regardless of whether it is listed in the inventory. The EPA requests that states or individuals identify additional sources for inclusion on the list during the comment period for this proposal.

C. Inventory of Emissions

This proposed federal plan includes emissions estimates for existing CISWI units. The pollutants inventoried are Cd, CO, polychlorinated dibenzo-p-dioxins/polychlorinated dibenzofurans (PCDD/PCDF), HCl, Pb, Hg, PM, NO_X, and SO_2. For this proposal, the EPA has estimated the emissions from each known CISWI unit that potentially may be covered by the proposed federal plan for the nine pollutants regulated by the EG and covered by the proposed federal plan. The emissions inventory is based on available information about CISWI units and typical emissions rates developed for calculating nationwide air impacts of the EG. Refer to the inventory memorandum ''CISWI Federal Plan Inventory,'' December 9, 2016 in Docket No. EPA–HQ–OAR–2016–0664 for the complete updated emissions inventory.

D. Compliance Schedules

The CAA provides that owners or operators of affected CISWI units must comply no later than 5 years after the effective date of the final CISWI EG (*i.e.,* February 7, 2018) or within 3 years from state plan approval (or promulgation of a federal plan), whichever is earlier. *See* CAA section 129(f)(2). The EPA aims to take final action on this proposal in 2017 and, thus, proposes to allow the maximum time statutorily permitted for compliance with the federal plan, that is until February 7, 2018.

E. Emissions Limits and Operating Limits

The proposed federal plan contains emissions limits that correspond to the final CISWI EG. (*See* 40 CFR 62.14630 through 62.14645.) The emissions limits in this proposed CISWI Federal Plan are the same as those contained in the final CISWI EG. (*See* proposed Table 5 of this preamble.) This action does not revise the final limits; instead, it simply implements the previously promulgated limits for existing sources in states that have not adopted a state plan. Section V.C of this preamble discusses the final CISWI EG emissions limits.

F. Operator Training and Qualification Requirements

The proposed federal plan requires that the owner or operator must qualify operators or their supervisors (at least one per facility) by ensuring that they complete an operator training course and annual review or refresher course. (*See* 40 CFR 62.14595 through 62.14625.) This proposed federal plan also contains operator training and qualification requirements that correspond to the final CISWI EG.

G. Testing, Monitoring, Recordkeeping, and Reporting Requirements

The proposed federal plan includes testing, monitoring, recordkeeping, and reporting requirements. (*See* 40 CFR 62.14650 through 62.14760.) These proposed requirements correspond with the final CISWI EG. Testing, monitoring, recordkeeping and reporting requirements will assure initial and ongoing compliance.

H. Record of Public Hearings

This proposed federal plan provides an opportunity for public participation in adopting the plan. If requested to do so, the EPA will hold a public hearing at the EPA's office buildings in Washington, DC. A record of the public hearing, if any, will appear in Docket ID No. EPA–HQ–OAR–2016–0664. If a public hearing is requested and held, the EPA may ask clarifying questions during the oral presentation, but will not respond to the presentations or comments at that time. Written statements and supporting information submitted during the public comment period will be considered with equivalent weight as any oral statement and supporting information subsequently presented at a public hearing, if held.

I. Progress Reports

The proposed federal plan requests that the EPA Regional Offices prepare annual progress reports to show the progress of CISWI units toward implementation of the EG. States that have been delegated the authority to implement and enforce this federal plan will be required to submit annual progress reports to the appropriate EPA Regional Office as part of their delegation (*See* section VII.D). Each progress report must include the following items: (1) Status of enforcement actions; (2) identification of sources that have shut down or started operation; (3) emissions inventory data for sources that were not in operation at the time of plan development, but that began operation during the reporting period; (4)

[9] *See* 78 FR 9125–6 (February 7, 2013) for further discussion on compliance dates.

additional data as necessary to update previously submitted source and emissions information; and (5) copies of technical reports on any performance testing and monitoring. The EPA plans to request that the EPA Regional offices prepare progress reports to show the progress of CISWI units towards the implementation of EG.

V. Summary of Proposed CISWI Federal Plan Requirements

The proposed CISWI Federal Plan requirements are described below. Table 4 lists each element and identifies where it is located or codified.

TABLE 4—ELEMENTS OF THE PROPOSED CISWI FEDERAL PLAN

Element of the CISWI Federal Plan	Location
Legal authority and enforcement mechanism	Sections 129(b)(3), 111(d), 301(a), and 301(d)(4) of the CAA.
Inventory of affected CISWI units	Docket ID No. EPA–HQ–OAR–2016–0664.
Inventory of emissions	Docket ID No. EPA–HQ–OAR–2016–0664.
Compliance schedules	40 CFR 62.14535 to 62.14575.
Emissions limits and operating limits	40 CFR 62.14630 to 62.14645.
Operator training and qualification	40 CFR 62.14595 to 62.14625.
Testing, monitoring, recordkeeping and reporting	40 CFR 62.14650 to 62.14760.
Record of public hearings	Docket ID No. EPA–HQ–OAR–2016–0664.
Progress reports	Section IV.I of this preamble.

A. What are the proposed applicability requirements?

The proposed federal plan applicability reflects the final CISWI EG. The proposed federal plan applies to existing CISWI units meeting the applicability of 40 CFR 62.14510 that are located in any state that does not currently have an approved state plan in place. Existing CISWI units are all CISWI units for which construction commenced on or before June 4, 2010. All CISWI units for which construction commenced after June 4, 2010, or for which modification or reconstruction commenced after August 7, 2013, are ''new'' sources subject to NSPS emissions limits (40 CFR part 60, subpart CCCC). The federal plan requirements apply to owners and/or operators of incineration units combusting solid waste (as defined under RCRA) and located at commercial or industrial facilities (*i.e.,* CISWI units (as defined in the proposed rule at 40 CFR 62.14840)). Four subcategories are defined for existing units: incinerators (*i.e.,* units designed to burn discarded waste materials for the purpose of disposal); small, remote incinerators; ERUs (*i.e.,* units that would be boilers or process heaters if they did not combust solid waste); and waste burning kilns (*i.e.,* units that would be cement kilns if they did not combust solid waste). The final CISWI EG further subcategorized ERUs into three subcategories and waste burning kilns into two subcategories for CO emission limits only.

B. What are the proposed compliance schedules?

The proposed federal plan requires owners or operators of CISWI units to come into compliance by February 7, 2018. The final CISWI EG included increments of progress in the compliance schedule. However, we are not including increments of progress as a compliance pathway for the proposed federal plan. Increments of progress were included in the EG to establish obligations that would apply to sources planning to take more than one year from approval of the state plan to comply. The increments would help ensure that sources planning to take more than one year to comply would make some incremental progress toward compliance after the first year. The increments did not require any additional action within one year of approval of a state plan (or promulgation of a federal plan). The EPA aims to take final action on this proposal in 2017. As explained above (*see* section IV.D of this preamble), the statute requires all sources to fully comply by February 2018 (*i.e.,* 5 years after promulgation of the relevant EG). As explained above, the increments of progress contained in the final EG do not require any additional action within one year of promulgation of a federal plan. Thus, including the increments of progress in this federal plan would serve no meaningful purpose and may create confusion. For this reason, the EPA is not proposing to include increments of progress in this federal plan.

If a CISWI unit does not achieve final compliance by February 7, 2018, the proposed federal plan requires the CISWI unit to shut down by February 7, 2018, complete the retrofit while not operating, and be in compliance upon restarting. A CISWI unit that operates out of compliance after the final compliance date would be in violation of the federal plan and subject to enforcement action.

C. What emissions and operating limits is the EPA proposing to incorporate into the federal plan?

The EPA proposes to incorporate the EG emissions and operating limits from the final CISWI EG into this proposed CISWI Federal Plan. Table 5 of this preamble summarizes the EG emissions limits promulgated, as well as provides the existing CISWI Federal Plan emission limits (currently applicable only to existing incinerators) for comparison. Existing sources may comply with either the PCDD/PCDF toxicity equivalence or total mass balance emission limits. These standards apply at all times. Facilities will be required to establish site-specific operating limits derived from the results of performance testing. The site-specific operating limits are established as the minimum (or maximum, as appropriate) operating parameter value measured during the performance test. These operating limits will result in achievable operating ranges that will ensure that the control devices used for compliance will be operated to achieve continuous compliance with the emissions limits. Further discussion on performance testing can be found in section V.D of this preamble.

TABLE 5—SUMMARY OF EG EMISSIONS LIMITS PROMULGATED FOR EXISTING CISWI UNITS

Pollutant (units) [1]	Incinerators (2000 CISWI limit)	CISWI Subcategories				
		Incinerators	ERUs—solids	ERUs—liquid/gas	Waste-burning kilns	Small, remote incinerators
HCl (parts per million by volume (ppmv)).	62	29	0.20 (biomass units)/58 (coal units)	14	3.0	300
CO (ppmv)	157	17	260 (biomass units)/95 (coal units)	35	110 (long kilns)/790 (preheater/precalciner).	64
Pb (mg/dscm)	0.04	0.015	0.014 (biomass units)/0.057 (coal units).	0.096	0.014	2.1
Cd (mg/dscm)	0.004	0.0026	0.0014 (biomass units)/0.0017 (coal units).	0.023	0.0014	0.95
Hg (mg/dscm)	0.47	0.0048	0.0022 (biomass units)/0.013 (coal units).	0.0024	0.011	0.0053
PM, filterable (mg/dscm)	70	34	11 (biomass units)/130 (coal units)	110	13.5	270
Dioxin, furans, total (ng/dscm)	(no limit)	4.6	0.52 (biomass units)/5.1 (coal units)	2.9	1.3	4,400
Dioxins and furans, TEQ (nanograms per dry standard cubic meter (ng/dscm)).	0.41	0.13	0.12 (biomass units)/0.075 (coal units).	0.32	0.075	180
NO_X (ppmv)	388	53	290 (biomass units)/460 (coal units)	76	630	190
SO_2 (ppmv)	20	11	7.3 (biomass units)/850 (coal units)	720	600	150

[1] All emission limits are expressed as concentrations corrected to 7 percent O_2.

D. What are the proposed performance testing and monitoring requirements?

The EPA is proposing several performance testing and monitoring provisions amendments to the current 2003 CISWI Federal Plan that are consistent with the requirements of the final CISWI EG. The following paragraphs list a number of testing and monitoring requirements in the final CISWI EG that are being proposed in the CISWI Federal Plan.

1. Performance Testing and Monitoring

The proposed federal plan requires all CISWI units to demonstrate initial and continuous compliance with the final CISWI EG emission limits. These provisions require initial and annual performance tests and initial and annual inspections of scrubbers, fabric filters (FF), and other air pollution control devices that are used to meet the emission limits. In addition, a Method 22 (40 CFR part 60, appendix A–7) visible emissions test of the ash handling operations is required during the initial and annual compliance test for all subcategories except waste-burning kilns, which do not have ash handling systems. Furthermore, for any CISWI unit that operates a FF air pollution control device, we are requiring that a bag leak detection system be installed to monitor the device. The proposed federal plan continues to require parametric monitoring of all other add-on air pollution control devices, such as wet scrubbers, dry scrubbers and activated carbon injection (ACI). CISWI units that install selective non-catalytic reduction technology to reduce NO_X emissions are required to monitor the reagent (*e.g.,* ammonia or urea) injection rate and secondary chamber temperature (if applicable to the CISWI unit). This proposed federal plan also requires subcategory-specific monitoring requirements in addition to the aforementioned inspection, bag leak detection, and parametric monitoring requirements that are applicable to all CISWI units. Existing incinerators, small, remote incinerators, and ERUs would have annual emissions testing for all nine pollutants: PM, SO_2, HCl, NO_X, CO, Pb, Cd, Hg, and dioxins and furans. Waste-burning kilns are required to monitor Hg and HCl (if no scrubber) emissions using a continuous emissions monitoring system, monitor PM emissions using a PM continuous parameter monitoring system (PM CPMS), and perform annual testing for the remaining pollutants. The proposed federal plan provides reduced annual testing requirements for all nine pollutants when testing results are shown to be well below the limits. If an ERU has a design capacity greater than 250 Million British Thermal units per hour, we are requiring a PM CPMS for PM monitoring for these units. For the PM CPMS, the EPA is further requiring that a site-specific parametric operating limit be established during the performance test, that there be continuous monitoring of that parametric limit using a PM CPMS, that four deviations within a 12-month operating period constitutes a violation and triggers immediate corrective action and a Method 5 performance test within 30 days with an additional 15 days to reestablish a site-specific operating limit. Consistent with the final CISWI EG, we propose that all operating parameter averaging for ERU units be on a 30-day rolling average and allow the sorbent injection parameter to be adjusted based on the ERU's load. These testing and monitoring provisions reflect those in the final CISWI EG.

The proposed federal plan incorporates by reference three alternatives to the EPA reference test methods as shown in Table 6 below.

TABLE 6—LIST OF INCORPORATION BY REFERENCE (IBR)

Test method	Publisher	IBR in 40 CFR part 62, subpart III
ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus].	Available for purchase from the American Society of Mechanical Engineers (ASME), Three Park Avenue, New York, NY 10016–5990, *https://www.asme.org/*.	§§ 62.14670(s)(1)(i), 62.14670(s)(1)(ii), 62.14670(t)(1)(ii), and 62.14670(t)(4)(i).

TABLE 6—LIST OF INCORPORATION BY REFERENCE (IBR)—Continued

Test method	Publisher	IBR in 40 CFR part 62, subpart III
ASTM D6784–02 (Reapproved 2008) Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), approved April 1, 2008.	Available for purchase from at least one of the following addresses: American Society for Testing and Materials (ASTM), 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; or ProQuest, 300 North Zeeb Road, Ann Arbor, MI 48106, *http://www.astm.org/*.	§§ 62.14670(j), and Tables 1, 5, 6, and 8 to subpart III.
OAQPS Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997.	Available from the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 272–0167, *http://www.epa.gov*.	§§ 62.14670(r)(3).

These tests are discussed further in section IX.I of this preamble, titled ''National Technology Transfer and Advancement Act (NTTAA) and 1 CFR part 51.''

2. Electronic Data Submittal

The EPA is proposing that owners and operators of CISWI units are required to submit electronic copies of certain required performance test reports through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). This mirrors the final CISWI EG for CISWI units. The EPA believes that the electronic submittal of the reports addressed in this proposed rulemaking will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability, will further assist in the protection of public health and the environment and will ultimately result in less burden on the regulated community. It also will improve compliance by facilitating the ability of regulated facilities to demonstrate compliance and the ability of air agencies and the EPA to assess and determine compliance. Under current requirements, paper reports are often stored in filing cabinets or boxes, which make the reports more difficult to obtain and use for data analysis and sharing. Electronic storage of such reports would make data more accessible for review, analyses, and sharing. Electronic reporting can also eliminate paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors and providing data quickly and accurately to the affected facilities, air agencies, the EPA and the public.

In 2011, in response to Executive Order 13563, the EPA developed a plan [10] to periodically review its regulations to determine if they should be modified, streamlined, expanded or repealed in an effort to make regulations more effective and less burdensome. The plan includes replacing outdated paper reporting with electronic reporting. In keeping with this plan and the White House's Digital Government Strategy,[11] in 2013 the EPA issued an agency-wide policy specifying that new regulations will require reports to be electronic to the maximum extent possible. By requiring electronic submission of specified reports in this proposed rule, the EPA is taking steps to implement this policy.

The EPA Web site that stores the submitted electronic data, WebFIRE, will be easily accessible to everyone and will provide a user-friendly interface that any stakeholder could access. By making data readily available, electronic reporting increases the amount of data that can be used for many purposes. One example is the development of emissions factors. An emissions factor is a representative value that attempts to relate the quantity of a pollutant released to the atmosphere with an activity associated with the release of that pollutant (*e.g.,* kilograms of particulate emitted per megagram of coal burned). Such factors facilitate the estimation of emissions from various sources of air pollution and are an important tool in developing emissions inventories, which in turn are the basis for numerous efforts, including trends analysis, regional and local scale air quality modeling, regulatory impact assessments, and human exposure modeling. Emissions factors are also widely used in regulatory applicability determinations and in permitting decisions.

The EPA has received feedback from stakeholders asserting that many of the EPA's emissions factors are outdated or not representative of a particular industry emission source. While the EPA believes that the emissions factors are suitable for their intended purpose, we recognize that the quality of emissions factors varies based on the extent and quality of underlying data. We also recognize that emissions profiles on different pieces of equipment can change over time due to a number of factors (fuel changes, equipment improvements, industry work practices), and it is important for emissions factors to be updated to keep up with these changes. The EPA is currently pursuing emissions factor development improvements that include procedures to incorporate the source test data that we are proposing be submitted electronically. By requiring the electronic submission of the reports identified in this proposed action, the EPA would be able to access and use the submitted data to update emissions factors more quickly and efficiently, creating factors that are characteristic of what is currently representative of the relevant industry sector. Likewise, an increase in the number of test reports used to develop the emissions factors will provide more confidence that the factor is of higher quality and representative of the whole industry sector.

Additionally, by making the records, data, and reports addressed in this proposed rulemaking readily available, the EPA, the regulated community, and the public will benefit when the EPA conducts its CAA-required technology and risk-based reviews. As a result of having performance test reports and air emission reports readily accessible, our ability to carry out comprehensive reviews will be increased and achieved within a shorter period of time. These data will provide useful information on control efficiencies being achieved and maintained in practice within a source

[10] EPA's Final Plan for Periodic Retrospective Reviews, August 2011. Available at: *http://www.epa.gov/sites/production/files/2015-09/documents/eparetroreviewplan-aug2011_0.pdf.*

[11] Digital Government: Building a 21st Century Platform to Better Serve the American People, May 2012. Available at: *https://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-strategy.pdf.*

category and across source categories for regulated sources and pollutants. These reports can also be used to inform the technology-review process by providing information on improvements to add-on control technology and new control technology.

Under an electronic reporting system, the EPA's Office of Air Quality Planning and Standards (OAQPS) would have air emissions and performance test data in hand; OAQPS would not have to collect these data from the EPA Regional offices or from delegated air agencies or industry sources in cases where these reports are not submitted to the EPA Regional offices. Thus, we anticipate fewer or less substantial information collection requests (ICRs) in conjunction with prospective CAA-required technology and risk-based reviews may be needed. We expect this to result in a decrease in time spent by industry to respond to data collection requests. We also expect the ICRs to contain less extensive stack testing provisions, as we will already have stack test data electronically. Reduced testing requirements would be a cost savings to industry. The EPA should also be able to conduct these required reviews more quickly, as OAQPS will not have to include the ICR collection time in the process or spend time collecting reports from the EPA Regional Offices. While the regulated community may benefit from a reduced burden of ICRs, the general public benefits from the agency's ability to provide these required reviews more quickly, resulting in increased public health and environmental protection.

Electronic reporting could minimize submission of unnecessary or duplicative reports in cases where facilities report to multiple government agencies and the agencies opt to rely on the EPA's electronic reporting system to view report submissions. Where air agencies continue to require a paper copy of these reports and will accept a hard copy of the electronic report, facilities will have the option to print paper copies of the electronic reporting forms to submit to the air agencies, and, thus, minimize the time spent reporting to multiple agencies. Additionally, maintenance and storage costs associated with retaining paper records could likewise be minimized by replacing those records with electronic records of electronically submitted data and reports.

Air agencies could benefit from more streamlined and automated review of the electronically submitted data. For example, because the performance test data would be readily-available in a standard electronic format, air agencies would be able to review reports and data electronically rather than having to conduct a review of the reports and data manually. Having reports and associated data in electronic format will facilitate review through the use of software ''search'' options, as well as the downloading and analyzing of data in spreadsheet format. Additionally, air agencies would benefit from the reported data being accessible to them through the EPA's electronic reporting system wherever and whenever they want or need access (as long as they have access to the Internet). The ability to access and review air emission report information electronically will assist air agencies to more quickly and accurately determine compliance with the applicable regulations, potentially allowing a faster response to violations which could minimize harmful air emissions. This benefits both air agencies and the general public.

The proposed electronic reporting of data is consistent with electronic data trends (*e.g.,* electronic banking and income tax filing). Electronic reporting of environmental data is already common practice in many media offices at the EPA. The changes being proposed in this rulemaking are needed to continue the EPA's transition to electronic reporting.

E. What are the proposed recordkeeping and reporting requirements?

The EPA is proposing requirements that reflect those finalized in the final CISWI EG. The federal plan requires that records of all initial and all subsequent stack or performance specification (PS) tests, deviation reports, operating parameter data, continuous monitoring data, maintenance and inspections of air pollution control devices, monitoring plan, and operator training and qualification must be maintained for 5 years. The results of the stack tests and PS test and values for operating parameters are required to be included in initial and subsequent compliance reports. Any incident of deviation, resumed operation following shutdown, force majeure, intent to stop or start use of Continuous Regulatory Systems (CMS), and intent of conducting or rescheduling a performance test are required to be reported to the Administrator. Furthermore, final compliance reports are required following the completion of each requirement and identifying any missed requirement. *See* section V.B of this preamble for a more detailed discussion of the compliance schedules.

F. What are the other proposed requirements?

As discussed in several portions of this preamble, we are proposing requirements for the federal plan to make it consistent with the final CISWI EG. While many of these requirements were significantly different from those currently in the CISWI Federal Plan, there are some that differ very little, if at all. Some requirements that differ little from those in the current CISWI Federal Plan include the requirements for owners or operators of existing CISWI units to meet operator training and qualification requirements, which include: Ensuring that at least one operator or supervisor per facility complete the operator training course, that qualified operator(s) or supervisor(s) complete an annual review or refresher course specified in the regulation, and that they maintain plant-specific information, updated annually, regarding training.

Another such requirement is that owners or operators of existing CISWI units are required to submit a monitoring plan for any CMS or bag leak detection system used to comply with the rule.

VI. CISWI Units That Have or Will Shut Down

A. Units That Plan to Close

The proposed federal plan establishes that if owners or operators plan to permanently close currently operating CISWI units, they must do so and submit a closure notification to the Administrator by August 7, 2017. The proposed requirements for closing a CISWI unit will be set forth at 40 CFR 62.14570, subpart III. Conversely, the CISWI requirements do apply to a ''mothballed unit'' or inactive unit, where a unit does not operate, but it is not rendered inoperable. Until such time as a unit is permanently closed, it must comply with any applicable requirements of the federal plan. In addition, while still in operation, the CISWI unit is subject to the same requirements for title V operating permits that apply to units that will continue to operate.

B. Inoperable Units

The federal plan provides that in cases where a CISWI unit has already shut down permanently and has been rendered inoperable (*e.g.,* waste charge door is welded shut, stack is removed, combustion air blowers removed, burners or fuel supply equipment are removed), the CISWI unit may be left off the source inventory in a state plan or this proposed federal plan. A CISWI

unit that has been rendered inoperable would not be covered by the federal plan.

C. CISWI Units That Have Shut Down

The unit inventory for this federal plan includes any CISWI unit known to have already shut down (but not known to be inoperable).

1. Restarting Before the Final Compliance Date

If the owner or operator of an inactive CISWI unit plans to restart before the final compliance date, the owner or operator must achieve final compliance by February 7, 2018.

2. Restarting After the Final Compliance Date

Under the proposed federal plan, if the owner or operator of a CISWI unit closes the CISWI unit, but restarts the unit after the final compliance date of February 7, 2018, the owner or operator must complete emission control retrofits and meet the emissions and operating limits on the date the CISWI unit restarts operation. Within 6 months of the unit startup, operator(s) of these CISWI units would have to complete the operator training and qualification requirements. Within 60 days of installing an air pollution control device, operator(s) must conduct a unit inspection. Performance testing to demonstrate initial compliance would also be required as described at 40 CFR 62.14650. A CISWI unit may not use the provisions to close the CISWI unit and restart after the compliance date to gain an effective ''extension'' of the operator training and qualification requirements or initial compliance requirements. A CISWI unit that operates out of compliance after the final compliance date would be in violation of the federal plan and subject to enforcement action.

VII. Implementation of the Federal Plan and Delegation

A. Background of Authority

Under sections 111(d) and 129(b) of the CAA, the EPA is required to adopt EG that are applicable to existing solid waste incineration units. These EG are implemented when the EPA approves a state plan or adopts a federal plan that implements and enforces the EG. As discussed above, the federal plan regulates CISWI units in states that do not have approved plans in effect to implement the EG.

Congress has determined that the primary responsibility for air pollution prevention and control rests with state and local agencies. (*See* section 101(a)(3) of the CAA.) Consistent with that overall determination, Congress established sections 111 and 129 of the CAA with the intent that the state and local agencies take the primary responsibility for ensuring that the emissions limitations and other requirements in the EG are achieved. Also, in section 111(d) of the CAA, Congress explicitly required that the EPA establish procedures that are similar to those under CAA section 110(c) for state implementation plans. Although Congress required the EPA to propose and promulgate a federal plan for states that fail to submit approvable state plans on time, states may submit plans after promulgation of the CISWI Federal Plan. The EPA strongly encourages states that are unable to submit approvable plans to request delegation of the federal plan so that they can have primary responsibility for implementing the final CISWI EG, consistent with the intent of Congress.

The preferred outcome under the statute and the regulations results when the state, tribal, and local agencies implement the EPA approved state (or tribal) plan because state, tribal, and local agencies not only have the responsibility to implement the final CISWI EG, but also have the practical knowledge and enforcement resources critical to achieving the highest rate of compliance. In cases where states are unable to develop and submit approvable state plans, it is still preferable for the state and local agencies to be the implementing agency. For these reasons, the EPA will do all that it can to expedite delegation of the federal plan to state, tribal, and local agencies, whenever possible, in cases where states are unable to develop and submit approvable state plans. The EPA will also continue to review and approve state plans after promulgation of the CISWI Federal Plan.

B. Mechanisms for Transferring Authority

There are two mechanisms for transferring implementation authority to state, tribal, and local agencies: (1) The EPA approval of a state plan after the federal plan is in effect; and (2) if a state does not submit or obtain approval of its own plan, the EPA delegation to a state, tribe, or local agency with the authority to implement certain portions of this federal plan to the extent appropriate and if allowed by state law. Both of these options are described in more detail below.

1. Federal Plan Becomes Effective Prior To Approval of a State Plan

After CISWI units in a state become subject to the federal plan, the state or tribal agency may still adopt and submit a state or tribal plan to the EPA. If the EPA determines that the state or tribal plan is as protective as the final CISWI EG, the EPA will approve the state or tribal plan. If the EPA determines that the plan is not as protective as the final CISWI EG, the EPA may approve the portions of the plan that are consistent with the final CISWI EG. If a state or tribal plan is approved in part, the federal plan will apply to the affected CISWI units in lieu of the disapproved portions of the state plan until the state or tribe addresses the deficiencies in the state plan and the revised state plan is approved by the EPA. Prior to any disapproval, the EPA will work with states and tribes to attempt to reconcile areas of the plan that remain inconsistent with the EG.

Upon the effective date of a state or tribal plan, the federal plan would no longer apply to CISWI units covered by such a plan and the state, tribe, territory, or local agency would implement and enforce the state plan in lieu of the federal plan. When an EPA regional office approves a state or tribal plan, it will amend the appropriate subpart of 40 CFR part 62 to indicate such approval.

2. State, Tribe, Territory, or Local Agency Taking Delegation of the Federal Plan

The EPA, in its discretion, may delegate to state, tribe, territorial, or local agencies the authority to implement this federal plan. As discussed above, the EPA has concluded that it is advantageous and the best use of resources for states, tribes, territories, or local agencies to agree to undertake, on the EPA's behalf, administrative and substantive roles in implementing the federal plan to the extent appropriate and where authorized by federal, state, tribal, territorial, or local law. If a state, tribe, territory, or local agency requests delegation, the EPA will generally delegate the entire federal plan to the state, tribe, territory, or local agency. These functions include administration and oversight of compliance, and reporting and recordkeeping requirements, CISWI unit inspections and preparation of draft notices of violation, but will not include any authorities retained by the EPA. Agencies that have taken delegation, as well as the EPA, will have responsibility for bringing enforcement actions against sources violating federal plan provisions.

C. Implementing Authority

The EPA Regional Administrators have been delegated the authority for implementing the CISWI Federal Plan.

All reports required by the federal plan should be submitted to the appropriate Regional Administrator. Section II.C of this preamble includes Table 3 that lists names and addresses of the EPA regional office contacts and the states they cover.

D. Delegation of the Federal Plan and Retained Authorities

If a state, tribe, territory, or local agency intends to take delegation of the federal plan, the state, tribe, territory, or local agency should submit to the appropriate EPA regional office a written request for delegation of authority. The state, tribe, territory, or local agency should explain how it meets the criteria for delegation. *See* generally ''Good Practices Manual for Delegation of NSPS and NESHAP'' (EPA, February 1983). The letter requesting delegation of authority to implement the federal plan should: (1) Demonstrate that the state, tribe, territory, or local agency has adequate resources, as well as the legal authority to administer and enforce the program, (2) include an inventory of affected CISWI units, which includes those that have ceased operation, but have not been dismantled or rendered inoperable, and an inventory of the affected units' air emissions and a provision for state progress reports to the EPA, (3) certify that a public hearing is held on the state, tribe, territory, or local agency delegation request, and (4) include a memorandum of agreement between the state, tribe, territory, or local agency and the EPA that sets forth the terms and conditions of the delegation, the effective date of the agreement and the mechanism to transfer authority. Upon signature of the agreement, the appropriate EPA Regional office would publish an approval notice in the **Federal Register**, thereby incorporating the delegation of authority into the appropriate subpart of 40 CFR part 62.

If authority is not delegated to a state, tribe, territory, or local agency, the EPA will implement the federal plan. Also, if a state, tribe, territory, or local agency fails to properly implement a delegated portion of the federal plan, the EPA will assume direct implementation and enforcement of that portion. The EPA will continue to hold enforcement authority along with the state, tribe, territory, or local agency even when the agency has received delegation of the federal plan. In all cases where the federal plan is delegated, the EPA will retain and will not transfer authority to a state, tribe, or local agency to approve the following items promulgated in the final CISWI EG:

1. Approval of alternatives to the emission limitations in table 5 of this document and operating limits established under 40 CFR 62.14635 and 62.14640;
2. Approval of major alternatives to test methods;
3. Approval of major alternatives to monitoring;
4. Approval of major alternatives to recordkeeping and reporting;
5. [Reserved];
6. The requirements in § 62.14640;
7. The requirements in § 62.14625(b)(2);
8. Approval of alternative opacity emission limits in § 62.14630 under § 60.11(e)(6) through (8);
9. Performance test and data reduction waivers under § 60.8(b)(4) and (5);
10. Determination of whether a qualifying small power production facility or cogeneration facility under § 62.14525(e) or (f) is combusting homogenous waste; and
11. Approval of an alternative to any electronic reporting to the EPA required by this subpart.

CISWI unit owners or operators who wish to petition the agency for any alternative requirement should submit a request to the Regional Administrator with a copy sent to the appropriate state.

VIII. Title V Operating Permits

All existing CISWI units regulated under state, tribal, or federal plans implementing the final CISWI EG must operate in a manner consistent with a title V operating permit that assures compliance with all federally applicable requirements for any regulated CISWI units, including all applicable CAA section 129 requirements.[12]

The permit application deadline for a CAA section 129 source applying for a title V operating permit depends on when the source first becomes subject to the relevant title V permit program. Because existing major sources are subject to title V,[13] major source facilities that contain existing CISWI units should already have a title V permit. In such cases, the source must comply with the title V permit revision provisions of the relevant state title V program instead of applying for a title V permit. In contrast, the application deadline would be important to CISWI units at facilities that are not subject to the title V permit program for other reasons. Such sources with an existing CISWI unit subject to this proposed federal plan must submit a complete title V permit application by the earliest of the following dates:

- Twelve (12) months after the effective date of any applicable EPA-approved CAA sections 111(d)/129 plan (*i.e.,* approved state or tribal plan that implements the final CISWI EG); or
- Twelve (12) months after the effective date of any applicable federal plan; or
- Thirty-six (36) months after promulgation of 40 CFR part 60, subpart DDDD (*i.e.,* February 7, 2016).

For any existing CISWI unit not subject to an earlier permit application deadline, the application deadline of February 7, 2016, which is in the past, applies regardless of whether or when any applicable federal plan is effective, or whether or when any applicable CAA sections 111(d)/129 plan is approved by the EPA and becomes effective. (*See* CAA sections 129(e), 503(c), 503(d), 502(a), and 40 CFR 70.5(a)(1)(i) and 71.5(a)(1)(i).)

For more background information on the interface between CAA section 129 and title V, including the EPA's interpretation of CAA section 129(e), *see* the final federal plan for Commercial and Industrial Solid Waste Incinerators, October 3, 2003, (68 FR 57518, 57532). *See* also the final federal plan for Hospital Medical Infectious Waste Incinerators, August 15, 2000, (65 FR 49868, 49877).

A. Title V and Delegation of a Federal Plan

As noted previously, issuance of a title V permit is not equivalent to the approval of a state or tribal plan or delegation of a federal plan.[14] Legally, delegation of a standard or requirement results in a delegated state, local, or tribal agency standing in for the EPA as a matter of federal law. This means that obligations a source may have to the EPA under a federally promulgated standard become obligations to a state, tribal, or local agency (except for functions that the EPA retains for itself) upon delegation.[15] Although a state, local, or tribal agency may have the authority under state, local, or tribal law to incorporate CAA section 111/129 requirements into its title V permits, and implement and enforce these requirements in these permits without first taking delegation of the CAA section 111/129 federal plan, the state, local, or tribal agency is not standing in for the EPA as a matter of federal law in this situation. Where a state, local, or

[12] 40 CFR 70.2, 70.6(a)(1), 71.2, and 71.6(a)(1).

[13] CAA Section 503(c) and 40 CFR 70.3(a) and (b), 70.5(a)(1)(i), 71.3(a) and (b), and 71.5(a)(1)(i).

[14] *See, e.g.,* the ''Title V and Delegation of a Federal Plan'' section of the proposed federal plan for Commercial Industrial Solid Waste Incinerators (CISWI), November 25, 2002, (67 FR 70640, 70652). The preamble language from this section in the proposed federal plan for CISWI was reaffirmed in the final federal plan for CISWI, October 3, 2003, (68 FR 57518, 57535).

[15] If the Administrator chooses to retain certain authorities under a standard, those authorities cannot be delegated, *e.g.,* alternative methods of demonstrating compliance.

tribal agency does not take delegation of a section 111/129 federal plan, obligations that a source has to the EPA under the federal plan continue after a title V permit is issued to the source. As a result, the EPA maintains that an approved 40 CFR part 70 operating permits program cannot be used as a mechanism to transfer the authority to implement and enforce the federal plan from the EPA to a state, local, or tribal agency.

As mentioned above, a state, local, or tribal agency may have the authority under state, local, or tribal law to incorporate CAA section 111/129 requirements into its title V permits, and implement and enforce these requirements in that context without first taking delegation of the CAA section 111/129 federal plan.[16] Some states, local governments, or tribes, however, may not be able to implement and enforce a CAA section 111/129 standard in a title V permit under state, local, or tribal law until the CAA section 111/129 standard has been delegated. In these situations, a state, local, or tribal agency should not issue a 40 CFR part 70 permit to a source subject to a federal plan before taking delegation of the section 111/129 federal plan.

However, if a state or tribe can provide an Attorney General's (AG) opinion delineating its authority to incorporate CAA section 111/129 requirements into its title V permits, and then implement and enforce these requirements through its title V permits without first taking delegation of the requirements, then a state, local, or tribal agency does not need to take delegation of the CAA section 111/129 requirements for purposes of title V permitting.[17] In practical terms, without approval of a state or tribal plan, delegation of a federal plan, or an adequate AG's opinion, states, local governments, and tribes with approved 40 CFR part 70 permitting programs open themselves up to potential questions regarding their authority to issue permits containing CAA section 111/129 requirements and to assure compliance with these requirements. Such questions could lead to the issuance of a notice of deficiency for a state's or tribe's 40 CFR part 70 program. As a result, prior to a state, local, or tribal permitting authority drafting a part 70 permit for a source subject to a CAA section 111/129 federal plan, the state, local government, or tribe, the EPA regional office and the source in question are advised to ensure that delegation of the relevant federal plan has taken place or that the permitting authority has provided an adequate AG's opinion to the EPA Regional office.

In addition, if a permitting authority chooses to rely on an AG's opinion and not take delegation of a federal plan, a CAA section 111/129 source subject to the federal plan in that state must simultaneously submit to both the EPA and the state, local government, or tribe all reports required by the standard to be submitted to the EPA. Given that these reports are necessary to implement and enforce the CAA section 111/129 requirements when they have been included in title V permits, the permitting authority needs to receive these reports at the same time as the EPA.

In the situation where a permitting authority chooses to rely on an AG's opinion and not take delegation of a federal plan, the EPA regional offices will be responsible for implementing and enforcing CAA section 111/129 requirements outside of any title V permits. Moreover, in this situation, the EPA regional offices will continue to be responsible for developing progress reports and conducting any other administrative functions required under this federal plan or any other CAA section 111/129 federal plan. *See,* section V.B of this preamble titled ''What are the final compliance schedules?''.

It is important to note that the EPA is not using its authority under 40 CFR part 70.4(i)(3) to request that all states, local governments, and tribes that do not take delegation of this federal plan submit supplemental AG's opinions at this time. However, the EPA regional offices shall request, and permitting authorities shall provide, such opinions when the EPA questions a state's or tribe's authority to incorporate CAA section 111/129 requirements into a title V permit and implement and enforce these requirements in that context without delegation.

IX. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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 and was, therefore, not submitted to the Office of Management and Budget for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This action simply proposes the CISWI Federal Plan to implement the EG adopted on February 7, 2013,[18] for those states that do not have a state plan implementing the EG.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. EG for owners of existing CISWI units were established by the February 7, 2013, final rule (78 FR 9112), and that rule was certified as not having a significant economic impact on a substantial number of small entities. This action establishes a federal plan to implement and enforce those requirements in those states that do not have their own EPA-approved state plan for implementing and enforcing the requirements. We have, therefore, concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty or any state, local, or tribal government or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the

[16] The EPA interprets the phrase ''assure compliance'' in CAA section 502(b)(5)(A) to mean that permitting authorities will implement and enforce each applicable standard, regulation, or requirement which must be included in the title V permits the permitting authorities issue. *See* definition of ''applicable requirement'' in 40 CFR 70.2. *See* also 40 CFR 70.4(b)(3)(i) and 70.6(a)(1).

[17] It is important to note that an AG's opinion submitted at the time of initial title V program approval is sufficient if it demonstrates that a state or tribe has adequate authority to incorporate CAA section 111/129 requirements into its title V permits and to implement and enforce these requirements through its title V permits without delegation and no subsequent state law or regulation has in some way limited that authority.

[18] *See* 78 FR 9112, February 7, 2013.

relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. The EPA is not aware of any CISWI units owned or operated by Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Orders 12866.

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This action involves technical standards. Please reference Table 6 of this preamble for the locations where these standards are available. The EPA has decided to use ANSI/ASME PTC 19.10–1981, ''Flue and Exhaust Gas Analyses,'' for its manual methods of measuring the oxygen or carbon dioxide content of the exhaust gas. These parts of ASME PTC 19.10–1981 are acceptable alternatives to EPA Methods 6 and 7 for the manual procedures only. The EPA determined that this standard is reasonably available because it is available for purchase. Another voluntary consensus standards (VCS), ASTM D6784–02 (Reapproved 2008), ''Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method)'' for its manual method of measuring mercury is an acceptable alternative to Method 29 and 30B. The EPA determined that this standard is reasonably available because it is available for purchase. The EPA further determined to use OAQPS Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997, for its guidance on the use of tiboelectic monitors as bag leak detectors for a fabric filter air pollution control device and monitoring system decriptions, selection, installation, set up, adjustment, operation, and quality assurance procedures. The EPA determined that this standard is reasonably available because it is freely available from the EPA. Lastly, the EPA decided to use EPA Methods 5, 6, 6C, 7, 7E, 9, 10, l0A, l0B, 22, 23, 26A, 29, and 30B. No VCS were found for EPA Methods 9 and 22.

While the EPA has identified 23 VCS as being potentially applicable to the rule, we have decided not to use these VCS in this rulemaking. The use of these VCS would be impractical because they do not meet the objectives of the standards cited in this rule. *See* the docket for the final CISWI EG (Docket ID No. EPA–HQ–OAR–2003–0119), which are being implemented under this action, for further information.

Under 40 CFR 62.14838, the EPA Administrator retains the authority of approving alternate methods of demonstrating compliance as established under 40 CFR 60.8(b) and 40 CFR 60.13(i), subpart A (NSPS General Provisions). A source may apply to the EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required EPA test methods, performance specifications, or procedures.

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

The EPA believes that this action does *not* have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

The documentation for this decision is contained in this preamble section, as well as the final CISWI EG discussion for Executive Order 12898 (78 FR 9178, February 7, 2013). This proposed federal plan implements the final CISWI EG for states that do not have an approved state plan implementing the final CISWI EG. As discussed in the preamble to the 2013 CISWI rule, the final CISWI EG 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. The amendments finalized in 2013 (made to the 2011 CISWI final rule) do not relax the control measures on sources regulated by the CISWI rule, and, therefore, will not cause emissions increases from these sources. The March 2011 final CISWI rule will reduce emissions of all the listed hazardous air pollutants (HAP) emitted from this source. This proposed federal plan implements national standards in the final CISWI EG that would result in reduction in emissions of many of the listed HAP emitted from this source. This includes emissions of Cd, HCl, Pb, and Hg. Other emissions reductions include reductions of criteria pollutants such as CO, NO_X, PM and $PM_{2.5}$ microns or less, and SO_2. SO_2 and NO_X are precursors for the formation of $PM_{2.5}$ and NO_X is a precursor for ozone. Reducing these emissions will decrease the amount of such pollutants to which all affected populations are exposed.

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 14, 2016.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, Title 40, chapter I, part 62 of the Code of Federal Regulations (CFR) is proposed to be amended as follows:

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

■ 1. The authority citation for part 62 continues to read as follows:

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

■ 2. Part 62 is amended by revising subpart III to read as follows:

Subpart III—Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units

Sec.

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Introduction

§ 62.14500 What is the purpose of this subpart?

(a) This subpart establishes emission requirements and compliance schedules for the control of emissions from commercial and industrial solid waste incineration (CISWI) units that are not covered, or are only partially covered, by an EPA approved and currently effective state or tribal plan. The pollutants addressed by these emission requirements are listed in Table 1 and Tables 5 through 8 of this subpart. These emission requirements are developed in accordance with sections 111 and 129 of the Clean Air Act and subpart B of 40 CFR part 60.

(b) In this subpart, ''you'' means the owner or operator of a CISWI unit.

§ 62.14505 What are the principal components of this subpart?

This subpart contains the eleven major components listed in paragraphs (a) through (k) of this section.

(a) [Reserved].

(b) Waste management plan.

(c) Operator training and qualification.

(d) Emission limitations and operating limits.

(e) Performance testing.

(f) Initial compliance requirements.
(g) Continuous compliance requirements.
(h) Monitoring.
(i) Recordkeeping and reporting.
(j) Definitions.
(k) Tables.

Applicability

§ 62.14510 Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate a CISWI unit as defined in § 62.14840 or an air curtain incinerator as defined in § 62.14840 and the CISWI unit or air curtain incinerator meets the criteria described in paragraphs (a)(1) through (a)(3) of this section.

(1) Construction of your CISWI unit or air curtain incinerator commenced on or before June 4, 2010, or commenced modification or reconstruction after June 4, 2010 but no later than August 7, 2013.

(2) Your CISWI unit is not exempt under § 62.14525.

(3) Your CISWI unit is not regulated by an EPA approved and currently effective state or tribal plan, or your CISWI unit is located in any state whose approved state or tribal plan is only approved in part. In the case of a state or tribal program that is approved in part, the federal plan applies to affected CISWI units in lieu of the disapproved portions of the state or tribal program until the state or tribe plan addresses the deficiencies and the revised plan is approved by the EPA.

(b) If changes to the CISWI unit are made after August 7, 2013 that meet the definition of modification or reconstruction, your CISWI unit is subject to subpart CCCC of 40 CFR part 60 and this subpart no longer applies to that unit.

(c) If you make physical or operational changes to your existing CISWI unit primarily to comply with this subpart, then such changes do not qualify as modifications or reconstructions under subpart CCCC of 40 CFR part 60.

§ 62.14515 Can my CISWI unit be covered by both a state plan and this subpart?

(a) If your CISWI unit is located in a state that does not have an EPA-approved state plan or your state's plan has not become effective, this subpart applies to your CISWI unit until the EPA approves a state plan that covers your CISWI unit and that state plan becomes effective. However, a state may enforce the requirements of a state regulation while your CISWI unit is still subject to this subpart.

(b) After the EPA fully approves a state plan covering your CISWI unit, and after that state plan becomes effective, you will no longer be subject to this subpart and will only be subject to the approved and effective state plan. If the state or tribal plan are only approved in part, you will remain subject to the federal plan to the extent necessary to address the deficiencies in the disapproved portions of the state or tribal plan.

§ 62.14520 How do I determine if my CISWI unit is covered by an approved and effective state or tribal plan?

This part (40 CFR part 62) contains a list of state and tribal areas with approved Clean Air Act section 111(d) and section 129 plans along with the effective dates for such plans. The list is published annually. If this part does not indicate that your state or tribal area has an approved and effective plan, you should contact your state environmental agency's air director or your EPA Regional Office to determine if the EPA has approved a state plan covering your unit since publication of the most recent version of this subpart.

§ 62.14521 If my CISWI unit is not listed in the federal plan inventory, am I exempt from this subpart?

Any CISWI unit that meets the applicability criteria in § 62.14510 is required to comply with the applicable emissions guidelines even if the source is not listed in the federal plan or otherwise applicable state or tribal plan inventory. CISWI units subject to this subpart are not limited to the inventory of sources listed in Docket EPA–HQ–OAR–2016–0664 for the federal plan. If your CISWI units meets the applicability criteria in § 62.14510, this subpart applies to you whether or not your unit is listed in the federal plan inventory in the docket.

§ 62.14525 Can my combustion unit be exempt from this subpart?

This subpart exempts 8 types of units, described in paragraphs (a) and (c) through (o) of this section, from complying with the requirements of this subpart with the exception of the requirements specified in this section.

(a) *Pathological waste incineration units.* Incineration units burning 90 percent or more by weight (on a calendar quarter basis and excluding the weight of auxiliary fuel and combustion air) of pathological waste, low-level radioactive waste, and/or chemotherapeutic waste as defined in § 62.14840 are not subject to this subpart if you meet the two requirements specified in paragraphs (a)(1) and (2) of this section.

(1) Notify the Administrator that the unit meets these criteria.

(2) Keep records on a calendar quarter basis of the weight of pathological waste, low-level radioactive waste, and/or chemotherapeutic waste burned, and the weight of all other fuels and wastes burned in the unit.

(b) [Reserved]

(c) *Municipal waste combustion units.* Incineration units that are regulated under subpart Ea of 40 CFR part 60 (Standards of Performance for Municipal Waste Combustors); subpart Eb of 40 CFR part 60 (Standards of Performance for Municipal Waste Combustors for Which Construction is Commenced After September 20, 1994); subpart Cb of 40 CFR part 60 (Emission Guidelines and Compliance Times for Large Municipal Waste Combustors Constructed on or Before September 20, 1994); subpart AAAA of 40 CFR part 60 (Standards of Performance for New Stationary Sources: Small Municipal Waste Combustion Units); subpart BBBB of 40 CFR part 60 (Emission Guidelines for Existing Stationary Sources: Small Municipal Waste Combustion Units); or subpart JJJ of 40 CFR part 62 (Federal Plan Requirements for Small Municipal Waste Combustion Units Constructed on or Before August 30, 1999).

(d) *Medical waste incineration units.* Incineration units regulated under subpart Ec of 40 CFR part 60 (Standards of Performance for Hospital/Medical/Infectious Waste Incinerators for Which Construction is Commenced After June 20, 1996); 40 CFR part 60 subpart Ce (Emission Guidelines and Compliance Times for Hospital/Medical/Infectious Waste Incinerators); and 40 CFR part 62 subpart HHH (Federal Plan Requirements for Hospital/Medical/Infectious Waste Incinerators Constructed on or before June 20, 1996).

(e) *Small power production facilities.* Units that meet the four requirements specified in paragraphs (e)(1) through (4) of this section.

(1) The unit qualifies as a small power-production facility under section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)).

(2) The unit burns homogeneous waste (not including refuse-derived fuel) to produce electricity.

(3) You submit documentation to the Administrator notifying the Agency that the qualifying small power production facility is combusting homogenous waste.

(4) You must maintain the records specified in § 62.14700(v).

(f) *Cogeneration facilities.* Units that meet the four requirements specified in paragraphs (f)(1) through (4) of this section.

(1) The unit qualifies as a cogeneration facility under section

3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)).

(2) The unit burns homogeneous waste (not including refuse-derived fuel) to produce electricity and steam or other forms of energy used for industrial, commercial, heating, or cooling purposes.

(3) You submit documentation to the Administrator notifying the Agency that the qualifying cogeneration facility is combusting homogenous waste.

(4) You maintain the records specified in § 62.14700(w).

(g) *Hazardous waste combustion units.* Units for which you are required to get a permit under section 3005 of the Solid Waste Disposal Act.

(h) *Materials recovery units.* Units that combust waste for the primary purpose of recovering metals, such as primary and secondary smelters.

(i) *Air curtain incinerators.* Air curtain incinerators that burn 100 percent wood waste; 100 percent clean lumber; or a 100 percent mixture of only wood waste, clean lumber, and/or yard waste; are required to meet only the requirements under ''Air Curtain Incinerators'' (§§ 62.14765 through 62.14825) and the title V operating permit requirements (§ 62.14830).

(j) [Reserved]

(k) [Reserved]

(l) [Reserved]

(m) *Sewage treatment plants.* Incineration units regulated under subpart O of 40 CFR part 60 (Standards of Performance for Sewage Treatment Plants).

(n) *Sewage sludge incineration units.* Incineration units combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter that are subject to subpart LLLL of 40 CFR part 60 (Standards of Performance for New Sewage Sludge Incineration Units) or subpart MMMM of 40 CFR part 60 (Emission Guidelines and Compliance Times for Existing Sewage Sludge Incineration Units).

(o) *Other solid waste incineration units.* Incineration units that are subject to subpart EEEE of 40 CFR part 60 (Standards of Performance for Other Solid Waste Incineration Units for Which Construction is Commenced After December 9, 2004, or for Which Modification or Reconstruction is Commenced on or After June 16, 2006) or subpart FFFF of 40 CFR part 60 (Emission Guidelines and Compliance Times for Other Solid Waste Incineration Units That Commenced Construction On or Before December 9, 2004).

§§ 62.14530–62.14531 [Reserved]

Compliance Schedule and Increments of Progress

§ 62.14535 When must I comply with this subpart if I plan to continue operation of my CISWI unit?

If you plan to continue operation of your CISWI unit, then you must follow the requirements in paragraph (a) of this section.

(a) If you plan to continue operation and come into compliance with the requirements of this subpart by February 7, 2018, then you must complete the requirements of paragraphs (a)(1) through (a)(5) of this section.

(1) You must comply with the operator training and qualification requirements and inspection requirements (if applicable) of this subpart by February 7, 2018.

(2) You must submit a waste management plan no later than November 7, 2017

(3) You must achieve final compliance by February 7, 2018. To achieve final compliance, you must incorporate all process changes and complete retrofit construction of control devices, so that, if the affected CISWI unit is brought online, all necessary process changes and air pollution control devices would operate as designed.

(4) You must conduct the initial performance test within 90 days after the date when you are required to achieve final compliance under paragraph (a)(3) of this section.

(5) You must submit an initial report including the results of the initial performance test no later than 60 days following the initial performance test (*see* §§ 62.14700 through 62.14760 for complete reporting and recordkeeping requirements).

(b) [Reserved]

§ 62.14536 [Reserved]

§ 62.14545 [Reserved]

§ 62.14550 [Reserved]

§ 62.14555 [Reserved]

§ 62.14560 [Reserved]

§ 62.14565 [Reserved]

§ 62.14570 What must I do if I plan to permanently close my CISWI unit?

If you plan to permanently close your CISWI unit rather than comply with the federal plan, you must submit a legally binding closure agreement, to the Administrator no later than six months prior to your operation will cease. The closure agreement must specify the date by which operation will cease. The closure date cannot be later than February 7, 2018 for sources that will not operate on or after the compliance date.

§ 62.14575 What must I do if I close my CISWI unit and then restart it?

If you close your CISWI unit but will restart it after February 7, 2018, you must complete emission control retrofits and meet the emission limitations and operating limits on the date your unit restarts operation.

Waste Management Plan

§ 62.14580 What is a waste management plan?

A waste management plan is a written plan that identifies both the feasibility and the methods used to reduce or separate certain components of solid waste from the waste stream in order to reduce or eliminate toxic emissions from incinerated waste.

§ 62.14585 When must I submit my waste management plan?

You must submit a waste management plan no later than November 7, 2017 or six months prior to commencing or recommencing burning solid waste, whichever is later.

§ 62.14590 What should I include in my waste management plan?

A waste management plan must include consideration of the reduction or separation of waste-stream elements such as paper, cardboard, plastics, glass, batteries, or metals; or the use of recyclable materials. The plan must identify any additional waste management measures, and the source must implement those measures considered practical and feasible, based on the effectiveness of waste management measures already in place, the costs of additional measures, the emissions reductions expected to be achieved, and any other environmental or energy impacts they might have.

Operator Training and Qualification

§ 62.14595 What are the operator training and qualification requirements?

(a) You must have a fully trained and qualified CISWI unit operator accessible at all times when the unit is in operation, either at your facility or able to be at your facility within one hour. The trained and qualified CISWI unit operator may operate the CISWI unit directly or be the direct supervisor of one or more other plant personnel who operate the unit. If all qualified CISWI unit operators are temporarily not accessible, you must follow the procedures in § 62.14625.

(b) Operator training and qualification must be obtained through a State-approved program or by completing the requirements included in paragraph (c) of this section.

(c) Training must be obtained by completing an incinerator operator training course that includes, at a minimum, the three elements described in paragraphs (c)(1) through (3) of this section.

(1) Training on the eleven subjects listed in paragraphs (c)(1)(i) through (xi) of this section.

(i) Environmental concerns, including types of emissions.

(ii) Basic combustion principles, including products of combustion.

(iii) Operation of the specific type of incinerator to be used by the operator, including proper startup, waste charging, and shutdown procedures.

(iv) Combustion controls and monitoring.

(v) Operation of air pollution control equipment and factors affecting performance (where applicable).

(vi) Inspection and maintenance of the incinerator and air pollution control devices.

(vii) Actions to correct malfunctions or conditions that may lead to malfunction.

(viii) Bottom and fly ash characteristics and handling procedures.

(ix) Applicable Federal, State, and local regulations, including Occupational Safety and Health Administration workplace standards.

(x) Pollution prevention.

(xi) Waste management practices.

(2) An examination designed and administered by the instructor.

(3) Written material covering the training course topics that can serve as reference material following completion of the course.

§ 62.14600 When must the operator training course be completed?

(a) The operator training course must be completed by the later of the three dates specified in paragraphs (a)(1) and (3) of this section.

(1) February 7, 2018.

(2) Six months after CISWI unit startup; or

(3) Six months after an employee assumes responsibility for operating the CISWI unit or assumes responsibility for supervising the operation of the CISWI unit.

(b) [Reserved].

§ 62.14605 How do I obtain my operator qualification?

(a) You must obtain operator qualification by completing a training course that satisfies the criteria under § 62.14595(b).

(b) Qualification is valid from the date on which the training course is completed and the operator successfully passes the examination required under § 62.14595(c)(2).

§ 62.14610 How do I maintain my operator qualification?

To maintain qualification, you must complete an annual review or refresher course covering, at a minimum, the five topics described in paragraphs (a) through (e) of this section.

(a) Update of regulations.

(b) Incinerator operation, including startup and shutdown procedures, waste charging, and ash handling.

(c) Inspection and maintenance.

(d) Responses to malfunctions or conditions that may lead to malfunction.

(e) Discussion of operating problems encountered by attendees.

§ 62.14615 How do I renew my lapsed operator qualification?

You must renew a lapsed operator qualification by one of the two methods specified in paragraphs (a) and (b) of this section.

(a) For a lapse of less than 3 years, you must complete a standard annual refresher course described in § 62.14610.

(b) For a lapse of 3 years or more, you must repeat the initial qualification requirements in § 62.14605(a).

§ 62.14620 What site-specific documentation is required?

(a) Documentation must be available at the facility and readily accessible for all CISWI unit operators that addresses the ten topics described in paragraphs (a)(1) through (10) of this section. You must maintain this information and the training records required by paragraph (c) of this section in a manner that they can be readily accessed and are suitable for inspection upon request.

(1) Summary of the applicable standards under this subpart.

(2) Procedures for receiving, handling, and charging waste.

(3) Incinerator startup, shutdown, and malfunction procedures.

(4) Procedures for maintaining proper combustion air supply levels.

(5) Procedures for operating the incinerator and associated air pollution control systems within the standards established under this subpart.

(6) Monitoring procedures for demonstrating compliance with the incinerator operating limits.

(7) Reporting and recordkeeping procedures.

(8) The waste management plan required under §§ 62.14580 through 62.14590.

(9) Procedures for handling ash.

(10) A list of the wastes burned during the performance test.

(b) You must establish a program for reviewing the information listed in paragraph (a) of this section with each employee who operates your incinerator.

(1) The initial review of the information listed in paragraph (a) of this section must be conducted by the later of the three dates specified in paragraphs (b)(1)(i) through (iii) of this section.

(i) February 7, 2018.

(ii) Six months after CISWI unit startup.

(iii) Six months after being assigned to operate the CISWI unit.

(2) Subsequent annual reviews of the information listed in paragraph (a) of this section must be conducted no later than 12 months following the previous review.

(c) You must also maintain the information specified in paragraphs (c)(1) through (3) of this section.

(1) Records showing the names of all plant personnel who operate your CISWI unit who have completed review of the information in § 62.14620(a) as required by § 62.14620(b), including the date of the initial review and all subsequent annual reviews.

(2) Records showing the names of all plant personnel who operate your CISWI unit who have completed the operator training requirements under § 62.14595, met the criteria for qualification under § 62.14605, and maintained or renewed their qualification under § 62.14610 or § 62.14615. Records must include documentation of training, the dates of the initial refresher training, and the dates of their qualification and all subsequent renewals of such qualifications.

(3) For each qualified operator, the phone and/or pager number at which they can be reached during operating hours.

§ 62.14625 What if all the qualified operators are temporarily not accessible?

If all qualified operators are temporarily not accessible (*i.e.,* not at the facility and not able to be at the facility within 1 hour), you must meet one of the two criteria specified in paragraphs (a) and (b) of this section, depending on the length of time that a qualified operator is not accessible.

(a) When all qualified operators are not accessible for more than 8 hours, but less than 2 weeks, the CISWI unit may be operated by other plant personnel familiar with the operation of the CISWI unit who have completed a review of

the information specified in § 62.14620(a) within the past 12 months. However, you must record the period when all qualified operators were not accessible and include this deviation in the annual report as specified under § 62.14730.

(b) When all qualified operators are not accessible for 2 weeks or more, you must take the two actions that are described in paragraphs (b)(1) and (2) of this section.

(1) Notify the Administrator of this deviation in writing within 10 days. In the notice, state what caused this deviation, what you are doing to ensure that a qualified operator is accessible, and when you anticipate that a qualified operator will be accessible.

(2) Submit a status report to the Administrator every 4 weeks outlining what you are doing to ensure that a qualified operator is accessible, stating when you anticipate that a qualified operator will be accessible and requesting approval from the Administrator to continue operation of the CISWI unit. You must submit the first status report 4 weeks after you notify the Administrator of the deviation under paragraph (b)(1) of this section. If the Administrator notifies you that your request to continue operation of the CISWI unit is disapproved, the CISWI unit may continue operation for 90 days, then must cease operation. Operation of the unit may resume if you meet the two requirements in paragraphs (b)(2)(i) and (ii) of this section.

(i) A qualified operator is accessible as required under § 62.14595(a).

(ii) You notify the Administrator that a qualified operator is accessible and that you are resuming operation.

Emission Limitations and Operating Limits

§ 62.14630 What emission limitations must I meet and by when?

(a) You must meet the emission limitations for each CISWI unit, including bypass stack or vent, specified in table 1 of this subpart or tables 5 through 8 of this subpart by February 7, 2018. The emission limitations apply at all times the unit is operating including and not limited to startup, shutdown, or malfunction.

(b) Units that do not use wet scrubbers must maintain opacity to less than or equal to the percent opacity (three 1-hour blocks consisting of ten 6-minute average opacity values) specified in table 1 of this subpart, as applicable.

§ 62.14635 What operating limits must I meet and by when?

(a) If you use a wet scrubber to comply with the emission limitations, you must establish operating limits for four operating parameters (as specified in table 2 of this subpart) as described in paragraphs (a)(1) through (4) of this section during the initial performance test.

(1) Maximum charge rate, calculated using one of the two different procedures in paragraph (a)(1)(i) or (ii) of this section, as appropriate.

(i) For continuous and intermittent units, maximum charge rate is 110 percent of the average charge rate measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(ii) For batch units, maximum charge rate is 110 percent of the daily charge rate measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(2) Minimum pressure drop across the wet particulate matter scrubber, which is calculated as the lowest 1-hour average pressure drop across the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations; or minimum amperage to the wet scrubber, which is calculated as the lowest 1-hour average amperage to the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(3) Minimum scrubber liquor flow rate, which is calculated as the lowest 1-hour average liquor flow rate at the inlet to the wet acid gas or particulate matter scrubber measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(4) Minimum scrubber liquor pH, which is calculated as the lowest 1-hour average liquor pH at the inlet to the wet acid gas scrubber measured during the most recent performance test demonstrating compliance with the hydrogen chloride emission limitation.

(b) You must meet the operating limits established during the initial performance test on the date the initial performance test is required or completed (whichever is earlier). You must conduct an initial performance evaluation of each continuous monitoring system and continuous parameter monitoring system within 60 days of installation of the monitoring system.

(c) If you use a fabric filter to comply with the emission limitations and you do not use a PM CPMS for monitoring PM compliance, you must operate each fabric filter system such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during any 6-month period. In calculating this operating time percentage, if inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm shall be counted as a minimum of 1 hour. If you take longer than 1 hour to initiate corrective action, the alarm time shall be counted as the actual amount of time taken by you to initiate corrective action.

(d) If you use an electrostatic precipitator to comply with the emission limitations and you do not use a PM CPMS for monitoring PM compliance, you must measure the (secondary) voltage and amperage of the electrostatic precipitator collection plates during the particulate matter performance test. Calculate the average electric power value (secondary voltage x secondary current = secondary electric power) for each test run. The operating limit for the electrostatic precipitator is calculated as the lowest 1-hour average secondary electric power measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(e) If you use activated carbon sorbent injection to comply with the emission limitations, you must measure the sorbent flow rate during the performance testing. The operating limit for the carbon sorbent injection is calculated as the lowest 1-hour average sorbent flow rate measured during the most recent performance test demonstrating compliance with the mercury emission limitations. For energy recovery units, when your unit operates at lower loads, multiply your sorbent injection rate by the load fraction, as defined in this subpart, to determine the required injection rate (*e.g.,* for 50 percent load, multiply the injection rate operating limit by 0.5).

(f) If you use selective noncatalytic reduction to comply with the emission limitations, you must measure the charge rate, the secondary chamber temperature (if applicable to your CISWI unit), and the reagent flow rate during the nitrogen oxides performance testing. The operating limits for the selective noncatalytic reduction are calculated as the highest 1-hour average charge rate, lowest secondary chamber temperature, and lowest reagent flow rate measured during the most recent performance test demonstrating compliance with the nitrogen oxides emission limitations.

(g) If you use a dry scrubber to comply with the emission limitations, you must measure the injection rate of each sorbent during the performance testing. The operating limit for the injection rate of each sorbent is calculated as the lowest 1-hour average injection rate of each sorbent measured during the most recent performance test demonstrating compliance with the hydrogen chloride emission limitations. For energy recovery units, when your unit operates at lower loads, multiply your sorbent injection rate by the load fraction, as defined in this subpart, to determine the required injection rate (*e.g.,* for 50 percent load, multiply the injection rate operating limit by 0.5).

(h) If you do not use a wet scrubber, electrostatic precipitator, or fabric filter to comply with the emission limitations, and if you do not determine compliance with your particulate matter emission limitation with either a particulate matter CEMS or a particulate matter CPMS, you must maintain opacity to less than or equal to ten percent opacity (1-hour block average).

(i) If you use a PM CPMS to demonstrate compliance, you must establish your PM CPMS operating limit and determine compliance with it according to paragraphs (i)(1) through (5) of this section:

(1) During the initial performance test or any subsequent performance test that demonstrates compliance with the PM limit, record all hourly average output values (milliamps, or the digital signal equivalent) from the PM CPMS for the periods corresponding to the test runs (*e.g.,* three 1-hour average PM CPMS output values for three 1-hour test runs):

(i) Your PM CPMS must provide a 4–20 milliamp output, or the digital signal equivalent, and the establishment of its relationship to manual reference method measurements must be determined in units of milliamps or digital bits;

(ii) Your PM CPMS operating range must be capable of reading PM concentrations from zero to a level equivalent to at least two times your allowable emission limit. If your PM CPMS is an auto-ranging instrument capable of multiple scales, the primary range of the instrument must be capable of reading PM concentration from zero to a level equivalent to two times your allowable emission limit; and

(iii) During the initial performance test or any subsequent performance test that demonstrates compliance with the PM limit, record and average all milliamp output values, or their digital equivalent, from the PM CPMS for the periods corresponding to the compliance test runs (*e.g.,* average all your PM CPMS output values for three corresponding 2-hour Method 5I test runs).

(2) If the average of your three PM performance test runs are below 75 percent of your PM emission limit, you must calculate an operating limit by establishing a relationship of PM CPMS signal to PM concentration using the PM CPMS instrument zero, the average PM CPMS output values corresponding to the three compliance test runs, and the average PM concentration from the Method 5 or performance test with the procedures in (i)(1) through (5) of this section:

(i) Determine your instrument zero output with one of the following procedures:

(A) Zero point data for *in-situ* instruments should be obtained by removing the instrument from the stack and monitoring ambient air on a test bench;

(B) Zero point data for extractive instruments should be obtained by removing the extractive probe from the stack and drawing in clean ambient air;

(C) The zero point can also can be established obtained by performing manual reference method measurements when the flue gas is free of PM emissions or contains very low PM concentrations (*e.g.,* when your process is not operating, but the fans are operating or your source is combusting only natural gas) and plotting these with the compliance data to find the zero intercept; and

(D) If none of the steps in paragraphs (i)(2)(i)(A) through (C) of this section are possible, you must use a zero output value provided by the manufacturer.

(ii) Determine your PM CPMS instrument average in milliamps, or the digital equivalent, and the average of your corresponding three PM compliance test runs, using equation 1:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} X_i \,, \bar{y} = \frac{1}{n}\sum_{i=1}^{n} Y_i \qquad \text{(Eq. 1)}$$

Where:

X_i = the PM CPMS output data points for the three runs constituting the performance test,

Y_i = the PM concentration value for the three runs constituting the performance test, and

n = the number of data points.

(iii) With your instrument zero expressed in milliamps, or the digital equivalent, your three run average PM CPMS milliamp value, or its digital equivalent, and your three run average PM concentration from your three compliance tests, determine a relationship of mg/dscm per milliamp or digital signal equivalent, with equation 2:

$$R = \frac{Y_i}{(X_i - z)} \qquad \text{(Eq. 2)}$$

Where:

R = the relative mg/dscm per milliamp, or the digital equivalent, for your PM CPMS,

Y_i = the three run average mg/dscm PM concentration,

X_i = the three run average milliamp output, or the digital equivalent, from your PM CPMS, and

Z = the milliamp or digital signal equivalent of your instrument zero determined from paragraph (i)(2)(i) of this section.

(iv) Determine your source specific 30-day rolling average operating limit using the mg/dscm per milliamp value, or per digital signal equivalent, from equation 2 in equation 3, below. This sets your operating limit at the PM CPMS output value corresponding to 75 percent of your emission limit:

$$O_l = z + \frac{0.75(L)}{R} \qquad \text{(Eq. 3)}$$

Where:

O_l = the operating limit for your PM CPMS on a 30-day rolling average, in milliamps or their digital signal equivalent,

L = your source emission limit expressed in mg/dscm,

z = your instrument zero in milliamps or digital equivalent, determined from paragraph (i)(2)(i) of this section, and

R = the relative mg/dscm per milliamp, or per digital signal output equivalent, for your PM CPMS, from equation 2.

(3) If the average of your three PM compliance test runs is at or above 75 percent of your PM emission limit you must determine your operating limit by averaging the PM CPMS milliamp or digital signal output corresponding to your three PM performance test runs that demonstrate compliance with the emission limit using equation 4 and you must submit all compliance test and PM CPMS data according to the reporting requirements in paragraph (i)(5) of this section:

$$O_h = \frac{1}{n}\sum_{i=1}^{n} X_i \qquad \text{(Eq. 4)}$$

Where:

X_i = the PM CPMS data points for all runs i,

n = the number of data points, and

O_h = your site specific operating limit, in milliamps or digital signal equivalent.

(4) To determine continuous compliance, you must record the PM CPMS output data for all periods when the process is operating and the PM CPMS is not out-of-control. You must demonstrate continuous compliance by using all quality-assured hourly average

data collected by the PM CPMS for all operating hours to calculate the arithmetic average operating parameter in units of the operating limit (*e.g.,* milliamps or digital signal bits, PM concentration, raw data signal) on a 30-day rolling average basis.

(5) For PM performance test reports used to set a PM CPMS operating limit, the electronic submission of the test report must also include the make and model of the PM CPMS instrument, serial number of the instrument, analytical principle of the instrument (*e.g.,* beta attenuation), span of the instruments primary analytical range, milliamp or digital signal value equivalent to the instrument zero output, technique by which this zero value was determined, and the average milliamp or digital signals corresponding to each PM compliance test run.

§ 62.14640 What if I do not use a wet scrubber, fabric filter, activated carbon injection, selective noncatalytic reduction, an electrostatic precipitator, or a dry scrubber to comply with the emission limitations?

If you use an air pollution control device other than a wet scrubber, activated carbon injection, selective noncatalytic reduction, fabric filter, an electrostatic precipitator, or a dry scrubber or limit emissions in some other manner, including mass balances, to comply with the emission limitations under § 62.14630, you must petition the EPA Administrator for specific operating limits to be established during the initial performance test and continuously monitored thereafter. You must submit the petition at least sixty days before the performance test is scheduled to begin. Your petition must include the five items listed in paragraphs (a) through (e) of this section.

(a) Identification of the specific parameters you propose to use as additional operating limits.

(b) A discussion of the relationship between these parameters and emissions of regulated pollutants, identifying how emissions of regulated pollutants change with changes in these parameters, and how limits on these parameters will serve to limit emissions of regulated pollutants.

(c) A discussion of how you will establish the upper and/or lower values for these parameters that will establish the operating limits on these parameters.

(d) A discussion identifying the methods you will use to measure and the instruments you will use to monitor these parameters, as well as the relative accuracy and precision of these methods and instruments.

(e) A discussion identifying the frequency and methods for recalibrating the instruments you will use for monitoring these parameters.

§ 62.14645 [Reserved]

Performance Testing

§ 62.14650 How do I conduct the initial and annual performance test?

(a) All performance tests must consist of a minimum of three test runs conducted under conditions representative of normal operations.

(b) You must document that the waste burned during the performance test is representative of the waste burned under normal operating conditions by maintaining a log of the quantity of waste burned (as required in § 62.14700(b)(1)) and the types of waste burned during the performance test.

(c) All performance tests must be conducted using the minimum run duration specified in tables 1 and 5 through 8 of this subpart.

(d) Method 1 of 40 CFR part 60, appendix A must be used to select the sampling location and number of traverse points.

(e) Method 3A or 3B of 40 CFR part 60, appendix A must be used for gas composition analysis, including measurement of oxygen concentration. Method 3A or 3B of 40 CFR part 60, appendix A must be used simultaneously with each method.

(f) All pollutant concentrations, except for opacity, must be adjusted to 7 percent oxygen using Equation 5 of this section:

$$C_{adj} = C_{meas}\ (20.9-7)/(20.9-\%O_2) \quad \text{(Eq. 5)}$$

Where:

C_{adj} = pollutant concentration adjusted to 7 percent oxygen;

C_{meas} = pollutant concentration measured on a dry basis;

$(20.9-7)$ = 20.9 percent oxygen − 7 percent oxygen (defined oxygen correction basis);

20.9 = oxygen concentration in air, percent; and

$\%O_2$ = oxygen concentration measured on a dry basis, percent.

(g) You must determine dioxins/furans toxic equivalency by following the procedures in paragraphs (g)(1) through (4) of this section.

(1) Measure the concentration of each dioxin/furan (tetra- through octa-) isomer emitted using EPA Method 23 at 40 CFR part 60, appendix A–7.

(2) Quantify isomers meeting identification criteria 2, 3, 4, and 5 in Section 5.3.2.5 of Method 23, regardless of whether the isomers meet identification criteria 1 and 7. You must quantify the isomers per Section 9.0 of Method 23. [**Note:** You may reanalyze the sample aliquot or split to reduce the number of isomers not meeting identification criteria 1 or 7 of Section 5.3.2.5.].

(3) For each dioxin/furan (tetra- through octa-chlorinated) isomer measured in accordance with paragraph (g)(1) and (2) of this section, multiply the isomer concentration by its corresponding toxic equivalency factor specified in table 3 of this subpart; and

(4) Sum the products calculated in accordance with paragraph (g)(3) of this section to obtain the total concentration of dioxins/furans emitted in terms of toxic equivalency.

(h) Method 22 at 40 CFR part 60, appendix A–7 must be used to determine compliance with the fugitive ash emission limit in table 5, 6, or 8 of this subpart.

(i) If you have an applicable opacity operating limit, you must determine compliance with the opacity limit using Method 9 at 40 CFR part 60, appendix A–4, based on three 1-hour blocks consisting of ten 6-minute average opacity values, unless you are required to install a continuous opacity monitoring system, consistent with §§ 62.14670 and 62.14690.

(j) You must determine dioxins/furans total mass basis by following the procedures in paragraphs (j)(1) through (3) of this section:

(1) Measure the concentration of each dioxin/furan tetra- through octa-chlorinated isomer emitted using EPA Method 23 at 40 CFR part 60, appendix A–7;

(2) Quantify isomers meeting identification criteria 2, 3, 4, and 5 in Section 5.3.2.5 of Method 23, regardless of whether the isomers meet identification criteria 1 and 7. You must quantify the isomers per Section 9.0 of Method 23. (**Note:** You may reanalyze the sample aliquot or split to reduce the number of isomers not meeting identification criteria 1 or 7 of Section 5.3.2.5.); and

(3) Sum the quantities measured in accordance with paragraphs (j)(1) and (2) of this section to obtain the total concentration of dioxins/furans emitted in terms of total mass basis.

§ 62.14655 How are the performance test data used?

You use results of performance tests to demonstrate compliance with the emission limitations in Table 1 of this subpart or tables 5 through 8 of this subpart.

Initial Compliance Requirements

§ 62.14660 How do I demonstrate initial compliance with the emission limitations and establish the operating limits?

You must conduct an initial performance test to determine compliance with the emission limitations in Table 1 of this subpart and tables 5 through 8 of this subpart, to establish compliance with any opacity operating limits in § 62.14635, to establish the kiln-specific emission limit in § 62.14670(y), as applicable, and to establish operating limits using the procedure in § 62.14635 or § 62.14640. The initial performance test must be conducted using the test methods listed in table 1 of this subpart and tables 5 through 8 of this subpart and the procedures in § 62.14650. The use of the bypass stack during a performance test shall invalidate the performance test. You must conduct a performance evaluation of each continuous monitoring system within 60 days of installation of the monitoring system.

§ 62.14665 By what date must I conduct the initial performance test?

(a) The initial performance test must be conducted no later than 180 days after your final compliance date. Your final compliance date is February 7, 2018, or the date you restart your CISWI unit if later than February 7, 2018.

(b) If you commence or recommence combusting a solid waste at an existing combustion unit at any commercial or industrial facility and you conducted a test consistent with the provisions of this subpart while combusting the given solid waste within the 6 months preceding the reintroduction of that solid waste in the combustion chamber, you do not need to retest until 6 months from the date you reintroduce that solid waste.

(c) If you commence or recommence combusting a solid waste at an existing combustion unit at any commercial or industrial facility and you have not conducted a performance test consistent with the provisions of this subpart while combusting the given solid waste within the 6 months preceding the reintroduction of that solid waste in the combustion chamber, you must conduct a performance test within 60 days from the date you reintroduce solid waste.

§ 62.14666 By what date must I conduct the initial air pollution control device inspection?

(a) The initial air pollution control device inspection must be conducted within 60 days after installation of the control device and the associated CISWI unit reaches the charge rate at which it will operate, but no later than 180 days after the final compliance date for meeting the amended emission limitations.

(b) Within 10 operating days following an air pollution control device inspection, all necessary repairs must be completed unless the owner or operator obtains written approval from the state agency establishing a date whereby all necessary repairs of the designated facility must be completed.

Continuous Compliance Requirements

§ 62.14670 How do I demonstrate continuous compliance with the emission limitations and the operating limits?

(a) *Compliance with standards.* (1) The emission standards and operating requirements set forth in this subpart apply at all times.

(2) If you cease combusting solid waste you may opt to remain subject to the provisions of this subpart. Consistent with the definition of CISWI unit, you are subject to the requirements of this subpart at least 6 months following the last date of solid waste combustion. Solid waste combustion is ceased when solid waste is not in the combustion chamber (*i.e.,* the solid waste feed to the combustor has been cut off for a period of time not less than the solid waste residence time).

(3) If you cease combusting solid waste you must be in compliance with any newly applicable standards on the effective date of the waste-to-fuel switch. The effective date of the waste-to-fuel switch is a date selected by you, that must be at least 6 months from the date that you ceased combusting solid waste, consistent with paragraph (a)(2) of this section. Your source must remain in compliance with this subpart until the effective date of the waste-to-fuel switch.

(4) If you own or operate an existing commercial or industrial combustion unit that combusted a fuel or non-waste material, and you commence or recommence combustion of solid waste, you are subject to the provisions of this subpart as of the first day you introduce or reintroduce solid waste to the combustion chamber, and this date constitutes the effective date of the fuel-to-waste switch. You must complete all initial compliance demonstrations for any Section 112 standards that are applicable to your facility before you commence or recommence combustion of solid waste. You must provide 30 days prior notice of the effective date of the waste-to-fuel switch. The notification must identify:

(i) The name of the owner or operator of the CISWI unit, the location of the source, the emissions unit(s) that will cease burning solid waste, and the date of the notice;

(ii) The currently applicable subcategory under this subpart, and any 40 CFR part 63 subpart and subcategory that will be applicable after you cease combusting solid waste;

(iii) The fuel(s), non-waste material(s) and solid waste(s) the CISWI unit is currently combusting and has combusted over the past 6 months, and the fuel(s) or non-waste materials the unit will commence combusting;

(iv) The date on which you became subject to the currently applicable emission limits;

(v) The date upon which you will cease combusting solid waste, and the date (if different) that you intend for any new requirements to become applicable (*i.e.,* the effective date of the waste-to-fuel switch), consistent with paragraphs (a)(2) and (3) of this section.

(5) All air pollution control equipment necessary for compliance with any newly applicable emissions limits which apply as a result of the cessation or commencement or recommencement of combusting solid waste must be installed and operational as of the effective date of the waste-to-fuel, or fuel-to-waste switch.

(6) All monitoring systems necessary for compliance with any newly applicable monitoring requirements which apply as a result of the cessation or commencement or recommencement of combusting solid waste must be installed and operational as of the effective date of the waste-to-fuel, or fuel-to-waste switch. All calibration and drift checks must be performed as of the effective date of the waste-to-fuel, or fuel-to-waste switch. Relative accuracy tests must be performed as of the performance test deadline for PM CEMS (if PM CEMS are elected to demonstrate continuous compliance with the particulate matter emission limits). Relative accuracy testing for other CEMS need not be repeated if that testing was previously performed consistent with section 112 monitoring requirements or monitoring requirements under this subpart.

(b) You must conduct an annual performance test for the pollutants listed in table 1 of this subpart or tables 5 through 8 of this subpart and opacity for each CISWI unit as required under § 62.14650. The annual performance test must be conducted using the test methods listed in table 1 or tables 5 through 8 of this subpart and the procedures in § 62.14650. Opacity must be measured using EPA Reference Method 9 at 40 CFR part 60. Annual performance tests are not required if you use CEMS or continuous opacity monitoring systems to determine compliance.

(c) You must continuously monitor the operating parameters specified in § 62.14635 or established under § 62.14640. Operation above the established maximum or below the established minimum operating limits constitutes a deviation from the established operating limits. Three-hour block average values are used to determine compliance (except for baghouse leak detection system alarms) unless a different averaging period is established under § 62.14640 or, for energy recovery units, where the averaging time for each operating parameter is a 30-day rolling average, calculated each hour as the average of the previous 720 operating hours over the previous 30 days of operation. Operation above the established maximum, below the established minimum, or outside the allowable range of the operating limits specified in paragraph (a) of this section constitutes a deviation from your operating limits established under this subpart, except during performance tests conducted to determine compliance with the emission and operating limits or to establish new operating limits. Operating limits are confirmed or reestablished during performance tests.

(d) You must burn only the same types of waste and fuels used to establish subcategory applicability (for ERUs) and operating limits during the performance test.

(e) For energy recovery units, incinerators, and small remote units, you must perform annual visual emissions tests for ash handling.

(f) For energy recovery units, you must conduct an annual performance test for opacity using EPA Reference Method 9 at 40 CFR part 60, apppendix A–4 (except where particulate matter continuous monitoring system or continuous parameter monitoring systems are used) and the pollutants listed in table 6 of this subpart.

(g) For facilities using a CEMS to demonstrate compliance with the carbon monoxide emission limit, compliance with the carbon monoxide emission limit may be demonstrated by using the CEMS according to the following requirements:

(1) You must measure emissions according to § 60.13 to calculate 1-hour arithmetic averages, corrected to 7 percent oxygen. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. You must demonstrate initial compliance with the carbon monoxide emissions limit using a 30-day rolling average of the 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, calculated using equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7.

(2) Operate the carbon monoxide continuous emissions monitoring system in accordance with the applicable requirements of performance specification 4A of appendix B and the quality assurance procedures of appendix F of this part.

(h) Coal and liquid/gas energy recovery units with annual average heat input rates greater than 250 MMBtu/hr may elect to demonstrate continuous compliance with the particulate matter emissions limit using a particulate matter CEMS according to the procedures in § 62.14690(n) instead of the continuous parameter monitoring system specified in § 62.14670(i). Coal and liquid/gas energy recovery units with annual average heat input rates less than 250 MMBtu/hr, incinerators, and small remote incinerators may also elect to demonstrate compliance using a particulate matter CEMS according to the procedures in § 62.14690(n) instead of particulate matter testing with EPA Method 5 at 40 CFR part 60, appendix A–3 and, if applicable, the continuous opacity monitoring requirements in paragraph (i) of this section.

(i) For energy recovery units with annual average heat input rates greater than or equal to 10 MMBTU/hour but less than 250 MMBtu/hr you must install, operate, certify and maintain a continuous opacity monitoring system (COMS) according to the procedures in § 62.14690.

(j) For waste-burning kilns, you must conduct an annual performance test for the pollutants (except mercury and particulate matter, and hydrogen chloride if no acid gas wet scrubber is used) listed in table 7 of this subpart. If you do not use an acid gas wet scrubber or dry scrubber, you must determine compliance with the hydrogen chloride emissions limit according to the requirements in paragraph (j)(1) of this section. You must determine compliance with the mercury emissions limit using a mercury CEMS according to paragraph (j)(2) of this section. You must determine compliance with particulate matter using CPMS:

(1) If you monitor compliance with the HCl emissions limit by operating an HCl CEMS, you must do so in accordance with Performance Specification 15 (PS 15) of appendix B to 40 CFR part 60, or, PS 18 of appendix B to 40 CFR part 60. You must operate, maintain, and quality assure a HCl CEMS installed and certified under PS 15 according to the quality assurance requirements in Procedure 1 of appendix F to 40 CFR part 60 except that the Relative Accuracy Test Audit requirements of Procedure 1 must be replaced with the validation requirements and criteria of sections 11.1.1 and 12.0 of PS 15. You must operate, maintain and quality assure a HCl CEMS installed and certified under PS 18 according to the quality assurance requirements in Procedure 6 of appendix F to 40 CFR part 60. For any performance specification that you use, you must use Method 321 of appendix A to 40 CFR part 63 as the reference test method for conducting relative accuracy testing. The span value and calibration requirements in paragraphs (j)(1)(i) and (ii) of this section apply to all HCl CEMS used under this subpart:

(i) You must use a measurement span value for any HCl CEMS of 0–10 ppmvw unless the monitor is installed on a kiln without an inline raw mill. Kilns without an inline raw mill may use a higher span value sufficient to quantify all expected emissions concentrations. The HCl CEMS data recorder output range must include the full range of expected HCl concentration values which would include those expected during ''mill off'' conditions. The corresponding data recorder range shall be documented in the site-specific monitoring plan and associated records; and

(ii) In order to quality assure data measured above the span value, you must use one of the three options in paragraphs (j)(1)(ii)(A) through (C) of this section:

(A) Include a second span that encompasses the HCl emission concentrations expected to be encountered during ''mill off'' conditions. This second span may be rounded to a multiple of 5 ppm of total HCl. The requirements of the appropriate HCl monitor performance specification shall be followed for this second span with the exception that a RATA with the mill off is not required;

(B) Quality assure any data above the span value by proving instrument linearity beyond the span value established in paragraph (j)(1)(i) of this section using the following procedure. Conduct a weekly ''above span linearity'' calibration challenge of the monitoring system using a reference gas with a certified value greater than your highest expected hourly concentration or greater than 75% of the highest measured hourly concentration. The ''above span'' reference gas must meet the requirements of the applicable performance specification and must be introduced to the measurement system at the probe. Record and report the results of this procedure as you would for a daily calibration. The ''above span linearity'' challenge is successful if the value measured by the HCl CEMS falls within 10 percent of the certified value of the reference gas. If the value measured by the HCl CEMS during the above span linearity challenge exceeds 10 percent of the certified value of the reference gas, the monitoring system must be evaluated and repaired and a new ''above span linearity'' challenge met before returning the HCl CEMS to service, or data above span from the HCl CEMS must be subject to the quality assurance procedures established in (j)(1)(ii)(D) of this section. In this manner values measured by the HCl CEMS during the above span linearity challenge exceeding +/-20 percent of the certified value of the reference gas must be normalized using equation 6;

(C) Quality assure any data above the span value established in paragraph (j)(1)(i) of this section using the following procedure. Any time two consecutive one-hour average measured concentration of HCl exceeds the span value you must, within 24 hours before or after, introduce a higher, ''above span'' HCl reference gas standard to the HCl CEMS. The ''above span'' reference gas must meet the requirements of the applicable performance specification and target a concentration level between 50 and 150 percent of the highest expected hourly concentration measured during the period of measurements above span, and must be introduced at the probe. While this target represents a desired concentration range that is not always achievable in practice, it is expected that the intent to meet this range is demonstrated by the value of the reference gas. Expected values may include above span calibrations done before or after the above-span measurement period. Record and report the results of this procedure as you would for a daily calibration. The ''above span'' calibration is successful if the value measured by the HCl CEMS is within 20 percent of the certified value of the reference gas. If the value measured by the HCl CEMS is not within 20 percent of the certified value of the reference gas, then you must normalize the stack gas values measured above span as described in paragraph (j)(1)(ii)(D) of this section. If the ''above span'' calibration is conducted during the period when measured emissions are above span and there is a failure to collect the one data point in an hour due to the calibration duration, then you must determine the emissions average for that missed hour as the average of hourly averages for the hour preceding the missed hour and the hour following the missed hour. In an hour where an ''above span'' calibration is being conducted and one or more data points are collected, the emissions average is represented by the average of all valid data points collected in that hour; and

(D) In the event that the ''above span'' calibration is not successful (*i.e.,* the HCl CEMS measured value is not within 20 percent of the certified value of the reference gas), then you must normalize the one-hour average stack gas values measured above the span during the 24-hour period preceding or following the ''above span'' calibration for reporting based on the HCl CEMS response to the reference gas as shown in equation 6:

$$\frac{\text{Certified reference gas value}}{\text{Measured value of reference gas}} = \text{Measured stack gas} = \text{Normalized stack gas result} \quad \text{(Eq. 6)}$$

Only one ''above span'' calibration is needed per 24-hour period.

(2) Compliance with the mercury emissions limit must be determined using a mercury CEMS according to the following requirements:

(i) You must operate a CEMS in accordance with performance specification 12A at 40 CFR part 60, appendix B or a sorbent trap based integrated monitor in accordance with performance specification 12B at 40 CFR part 60, appendix B. The duration of the performance test must be a calendar month. For each calendar month in which the waste-burning kiln operates, hourly mercury concentration data and stack gas volumetric flow rate data must be obtained. You must demonstrate compliance with the mercury emissions limit using a 30-day rolling average of these 1-hour mercury concentrations, including CEMS data during startup and shutdown as defined in this subpart, calculated using equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content;

(ii) Owners or operators using a mercury continuous emissions monitoring systems must install, operate, calibrate and maintain an instrument for continuously measuring and recording the mercury mass emissions rate to the atmosphere according to the requirements of performance specifications 6 and 12A at 40 CFR part 60, appendix B and quality assurance procedure 5 at 40 CFR part 60, appendix F; and

(iii) The owner or operator of a waste-burning kiln must demonstrate initial compliance by operating a mercury CEMS while the raw mill of the in-line kiln/raw mill is operating under normal conditions and including at least one period when the raw mill is off.

(k) If you use an air pollution control device to meet the emission limitations in this subpart, you must conduct an initial and annual inspection of the air pollution control device. The inspection must include, at a minimum, the following:

(1) Inspect air pollution control device(s) for proper operation; and

(2) Develop a site-specific monitoring plan according to the requirements in paragraph (l) of this section. This requirement also applies to you if you petition the EPA Administrator for alternative monitoring parameters under § 60.13(i).

(l) For each CMS required in this section, you must develop and submit to the EPA Administrator for approval a site-specific monitoring plan according to the requirements of this paragraph (l) that addresses paragraphs (l)(1)(i) through (vi) of this section:

(1) You must submit this site-specific monitoring plan at least 60 days before your initial performance evaluation of your continuous monitoring system:

(i) Installation of the continuous monitoring system sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust

emissions (*e.g.,* on or downstream of the last control device);

(ii) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer and the data collection and reduction systems;

(iii) Performance evaluation procedures and acceptance criteria (*e.g.,* calibrations);

(iv) Ongoing operation and maintenance procedures in accordance with the general requirements of § 60.11(d);

(v) Ongoing data quality assurance procedures in accordance with the general requirements of § 60.13; and

(vi) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 60.7(b), (c), (c)(1), (c)(4), (d), (e), (f) and (g).

(2) You must conduct a performance evaluation of each continuous monitoring system in accordance with your site-specific monitoring plan.

(3) You must operate and maintain the continuous monitoring system in continuous operation according to the site-specific monitoring plan.

(m) If you have an operating limit that requires the use of a flow monitoring system, you must meet the requirements in paragraphs (l) and (m)(1) through (4) of this section:

(1) Install the flow sensor and other necessary equipment in a position that provides a representative flow;

(2) Use a flow sensor with a measurement sensitivity at full scale of no greater than 2 percent;

(3) Minimize the effects of swirling flow or abnormal velocity distributions due to upstream and downstream disturbances; and

(4) Conduct a flow monitoring system performance evaluation in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(n) If you have an operating limit that requires the use of a pressure monitoring system, you must meet the requirements in paragraphs (l) and (n)(1) through (6) of this section:

(1) Install the pressure sensor(s) in a position that provides a representative measurement of the pressure (*e.g.,* PM scrubber pressure drop);

(2) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion;

(3) Use a pressure sensor with a minimum tolerance of 1.27 centimeters of water or a minimum tolerance of 1 percent of the pressure monitoring system operating range, whichever is less;

(4) Perform checks at the frequency outlined in your site-specific monitoring plan to ensure pressure measurements are not obstructed (*e.g.,* check for pressure tap plugging daily);

(5) Conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually; and

(6) If at any time the measured pressure exceeds the manufacturer's specified maximum operating pressure range, conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan and confirm that the pressure monitoring system continues to meet the performance requirements in your monitoring plan. Alternatively, install and verify the operation of a new pressure sensor.

(o) If you have an operating limit that requires a pH monitoring system, you must meet the requirements in paragraphs (l) and (o)(1) through (4) of this section:

(1) Install the pH sensor in a position that provides a representative measurement of scrubber effluent pH;

(2) Ensure the sample is properly mixed and representative of the fluid to be measured;

(3) Conduct a performance evaluation of the pH monitoring system in accordance with your monitoring plan at least once each process operating day; and

(4) Conduct a performance evaluation (including a two-point calibration with one of the two buffer solutions having a pH within 1 of the pH of the operating limit) of the pH monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than quarterly.

(p) If you have an operating limit that requires a secondary electric power monitoring system for an electrostatic precipitator, you must meet the requirements in paragraphs (l) and (p)(1) and (2) of this section:

(1) Install sensors to measure (secondary) voltage and current to the precipitator collection plates; and

(2) Conduct a performance evaluation of the electric power monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(q) If you have an operating limit that requires the use of a monitoring system to measure sorbent injection rate (*e.g.,* weigh belt, weigh hopper, or hopper flow measurement device), you must meet the requirements in paragraphs (l) and (q)(1) and (2) of this section:

(1) Install the system in a position(s) that provides a representative measurement of the total sorbent injection rate; and

(2) Conduct a performance evaluation of the sorbent injection rate monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(r) If you elect to use a fabric filter bag leak detection system to comply with the requirements of this subpart, you must install, calibrate, maintain, and continuously operate a bag leak detection system as specified in paragraphs (l) and (r)(1) through (5) of this section:

(1) Install a bag leak detection sensor(s) in a position(s) that will be representative of the relative or absolute particulate matter loadings for each exhaust stack, roof vent, or compartment (*e.g.,* for a positive pressure fabric filter) of the fabric filter;

(2) Use a bag leak detection system certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less;

(3) Conduct a performance evaluation of the bag leak detection system in accordance with your monitoring plan and consistent with the guidance provided in ''Fabric Filter Bag Leak Detection Guidance,'' (EPA–454/R–98–015, September 1997). This document is available from the U.S. Environmental Protection Agency (U.S. EPA); Office of Air Quality Planning and Standards; Sector Policies and Programs Division; Measurement Policy Group (D–243–02), Research Triangle Park, NC 27711. This document is also available on the Technology Transfer Network under Emissions Measurement Center Continuous Emissions Monitoring;

(4) Use a bag leak detection system equipped with a device to continuously record the output signal from the sensor; and

(5) Use a bag leak detection system equipped with a system that will sound an alarm when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is observed readily by plant operating personnel.

(s) For facilities using a CEMS to demonstrate compliance with the sulfur dioxide emission limit, compliance with the sulfur dioxide emission limit may be demonstrated by using the CEMS specified in § 62.14690 to measure sulfur dioxide. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. You must calculate a 30-day rolling average of the 1-hour

arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, using equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7. The sulfur dioxide CEMS must be operated according to performance specification 2 in appendix B of 40 CFR part 60 and must follow the procedures and methods specified in paragraph (s) of this section. For sources that have actual inlet emissions less than 100 parts per million dry volume, the relative accuracy criterion for inlet sulfur dioxide CEMS should be no greater than 20 percent of the mean value of the reference method test data in terms of the units of the emission standard, or 5 parts per million dry volume absolute value of the mean difference between the reference method and the CEMS, whichever is greater:

(1) During each relative accuracy test run of the CEMS required by performance specification 2 in appendix B of 40 CFR part 60, collect sulfur dioxide and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the CEMS and the test methods specified in paragraphs (s)(1)(i) and (ii) of this section:

(i) For sulfur dioxide, EPA Reference Method 6 or 6C, or as an alternative ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus] must be used (*see* paragraph (z) of this section); and

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B, or as an alternative ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], as applicable, must be used (*see* paragraph (z) of this secion).

(2) The span value of the CEMS at the inlet to the sulfur dioxide control device must be 125 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this rule. The span value of the CEMS at the outlet of the sulfur dioxide control device must be 50 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this rule.

(3) Conduct accuracy determinations quarterly and calibration drift tests daily in accordance with procedure 1 in appendix F of 40 CFR part 60.

(t) For facilities using a CEMS to demonstrate continuous compliance with the nitrogen oxides emission limit, compliance with the nitrogen oxides emission limit may be demonstrated by using the CEMS specified in § 62.14690 to measure nitrogen oxides. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. You must calculate a 30-day rolling average of the 1-hour arithmetic average emission concentration using equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7. The nitrogen oxides CEMS must be operated according to performance specification 2 in appendix B of 40 CFR part 60 and must follow the procedures and methods specified in paragraphs (t)(1) through (4) of this section:

(1) During each relative accuracy test run of the CEMS required by performance specification 2 of appendix B of 40 CFR part 60, collect nitrogen oxides and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the CEMS and the test methods specified in paragraphs (t)(1)(i) and (ii) of this section:

(i) For nitrogen oxides, EPA Reference Method 7 or 7E at 40 CFR part 60, appendix A–4 must be used; and

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B, or as an alternative ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], as applicable, must be used (*see* paragraph (z) of this section).

(2) The span value of the CEMS must be 125 percent of the maximum estimated hourly potential nitrogen oxide emissions of unit.

(3) Conduct accuracy determinations quarterly and calibration drift tests daily in accordance with procedure 1 in appendix F of 40 CFR part 60.

(4) The owner or operator of an affected facility may request that compliance with the nitrogen oxides emission limit be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. If carbon dioxide is selected for use in diluent corrections, the relationship between oxygen and carbon dioxide levels must be established during the initial performance test according to the procedures and methods specified in paragraphs (t)(4)(i) through (iv) of this section. This relationship may be reestablished during performance compliance tests:

(i) The fuel factor equation in Method 3B must be used to determine the relationship between oxygen and carbon dioxide at a sampling location. Method 3A, 3B, or as an alternative ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], as applicable, must be used to determine the oxygen concentration at the same location as the carbon dioxide monitor (*see* paragraph (z) of this section);

(ii) Samples must be taken for at least 30 minutes in each hour;

(iii) Each sample must represent a 1-hour average; and

(iv) A minimum of 3 runs must be performed.

(u) For facilities using a continuous emissions monitoring system to demonstrate continuous compliance with any of the emission limits of this subpart, you must complete the following:

(1) Demonstrate compliance with the appropriate emission limit(s) using a 30-day rolling average of 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown, as defined in this subpart, calculated using equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content; and

(2) Operate all CEMS in accordance with the applicable procedures under appendices B and F of 40 CFR part 60.

(v) Use of the bypass stack at any time is an emissions standards deviation for particulate matter, HCl, Pb, Cd, Hg, NO_X, SO_2, and dioxin/furans.

(w) For energy recovery units with a design heat input capacity of 100 MMBtu per hour or greater that do not use a carbon monoxide CEMS, you must install, operate, and maintain an oxygen analyzer system as defined in § 62.14840 according to the procedures in paragraphs (w)(1) through (4) of this section:

(1) The oxygen analyzer system must be installed by the initial performance test date specified in § 62.14635;

(2) You must operate the oxygen trim system within compliance with paragraph (w)(3) of this section at all times;

(3) You must maintain the oxygen level such that the 30-day rolling average that is established as the operating limit for oxygen is not below the lowest hourly average oxygen concentration measured during the most recent CO performance test; and

(4) You must calculate and record a 30-day rolling average oxygen concentration using equation 19–19 in section 12.4.1 of EPA Reference Method 19 of Appendix A–7 of 40 CFR part 60.

(x) For energy recovery units with annual average heat input rates greater than or equal to 250 MMBtu/hour and waste-burning kilns, you must install, calibrate, maintain, and operate a PM CPMS and record the output of the

system as specified in paragraphs (x)(1) through (8) of this section. For other energy recovery units, you may elect to use PM CPMS operated in accordance with this section. PM CPMS are suitable in lieu of using other CMS for monitoring PM compliance (*e.g.,* bag leak detectors, electrostatic precipitator secondary power, PM scrubber pressure):

(1) Install, calibrate, operate, and maintain your PM CPMS according to the procedures in your approved site-specific monitoring plan developed in accordance with paragraphs (l) and (x)(1)(i) through (iii) of this section:

(i) The operating principle of the PM CPMS must be based on in-stack or extractive light scatter, light scintillation, beta attenuation, or mass accumulation of the exhaust gas or representative sample. The reportable measurement output from the PM CPMS must be expressed as milliamps or the digital signal equivalent;

(ii) The PM CPMS must have a cycle time (*i.e.,* period required to complete sampling, measurement, and reporting for each measurement) no longer than 60 minutes; and

(iii) The PM CPMS must be capable of detecting and responding to particulate matter concentrations increments no greater than 0.5 mg/actual cubic meter.

(2) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, you must adjust the site-specific operating limit in accordance with the results of the performance test according to the procedures specified in § 62.14635.

(3) Collect PM CPMS hourly average output data for all energy recovery unit or waste-burning kiln operating hours. Express the PM CPMS output as milliamps or the digital signal equivalent.

(4) Calculate the arithmetic 30-day rolling average of all of the hourly average PM CPMS output collected during all energy recovery unit or waste-burning kiln operating hours data (milliamps or their digital equivalent).

(5) You must collect data using the PM CPMS at all times the energy recovery unit or waste-burning kiln is operating and at the intervals specified in paragraph (x)(1)(ii) of this section, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments), and any scheduled maintenance as defined in your site-specific monitoring plan.

(6) You must use all the data collected during all energy recovery unit or waste-burning kiln operating hours in assessing the compliance with your operating limit except:

(i) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or quality control activities conducted during monitoring system malfunctions are not used in calculations (report any such periods in your annual deviation report);

(ii) Any data collected during periods when the monitoring system is out of control as specified in your site-specific monitoring plan, repairs associated with periods when the monitoring system is out of control, or required monitoring system quality assurance or quality control activities conducted during out-of-control periods are not used in calculations (report emissions or operating levels and report any such periods in your annual deviation report);

(iii) Any PM CPMS data recorded during periods of CEMS data during startup and shutdown, as defined in this subpart.

(7) You must record and make available upon request results of PM CPMS system performance audits, as well as the dates and duration of periods from when the PM CPMS is out of control until completion of the corrective actions necessary to return the PM CPMS to operation consistent with your site-specific monitoring plan.

(8) For any deviation of the 30-day rolling average PM CPMS average value from the established operating parameter limit, you must:

(i) Within 48 hours of the deviation, visually inspect the air pollution control device;

(ii) If inspection of the air pollution control device identifies the cause of the deviation, take corrective action as soon as possible and return the PM CPMS measurement to within the established value;

(iii) Within 30 days of the deviation or at the time of the annual compliance test, whichever comes first, conduct a PM emissions compliance test to determine compliance with the PM emissions limit and to verify. Within 45 days of the deviation, you must re-establish the CPMS operating limit. You are not required to conduct additional testing for any deviations that occur between the time of the original deviation and the PM emissions compliance test required under paragraph (x) of this section; and

(iv) PM CPMS deviations leading to more than four required performance tests in a 12-month process operating period (rolling monthly) constitute a violation of this subpart.

(y) When there is an alkali bypass and/or an in-line coal mill that exhaust emissions through a separate stack(s), the combined emissions are subject to the emission limits applicable to waste-burning kilns. To determine the kiln-specific emission limit for demonstrating compliance, you must:

(1) Calculate a kiln-specific emission limit using equation 7:

$$C_{ks} = ((\text{Emission limit} \times (Q_{ab}+Q_{cm}+Q_{ks})) - (Q_{ab} \times C_{ab}) - (Q_{cm} \times C_{cm}))/Q_{ks} \quad \text{(Eq. 7)}$$

Where:

C_{ks} = Kiln stack concentration (ppmvd, mg/dscm, ng/dscm, depending on pollutant. Each corrected to 7% O_2.)

Q_{ab} = Alkali bypass flow rate (volume/hr).

C_{ab} = Alkali bypass concentration (ppmvd, mg/dscm, ng/dscm, depending on pollutant. Each corrected to 7% O_2.)

Q_{cm} = In-line coal mill flow rate (volume/hr).

C_{cm} = In-line coal mill concentration (ppmvd, mg/dscm, ng/dscm, depending on pollutant. Each corrected to 7% O_2.)

Q_{ks} = Kiln stack flow rate (volume/hr).

(2) Particulate matter concentration must be measured downstream of the in-line coal mill. All other pollutant concentrations must be measured either upstream or downstream of the in-line coal mill.

(3) For purposes of determining the combined emissions from kilns equipped with an alkali bypass or that exhaust kiln gases to a coal mill that exhausts through a separate stack, instead of installing a CEMS or PM CPMS on the alkali bypass stack or in-line coal mill stack, the results of the initial and subsequent performance test can be used to demonstrate compliance with the relevant emissions limit. A performance test must be conducted on an annual basis (between 11 and 13 calendar months following the previous performance test).

(z) *Incorporation by reference.* These standards are incorporated by reference into this section with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 272–0167, *http://www.epa.gov.* You may also inspect a copy at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(1) American Society of Mechanical Engineers (ASME), Three Park Avenue, New York, NY 10016–5990 (Phone: 1–800–843–2763; Web site: *https://www.asme.org/*).

(i) ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus].

(ii) [Reserved]

(2) ASTM Int'l, 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; or ProQuest, 300 North Zeeb Road, Ann Arbor, MI 48106 (Phone: 1–877–909–2786; Web site: *http://www.astm.org/*).

(i) ASTM D6784–02 (Reapproved 2008) Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), approved April 1, 2008.

(ii) [Reserved]

(3) U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 272–0167, *http://www.epa.gov.*

(i) OAQPS Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997.

(ii) [Reserved]

§ 62.14675 By what date must I conduct the annual performance test?

You must conduct annual performance tests between 11 and 13 months of the previous performance test.

§ 62.14676 By what date must I conduct the annual air pollution control device inspection?

On an annual basis (no more than 12 months following the previous annual air pollution control device inspection), you must complete the air pollution control device inspection as described in § 62.14666.

§ 62.14680 May I conduct performance testing less often?

(a) You must conduct annual performance tests according to the schedule specified in § 62.14675, with the following exceptions:

(1) You may conduct a repeat performance test at any time to establish new values for the operating limits to apply from that point forward, as specified in § 62.14685. The Administrator may request a repeat performance test at any time;

(2) You must repeat the performance test within 60 days of a process change, as defined in § 62.14840; and

(3) If the initial or any subsequent performance test for any pollutant in table 1 or tables 5 through 8 of this subpart, as applicable, demonstrates that the emission level for the pollutant is no greater than the emission level specified in paragraph (a)(3)(i) or (a)(3)(ii) of this section, as applicable, and you are not required to conduct a performance test for the pollutant in response to a request by the Administrator in paragraph (a)(1) of this section or a process change in paragraph (a)(2) of this section, you may elect to skip conducting a performance test for the pollutant for the next 2 years. You must conduct a performance test for the pollutant during the third year and no more than 37 months following the previous performance test for the pollutant. For cadmium and lead, both cadmium and lead must be emitted at emission levels no greater than their respective emission levels specified in paragraph (a)(3)(i) of this section for you to qualify for less frequent testing under paragraph (a) of this section:

(i) For particulate matter, hydrogen chloride, mercury, carbon monoxide, nitrogen oxides, sulfur dioxide, cadmium, lead, and dioxins/furans, the emission level equal to 75 percent of the applicable emission limit in table 1 or tables 5 through 8 of this subpart, as applicable, to this subpart; and

(ii) For fugitive emissions, visible emissions (of combustion ash from the ash conveying system) for 2 percent of the time during each of the three 1-hour observation periods.

(4) If you are conducting less frequent testing for a pollutant as provided in paragraph (a)(3) of this section and a subsequent performance test for the pollutant indicates that your CISWI unit does not meet the emission level specified in paragraph (a)(3)(i) or (a)(3)(ii) of this section, as applicable, you must conduct annual performance tests for the pollutant according to the schedule specified in paragraph (a) of this section until you qualify for less frequent testing for the pollutant as specified in paragraph (a)(3) of this section.

(b) [Reserved].

§ 62.14685 May I conduct a repeat performance test to establish new operating limits?

(a) Yes. You may conduct a repeat performance test at any time to establish new values for the operating limits. The Administrator may request a repeat performance test at any time.

(b) You must repeat the performance test if your feed stream is different than the feed streams used during any performance test used to demonstrate compliance.

Monitoring

§ 62.14690 What monitoring equipment must I install and what parameters must I monitor?

(a) If you are using a wet scrubber to comply with the emission limitation under § 62.14630, you must install, calibrate (to manufacturers' specifications), maintain, and operate devices (or establish methods) for monitoring the value of the operating parameters used to determine compliance with the operating limits listed in table 2 of this subpart. These devices (or methods) must measure and record the values for these operating parameters at the frequencies indicated in table 2 of this subpart at all times except as specified in § 62.14695(a).

(b) If you use a fabric filter to comply with the requirements of this subpart and you do not use a PM CPMS for monitoring PM compliance, you must install, calibrate, maintain, and continuously operate a bag leak detection system as specified in paragraphs (b)(1) through (8) of this section.

(1) You must install and operate a bag leak detection system for each exhaust stack of the fabric filter.

(2) Each bag leak detection system must be installed, operated, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations.

(3) The bag leak detection system must be certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less.

(4) The bag leak detection system sensor must provide output of relative or absolute particulate matter loadings.

(5) The bag leak detection system must be equipped with a device to continuously record the output signal from the sensor.

(6) The bag leak detection system must be equipped with an alarm system

that will alert automatically an operator when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is observed easily by plant operating personnel.

(7) For positive pressure fabric filter systems, a bag leak detection system must be installed in each baghouse compartment or cell. For negative pressure or induced air fabric filters, the bag leak detector must be installed downstream of the fabric filter.

(8) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(c) If you are using something other than a wet scrubber, activated carbon, selective non-catalytic reduction, an electrostatic precipitator, or a dry scrubber to comply with the emission limitations under § 62.14630, you must install, calibrate (to the manufacturers' specifications), maintain, and operate the equipment necessary to monitor compliance with the site-specific operating limits established using the procedures in § 62.14640.

(d) If you use activated carbon injection to comply with the emission limitations in this subpart, you must measure the minimum sorbent flow rate once per hour.

(e) If you use selective noncatalytic reduction to comply with the emission limitations, you must complete the following:

(1) Following the date on which the initial performance test is completed or is required to be completed under § 62.14650, whichever date comes first, ensure that the affected facility does not operate above the maximum charge rate, or below the minimum secondary chamber temperature (if applicable to your CISWI unit) or the minimum reagent flow rate measured as 3-hour block averages at all times; and

(2) Operation of the affected facility above the maximum charge rate, below the minimum secondary chamber temperature and below the minimum reagent flow rate simultaneously constitute a violation of the nitrogen oxides emissions limit.

(f) If you use an electrostatic precipitator to comply with the emission limits of this subpart and you do not use a PM CPMS for monitoring PM compliance, you must monitor the secondary power to the electrostatic precipitator collection plates and maintain the 3-hour block averages at or above the operating limits established during the mercury or particulate matter performance test.

(g) For waste-burning kilns not equipped with a wet scrubber or dry scrubber, in place of hydrogen chloride testing with EPA Method 321 at 40 CFR part 63, appendix A, an owner or operator must install, calibrate, maintain, and operate a CEMS for monitoring hydrogen chloride emissions, as specified in § 62.14670(j) of this subpart, discharged to the atmosphere and record the output of the system. To demonstrate continuous compliance with the hydrogen chloride emissions limit for units other than waste-burning kilns not equipped with a wet scrubber or dry scrubber, a facility may substitute use of a hydrogen chloride CEMS for conducting the hydrogen chloride annual performance test, monitoring the minimum hydrogen chloride sorbent flow rate, monitoring the minimum scrubber liquor pH.

(h) To demonstrate continuous compliance with the particulate matter emissions limit, a facility may substitute use of either a particulate matter CEMS or a particulate matter CPMS for conducting the particulate matter annual performance test and other CMS monitoring for PM compliance (*e.g.,* bag leak detectors, electrostatic precipitator secondary power, PM scrubber pressure).

(i) To demonstrate continuous compliance with the dioxin/furan emissions limit, a facility may substitute use of a continuous automated sampling system for the dioxin/furan annual performance test. You must record the output of the system and analyze the sample according to EPA Method 23 at 40 CFR part 60, appendix A–7. This option to use a continuous automated sampling system takes effect on the date a final performance specification applicable to dioxin/furan from continuous monitors is published in the **Federal Register**. The owner or operator who elects to continuously sample dioxin/furan emissions instead of sampling and testing using EPA Method 23 at 40 CFR part 60, appendix A–7 must install, calibrate, maintain and operate a continuous automated sampling system and must comply with the requirements specified in § 60.58b(p) and (q). A facility may substitute continuous dioxin/furan monitoring for the minimum sorbent flow rate, if activated carbon sorbent injection is used solely for compliance with the dioxin/furan emission limit.

(j) To demonstrate continuous compliance with the mercury emissions limit, a facility may substitute use of a continuous automated sampling system for the mercury annual performance test. You must record the output of the system and analyze the sample at set intervals using any suitable determinative technique that can meet performance specification 12B criteria. This option to use a continuous automated sampling system takes effect on the date a final performance specification applicable to mercury from monitors is published in the **Federal Register**. The owner or operator who elects to continuously sample mercury emissions instead of sampling and testing using EPA Method 29 or 30B at 40 CFR part 60, appendix A–8, ASTM D6784–02 (Reapproved 2008) (*see* § 62.14670(z)), or an approved alternative method for measuring mercury emissions, must install, calibrate, maintain and operate a continuous automated sampling system and must comply with the requirements specified in § 60.58b(p) and (q). A facility may substitute continuous mercury monitoring for the minimum sorbent flow rate, if activated carbon sorbent injection is used solely for compliance with the mercury emission limit. Waste-burning kilns must install, calibrate, maintain, and operate a mercury CEMS as specified in § 62.14670(j) of this subpart.

(k) To demonstrate continuous compliance with the nitrogen oxides emissions limit, a facility may substitute use of a CEMS for the nitrogen oxides annual performance test to demonstrate compliance with the nitrogen oxides emissions limits and monitoring the charge rate, secondary chamber temperature and reagent flow for selective noncatalytic reduction, if applicable:

(1) Install, calibrate, maintain and operate a CEMS for measuring nitrogen oxides emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 2 of appendix B of 40 CFR part 60, the quality assurance procedure 1 of appendix F of 40 CFR part 60 and the procedures under § 60.13 must be followed for installation, evaluation and operation of the CEMS; and

(2) Following the date that the initial performance test for nitrogen oxides is completed or is required to be completed under § 62.14650, compliance with the emission limit for nitrogen oxides required under § 60.52b(d) must be determined based on the 30-day rolling average of the hourly emission concentrations using CEMS outlet data. The 1-hour arithmetic averages must be expressed in parts per million by volume corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack

oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(l) To demonstrate continuous compliance with the sulfur dioxide emissions limit, a facility may substitute use of a continuous automated sampling system for the sulfur dioxide annual performance test to demonstrate compliance with the sulfur dioxide emissions limits:

(1) Install, calibrate, maintain and operate a CEMS for measuring sulfur dioxide emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 2 of appendix B of 40 CFR part 60, the quality assurance requirements of procedure 1 of appendix F of 40 CFR part 60 and the procedures under § 60.13 must be followed for installation, evaluation and operation of the CEMS; and

(2) Following the date that the initial performance test for sulfur dioxide is completed or is required to be completed under § 62.14650, compliance with the sulfur dioxide emission limit may be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations using CEMS outlet data. The 1-hour arithmetic averages must be expressed in parts per million corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average emission concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(m) For energy recovery units over 10 MMBtu/hr but less than 250 MMBtu/hr annual average heat input rates that do not use a wet scrubber, fabric filter with bag leak detection system, or particulate matter CEMS, you must install, operate, certify and maintain a continuous opacity monitoring system according to the procedures in paragraphs (m)(1) through (5) of this section by the compliance date specified in § 62.14630. Energy recovery units that use a particulate matter CEMS to demonstrate initial and continuing compliance according to the procedures in § 62.14690(n) are not required to install a continuous opacity monitoring system and must perform the annual performance tests for opacity consistent with § 62.14670(f):

(1) Install, operate and maintain each continuous opacity monitoring system according to performance specification 1 at 40 CFR part 60, appendix B;

(2) Conduct a performance evaluation of each continuous opacity monitoring system according to the requirements in § 60.13 and according to performance specification 1 at 40 CFR part 60, appendix B;

(3) As specified in § 60.13(e)(1), each continuous opacity monitoring system must complete a minimum of one cycle of sampling and analyzing for each successive 10-second period and one cycle of data recording for each successive 6-minute period;

(4) Reduce the continuous opacity monitoring system data as specified in § 60.13(h)(1); and

(5) Determine and record all the 6-minute averages (and 1-hour block averages as applicable) collected.

(n) For coal and liquid/gas energy recovery units, incinerators, and small remote incinerators, an owner or operator may elect to install, calibrate, maintain and operate a CEMS for monitoring particulate matter emissions discharged to the atmosphere and record the output of the system. The owner or operator of an affected facility who continuously monitors particulate matter emissions instead of conducting performance testing using EPA Method 5 at 40 CFR part 60, appendix A–3 or, as applicable, monitor with a particulate matter CPMS according to paragraph (r) of this section, must install, calibrate, maintain and operate a CEMS and must comply with the requirements specified in paragraphs (n)(1) through (13) of this section:

(1) Notify the Administrator 1 month before starting use of the system;

(2) Notify the Administrator 1 month before stopping use of the system;

(3) The monitor must be installed, evaluated and operated in accordance with the requirements of performance specification 11 of appendix B of 40 CFR part 60 and quality assurance requirements of procedure 2 of appendix F of 40 CFR part 60 and § 60.13;

(4) The initial performance evaluation must be completed no later than 180 days after the final compliance date for meeting the amended emission limitations, as specified under § 62.14650 or within 180 days of notification to the Administrator of use of the continuous monitoring system if the owner or operator was previously determining compliance by Method 5 at 40 CFR part 60, appendix A–3 performance tests, whichever is later;

(5) The owner or operator of an affected facility may request that compliance with the particulate matter emission limit be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. The relationship between oxygen and carbon dioxide levels for the affected facility must be established according to the procedures and methods specified in § 62.14670(t)(4)(i) through (iv);

(6) The owner or operator of an affected facility must conduct an initial performance test for particulate matter emissions as required under § 62.14650. Compliance with the particulate matter emission limit, if PM CEMS are elected for demonstrating compliance, must be determined by using the CEMS specified in paragraph (n) of this section to measure particulate matter. You must calculate a 30-day rolling average of 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown, as defined in this subpart, using equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7;

(7) Compliance with the particulate matter emission limit must be determined based on the 30-day rolling average calculated using equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, Appendix A–7 of the part from the 1-hour arithmetic average of the CEMS outlet data;

(8) At a minimum, valid continuous monitoring system hourly averages must be obtained as specified § 62.14695;

(9) The 1-hour arithmetic averages required under paragraph (n)(7) of this section must be expressed in milligrams per dry standard cubic meter corrected to 7 percent oxygen (or carbon dioxide) (dry basis) and must be used to calculate the 30-day rolling average emission concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2);

(10) All valid CEMS data must be used in calculating average emission concentrations even if the minimum CEMS data requirements of paragraph (n)(8) of this section are not met;

(11) The CEMS must be operated according to performance specification 11 in appendix B of 40 CFR part 60;

(12) During each relative accuracy test run of the CEMS required by performance specification 11 in appendix B of 40 CFR part 60, particulate matter and oxygen (or carbon dioxide) data must be collected concurrently (or within a 30- to 60-minute period) by both the CEMS and the following test methods:

(i) For particulate matter, EPA Reference Method 5 at 40 CFR part 60, appendix A–3 must be used; and

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B at 40 CFR part 60, appendix A–2, as applicable, must be used.

(13) Quarterly accuracy determinations and daily calibration drift tests must be performed in accordance with procedure 2 in appendix F of 40 CFR part 60.

(o) To demonstrate continuous compliance with the carbon monoxide emissions limit, a facility may substitute use of a continuous automated sampling system for the carbon monoxide annual performance test to demonstrate compliance with the carbon monoxide emissions limits:

(1) Install, calibrate, maintain, and operate a CEMS for measuring carbon monoxide emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 4B of appendix B of 40 CFR part 60, the quality assurance procedure 1 of appendix F of 40 CFR part 60 and the procedures under § 60.13 must be followed for installation, evaluation, and operation of the CEMS; and

(2) Following the date that the initial performance test for carbon monoxide is completed or is required to be completed under § 62.14650, compliance with the carbon monoxide emission limit may be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, using CEMS outlet data. Except for CEMS data during startup and shutdown, as defined in this subpart, the 1-hour arithmetic averages must be expressed in parts per million corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average emission concentrations. CEMS data collected during startup or shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(p) The owner/operator of an affected source with a bypass stack shall install, calibrate (to manufacturers' specifications), maintain and operate a device or method for measuring the use of the bypass stack including date, time and duration.

(q) For energy recovery units with a heat input capacity of 100 MMBtu per hour or greater that do not use a carbon monoxide CEMS, you must install, operate and maintain the continuous oxygen monitoring system as defined in § 62.14840 according to the procedures in paragraphs (q)(1) through (4) of this section:

(1) The oxygen analyzer system must be installed by the initial performance test date specified in § 62.14635;

(2) You must operate the oxygen trim system within compliance with paragraph (q)(3) of this section at all times;

(3) You must maintain the oxygen level such that the 30-day rolling average that is established as the operating limit for oxygen according to paragraph (q)(4) of this section is not below the lowest hourly average oxygen concentration measured during the most recent CO performance test; and

(4) You must calculate and record a 30-day rolling average oxygen concentration using equation 19–19 in section 12.4.1 of EPA Reference Method 19 of Appendix A–7.

(r) For energy recovery units with annual average heat input rates greater than or equal to 250 MMBtu/hour and waste-burning kilns, you must install, calibrate, maintain, and operate a PM CPMS and record the output of the system as specified in paragraphs (r)(1) through (8) of this section. For other energy recovery units, you may elect to use PM CPMS operated in accordance with this section. PM CPMS are suitable in lieu of using other CMS for monitoring PM compliance (*e.g.,* bag leak detectors, electrostatic precipitator secondary power, PM scrubber pressure):

(1) Install, calibrate, operate, and maintain your PM CPMS according to the procedures in your approved site-specific monitoring plan developed in accordance with § 62.14670(l) and (r)(1)(i) through (iii) of this section:

(i) The operating principle of the PM CPMS must be based on in-stack or extractive light scatter, light scintillation, beta attenuation, or mass accumulation of the exhaust gas or representative sample. The reportable measurement output from the PM CPMS must be expressed as milliamps or the digital signal equivalent;

(ii) The PM CPMS must have a cycle time (*i.e.,* period required to complete sampling, measurement, and reporting for each measurement) no longer than 60 minutes; and

(iii) The PM CPMS must be capable of detecting and responding to particulate matter concentrations increments no greater than 0.5 mg/actual cubic meter.

(2) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, you must adjust the site-specific operating limit in accordance with the results of the performance test according to the procedures specified in § 62.14635.

(3) Collect PM CPMS hourly average output data for all energy recovery unit or waste-burning kiln operating hours. Express the PM CPMS output as milliamps or the digital signal equivalent.

(4) Calculate the arithmetic 30-day rolling average of all of the hourly average PM CPMS output collected during all energy recovery unit or waste-burning kiln operating hours data (milliamps or digital bits).

(5) You must collect data using the PM CPMS at all times the energy recovery unit or waste-burning kiln is operating and at the intervals specified in paragraph (r)(1)(ii) of this section, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments), and any scheduled maintenance as defined in your site-specific monitoring plan.

(6) You must use all the data collected during all energy recovery unit or waste-burning kiln operating hours in assessing the compliance with your operating limit except:

(i) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or quality control activities conducted during monitoring system malfunctions are not used in calculations (report any such periods in your annual deviation report);

(ii) Any data collected during periods when the monitoring system is out of control as specified in your site-specific monitoring plan, repairs associated with periods when the monitoring system is out of control, or required monitoring system quality assurance or quality control activities conducted during out-of-control periods are not used in calculations (report emissions or operating levels and report any such periods in your annual deviation report); and

(iii) Any PM CPMS data recorded during periods of CEMS data during startup and shutdown, as defined in this subpart.

(7) You must record and make available upon request results of PM CPMS system performance audits, as well as the dates and duration of periods from when the PM CPMS is out of control until completion of the corrective actions necessary to return

the PM CPMS to operation consistent with your site-specific monitoring plan.

(8) For any deviation of the 30-day rolling average PM CPMS average value from the established operating parameter limit, you must:

(i) Within 48 hours of the deviation, visually inspect the air pollution control device;

(ii) If inspection of the air pollution control device identifies the cause of the deviation, take corrective action as soon as possible and return the PM CPMS measurement to within the established value;

(iii) Within 30 days of the deviation or at the time of the annual compliance test, whichever comes first, conduct a PM emissions compliance test to determine compliance with the PM emissions limit and to verify the operation of the emissions control device(s). Within 45 days of the deviation, you must re-establish the CPMS operating limit. You are not required to conduct additional testing for any deviations that occur between the time of the original deviation and the PM emissions compliance test required under this paragraph; and

(iv) PM CPMS deviations leading to more than four required performance tests in a 12-month process operating period (rolling monthly) constitute a violation of this subpart.

(s) If you use a dry scrubber to comply with the emission limits of this subpart, you must monitor the injection rate of each sorbent and maintain the 3-hour block averages at or above the operating limits established during the hydrogen chloride performance test.

§ 62.14695 Is there a minimum amount of monitoring data I must obtain?

For each continuous monitoring system required or optionally allowed under § 62.14690, you must monitor and collect data according to this section:

(a) You must operate the monitoring system and collect data at all required intervals at all times compliance is required except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods (as specified in § 62.14730(o)), and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments. A monitoring system malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. You are required to effect monitoring system repairs in response to monitoring system malfunctions or out-of-control periods and to return the monitoring system to operation as expeditiously as practicable.

(b) You may not use data recorded during monitoring system malfunctions, repairs associated with monitoring system malfunctions or out-of-control periods, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating levels. You must use all the data collected during all other periods, including data normalized for above scale readings, in assessing the operation of the control device and associated control system.

(c) Except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments, failure to collect required data is a deviation of the monitoring requirements.

Recordkeeping and Reporting

§ 62.14700 What records must I keep?

You must maintain the items (as applicable) as specified in paragraphs (a), (b), and (e) through (w) of this section for a period of at least 5 years:

(a) Calendar date of each record.

(b) Records of the data described in paragraphs (b)(1) through (6) of this section:

(1) The CISWI unit charge dates, times, weights, and hourly charge rates;

(2) Liquor flow rate to the wet scrubber inlet every 15 minutes of operation, as applicable;

(3) Pressure drop across the wet scrubber system every 15 minutes of operation or amperage to the wet scrubber every 15 minutes of operation, as applicable;

(4) Liquor pH as introduced to the wet scrubber every 15 minutes of operation, as applicable.

(5) For affected CISWI units that establish operating limits for controls other than wet scrubbers under § 62.14640, you must maintain data collected for all operating parameters used to determine compliance with the operating limits. For energy recovery units using activated carbon injection or a dry scrubber, you must also maintain records of the load fraction and corresponding sorbent injection rate records; and

(6) If a fabric filter is used to comply with the emission limitations, you must record the date, time, and duration of each alarm and the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken. You must also record the percent of operating time during each 6-month period that the alarm sounds, calculated as specified in § 62.14635(c).

(c) [Reserved]

(d) [Reserved]

(e) Identification of calendar dates and times for which data show a deviation from the operating limits in table 2 of this subpart or a deviation from other operating limits established under § 62.14635(d) through (g) or § 62.14640 with a description of the deviations, reasons for such deviations, and a description of corrective actions taken.

(f) The results of the initial, annual, and any subsequent performance tests conducted to determine compliance with the emission limits and/or to establish operating limits, as applicable. Retain a copy of the complete test report including calculations.

(g) Records showing the names of CISWI unit operators who have completed review of the information in § 62.14620(a) as required by § 62.14620(b), including the date of the initial review and all subsequent annual reviews.

(h) Records showing the names of the CISWI operators who have completed the operator training requirements under § 62.14595, met the criteria for qualification under § 62.14605, and maintained or renewed their qualification under § 62.14610 or § 62.14615. Records must include documentation of training, the dates of the initial and refresher training, and the dates of their qualification and all subsequent renewals of such qualifications.

(i) For each qualified operator, the phone and/or pager number at which they can be reached during operating hours.

(j) Records of calibration of any monitoring devices as required under § 62.14690.

(k) Equipment vendor specifications and related operation and maintenance requirements for the incinerator, emission controls, and monitoring equipment.

(l) The information listed in § 62.14620(a).

(m) On a daily basis, keep a log of the quantity of waste burned and the types of waste burned (always required).

(n) Maintain records of the annual air pollution control device inspections that are required for each CISWI unit subject to the emissions limits in table

1 of this subpart or tables 5 through 8 of this subpart, any required maintenance and any repairs not completed within 10 days of an inspection or the timeframe established by the state regulatory agency.

(o) For continuously monitored pollutants or parameters, you must document and keep a record of the following parameters measured using continuous monitoring systems:

(1) All 6-minute average levels of opacity;

(2) All 1-hour average concentrations of sulfur dioxide emissions. You must indicate which data are CEMS data during startup and shutdown;

(3) All 1-hour average concentrations of nitrogen oxides emissions. You must indicate which data are CEMS data during startup and shutdown;

(4) All 1-hour average concentrations of carbon monoxide emissions. You must indicate which data are CEMS data during startup and shutdown;

(5) All 1-hour average concentrations of particulate matter emissions. You must indicate which data are CEMS data during startup and shutdown;

(6) All 1-hour average concentrations of mercury emissions. You must indicate which data are CEMS data during startup and shutdown;

(7) All 1-hour average concentrations of hydrogen chloride emissions. You must indicate which data are CEMS data during startup and shutdown;

(8) All 1-hour average percent oxygen concentrations; and

(9) All 1-hour average PM CPMS readings or particulate matter CEMS outputs.

(p) Records indicating use of the bypass stack, including dates, times and durations.

(q) If you choose to stack test less frequently than annually, consistent with § 62.14680(a) through (c), you must keep annual records that document that your emissions in the previous stack test(s) were less than 75 percent of the applicable emission limit and document that there was no change in source operations including fuel composition and operation of air pollution control equipment that would cause emissions of the relevant pollutant to increase within the past year.

(r) Records of the occurrence and duration of each malfunction of operation (*i.e.,* process equipment) or the air pollution control and monitoring equipment.

(s) Records of all required maintenance performed on the air pollution control and monitoring equipment.

(t) Records of actions taken during periods of malfunction to minimize emissions in accordance with § 60.11(d), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

(u) For operating units that combust non-hazardous secondary materials that have been determined not to be solid waste pursuant to § 241.3(b)(1), you must keep a record which documents how the secondary material meets each of the legitimacy criteria under § 241.3(d)(1). If you combust a fuel that has been processed from a discarded non-hazardous secondary material pursuant to § 241.3(b)(4), you must keep records as to how the operations that produced the fuel satisfies the definition of processing in § 241.2 and each of the legitimacy criteria in § 241.3(d)(1) of this chapter. If the fuel received a non-waste determination pursuant to the petition process submitted under § 241.3(c), you must keep a record that documents how the fuel satisfies the requirements of the petition process. For operating units that combust non-hazardous secondary materials as fuel per § 241.4, you must keep records documenting that the material is a listed non-waste under § 241.4(a).

(v) Records of the criteria used to establish that the unit qualifies as a small power production facility under section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)) and that the waste material the unit is proposed to burn is homogeneous.

(w) Records of the criteria used to establish that the unit qualifies as a cogeneration facility under section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)) and that the waste material the unit is proposed to burn is homogeneous.

§ 62.14705 Where and in what format must I keep my records?

All records must be available onsite in either paper copy or computer-readable format that can be printed upon request, unless an alternative format is approved by the Administrator.

§ 62.14710 What reports must I submit?

See table 4 of this subpart for a summary of the reporting requirements.

§ 62.14715 When must I submit my waste management plan?

You must submit a waste management plan no later than November 7, 2017 or six months prior to the date you commence or recommence burning solid waste, whichever is later.

§ 62.14720 What information must I submit following my initial performance test?

You must submit the information specified in paragraphs (a) through (c) of this section no later than 60 days following the initial performance test. All reports must be signed by the facilities manager:

(a) The complete test report for the initial performance test results obtained under § 62.14660, as applicable;

(b) The values for the site-specific operating limits established in § 62.14635 or § 62.14640; and

(c) If you are using a fabric filter to comply with the emission limitations, documentation that a bag leak detection system has been installed and is being operated, calibrated, and maintained as required by § 62.14690(b).

§ 62.14725 When must I submit my annual report?

You must submit an annual report no later than 12 months following the submission of the information in § 62.14720. You must submit subsequent reports no more than 12 months following the previous report. (If the unit is subject to permitting requirements under title V of the Clean Air Act, you may be required by the permit to submit these reports more frequently.)

§ 62.14730 What information must I include in my annual report?

The annual report required under § 62.14725 must include the ten items listed in paragraphs (a) through (j) of this section. If you have a deviation from the operating limits or the emission limitations, you must also submit deviation reports as specified in §§ 62.14735, 62.14740, and 62.14745.

(a) Company name and address;

(b) Statement by a responsible official, with that official's name, title, and signature, certifying the accuracy of the content of the report;

(c) Date of report and beginning and ending dates of the reporting period.

(d) The values for the operating limits established pursuant to § 62.14635 or § 62.14640.

(e) If no deviation from any emission limitation or operating limit that applies to you has been reported, a statement that there was no deviation from the emission limitations or operating limits during the reporting period.

(f) The highest recorded 3-hour average and the lowest recorded 3-hour average, as applicable, for each operating parameter recorded for the calendar year being reported;

(g) Information recorded under § 62.14700(b)(6) and (c) through (e) for the calendar year being reported.

(h) For each performance test conducted during the reporting period, if any performance test is conducted, the process unit(s) tested, the pollutant(s) tested and the date that such performance test was conducted. Submit, following the procedure specified in § 62.14755(b)(1), the performance test report no later than the date that you submit the annual report;

(i) If you met the requirements of § 62.14680(a) or (b), and did not conduct a performance test during the reporting period, you must state that you met the requirements of § 62.14680(a) or (b), and, therefore, you were not required to conduct a performance test during the reporting period;

(j) Documentation of periods when all qualified CISWI unit operators were unavailable for more than 8 hours, but less than 2 weeks;

(k) If you had a malfunction during the reporting period, the compliance report must include the number, duration, and a brief description for each type of malfunction that occurred during the reporting period and that caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 60.11(d), including actions taken to correct a malfunction;

(l) For each deviation from an emission or operating limitation that occurs for a CISWI unit for which you are not using a CMS to comply with the emission or operating limitations in this subpart, the annual report must contain the following information:

(1) The total operating time of the CISWI unit at which the deviation occurred during the reporting period; and

(2) Information on the number, duration, and cause of deviations (including unknown cause, if applicable), as applicable, and the corrective action taken.

(m) If there were periods during which the continuous monitoring system, including the CEMS, was out of control as specified in paragraph (o) of this section, the annual report must contain the following information for each deviation from an emission or operating limitation occurring for a CISWI unit for which you are using a continuous monitoring system to comply with the emission and operating limitations in this subpart:

(1) The date and time that each malfunction started and stopped;

(2) The date, time, and duration that each CMS was inoperative, except for zero (low-level) and high-level checks;

(3) The date, time, and duration that each continuous monitoring system was out-of-control, including start and end dates and hours and descriptions of corrective actions taken;

(4) The date and time that each deviation started and stopped, and whether each deviation occurred during a period of malfunction or during another period;

(5) A summary of the total duration of the deviation during the reporting period, and the total duration as a percent of the total source operating time during that reporting period;

(6) A breakdown of the total duration of the deviations during the reporting period into those that are due to control equipment problems, process problems, other known causes, and other unknown causes;

(7) A summary of the total duration of continuous monitoring system downtime during the reporting period, and the total duration of continuous monitoring system downtime as a percent of the total operating time of the CISWI unit at which the continuous monitoring system downtime occurred during that reporting period;

(8) An identification of each parameter and pollutant that was monitored at the CISWI unit;

(9) A brief description of the CISWI unit;

(10) A brief description of the continuous monitoring system;

(11) The date of the latest continuous monitoring system certification or audit; and

(12) A description of any changes in continuous monitoring system, processes, or controls since the last reporting period.

(n) If there were periods during which the continuous monitoring system, including the CEMS, was not out of control as specified in paragraph (o) of this section, a statement that there were not periods during which the continuous monitoring system was out of control during the reporting period.

(o) A continuous monitoring system is out of control if any of the following occur:

(1) The zero (low-level), mid-level (if applicable), or high-level calibration drift exceeds two times the applicable calibration drift specification in the applicable performance specification or in the relevant standard;

(2) The continuous monitoring system fails a performance test audit (*e.g.,* cylinder gas audit), relative accuracy audit, relative accuracy test audit, or linearity test audit; and

(3) The continuous opacity monitoring system calibration drift exceeds two times the limit in the applicable performance specification in the relevant standard.

(p) For energy recovery units, include the annual heat input and average annual heat input rate of all fuels being burned in the unit to verify which subcategory of energy recovery unit applies.

§ 62.14735 What else must I report if I have a deviation from the operating limits or the emission limitations?

(a) You must submit a deviation report if any recorded 3-hour average parameter level is above the maximum operating limit or below the minimum operating limit established under this subpart, if the bag leak detection system alarm sounds for more than 5 percent of the operating time for any 6-month reporting period, or if a performance test was conducted that deviated from any emission limitation.

(b) The deviation report must be submitted by August 1 of that year for data collected during the first half of the calendar year (January 1 to June 30), and by February 1 of the following year for data you collected during the second half of the calendar year (July 1 to December 31).

§ 62.14740 What must I include in the deviation report?

In each report required under § 62.14735, for any pollutant or parameter that deviated from the emission limitations or operating limits specified in this subpart, include the four items described in paragraphs (a) through (d) of this section.

(a) The calendar dates and times your unit deviated from the emission limitations or operating limit requirements;

(b) The averaged and recorded data for those dates;

(c) Duration and causes of the following:

(1) Each deviation from the emission limitations or operating limits and your corrective actions; and

(2) Bypass events and your corrective actions.

(d) A copy of the operating limit monitoring data during each deviation and, for any test report that documents the emission levels, the process unit(s) tested, the pollutant(s) tested and the date that the performance test was conducted. Submit, following the procedure specified in § 62.14755(b)(1), the performance test report no later than the date that you submit the deviation report.

§ 62.14745 What else must I report if I have a deviation from the requirement to have a qualified operator accessible?

(a) If all qualified operators are not accessible for two weeks or more, you must take the two actions in paragraphs (a)(1) and (2) of this section.

(1) You must submit a notification of the deviation within 10 days that includes the three items in paragraphs (a)(1)(i) through (iii) of this section.

(i) A statement of what caused the deviation;

(ii) A description of what you are doing to ensure that a qualified operator is accessible; and

(iii) The date when you anticipate that a qualified operator will be available.

(2) Submit a status report to the Administrator every 4 weeks that includes the three items in paragraphs (a)(2)(i) through (iii) of this section.

(i) A description of what you are doing to ensure that a qualified operator is accessible;

(ii) The date when you anticipate that a qualified operator will be accessible; and

(iii) Request approval from the Administrator to continue operation of the CISWI unit.

(b) If your unit was shut down by the Administrator, under the provisions of § 62.14625(b)(2), due to a failure to provide an accessible qualified operator, you must notify the Administrator that you are resuming operation once a qualified operator is accessible.

§ 62.14750 Are there any other notifications or reports that I must submit?

(a) Yes. You must submit notifications as provided by § 60.7.

(b) If you cease combusting solid waste but continue to operate, you must provide 30 days prior notice of the effective date of the waste-to-fuel switch, consistent with § 62.14670(a). The notification must identify:

(1) The name of the owner or operator of the CISWI unit, the location of the source, the emissions unit(s) that will cease burning solid waste, and the date of the notice;

(2) The currently applicable subcategory under this subpart, and any 40 CFR part 63 subpart and subcategory that will be applicable after you cease combusting solid waste;

(3) The fuel(s), non-waste material(s) and solid waste(s) the CISWI unit is currently combusting and has combusted over the past 6 months, and the fuel(s) or non-waste materials the unit will commence combusting;

(4) The date on which you became subject to the currently applicable emission limits; and

(5) The date upon which you will cease combusting solid waste, and the date (if different) that you intend for any new requirements to become applicable (*i.e.,* the effective date of the waste-to-fuel switch), consistent with paragraphs (b)(2) and (3) of this section.

§ 62.14755 In what form can I submit my reports?

(a) Submit initial, annual, and deviation reports electronically on or before the submittal due dates. Submit the reports to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI). (CEDRI can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov*).) Use the appropriate electronic report in CEDRI for this subpart or an alternate electronic file format consistent with the extensible markup language (XML) schema listed on the CEDRI Web site (*https://www.epa.gov/electronic-reporting-air-emissions/compliance-and-emissions-data-reporting-interface-cedri*), once the XML schema is available. If the reporting form specific to this subpart is not available in CEDRI at the time that the report is due, submit the report to the Administrator at the appropriate address listed in § 60.4. Once the form has been available in CEDRI for 90 calendar days, you must begin submitting all subsequent reports via CEDRI. The reports must be submitted by the deadlines specified in this subpart, regardless of the method in which the report is submitted.

(b) Submit results of each performance test and CEMS performance evaluation required by this subpart as follows:

(1) Within 60 days after the date of completing each performance test (*see* § 60.8) required by this subpart, you must submit the results of the performance test following the procedure specified in either paragraph (b)(1)(i) or (b)(1)(ii) of this section:

(i) For data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT Web site (*https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert*) at the time of the test, you must submit the results of the performance test to the EPA via the CEDRI. (CEDRI can be accessed through the EPA's CDX (*https://cdx.epa.gov*).) Performance test data must be submitted in a file format generated through the use of the EPA's ERT or an alternate electronic file format consistent with the XML schema listed on the EPA's ERT Web site. If you claim that some of the performance test information being submitted is confidential business information (CBI), you must submit a complete file generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT Web site, including information claimed to be CBI, on a compact disc, flash drive, or other commonly used electronic storage media to the EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same ERT or alternate file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph; and

(ii) For data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT Web site at the time of the test, you must submit the results of the performance test to the Administrator at the appropriate address listed in § 60.4.

(2) Within 60 days after the date of completing each continuous emissions monitoring system performance evaluation you must submit the results of the performance evaluation following the procedure specified in either paragraph (c)(1) or (c)(2) of this section:

(i) For performance evaluations of continuous monitoring systems measuring relative accuracy test audit (RATA) pollutants that are supported by the EPA's ERT as listed on the EPA's ERT Web site at the time of the evaluation, you must submit the results of the performance evaluation to the EPA via the CEDRI. (CEDRI can be accessed through the EPA's CDX.) Performance evaluation data must be submitted in a file format generated through the use of the EPA's ERT or an alternate file format consistent with the XML schema listed on the EPA's ERT Web site. If you claim that some of the performance evaluation information being submitted is CBI, you must submit a complete file generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT Web site, including information claimed to be CBI, on a compact disc, flash drive, or other commonly used electronic storage media to the EPA. The electronic storage media must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same ERT or alternate file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph; and

(ii) For any performance evaluations of continuous monitoring systems

measuring RATA pollutants that are not supported by the EPA's ERT as listed on the EPA's ERT Web site at the time of the evaluation, you must submit the results of the performance evaluation to the Administrator at the appropriate address listed in § 60.4.

§ 62.14760 Can reporting dates be changed?

If the Administrator agrees, you may change the semiannual or annual reporting dates. *See* § 60.19(c) for procedures to seek approval to change your reporting date.

Air Curtain Incinerators

§ 62.14765 What is an air curtain incinerator?

(a) An air curtain incinerator operates by forcefully projecting a curtain of air across an open chamber or open pit in which combustion occurs. Incinerators of this type can be constructed above or below ground and with or without refractory walls and floor. (Air curtain incinerators are not to be confused with conventional combustion devices with enclosed fireboxes and controlled air technology such as mass burn, modular, and fluidized bed combustors.)

(b) Air curtain incinerators that burn only the materials listed in paragraphs (b)(1) through (3) of this section are only required to meet the requirements under § 62.14830 and under ''Air Curtain Incinerators'' (§§ 62.14765 through 62.14825):

(1) 100 percent wood waste;

(2) 100 percent clean lumber; and

(3) 100 percent mixture of only wood waste, clean lumber, and/or yard waste.

§§ 62.14770–62.14775 [Reserved]

§ 62.14795 [Reserved]

§ 62.14805 What must I do if I close my air curtain incinerator and then restart it?

(a) If you close your incinerator but will reopen it prior to the final compliance date in this subpart, you must comply with the final standards on February 7, 2018.

(b) If you close your incinerator but will restart it after February 7, 2018, you must complete emission control retrofits and meet the emission limitations on the date your incinerator restarts operation.

§ 62.14810 What must I do if I plan to permanently close my air curtain incinerator and not restart it?

If you plan to permanently close your incinerator rather than comply with this subpart, submit a closure notification, including the date of closure, to the Administrator no later than six months prior to your operation will cease. The closure date cannot be later than February 7, 2018 for sources that will not operate on and after the compliance date. In addition, while still in operation, your air curtain incinerator is subject to the same requirement to apply for and obtain a title V operating permit that applies to an air curtain incinerator that will not be permanently closing.

§ 62.14815 What are the emission limitations for air curtain incinerators?

After the date the initial test for opacity is required or completed (whichever is earlier), you must meet the limitations in paragraphs (a) and (b) of this section.

(a) Maintain opacity to less than or equal to 10 percent opacity (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values), except as described in paragraph (b) of this section.

(b) Maintain opacity to less than or equal to 35 percent opacity (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values) during the startup period that is within the first 30 minutes of operation.

§ 62.14820 How must I monitor opacity for air curtain incinerators?

(a) Use Method 9 of 40 CFR part 60, appendix A to determine compliance with the opacity limitation.

(b) Conduct an initial test for opacity as specified in § 60.8 no later than 180 days after your final compliance date.

(c) After the initial test for opacity, conduct annual tests no more than 12 calendar months following the date of your previous test.

§ 62.14825 What are the recordkeeping and reporting requirements for air curtain incinerators?

(a) Keep records of results of all initial and annual opacity tests onsite in either paper copy or electronic format, unless the Administrator approves another format, for at least 5 years.

(b) Make all records available for submittal to the Administrator or for an inspector's onsite review.

(c) Submit an initial report no later than 60 days following the initial opacity test that includes the information specified in paragraphs (c)(1) and (2) of this section.

(1) The types of materials you plan to combust in your air curtain incinerator; and

(2) The results (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values) of the initial opacity tests.

(d) Submit annual opacity test results within 12 months following the previous report.

(e) Submit initial and annual opacity test reports as electronic or paper copy on or before the applicable submittal date and keep a copy onsite for a period of 5 years.

Title V Requirements

§ 62.14830 Am I required to apply for and obtain a Title V operating permit for my unit?

Yes. Each CISWI unit and air curtain incinerator subject to standards under this subpart must operate pursuant to a permit issued under Clean Air Act sections 129(e) and title V.

§ 62.14835 [Reserved]

Delegation of Authority

§ 62.14838 What authorities are withheld by the EPA Administrator?

The following authorities are withheld by the EPA Administrator and not transferred to the State or Tribe:

(a) Approval of alternatives to the emission limitations in tables 1 and 5 through 8 of this subpart and operating limits established under § 62.14635 and table 2 of this subpart.

(b) Approval of petitions submitted pursuant to the requirements of § 62.14640 establishing operating parameters when using controls other than a wet scrubber, fabric filter, activated carbon injection, selective noncatalytic reduction, or a dry scrubber to comply with the emission limitations in tables 1 and 5 through 8 of this subpart.

(c) Approval of major alternatives to test methods established under § 62.14650 and tables 1 and 5 through 8 of this subpart.

(d) Approval of major alternatives to monitoring requirements established under §§ 62.14690, 62.14605 and table 2 of this subpart.

(e) Approval of major alternatives to recordkeeping and reporting requirements of this subpart.

(f) [Reserved]

(g) Approval of requests submitted pursuant to the requirements in § 62.14625(b)(2).

(h) Approval of alternative opacity emission limits in § 62.14630 under § 60.11(e)(6) through (e)(8).

(i) Performance test and data reduction waivers under §§ 62.14650(j), 60.8(b)(4) and (5).

(j) Determination of whether a qualifying small power production facility or cogeneration facility under § 62.14525(e) or (f) is combusting homogeneous waste.

Definitions

§ 62.14840 What definitions must I know?

Terms used but not defined in this subpart are defined in the Clean Air Act, subparts A and B of part 60 and subpart A of this part 62.

30-day rolling average means the arithmetic mean of the previous 720 hours of valid operating data. Valid data excludes periods when this unit is not operating. The 720 hours should be consecutive, but not necessarily continuous if operations are intermittent.

Administrator means the Administrator of the U.S. Environmental Protection Agency or his/her authorized representative or Administrator of a State Air Pollution Control Agency.

Agricultural waste means vegetative agricultural materials such as nut and grain hulls and chaff (*e.g.,* almond, walnut, peanut, rice, and wheat), bagasse, orchard prunings, corn stalks, coffee bean hulls and grounds, and other vegetative waste materials generated as a result of agricultural operations.

Air curtain incinerator means an incinerator that operates by forcefully projecting a curtain of air across an open chamber or pit in which combustion occurs. Incinerators of this type can be constructed above or below ground and with or without refractory walls and floor. (Air curtain incinerators are different from conventional combustion devices which typically have enclosed fireboxes and controlled air technology such as mass burn, modular, and fluidized bed combustors.)

Annual heat input means the heat input for the 12 months preceding the compliance demonstration.

Auxiliary fuel means natural gas, liquefied petroleum gas, fuel oil, or diesel fuel.

Average annual heat input rate means annual heat input divided by the hours of operation for the 12 months preceding the compliance demonstration.

Bag leak detection system means an instrument that is capable of monitoring particulate matter loadings in the exhaust of a fabric filter (*i.e.,* baghouse) in order to detect bag failures. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light scattering, light transmittance, or other principle to monitor relative particulate matter loadings.

Burn-off oven means any rack reclamation unit, part reclamation unit, or drum reclamation unit. A burn-off oven is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Bypass stack means a device used for discharging combustion gases to avoid severe damage to the air pollution control device or other equipment.

Calendar quarter means 3 consecutive months (non-overlapping) beginning on: January 1, April 1, July 1, or October 1.

Calendar year means 365 consecutive days starting on January 1 and ending on December 31.

CEMS data during startup and shutdown means the following:

(1) For incinerators and small remote incinerators: CEMS data collected during the first hours of operation of a CISWI unit startup from a cold start until waste is fed into the unit and the hours of operation following the cessation of waste material being fed to the CISWI unit during a unit shutdown. For each startup event, the length of time that CEMS data may be claimed as being CEMS data during startup must be 48 operating hours or less. For each shutdown event, the length of time that CEMS data may be claimed as being CEMS data during shutdown must be 24 operating hours or less;

(2) For energy recovery units: CEMS data collected during the startup or shutdown periods of operation. Startup begins with either the first-ever firing of fuel in a boiler or process heater for the purpose of supplying useful thermal energy (such as steam or heat) for heating, cooling or process purposes, or producing electricity, or the firing of fuel in a boiler or process heater for any purpose after a shutdown event. Startup ends four hours after when the boiler or process heater makes useful thermal energy (such as heat or steam) for heating, cooling, or process purposes, or generates electricity, whichever is earlier. Shutdown begins when the boiler or process heater no longer makes useful thermal energy (such as heat or steam) for heating, cooling, or process purposes and/or generates electricity or when no fuel is being fed to the boiler or process heater, whichever is earlier. Shutdown ends when the boiler or process heater no longer makes useful thermal energy (such as steam or heat) for heating, cooling, or process purposes and/or generates electricity, and no fuel is being combusted in the boiler or process heater; and

(3) For waste-burning kilns: CEMS data collected during the periods of kiln operation that do not include normal operations. Startup means the time from when a shutdown kiln first begins firing fuel until it begins producing clinker. Startup begins when a shutdown kiln turns on the induced draft fan and begins firing fuel in the main burner. Startup ends when feed is being continuously introduced into the kiln for at least 120 minutes or when the feed rate exceeds 60 percent of the kiln design limitation rate, whichever occurs first. Shutdown means the cessation of kiln operation. Shutdown begins when feed to the kiln is halted and ends when continuous kiln rotation ceases.

Chemical recovery unit means combustion units burning materials to recover chemical constituents or to produce chemical compounds where there is an existing commercial market for such recovered chemical constituents or compounds. A chemical recovery unit is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart. The following seven types of units are considered chemical recovery units:

(1) Units burning only pulping liquors (*i.e.,* black liquor) that are reclaimed in a pulping liquor recovery process and reused in the pulping process;

(2) Units burning only spent sulfuric acid used to produce virgin sulfuric acid;

(3) Units burning only wood or coal feedstock for the production of charcoal;

(4) Units burning only manufacturing byproduct streams/residue containing catalyst metals that are reclaimed and reused as catalysts or used to produce commercial grade catalysts;

(5) Units burning only coke to produce purified carbon monoxide that is used as an intermediate in the production of other chemical compounds;

(6) Units burning only hydrocarbon liquids or solids to produce hydrogen, carbon monoxide, synthesis gas, or other gases for use in other manufacturing processes; and

(7) Units burning only photographic film to recover silver.

Chemotherapeutic waste means waste material resulting from the production or use of antineoplastic agents used for the purpose of stopping or reversing the growth of malignant cells.

Clean lumber means wood or wood products that have been cut or shaped and include wet, air-dried, and kiln-dried wood products. Clean lumber does not include wood products that have been painted, pigment-stained, or pressure-treated by compounds such as chromate copper arsenate, pentachlorophenol, and creosote.

Commercial and industrial solid waste incineration (CISWI) unit means any distinct operating unit of any commercial or industrial facility that combusts, or has combusted in the preceding 6 months, any solid waste as

that term is defined in 40 CFR part 241. If the operating unit burns materials other than traditional fuels as defined in § 241.2 that have been discarded, and you do not keep and produce records as required by § 62.14700(u), the operating unit is a CISWI unit. While not all CISWI units will include all of the following components, a CISWI unit includes, but is not limited to, the solid waste feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The CISWI unit does not include air pollution control equipment or the stack. The CISWI unit boundary starts at the solid waste hopper (if applicable) and extends through two areas: The combustion unit flue gas system, which ends immediately after the last combustion chamber or after the waste heat recovery equipment, if any; and the combustion unit bottom ash system, which ends at the truck loading station or similar equipment that transfers the ash to final disposal. The CISWI unit includes all ash handling systems connected to the bottom ash handling system.

Contained gaseous material means gases that are in a container when that container is combusted.

Continuous emission monitoring system (CEMS) means the total equipment that may be required to meet the data acquisition and availability requirements of this subpart, used to sample, condition (if applicable), analyze, and provide a record of emissions.

Continuous monitoring system (CMS) means the total equipment, required under the emission monitoring sections in applicable subparts, used to sample and condition (if applicable), to analyze, and to provide a permanent record of emissions or process parameters. A particulate matter continuous parameter monitoring system (PM CPMS) is a type of CMS.

Cyclonic burn barrel means a combustion device for waste materials that is attached to a 55 gallon, open-head drum. The device consists of a lid, which fits onto and encloses the drum, and a blower that forces combustion air into the drum in a cyclonic manner to enhance the mixing of waste material and air. A cyclonic burn barrel is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Deviation means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limitation, operating limit, or operator qualification and accessibility requirements; and

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit.

Dioxins/furans means tetra-through octa-chlorinated dibenzo-p-dioxins and dibenzofurans.

Discard means, for purposes of this subpart and 40 CFR part 60, subpart DDDD, only, burned in an incineration unit without energy recovery.

Drum reclamation unit means a unit that burns residues out of drums (*e.g.,* 55 gallon drums) so that the drums can be reused.

Dry scrubber means an add-on air pollution control system that injects dry alkaline sorbent (dry injection) or sprays an alkaline sorbent (spray dryer) to react with and neutralize acid gas in the exhaust stream forming a dry powder material. Sorbent injection systems in fluidized bed boilers and process heaters are included in this definition. A dry scrubber is a dry control system.

Energy recovery means the process of recovering thermal energy from combustion for useful purposes such as steam generation or process heating.

Energy recovery unit means a combustion unit combusting solid waste (as that term is defined by the Administrator in 40 CFR part 241) for energy recovery. Energy recovery units include units that would be considered boilers and process heaters if they did not combust solid waste.

Energy recovery unit designed to burn biomass (Biomass) means an energy recovery unit that burns solid waste, biomass, and non-coal solid materials but less than 10 percent coal, on a heat input basis on an annual average, either alone or in combination with liquid waste, liquid fuel or gaseous fuels.

Energy recovery unit designed to burn coal (Coal) means an energy recovery unit that burns solid waste and at least 10 percent coal on a heat input basis on an annual average, either alone or in combination with liquid waste, liquid fuel or gaseous fuels.

Energy recovery unit designed to burn liquid waste materials and gas (Liquid/gas) means an energy recovery unit that burns a liquid waste with liquid or gaseous fuels not combined with any solid fuel or waste materials.

Energy recovery unit designed to burn solid materials (Solids) includes energy recovery units designed to burn coal and energy recovery units designed to burn biomass.

Fabric filter means an add-on air pollution control device used to capture particulate matter by filtering gas streams through filter media, also known as a baghouse.

Foundry sand thermal reclamation unit means a type of part reclamation unit that removes coatings that are on foundry sand. A foundry sand thermal reclamation unit is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Incinerator means any furnace used in the process of combusting solid waste (as that term is defined by the Administrator in 40 CFR part 241) for the purpose of reducing the volume of the waste by removing combustible matter. Incinerator designs include single chamber and two-chamber.

In-line coal mill means those coal mills using kiln exhaust gases in their process. Coal mills with a heat source other than the kiln or coal mills using exhaust gases from the clinker cooler alone are not an in-line coal mill.

In-line kiln/raw mill means a system in a Portland Cement production process where a dry kiln system is integrated with the raw mill so that all or a portion of the kiln exhaust gases are used to perform the drying operation of the raw mill, with no auxiliary heat source used. In this system the kiln is capable of operating without the raw mill operating, but the raw mill cannot operate without the kiln gases, and consequently, the raw mill does not generate a separate exhaust gas stream.

Kiln means an oven or furnace, including any associated preheater or precalciner devices, in-line raw mills, in-line coal mills or alkali bypasses used for processing a substance by burning, firing or drying. Kilns include cement kilns that produce clinker by heating limestone and other materials for subsequent production of Portland Cement. Because the alkali bypass, in-line raw mill and in-line coal mill are considered an integral part of the kiln, the kiln emissions limits also apply to the exhaust of the alkali bypass, in-line raw mill and in-line coal mill.

Laboratory analysis unit means units that burn samples of materials for the purpose of chemical or physical analysis. A laboratory analysis unit is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Load fraction means the actual heat input of an energy recovery unit divided by heat input during the performance test that established the minimum sorbent injection rate or minimum activated carbon injection rate,

expressed as a fraction (*e.g.,* for 50 percent load the load fraction is 0.5).

Low-level radioactive waste means waste material which contains radioactive nuclides emitting primarily beta or gamma radiation, or both, in concentrations or quantities that exceed applicable federal or state standards for unrestricted release. Low-level radioactive waste is not high-level radioactive waste, spent nuclear fuel, or by-product material as defined by the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(2)).

Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused, in part, by poor maintenance or careless operation are not malfunctions.

Minimum voltage or amperage means 90 percent of the lowest test-run average voltage or amperage to the electrostatic precipitator measured during the most recent particulate matter or mercury performance test demonstrating compliance with the applicable emission limits.

Modification or *modified CISWI unit* means a CISWI unit you have changed later than August 7, 2013 and that meets one of two criteria:

(1) The cumulative cost of the changes over the life of the unit exceeds 50 percent of the original cost of building and installing the CISWI unit (not including the cost of land) updated to current costs (current dollars). To determine what systems are within the boundary of the CISWI unit used to calculate these costs, *see* the definition of CISWI unit; and

(2) Any physical change in the CISWI unit or change in the method of operating it that increases the amount of any air pollutant emitted for which section 129 or section 111 of the Clean Air Act has established standards.

Municipal solid waste or municipal-type solid waste means household, commercial/retail, or institutional waste. Household waste includes material discarded by residential dwellings, hotels, motels, and other similar permanent or temporary housing. Commercial/retail waste includes material discarded by stores, offices, restaurants, warehouses, nonmanufacturing activities at industrial facilities, and other similar establishments or facilities. Institutional waste includes materials discarded by schools, by hospitals (nonmedical), by nonmanufacturing activities at prisons and government facilities, and other similar establishments or facilities. Household, commercial/retail, and institutional waste does include yard waste and refuse-derived fuel. Household, commercial/retail, and institutional waste does not include used oil; sewage sludge; wood pallets; construction, renovation, and demolition wastes (which include railroad ties and telephone poles); clean wood; industrial process or manufacturing wastes; medical waste; or motor vehicles (including motor vehicle parts or vehicle fluff).

Opacity means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

Operating day means a 24-hour period between 12:00 midnight and the following midnight during which any amount of solid waste is combusted at any time in the CISWI unit.

Oxygen analyzer system means all equipment required to determine the oxygen content of a gas stream and used to monitor oxygen in the boiler or process heater flue gas, boiler/process heater, firebox, or other appropriate location. This definition includes oxygen trim systems and certified oxygen CEMS. The source owner or operator is responsible to install, calibrate, maintain, and operate the oxygen analyzer system in accordance with the manufacturer's recommendations.

Oxygen trim system means a system of monitors that is used to maintain excess air at the desired level in a combustion device over its operating range. A typical system consists of a flue gas oxygen and/or carbon monoxide monitor that automatically provides a feedback signal to the combustion air controller or draft controller.

Part reclamation unit means a unit that burns coatings off parts (*e.g.,* tools, equipment) so that the parts can be reconditioned and reused.

Particulate matter means total particulate matter emitted from CISWI units as measured by Method 5 or Method 29 of 40 CFR part 60, appendix A.

Pathological waste means waste material consisting of only human or animal remains, anatomical parts, and/or tissue, the bags/containers used to collect and transport the waste material, and animal bedding (if applicable).

Performance evaluation means the conduct of relative accuracy testing, calibration error testing, and other measurements used in validating the continuous monitoring system data.

Performance test means the collection of data resulting from the execution of a test method (usually three emission test runs) used to demonstrate compliance with a relevant emission standard as specified in the performance test section of the relevant standard.

Process change means any of the following physical or operational changes:

(1) A physical change (maintenance activities excluded) to the CISWI unit which may increase the emission rate of any air pollutant to which a standard applies;

(2) An operational change to the CISWI unit where a new type of non-hazardous secondary material is being combusted;

(3) A physical change (maintenance activities excluded) to the air pollution control devices used to comply with the emission limits for the CISWI unit (*e.g.,* replacing an electrostatic precipitator with a fabric filter); and

(4) An operational change to the air pollution control devices used to comply with the emission limits for the affected CISWI unit (*e.g.,* change in the sorbent injection rate used for activated carbon injection).

Rack reclamation unit means a unit that burns the coatings off racks used to hold small items for application of a coating. The unit burns the coating overspray off the rack so the rack can be reused.

Raw mill means a ball or tube mill, vertical roller mill or other size reduction equipment, that is not part of an in-line kiln/raw mill, used to grind feed to the appropriate size. Moisture may be added or removed from the feed during the grinding operation. If the raw mill is used to remove moisture from feed materials, it is also, by definition, a raw material dryer. The raw mill also includes the air separator associated with the raw mill.

Reconstruction means rebuilding a CISWI unit and meeting two criteria:

(1) The reconstruction begins on or after August 7, 2013; and

(2) The cumulative cost of the construction over the life of the incineration unit exceeds 50 percent of the original cost of building and installing the CISWI unit (not including land) updated to current costs (current dollars). To determine what systems are within the boundary of the CISWI unit used to calculate these costs, *see* the definition of CISWI unit.

Refuse-derived fuel means a type of municipal solid waste produced by processing municipal solid waste through shredding and size classification. This includes all classes of refuse-derived fuel including two fuels:

(1) Low-density fluff refuse-derived fuel through densified refuse-derived fuel; and

(2) Pelletized refuse-derived fuel.

Responsible official means one of the following:

(1) For a corporation: A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) The delegation of authority to such representatives is approved in advance by the permitting authority;

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(3) For a municipality, state, federal, or other public agency: Either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (*e.g.,* a Regional Administrator of EPA); or

(4) For affected facilities:

(i) The designated representative in so far as actions, standards, requirements, or prohibitions under Title IV of the Clean Air Act or the regulations promulgated thereunder are concerned; or

(ii) The designated representative for any other purposes under part 60.

Shutdown means, for incinerators and small, remote incinerators, the period of time after all waste has been combusted in the primary chamber.

Small, remote incinerator means an incinerator that combusts solid waste (as that term is defined by the Administrator in 40 CFR part 241) and combusts 3 tons per day or less solid waste and is more than 25 miles driving distance to the nearest municipal solid waste landfill.

Soil treatment unit means a unit that thermally treats petroleum-contaminated soils for the sole purpose of site remediation. A soil treatment unit may be direct-fired or indirect fired. A soil treatment unit is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Solid waste means the term solid waste as defined in 40 CFR 241.2.

Solid waste incineration unit means a distinct operating unit of any facility which combusts any solid waste (as that term is defined by the Administrator in 40 CFR part 241) material from commercial or industrial establishments or the general public (including single and multiple residences, hotels and motels). Such term does not include incinerators or other units required to have a permit under section 3005 of the Solid Waste Disposal Act. The term ''solid waste incineration unit'' does not include:

(1) Materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals;

(2) Qualifying small power production facilities, as defined in section 3(17)(C) of the Federal Power Act (16 U.S.C. 769(17)(C)), or qualifying cogeneration facilities, as defined in section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes; or

(3) Air curtain incinerators provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with opacity limitations to be established by the Administrator by rule.

Space heater means a unit that meets the requirements of 40 CFR 279.23. A space heater is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Standard conditions, when referring to units of measure, means a temperature of 68 °F (20 °C) and a pressure of 1 atmosphere (101.3 kilopascals).

Startup period means, for incinerators and small, remote incinerators, the period of time between the activation of the system and the first charge to the unit.

Useful Thermal Energy means energy (*i.e.,* steam, hot water, or process heat) that meets the minimum operating temperature and/or pressure required by any energy use system that uses energy provided by the affected energy recovery unit.

Waste-burning kiln means a kiln that is heated, in whole or in part, by combusting solid waste (as the term is defined by the Administrator in 40 CFR part 241). Secondary materials used in Portland cement kilns shall not be deemed to be combusted unless they are introduced into the flame zone in the hot end of the kiln or mixed with the precalciner fuel.

Wet scrubber means an add-on air pollution control device that utilizes an aqueous or alkaline scrubbing liquor to collect particulate matter (including non-vaporous metals and condensed organics) and/or to absorb and neutralize acid gases.

Wood waste means untreated wood and untreated wood products, including tree stumps (whole or chipped), trees, tree limbs (whole or chipped), bark, sawdust, chips, scraps, slabs, millings, and shavings. Wood waste does not include:

(1) Grass, grass clippings, bushes, shrubs, and clippings from bushes and shrubs from residential, commercial/retail, institutional, or industrial sources as part of maintaining yards or other private or public lands;

(2) Construction, renovation, or demolition wastes; or

(3) Clean lumber.

TABLE 1 TO SUBPART III OF PART 62—EMISSION LIMITATIONS THAT APPLY TO INCINERATORS BEFORE FEBRUARY 7, 2018 [2]

For the air pollutant	You must meet this emission limitation [1]	Using this averaging time	And determining compliance using this method
Cadmium	0.004 milligrams per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Performance test (Method 29 of appendix A of part 60).
Carbon monoxide	157 parts per million by dry volume	3-run average (1 hour minimum sample time per run).	Performance test (Method 10, 10A, or 10B, of appendix A of this part).
Dioxins/furans (toxic equivalency basis).	0.41 nanograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Performance test (Method 23 of appendix A of this part).

TABLE 1 TO SUBPART III OF PART 62—EMISSION LIMITATIONS THAT APPLY TO INCINERATORS BEFORE FEBRUARY 7, 2018 [2]—Continued

For the air pollutant	You must meet this emission limitation [1]	Using this averaging time	And determining compliance using this method
Hydrogen chloride	62 parts per million by dry volume	3-run average (For Method 26, collect a minimum volume of 120 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
Lead	0.04 milligrams per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Performance test (Method 29 of appendix A of this part).
Mercury	0.47 milligrams per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008).[3]
Opacity	10 percent	Three 1-hour blocks consisting of ten 6-minute average opacity values.	Performance test (Method 9 at 40 CFR part 60, appendix A–4).
Oxides of nitrogen	388 parts per million by dry volume	3-run average (1 hour minimum sample time per run).	Performance test (Methods 7 or 7E at 40 CFR part 60, appendix A–4).
Particulate matter	70 milligrams per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Performance test (Method 5 or 29 of appendix A of part 60).
Sulfur dioxide	20 parts per million by dry volume	3-run average (1 hour minimum sample time per run).	Performance test (Method 6 or 6c of appendix A of part 60).

[1] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions.
[2] Applies only to incinerators subject to the CISWI standards through a state plan or the Federal plan prior to June 4, 2010.
[3] Incorporated by reference, *see* § 62.14670(z).

TABLE 2 TO SUBPART III OF PART 62—OPERATING LIMITS FOR WET SCRUBBERS

For these operating parameters	You must establish these operating limits	And monitor using these minimum frequencies		
		Data measurement	Data recording	Averaging time
Charge rate	Maximum charge rate	Continuous	Every hour	1. Daily (batch units). 2. 3-hour rolling (continuous and intermittent units).[1]
Pressure drop across the wet scrubber or amperage to wet scrubber.	Minimum pressure drop or amperage.	Continuous	Every 15 minutes	3-hour rolling.[1]
Scrubber liquor flow rate	Minimum flow rate	Continuous	Every 15 minutes	3-hour rolling.[1]
Scrubber liquor pH	Minimum pH	Continuous	Every 15 minutes	3-hour rolling.[1]

[1] Calculated each hour as the average of the previous 3 operating hours.

TABLE 3 TO SUBPART III OF PART 62—TOXIC EQUIVALENCY FACTORS

Dioxin/furan congener	Toxic equivalency factor
2,3,7,8-tetrachlorinated dibenzo-p-dioxin	1
1,2,3,7,8-pentachlorinated dibenzo-p-dioxin	0.5
1,2,3,4,7,8-hexachlorinated dibenzo-p-dioxin	0.1
1,2,3,7,8,9-hexachlorinated dibenzo-p-dioxin	0.1
1,2,3,6,7,8-hexachlorinated dibenzo-p-dioxin	0.1
1,2,3,4,6,7,8-heptachlorinated dibenzo-p-dioxin	0.01
Octachlorinated dibenzo-p-dioxin	0.001
2,3,7,8-tetrachlorinated dibenzofuran	0.1
2,3,4,7,8-pentachlorinated dibenzofuran	0.5
1,2,3,7,8-pentachlorinated dibenzofuran	0.05
1,2,3,4,7,8-hexachlorinated dibenzofuran	0.1
1,2,3,6,7,8-hexachlorinated dibenzofuran	0.1
1,2,3,7,8,9-hexachlorinated dibenzofuran	0.1
2,3,4,6,7,8-hexachlorinated dibenzofuran	0.1
1,2,3,4,6,7,8-heptachlorinated dibenzofuran	0.01
1,2,3,4,7,8,9-heptachlorinated dibenzofuran	0.01
Octachlorinated dibenzofuran	0.001

TABLE 4 TO SUBPART III OF PART 62—SUMMARY OF REPORTING REQUIREMENTS [1]

Report	Due date	Contents	Reference
A. Waste Management Plan	No later than November 7, 2017 or six months prior to the date you commence or recommence burning solid waste, whichever is later.	Waste management plan	§ 62.14715.
B. Initial Test Report	No later than 60 days following the initial performance test.	1. Complete test report for the initial performance test. 2. The values for the site-specific operating limits. 3. Installation of bag leak detection systems for fabric filters.	§ 62.14720.
C. Annual report	No later than 12 months following the submission of the initial test report. Subsequent reports are to be submitted no more than 12 months following the previous report.	1. Name and address 2. Statement and signature by responsible official. 3. Date of report. 4. Values for the operating limits. 5. If no deviations or malfunctions were reported, a statement that no deviations occurred during the reporting period. 6. Highest recorded 3-hour average and the lowest 3-hour average, as applicable, for each operating parameter recorded for the calendar year being reported. 7. Information for deviations or malfunctions recorded under § 62.14700(b)(6) and (c) through (e). 8. If a performance test was conducted during the reporting period, the results of the test. 9. If a performance test was not conducted during the reporting period, a statement that the requirements of § 62.14680(a) were met. 10. Documentation of periods when all qualified CISWI unit operators were unavailable for more than 8 hours but less than 2 weeks.	§§ 62.14725 and 62.14730. Subsequent reports are to be submitted no more than 12 months following the previous report.
D. Emission Limitation or Operating Limit Deviation Report.	By August 1 of that year for data collected during the first half of the calendar year. By February 1 of the following year for data collected during the second half of the calendar year.	1. Dates and times of deviations 2. Averaged and recorded data for these dates. 3. Duration and causes for each deviation and the corrective actions taken. 4. Copy of operating limit monitoring data and any test reports. 5. Dates, times, and causes for monitor downtime incidents. 6. Whether each deviation occurred during a period of start-up, shutdown, or malfunction.	§§ 62.14735 and 62.14740.
E. Qualified Operator Deviation Notification.	Within 10 days of deviation	1. Statement of cause of deviation 2. Description of efforts to have an accessible qualified operator. 3. The date a qualified operator will be accessible.	§ 62.14745(a)(1).
F. Qualified Operator Deviation Status Report.	Every 4 weeks following deviation	1. Description of efforts to have an accessible qualified operator. 2. The date a qualified operator will be accessible. 3. Request for approval to continue operation.	§ 62.14745(a)(2).
G. Qualified Operator Deviation Notification of Resumed Operation.	Prior to resuming operation	Notification that you are resuming operation.	§ 62.14745(b).

[1] This table is only a summary, *see* the referenced sections of the rule for the complete requirements.

TABLE 5 TO SUBPART III OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO INCINERATORS ON AND AFTER FEBRUARY 7, 2018

For the air pollutant	You must meet this emission limitation [1]	Using this averaging time	And determining compliance using this method
Cadmium	0.0026 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Carbon monoxide	17 parts per million dry volume	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxins/furans (total mass basis)	4.6 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Dioxins/furans (toxic equivalency basis).	0.13 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Hydrogen chloride	29 parts per million dry volume	3-run average (For Method 26, collect a minimum volume of 60 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
Lead	0.015 milligrams per dry standard cubic meter.[2]	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Mercury	0.0048 milligrams per dry standard cubic meter.	3-run average (For Method 29 an ASTM D6784–02 (Reapproved 2008),[3] collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A).	Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008).[3]
Oxides of nitrogen	53 parts per million dry volume	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).
Particulate matter filterable	34 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meter).	Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8).
Sulfur dioxide	11 parts per million dry volume	3-run average (1 hour minimum sample time per run).	Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4).
Fugitive ash	Visible emissions for no more than 5% of the hourly observation period.	Three 1-hour observation periods	Visible emission test (Method 22 at 40 CFR part 60, appendix A–7).

[1] All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

[2] If you are conducting stack tests to demonstrate compliance and your performance tests for this pollutant for at least 2 consecutive years show that your emissions are at or below this limit, you can skip testing according to § 62.14680 if all of the other provisions of § 62.14680 are met. For all other pollutants that do not contain a footnote ''2'', your performance tests for this pollutant for at least 2 consecutive years must show that your emissions are at or below 75 percent of this limit in order to qualify for skip testing.

[3] Incorporated by reference, *see* § 62.1670(z).

TABLE 6 TO SUBPART III OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO ENERGY RECOVERY UNITS AFTER FEBRUARY 7, 2018

For the air pollutant	You must meet this emission limitation [1]		Using this averaging time	And determining compliance using this method
	Liquid/gas	Solids		
Cadmium	0.023 milligrams per dry standard cubic meter.	Biomass—0.0014 milligrams per dry standard cubic meter. Coal—0.0017 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Carbon monoxide	35 parts per million dry volume.	Biomass—260 parts per million dry volume. Coal—95 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).

TABLE 6 TO SUBPART III OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO ENERGY RECOVERY UNITS AFTER FEBRUARY 7, 2018—Continued

For the air pollutant	You must meet this emission limitation [1]		Using this averaging time	And determining compliance using this method
	Liquid/gas	Solids		
Dioxins/furans (total mass basis).	2.9 nanograms per dry standard cubic meter.	Biomass—0.52 nanograms per dry standard cubic meter.[2] Coal—5.1 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 4 dry standard cubic meter).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Dioxins/furans (toxic equivalency basis).	0.32 nanograms per dry standard cubic meter.	Biomass—0.12 nanograms per dry standard cubic meter. Coal—0.075 nanograms per dry standard cubic meter.[2]	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Hydrogen chloride	14 parts per million dry volume.	Biomass—0.20 parts per million dry volume. Coal—58 parts per million dry volume.	3-run average (for Method 26, collect a minimum of 120 liters; for Method 26A, collect a minimum volume of 1 dry standard cubic meter).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
Lead	0.096 milligrams per dry standard cubic meter.	Biomass—0.014 milligrams per dry standard cubic meter.[2] Coal—0.057 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Mercury	0.0024 milligrams per dry standard cubic meter.	Biomass—0.0022 milligrams per dry standard cubic meter. Coal—0.013 milligrams per dry standard cubic meter.	3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008),[3] collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A).	Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008) [3]
Oxides of nitrogen	76 parts per million dry volume.	Biomass—290 parts per million dry volume. Coal—460 parts per million dry volume.	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).
Particulate matter filterable.	110 milligrams per dry standard cubic meter.	Biomass—11 milligrams per dry standard cubic meter. Coal—130 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meter).	Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8) if the unit has an annual average heat input rate less than or equal to 250 MMBtu/hr; or PM CPMS (as specified in § 62.14670(x)) if the unit has an annual average heat input rate greater than 250 MMBtu/hr.
Sulfur dioxide	720 parts per million dry volume.	Biomass—7.3 parts per million dry volume. Coal—850 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4).
Fugitive ash	Visible emissions for no more than 5 percent of the hourly observation period.	Visible emissions for no more than 5 percent of the hourly observation period.	Three 1-hour observation periods.	Visible emission test (Method 22 at 40 CFR part 60, appendix A–7).

[1] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

[2] If you are conducting stack tests to demonstrate compliance and your performance tests for this pollutant for at least 2 consecutive years show that your emissions are at or below this limit, you can skip testing according to § 62.14680 if all of the other provisions of § 62.14680 are met. For all other pollutants that do not contain a footnote ''2'', your performance tests for this pollutant for at least 2 consecutive years must show that your emissions are at or below 75 percent of this limit in order to qualify for skip testing, with the exception of annual performance tests to certify a CEMS or PM CPMS.

[3] Incorporated by reference, *see* § 62.14670(z).

TABLE 7 TO SUBPART III OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO WASTE-BURNING KILNS AFTER FEBRUARY 7, 2018

For the air pollutant	You must meet this emission limitation [1]	Using this averaging time	And determining compliance using this method [3]
Cadmium	0.0014 milligrams per dry standard cubic meter.[2]	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8).
Carbon monoxide	110 (long kilns)/790 (preheater/precalciner) parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxins/furans (total mass basis)	1.3 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Dioxins/furans (toxic equivalency basis).	0.075 nanograms per dry standard cubic meter.[2]	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Hydrogen chloride	3.0 parts per million dry volume.[2]	3-run average (collect a minimum volume of 1 dry standard cubic meter) or 30-day rolling average if HCl CEMS is being used.	Performance test (Method 321 at 40 CFR part 63, appendix A of this part) or HCl CEMS if a wet scrubber or dry scrubber is not used, as specified in § 62.14670(j).
Lead	0.014 milligrams per dry standard cubic meter.[2]	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8).
Mercury	0.011 milligrams per dry standard cubic meter.	30-day rolling average	Mercury CEMS or sorbent trap monitoring system (performance specification 12A or 12B, respectively, of appendix B of this part), as specified in § 62.14670(j).
Oxides of nitrogen	630 parts per million dry volume	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).
Particulate matter filterable	13.5 milligrams per dry standard cubic meter.	30-day rolling average	PM CPMS (as specified in § 62.14670(x)).
Sulfur dioxide	600 parts per million dry volume	3-run average (for Method 6, collect a minimum of 20 liters; for Method 6C, 1 hour minimum sample time per run).	Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4).

[1] All emission limitations are measured at 7 percent oxygen (except for CEMS data during startup and shutdown), dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

[2] If you are conducting stack tests to demonstrate compliance and your performance tests for this pollutant for at least 2 consecutive years show that your emissions are at or below this limit, you can skip testing according to § 62.14680 if all of the other provisions of § 62.14680 are met. For all other pollutants that do not contain a footnote ''2'', your performance tests for this pollutant for at least 2 consecutive years must show that your emissions are at or below 75 percent of this limit in order to qualify for skip testing, with the exception of annual performance tests to certify a CEMS or PM CPMS.

[3] Alkali bypass and in-line coal mill stacks are subject to performance testing only, as specified in 62.14670(y)(3). They are not be subject to the CEMS, sorbent trap or CPMS requirements that otherwise may apply to the main kiln exhaust.

TABLE 8 TO SUBPART III OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO SMALL, REMOTE INCINERATORS AFTER FEBRUARY 7, 2018

For the air pollutant	You must meet this emission limitation [1]	Using this averaging time	And determining compliance using this method
Cadmium	0.95 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters per run).	Performance test (Method 29 at 40 CFR part 60, appendix A–8).
Carbon monoxide	64 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 at 40 CFR part 60, appendix A–4).
Dioxins/furans (total mass basis).	4,400 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters per run).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Dioxins/furans (toxic equivalency basis).	180 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 23 at 40 CFR part 60, appendix A–7).
Fugitive ash	Visible emissions for no more than 5 percent of the hourly observation period.	Three 1-hour observation periods	Visible emissions test (Method 22 at 40 CFR part 60, appendix A–7).

TABLE 8 TO SUBPART III OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO SMALL, REMOTE INCINERATORS AFTER FEBRUARY 7, 2018—Continued

For the air pollutant	You must meet this emission limitation [1]	Using this averaging time	And determining compliance using this method
Hydrogen chloride	300 parts per million dry volume.	3-run average (For Method 26, collect a minimum volume of 120 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run).	Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8).
Lead	2.1 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish.
Mercury	0.0053 milligrams per dry standard cubic meter.	3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008),[2] collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A).	Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008).[2]
Oxides of nitrogen	190 parts per million dry volume.	3-run average (for Method 7E, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4).
Particulate matter (filterable)	270 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8).
Sulfur dioxide	150 parts per million dry volume.	3-run average (for Method 6, collect a minimum of 20 liters per run; for Method 6C, 1 hour minimum sample time per run).	Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4).

[1] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.
[2] Incorporated by reference, *see* § 62.14670(z).

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