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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

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

WHEN: Tuesday, June 8, 2010 [CANCELLED]
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

Contents

Federal Register

Vol. 75, No. 106

Thursday, June 3, 2010

Reader Aids

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

2 CFR
2339.....31273

7 CFR
916.....31275
917.....31275
1218.....31279
1470.....31610

10 CFR

Proposed Rules:
430.....31323

14 CFR
39.....31282
65.....31283

Proposed Rules:
39 (5 documents) 31324, 31327, 31329, 31330, 31332

20 CFR
439.....31273

24 CFR

Proposed Rules:
3500.....31334

27 CFR
478.....31285

34 CFR

Proposed Rules:
Ch. VI.....31338

39 CFR
111.....31288

40 CFR
51.....31514
52 (4 documents) 31288, 31290, 31306, 31514
63.....31317
70.....31514
71.....31514

Proposed Rules:
52.....31340

44 CFR

Proposed Rules:
67 (6 documents) 31361, 31368

46 CFR
501.....31320

49 CFR

Proposed Rules:
611.....31383

50 CFR
679.....31321

Proposed Rules:
17.....31387

Rules and Regulations

Federal Register
Vol. 75, No. 106
Thursday, June 3, 2010

SOCIAL SECURITY ADMINISTRATION

2 CFR Part 2339 and 20 CFR Part 439

[Docket No. SSA–2009–0054]

RIN 0960–AH14

Social Security Administration Implementation of OMB Guidance for Drug-Free Workplace Requirements

AGENCY: Social Security Administration.

ACTION: Final rule with request for comments.

SUMMARY: The Office of Management and Budget (OMB) is consolidating all Federal regulations concerning drug-free workplace requirements for recipients of financial assistance. Accordingly, we are removing our regulation on this subject currently located within title 20 of the Code of Federal Regulations (CFR) and issuing a new regulation to adopt the OMB guidance at 2 CFR part 182. The new regulation makes no substantive change to our policy or procedures for a drug-free workplace.

DATES: This direct to final rule is effective on August 2, 2010 without further action. Submit comments by July 6, 2010 on any unintended changes this action makes in our policies and procedures for drug-free workplace. All comments on unintended changes will be considered and, if warranted, we will revise the rule.

ADDRESSES: You may submit comments by any one of three methods—Internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2009–0054 so that we may associate your comments with the correct regulation.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comment via the Internet. Please visit the Federal eRulemaking portal at *http://www.regulations.gov.* Use the *Search* function to find docket number SSA–2009–0054. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comment to be viewable.

2. *Fax:* Fax comments to (410) 966–2830.

3. *Mail:* Mail your comments to the Office of Regulations, Social Security Administration, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Comments are available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Fran O. Thomas, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 966–9822. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.*

Background

Congress passed the Drug-Free Workplace Act of 1988 as part of omnibus drug legislation. Public Law 100–690, title V, Subtitle D; 41 U.S.C. 701, *et seq.* This statute requires that recipients of grants and parties to cooperative agreements must provide a drug-free workplace. Federal agencies issued an interim final common rule to implement the act as it applied to grants. 54 FR 4946, January 31, 1989. The agencies issued a final common rule after consideration of public comments [55 FR 21681, May 25, 1990].

The agencies proposed an update to the drug-free workplace common rule in 2002 [67 FR 3266, January 23, 2002] and finalized it in 2003 [68 FR 66534, November 26, 2003]. The updated common rule was redrafted in plain language. Based on an amendment to the drug-free workplace requirements in 41 U.S.C. 702 [Pub. L. 105–85, div. A, title VIII, Sec. 809, Nov. 18, 1997, 111 Stat. 1838], the update also allowed multiple enforcement options from which agencies could select.

When it established 2 CFR as the new central location for OMB guidance and agency implementing regulations concerning grants and agreements [69 FR 26276, May 11, 2004], OMB announced its intention to replace common rules with OMB guidance that agencies could adopt in brief regulations. OMB began that process by proposing [70 FR 51863, August 31, 2005] and finalizing [71 FR 66431, November 15, 2006] Government-wide guidance on non-procurement suspension and debarment in 2 CFR part 180.

As the next step in that process, OMB proposed for comment [73 FR 55776, September 26, 2008] and finalized [74 FR 28149, June 15, 2009] Government-wide guidance with policies and procedures to implement drug-free workplace requirements for financial assistance. The guidance requires each agency to replace the common rule on drug-free workplace requirements that the agency previously issued in its own CFR title with a brief regulation in 2 CFR adopting the Government-wide policies and procedures. One advantage of this approach is that it reduces the total number of drug-free workplace regulations. A second advantage is that it collocates OMB's guidance and all of the agencies' implementing regulations in 2 CFR.

The Current Regulatory Actions

As the OMB guidance requires, we are taking two regulatory actions. First, we are removing the drug-free workplace common rule from 20 CFR part 439. Second, to replace the common rule, we are issuing a brief regulation in 2 CFR part 2339 to adopt the Government-wide policies and procedures in the OMB guidance.

Invitation To Comment

This regulatory action is solely an administrative simplification and does

not make any substantive change in our policies or procedures. While we invite your comments on this action, we will not revisit substantive issues that were resolved during the development of the final common rule in 2003. Please limit your comments to any specific unintended changes in substantive content that the new regulation would make.

Regulatory Procedures

We follow the Administrative Procedure Act (APA) rulemaking procedures specified in 5 U.S.C. 553 in the development of our regulations. 205(a), 702(a)(5), and 1631(d)(1) of the Act, 42 U.S.C. 405(a), 902(a)(5), 1383(d)(1). The APA provides exceptions to its prior notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest.

This final rule is solely an administrative simplification that makes no substantive changes to our policy or procedures for drug-free workplace. We therefore believe that the rule is noncontroversial and do not expect to receive any adverse comments, although we are inviting comments on any unintended substantive change this rule may make.

Accordingly, we find that the solicitation of public comments on this final rule is unnecessary and that good cause exists under 5 U.S.C. 553(b)(B) and 553(d) to make this rule effective on August 2, 2010. If any comment on unintended effects is received, we will consider it and, if warranted, publish a timely revision of the rule.

Executive Order 12866

We have consulted with OMB and determined that this final rule does not meet the criteria for a significant regulatory action under Executive Order 12866 and is not subject to OMB review.

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)

This final rule will not have a significant economic impact on a substantial number of small entities. Therefore, we did not prepare a regulatory flexibility analysis.

Unfunded Mandates Act of 1995 (Sec. 202, Pub. L. 104–4)

This final rule does not contain a Federal mandate that will result in the expenditure by State, local, or tribal governments, in aggregate, or by the private sector of $100 million or more in any one year.

Paperwork Reduction Act of 1995 (44 U.S.C., Chapter 35)

These final rules contain a public reporting requirement in the regulation section listed below. Since the inception of these rules in 1988, we have not received any notifications from any of our 167 grantees; therefore, we do not expect to receive any notifications in the future. However, since there is a public reporting requirement that affects the grantees, we inserted a 1-hour placeholder burden for this section.

Regulation section	Description of public reporting requirement	Total number of grantees	Number of respondents (annually)	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
2 CFR 2339.225	A recipient other than an individual must notify the Commissioner of Social Security about an employee's conviction for a criminal drug offense.	167	.....	.....	.....	1 hour

We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize the burden on respondents, including the use of automated techniques or other forms of information technology. If you would like to submit comments, please send them to the following locations:

Office of Management and Budget, Attn: Desk Officer for SSA, Fax Number: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov.*

Social Security Administration, Attn: Reports Clearance Officer, 1333 Annex, 6401 Security Blvd., Baltimore, MD 21235–0001, Fax Number: 410–965–6400, E-mail: *OPLM.RCO@ssa.gov.*

You can submit comments until August 2, 2010, which is 60 days after the publication of this notice. However, your comments will be most useful if you send them to SSA by July 6, 2010, which is 30 days after publication. To receive a copy of the OMB clearance package, contact the SSA Reports Clearance Officer using any of the above contact methods. We prefer to receive comments by e-mail or fax.

Federalism (Executive Order 13132)

This final rule does not have Federalism implications, as set forth in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 2 CFR Part 2339 and 20 CFR Part 439

Administrative practice and procedure, Drug abuse, Grant programs, Reporting and recordkeeping requirements.

Michael J. Astrue,

Commissioner of Social Security.

■ Accordingly, for the reasons set forth in the preamble, and under the authority of 5 U.S.C. 301, SSA is amending the Code of Federal Regulations, title 2, Subtitle B, Chapter XXIII, and title 20, chapter III, part 439, as follows:

Title 2—Grants and Agreements

■ 1. Add part 2339 in Subtitle B, Chapter XXIII of 2 CFR, to read as follows:

PART 2339—REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

Sec.

Authority: 41 U.S.C. 701–707.

§ 2339.10 What does this part do?

This part requires that the award and administration of Social Security Administration (SSA) grants and cooperative agreements comply with Office of Management and Budget (OMB) guidance implementing the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701–707, as amended, hereafter referred to as "the Act") that applies to grants. It thereby—

(a) Gives regulatory effect to the OMB guidance (subparts A through F of 2 CFR part 182) for SSA's grants and cooperative agreements; and

(b) Establishes SSA's policies and procedures for compliance with the Act that are the same as those of other Federal agencies, in conformance with the requirement in 41 U.S.C. 705 for Government-wide implementing regulations.

§ 2339.20 Does this part apply to me?

This part and, through this part, pertinent portions of the OMB guidance in Subparts A through F of 2 CFR part 182 (see table at 2 CFR 182.115(b)) apply to you if you are—

(a) A recipient of an SSA grant or cooperative agreement; or

(b) An SSA awarding official.

§ 2339.30 What policies and procedures must I follow?

(a) *General.* You must follow the policies and procedures specified in applicable sections of the OMB guidance in Subparts A through F of 2 CFR part 182, as implemented by this part.

(b) *Specific sections of OMB guidance that this part supplements.* In implementing the OMB guidance in 2 CFR part 182, this part supplements four sections of the guidance, as shown in the following table.

Section of OMB guidance in 2 CFR	Section in this part where supplemented, 2 CFR	What the supplementation clarifies
(1) 182.225(a)	§ 2339.225	Who in SSA a recipient other than an individual must notify if an employee is convicted for a violation of a criminal drug statute in the workplace.
(2) 182.300(b)	§ 2339.300	Who in SSA a recipient who is an individual must notify if he or she is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.
(3) 182.500	§ 2339.500	Who in SSA is authorized to determine that a recipient other than an individual is in violation of the requirements of 2 CFR part 182, as implemented by this part.
(4) 182.505	§ 2339.505	Who in SSA is authorized to determine that a recipient who is an individual is in violation of the requirements of 2 CFR part 182, as implemented by this part.

(c) *Sections of the OMB guidance that this part does not supplement.* Our policies and procedures are the same as those in the OMB guidance for any section not included in the table in paragraph (b) of this section.

Subpart A—[Reserved.]

Subpart B—Requirements for Recipients Other Than Individuals

§ 2339.225 Who in the Social Security Administration does a recipient other than an individual notify about a criminal drug conviction?

A recipient other than an individual that is required under 2 CFR 182.225(a) to notify Federal agencies about an employee's conviction for a criminal drug offense must notify the Commissioner of Social Security or designee.

Subpart C—[Reserved.]

Subpart D—Responsibilities of Agency Awarding Officials

§ 2339.400 What method do I use as an agency awarding official to obtain a recipient's agreement to comply with the OMB guidance?

You must include the following term or condition in the award:

Drug-free workplace. You, as the recipient, must comply with drug-free workplace requirements in Subpart B, which adopts the Government-wide implementation (2 CFR part 182) of sec. 5152–5158 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701–707).

Subpart E—Violations of this Part and Consequences

§ 2339.500 Who in the Social Security Administration determines that a recipient other than an individual violated the requirements of this part?

The Commissioner of Social Security or designee will make the determination.

Subpart F—[Reserved]

Title 20—Employees' Benefits

Chapter III—Social Security Administration

PART 439—[REMOVED]

■ 2. Remove Part 439.

[FR Doc. 2010–13093 Filed 6–2–10; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Doc. No. AMS–FV–09–0091; FV10–916/917–2 FR]

Nectarines and Peaches Grown in California; Increased Assessment Rates

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rates established for the Nectarine Administrative Committee and the Peach Commodity Committee (Committees) for the 2010–11 and subsequent fiscal periods from $0.0175 to $0.0280 per 25-pound container or container equivalent of nectarines handled, and from $0.0025 to $0.026 per 25-pound container or container equivalent of peaches handled. The Committees locally administer the marketing orders which regulate the handling of nectarines and peaches grown in California. Assessments upon nectarine and peach handlers are used by the Committees to fund reasonable and necessary expenses of the programs. The fiscal periods run from March 1 through the last day of February. The assessment rates will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: *Effective Date:* June 4, 2010.

FOR FURTHER INFORMATION CONTACT: Jerry L. Simmons, Marketing Specialist, or Kurt Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906; or E-mail: *Jerry.Simmons@ams.usda.gov* or *Kurt.Kimmel@ams.usda.gov.*

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

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

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing orders now in effect, California nectarine and peach handlers are subject to assessments. Funds to administer the orders are derived from such assessments. It is intended that the assessment rates as issued herein will be applicable to all assessable nectarines and peaches beginning on March 1, 2010, and continue until amended, suspended, or terminated.

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

This rule increases the assessment rates established for the Nectarine Administrative Committee (NAC) for the 2010–11 and subsequent fiscal periods from $0.0175 to $0.0280 per 25-pound container or container equivalent of nectarines and for the Peach Commodity Committee (PCC) for the 2010–11 and subsequent fiscal periods from $0.0025 to $0.026 per 25-pound container or container equivalent of peaches.

The nectarine and peach marketing orders provide authority for the Committees, with the approval of USDA, to formulate annual budgets of expenses and collect assessments from handlers to administer the programs. The members of NAC and PCC are producers of California nectarines and peaches, respectively. They are familiar with the Committees' needs, and with the costs for goods and services in their local area and are, therefore, in a position to formulate appropriate budgets and assessment rates. The assessment rates are formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

NAC Assessment and Expenses

For the 2009–10 and subsequent fiscal periods, the NAC recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The NAC met on December 10, 2009, and unanimously recommended 2010–11 expenditures of $1,448,101 and an assessment rate of $0.0280 per 25-pound container or container equivalent of nectarines. In comparison, the budgeted expenditures for the 2010–11 fiscal period were $1,797,290. The assessment rate of $0.0280 per 25-pound container or container equivalent of nectarines is $0.0105 higher than the rate currently in effect. The NAC recommended a higher assessment rate because the 2009 crop was lower than expected due to a large number of tree pullouts and other economic factors.

The major expenditures recommended by the NAC for the 2010–11 fiscal period include $291,377 for administration, $157,016 for production research, and $999,708 for domestic and international programs. In comparison, budgeted expenses for these items in 2008–09 were $319,965.32 for administration, $349,447.55 for production research, and $1,127,877.33 for domestic and international programs.

The assessment rate recommended by the NAC was derived after considering anticipated fiscal year expenses; estimated assessable nectarines of 16,200,000 25-pound containers or container equivalents; the estimated income from other sources, such as interest; and the need for an adequate financial reserve to carry the NAC into the 2011–12 fiscal period. Therefore, the NAC recommended an assessment rate of $0.0280 per 25-pound container or container equivalent.

Combining expected assessment revenue of $453,600 with the $641,840 carryover available from the 2009–10 fiscal period and other income such as interest should be adequate to meet Committee needs. The assessment rate is also likely to provide a $116,486 reserve, which may be used to cover administrative expenses prior to the beginning of the 2011–12 shipping season as provided in the order (§ 916.42).

PCC Assessment and Expenses

For the 2009–10 and subsequent fiscal periods, the PCC recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The PCC met on December 10, 2009, and recommended 2010–11 expenditures of $1,839,651 and an assessment rate of $0.026 per 25-pound container or container equivalent of

peaches. In comparison, budgeted expenditures for the 2009–10 fiscal period were $1,885,250. The assessment rate of $0.026 per 25-pound container or container equivalent of peaches is $0.0235 higher than the rate currently in effect. The PCC recommended a higher assessment rate because the 2009 crop was lower than expected due to a large number of tree pullouts and other economic factors.

The major expenditures recommended by the PCC for the 2010–11 fiscal period include $368,756 for administration, $199,662 for production research, and $1,271,233 for domestic and international programs. In comparison, budgeted expenses for these items in 2009–10 were $334,058 for administration, $366,920 for production research, and $1,184,272 for domestic and international programs.

The assessment rate recommended by the PCC was derived after considering anticipated fiscal year expenses; estimated assessable peaches of 20,600,000 25-pound containers or container equivalents; the estimated income from other sources, such as interest; and the need for an adequate financial reserve to carry the PCC into the 2011–12 fiscal period. Therefore, the PCC recommended an assessment rate of $0.026 per 25-pound container or container equivalent.

Combining expected assessment revenues of $535,600 with the $854,699 carryover available from the 2009–10 fiscal period and other income such as interest should be adequate to meet Committee needs. The assessment rate is also likely to provide a $147,502 reserve, which may be used to cover administrative expenses prior to the beginning of the 2011–12 shipping season as provided in the order (§ 917.38).

Continuance of Assessment Rates

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

Although these assessment rates will be in effect for an indefinite period, the Committees will continue to meet prior to or during each fiscal period to recommend budgets of expenses and consider recommendations for modification of the assessment rates. The dates and times of Committee meetings are available from the Committees' Web site at *http://www.eatcaliforniafruit.com* or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate the Committees' recommendations and other available information to determine whether modification of the assessment rate for each Committee is needed. Further rulemaking will be undertaken as necessary. The Committees' 2010–11 fiscal period budgets and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

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

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

There are approximately 101 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 475 producers of these fruits in California. Small agricultural service firms, which include handlers, are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000. A majority of these handlers and producers may be classified as small entities.

The Committees' staff has estimated that there are fewer than 50 handlers in the industry who would not be considered small entities. For the 2009 season, the committees' staff estimated that the average handler price received was $11.50 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 608,696 containers to have annual receipts of $7,000,000. Given data on shipments maintained by the committees' staff and the average handler price received during the 2009 season, the Committees' staff estimates that small handlers represent approximately 50 percent of all the handlers within the industry.

The Committees' staff has also estimated that fewer than 50 producers in the industry would not be considered small entities. For the 2009 season, the Committees estimated the average producer price received was $6.50 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 115,385 containers of nectarines and peaches to have annual receipts of $750,000. Given data maintained by the Committees' staff and the average producer price received during the 2009 season, the Committees' staff estimates that small producers represent more than 80 percent of the producers within the industry.

With an average producer price of $6.50 per container or container equivalent, and a combined packout of nectarines and peaches of 37,263,343 containers, the value of the 2009 packout is estimated to be $242,211,730. Dividing this total estimated grower revenue figure by the estimated number of producers (475) yields an estimate of average revenue per producer of about $509,919 from the sales of peaches and nectarines.

The nectarine and peach marketing orders provide authority for the Committees, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the programs. The members of the NAC and PCC are producers of California nectarines and peaches, respectively.

This rule increases the assessment rates established for the NAC for the 2010–11 and subsequent fiscal periods from $0.0175 to $0.0280 per 25-pound container or container equivalent of nectarines and for the PCC for the 2010–11 and subsequent fiscal periods from $0.0025 to $0.026 per 25-pound container or container equivalent of peaches.

The NAC recommended 2010–11 fiscal period expenditures of $1,448,101 for nectarines and an assessment rate of $0.0280 per 25-pound container or container equivalent of nectarines. The assessment rate of $0.0280 is $0.0105 higher than the rate currently in effect. The PCC recommended 2010–11 fiscal period expenditures of $1,839,651 for peaches and an assessment rate of $0.026 per 25-pound container or container equivalent of peaches. The assessment rate of $0.026 is $0.0235 higher than the rate currently in effect.

Analysis of NAC Budget

The quantity of assessable nectarines for the 2010–11 fiscal period is estimated at 16,200,000 25-pound containers or container equivalents. Thus, the $0.0280 rate should provide $453,600 in assessment income. Income

derived from handler assessments, along with income from other sources and funds from the NAC's reserve, would be adequate to cover budgeted expenses.

The major expenditures recommended by the NAC for the 2010–11 year include $291,377 for administration, $157,016 for production research, and $999,708 for domestic and international programs. Budgeted expenses in 2009–10 were $319,965.32 for administration, $349,447.55 for production research, and $1,127,877.33 for domestic and international programs.

The NAC recommended an increased 2010–11 fiscal period assessment rate because the 2009 crop was lower than expected due to a large number of tree pullouts and other economic factors. Income generated from the higher assessment rate combined with reserve funds should be adequate to cover anticipated 2010–11 expenses.

Analysis of PCC Budget

The quantity of assessable peaches for the 2010–11 fiscal year is estimated at 20,600,000 25-pound containers or container equivalents. Thus, the $0.026 rate should provide $535,600 in assessment income.

The major expenditures recommended by PCC for the 2010–11 year include $368,756 for administration, $199,662 for production research, and $1,271,233 for domestic and international programs. Budgeted expenses in 2009–10 were $334,058 for administration, $366,920 for production research, and $1,184,272 for domestic and international programs.

The PCC recommended an increased 2010–11 fiscal period assessment rate because the 2009 crop was lower than expected due to a large number of tree pullouts and other economic factors. Income generated from the higher assessment rate combined with reserve funds should be adequate to cover anticipated 2010–11 expenses.

Considerations in Determining Expenses and Assessment Rates

Prior to arriving at these budgets, the Committees considered alternative expenditure and assessment rate levels, but ultimately decided that the recommended levels were reasonable to properly administer the orders.

Each of the Committees then reviewed the proposed expenses; the total estimated assessable 25-pound containers or container equivalents; and the estimated income from other sources, such as interest income, prior to recommending a final assessment rate. The NAC decided that an assessment rate of $0.0280 per 25-pound container or container equivalent will allow it to meet its 2010–11 fiscal period expenses and carryover an operating reserve of about $116,486 which is in line with the Committee's financial needs. The PCC decided that an assessment rate of $0.026 per 25-pound container or container equivalent will allow it to meet its 2010–11 fiscal period expenses and carryover an operating reserve of $147,502. These assessment rates would allow them to meet their 2010–11 fiscal period expenses and carryover necessary reserves to finance operations before 2011–12 fiscal period assessments are collected.

A review of historical and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for nectarines and peaches for the 2010–11 season could range between $6.00 and $8.00 per 25-pound container or container equivalent. Therefore, the estimated assessment revenue for the 2010–11 fiscal period as a percentage of total grower revenue could range between 0.33 and 0.47 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be offset by the benefits derived by the operation of the marketing order. In addition, the Committees' meetings were widely publicized throughout the California nectarine and peach industries and all interested persons were invited to attend the meetings and were encouraged to participate in the Committees' deliberations on all issues. Like all Committee meetings, the December 10, 2009, meetings were public meetings and entities of all sizes were able to express views on this issue.

This rule imposes no additional reporting or recordkeeping requirements on either small or large handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

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

A proposed rule concerning this action was published in the **Federal Register** on April 5, 2010 (75 FR 17072). Copies of the proposed rule were also mailed or sent via facsimile to all nectarine and peach handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 30-day comment period ending May 5, 2010, was provided for interested persons to respond to the proposal. No comments were received.

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

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

Pursuant to 5 U.S.C. 553, it also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2010–11 fiscal period begins March 1, 2010, and the marketing orders require that the rates of assessment for each fiscal period apply to all assessable nectarines and peaches handled during such fiscal period; (2) the Committees need to have sufficient funds to pay its expenses which are incurred on a continuous basis; (3) handlers are aware of this action which was unanimously recommended by the Committees at public meetings and is similar to other assessment rate actions issued in past years.

List of Subjects

7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

7 CFR Part 917

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

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

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

Authority: 7 U.S.C. 601–674.

PART 916—NECTARINES GROWN IN CALIFORNIA

■ 2. Section 916.234 is revised to read as follows:

§ 916.234 Assessment rate.

On and after March 1, 2010, an assessment rate of $0.0280 per 25-pound container or container equivalent of nectarines is established for California nectarines.

PART 917—PEACHES GROWN IN CALIFORNIA

■ 3. Section 917.258 is revised to read as follows:

§ 917.258 Assessment rate.

On and after March 1, 2010, an assessment rate of $0.026 per 25-pound container or container equivalent of peaches is established for California peaches.

Dated: May 27, 2010.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. 2010–13333 Filed 6–2–10; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1218

[Document Number AMS–FV–09–0022; FV–09–705]

Blueberry Promotion, Research, and Information Order; Increase Membership

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule adds two importer members and their alternates to the U.S. Highbush Blueberry Council (Council) to reflect changes in the quantity of highbush blueberry imports in the past three years. The change was proposed by the Council in accordance with the provisions of the Blueberry Promotion, Research, and Information Order (Order) which is authorized by the Commodity Promotion, Research, and Information Act of 1996 (Act). The Order requires that the Council review the geographical distribution of the United States production and the quantity of imports of highbush blueberries at least every five years. As a result of these changes, the total Council membership will increase from 14 to 16 members and their alternates. In addition, this rule increases the quorum minimum from seven to nine members.

DATES: *Effective Date:* June 4, 2010.

FOR FURTHER INFORMATION CONTACT: Jeanette Palmer, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, U.S. Department of Agriculture, Stop 0244, 1400 Independence Avenue, SW., Room 0632–S, Washington, DC 20250–0244; *telephone:* (888) 720–9917; *facsimile:* (202) 205–2800; *or electronic mail: Jeanette.Palmer@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under the Blueberry Promotion, Research, and Information Order [7 CFR part 1218]. The Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 (Act) [7 U.S.C. 7411–7425].

Executive Order 12866

The Office of Management and Budget (OMB) has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have retroactive effect. Section 524 of the Act provides that the Act shall not affect or preempt any other State or Federal law authorizing promotion or research relating to an agricultural commodity.

The Act provides that any person subject to an order may file a written petition with the Department if they believe that the order, any provision of the order, or any obligation imposed in connection with the order, is not established in accordance with law. In any petition, the person may request a modification of the order or an exemption from the order. The petitioner is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the petitioner resides or conducts business shall have the jurisdiction to review the Department's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Analysis and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601–612], AMS has considered the economic impact of this action on the small producers, first handlers, importers, and exporters that would be affected by this rule. The purpose of the RFA is to fit regulatory action to scale on businesses subject to such action so that small businesses will not be disproportionately burdened.

The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms as those having annual receipts of no more than $7 million. There are approximately 2,000 producers, 200 first handlers, 50 importers, and 4 exporters of highbush blueberries subject to the program. Most of the producers will be classified as small businesses under the criteria established by the Small Business Administration. Most importers, first handlers, and exporters will not be classified as small businesses. Producers who produce less than 2,000 pounds of highbush blueberries annually are exempt from this program. Importers who import less than 2,000 pounds of fresh and frozen highbush blueberries annually are also exempt from this program.

The Department's National Agricultural Statistics Service (NASS) data for the 2008 crop year shows that about 5,790 pounds of highbush blueberries were produced per acre. The 2008 average grower price for highbush blueberries published by NASS was $1.54 per pound. Thus, the value of highbush blueberry production per acre in 2008 averaged about $8,917 (5,790 pounds multiplied by $1.54). At that average value, a producer would have to farm over 84 acres to receive an annual income from highbush blueberries of $750,000 ($750,000 divided by $8,916 per acre equals 84). Accordingly, as previously noted, a majority of the producers of highbush blueberries will be classified as small businesses.

According to the Council, assessments received in 2008 reached $2.4 million. Of the total, the Council received $830,222 from import assessment collections which is approximately 35 percent of the Council's total budget. For 2009, the Council received $3.03 million from assessment collections. Of the total, the Council received approximately $1 million from import assessment collections which is approximately 34 percent of the Council's total budget. The Council projected import assessment collections at $1 million for the 2010 budget year.

According to the Council's World Blueberry Acreage and Production Report, highbush blueberry acreage in North America increased from 71,075 acres in 2005 to an estimated 95,607

acres in 2008, a 35 percent increase in just three years. The United States' share of this total increased from 56,665 acres in 2005 to 74,992 acres in 2008, a 32 percent increase. Most of this acreage growth is coming from the higher yielding western and southern states. Highbush blueberry production volume is expected to increase significantly from these regions in the coming years.

In 2008, the United States exported 13,791 metric tons of fresh highbush blueberries worth over $69 million. Canada is the principal destination for United States exports—accounting for nearly 84 percent of the total in 2008. Other key markets included the United Kingdom at 7 percent and Japan at 6 percent of the total. Most of the remaining 3 percent of the United States exports were to Asian countries.

The United States exports of frozen highbush blueberries totaled 5,785 metric tons in 2008 and were valued at over $17 million. The largest United States export market for frozen highbush blueberries is Canada which accounted for 47 percent of the total quantity exported in 2008. Japan was the second largest United States market accounting for 39 percent. Most of the remaining 14 percent of United States exports were sent to other Asian, United Kingdom, and European countries.

In 2008, the United States imported 45,105 metric tons of fresh highbush blueberries worth over $229 million. The largest imports of highbush blueberries came from Chile which accounted for 61 percent of the total in 2008. Other major suppliers of fresh highbush blueberries were Canada at 19 percent and Argentina at 17 percent of the total. The remaining 3 percent of imported highbush blueberries came from New Zealand and Uruguay.

The United States imports of frozen highbush blueberries totaled 19,152 metric tons in 2008 and were valued at over $64 million. The bulk of the United States frozen highbush blueberries imports came from Canada, which accounted for 78 percent of the total in 2008. Other major suppliers of frozen highbush blueberries were Chile with 16 percent of the total, Argentina with 5 percent and the Netherlands with 1 percent.

In the international market, highbush blueberry production has increased in Canada, Mexico, South America, Europe, and Asia. The highbush blueberry acreage worldwide has nearly doubled in the past five years from an estimated 83,299 acres in 2003 to an estimated 163,065 acres in 2008. Based on the data in the Council's 2007–2008 World Acreage and Production Report, North America represented 77 percent of the total worldwide highbush blueberry acreage in 2003 (64,360 acres), but just 59 percent of the estimated total acreage in 2008 (95,607 acres).

Most of the worldwide growth over the past five years has taken place in South America which has increased acreage from an estimated 6,939 acres in 2003 to an estimated 39,703 acres in 2008, a nearly sixfold increase with the largest growth in Chile and Argentina. Most of the growth in European production, which has increased from 8,978 acres in 2003 to 18,038 in 2008, has taken place in Spain, Germany, and Poland. Asian highbush blueberry production has increased during this five-year period from 2,372 acres to 7,870 acres with most of the growth taking place in China and to a lesser extent Japan. Acreage in Australia and New Zealand has not significantly increased during this period.

Given worldwide acreage estimates, projections show that given optimal conditions with no crop losses or disruptions, total worldwide highbush blueberry production has the potential to increase from an estimated 606 million pounds in 2008 to an estimated 1.5 billion pounds by the year 2015, more than two times the current level of production in the next seven years. This total does not include lowbush (wild) blueberry production, which at the current time averages around 200 million pounds per year. These projections are considered optimal forecasts and are based on the potential of what has been planted to date as well as upon assumptions of favorable crop years in all international highbush blueberry growing regions. During this period, North American highbush blueberry production is estimated to increase from 407 million pounds in 2008 to 890 million pounds by the year 2015, more than two times the current level of production.

Section 1218.40(b) of the Order requires that the Council review the geographical distribution of United States production of highbush blueberries and the quantity of imports at least once every five years. Based on this review, on August 13, 2009, the Council voted by electronic mail (e-mail) to add two importer members and their alternates to the Council. The vote to recommend two additional importers and their alternates was based on a three-year average production and imports data. Nine out of the ten Council members who voted were in support of adding these additional members.

The Council consists of a total of 14 members which includes 10 producers, 1 importer, 1 exporter from a foreign production area, 1 handler, and 1 public member. Each member has an alternate. The 10 producer members are allocated as follows: one producer member from each of the four regions and one producer member from each of the six top producing States. The regions are Western, Midwest, Northeast, and Southern. The top-producing States are Georgia, Michigan, New Jersey, North Carolina, Oregon, and Washington.

In 2006, the Council collected assessments on 360,467 million pounds of highbush blueberries. The domestic production of highbush blueberries in the United States was 268,800 million pounds which was 75 percent of the total assessments collected by the Council. Imports of highbush blueberries came in at 91,667 million pounds which represented 25 percent of the total assessments collected by the Council.

The Council records show that for the years 2003, 2004, and 2005 the United States produced 189,900 million pounds, 209,200 million pounds, and 246,000 million pounds of highbush blueberries respectively. Using this data, the three-year average annual highbush blueberries production for the United States totaled 215,033 million pounds per year (645,100 divided by 3). For this period, domestic production represented approximately 78 percent of the total assessments collected by the Council. For imports for the years 2003, 2004, and 2005, imports were at 63,334 million pounds, 55,000 million pounds, and 66,667 million pounds of highbush blueberries, respectively. Based on this data, the three-year average annual imports for highbush blueberries totaled 61,667 million pounds per year (185,001 divided by 3). Imports represented 22 percent of the total assessments paid to the Council during the period of 2003 through 2005.

The Council reviewed the domestic production of highbush blueberries in the United States. The Council records show that for the years 2006, 2007, and 2008 the United States produced 268,800 million pounds, 281,500 million pounds, and 335,900 million pounds of highbush blueberries respectively. Using this data, the three-year average annual highbush blueberries production for the United States totals 295,400 million pounds per year (886,200 divided by 3). Based on this data, the domestic production represents 72 percent of the total assessments collected by the Council.

Currently 72 percent of the Council's members represent the domestic production. Therefore, the Council determined that there were no changes

required at this time for the domestic member positions.

The Council's assessment records show that for the years 2006, 2007, and 2008 imports came in at 91,667 million pounds, 108,333 million pounds, and 141,667 million pounds of highbush blueberries respectively. Based on this data, the three-year average annual imports for highbush blueberries totals 113,889 million pounds per year (341,667 divided by 3). This represents approximately 28 percent of the total assessments paid to the Council. In contrast in 1997, imports came at 23.7 million pounds or 12 percent of the total of domestic and imports. Accordingly, two importer and alternate seats should be added to the Council. The new Council membership distribution would be 10 producers, 3 importers, 1 exporter, 1 handler, and 1 public member which would bring the percentage of seats for importers and exporters to 28 percent of the total seats on the Council.

Given the adjustment in membership for the Council in 2006 and the changes herein, the minimum quorum at a Council meeting increases from seven to nine members. This would reflect that a majority of the 16 Council members (or their alternates, when appropriate) are present for a quorum.

Nominations and appointments to the Council are conducted pursuant to sections 1218.40, 1218.41, and 1218.42 of the Order. Appointments to the Council are made by the Secretary from a slate of nominated candidates. Pursuant to section 1218.41(d) of the Order, nominations for the importer, exporter, handler, and public member positions will be made by the Council. The nominees for the two additional importer and alternate positions will be submitted to the Secretary for appointment to the Council.

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the background form, which represents the information collection and recordkeeping requirements that are imposed by the Order have been approved previously under OMB number 0505–0001.

The Order requires that two nominees be submitted for each vacant position. With regard to information collection requirements, adding two importers and their alternates to the Council means that eight additional importers will be required to submit background forms to the Department in order to be considered for appointment to the Council. However, serving on the Council is optional, and the burden of submitting the background form would be offset by the benefits of serving on the Council. The estimated annual cost of providing the information by eight importers would be $33 or $4.12 per importer. The additional burden will be included in the existing information collection package under OMB number 0505–0001.

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

Background

The Order became effective on August 16, 2000, and it is authorized under the Act. The Council is composed of 10 producers, 1 importer, 1 exporter from a foreign production area, 1 handler, and 1 public member. Each member has an alternate. The 10 producer members are allocated as follows: one producer member from each of the four regions and one producer member for each of the six top producing States. The regions are Western, Midwest, Northeast, and Southern. The top-producing States that currently have representation on the Council are Georgia, Michigan, New Jersey, North Carolina, Oregon, and Washington. The producer members are nominated by producers or producer groups. The importer, exporter, handler, and public member positions are nominated by the Council.

Under the Order, the Council administers a nationally coordinated program of research, development, advertising, and promotion designed to strengthen the position of highbush blueberries in the marketplace, and to establish, maintain, and expand markets for highbush blueberries. This program is financed by assessments on producers growing 2,000 pounds or more of highbush blueberries and importers who import 2,000 or more pounds of highbush blueberries per year. The current assessment rate is $12 per ton levied on highbush blueberries produced within the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States and on imports of more than 2,000 pounds into the United States. The Order specifies that handlers are responsible for collecting and submitting the producer assessments to the Council and maintaining records necessary to verify their reporting(s). Importers are responsible for payment of assessments to the Council on highbush blueberries imported into the United States through the U.S. Customs Service and Border Protection. Producers who produce less than 2,000 pounds and importers of less than 2,000 pounds of highbush blueberries annually are exempt from this program.

Pursuant to section 515(b)(3) of the Act and section 1218.40(b) of the Order, at least once in each five-year period, the Council shall review the geographical distribution of United States production of highbush blueberries and the quantity of imports and make a recommendation to the Secretary to continue without change or make changes to the representation on the Council to reflect changes in the geographical distribution of the production of highbush blueberries and the quantity of imports.

On August 13, 2009, the Council voted nine to one to increase the membership of the Council by adding two importer and alternate seats. Based on the Council's assessment records for the years 2006, 2007, and 2008, imports came in at 91,667 million pounds, 108,333 million pounds, and 141,667 million pounds of highbush blueberries respectively. Based on this data, the three-year average annual imports for highbush blueberries totals 113,889 million pounds per year (341,667 divided by 3). This represents approximately 28 percent of the total assessments paid to the Council. In contrast in 1997, imports came at 23.7 million pounds or 12 percent of the total of domestic and imports. Accordingly, two importer and alternate seats should be added to the Council. The new Council membership distribution would be 10 producers, 3 importers, 1 exporter, 1 handler, and 1 public member which would bring the percentage of seats for importers and exporters to 28 percent of the total seats on the Council.

This action will add to the Council two importers and two alternates. The Council will be composed of 10 producers, three importers, one exporter from a foreign production area, one handler, and one public member. Each member has an alternate. The addition of two importers and two alternates allows for more importers representation on the Council's decision making and also potentially provide an opportunity to increase diversity on the Council.

Furthermore, this rule would make amendments to section 1218.40(a) of the Order to specify that the Council will be composed of 16 members and their alternates rather than 14. Also, this rule would revise section 1218.40(a)(3) of the Order to specify three importers and alternates instead of one importer and alternate. In addition, this rule would revise section 1218.45 (a) of the Order to increase the minimum quorum level

at Council meetings from seven to nine members.

Nominations and appointments to the Council are conducted pursuant to sections 1218.40, 1218.41, and 1218.42 of the Order. Appointments to the Council are made by the Secretary from a slate of nominated candidates. Pursuant to section 1218.41(d) of the Order, nominations for the importer, exporter, handler, and public member positions are made by the Council. Nominations are submitted to the Secretary for appointment to the Council.

A twenty-day comment period was provided to allow interested persons to respond to the proposal which was published in the **Federal Register** on March 17, 2010 [75 FR 12707]. Copies of the rule were made available through the Internet by the Department and the Office of the Federal Register. The comment period ended April 6, 2010. No comments were received by the deadline.

After consideration of all relevant material presented, the Council's recommendation, and other information, it is hereby found that this rule is consistent with and will effectuate the purpose of the Act.

Pursuant to 5 U.S.C. 553, it is also found that good cause exits for not postponing the effective date of this action until one day after publication in the **Federal Register** because the Council's term of office begins January 1, 2011, and this rule will allow the upcoming nominations and appointments to be conducted in a timely manner for the new members to be appointed to the Council so they can begin serving during the next term of office.

List of Subjects in 7 CFR Part 1218

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Blueberry promotion, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 1218 is amended as follows:

PART 1218—BLUEBERRY PROMOTION, RESEARCH, AND INFORMATION ORDER

■ 1. The authority citation for 7 CFR part 1218 continues to read as follows:

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

■ 2. In § 1218.40, paragraph (a) introductory text and paragraph (a)(3) are revised to read as follows:

§ 1218.40 Establishment and membership.

(a) *Establishment of the U.S. Highbush Blueberry Council.* There is hereby established a U.S. Highbush Blueberry Council, hereinafter called the Council, composed of no more than 16 members and alternates, appointed by the Secretary from nominations as follows:

* * * * *

(3) Three importers and alternates.

* * * * *

■ 3. Section 1218.45 paragraph (a) is revised to read as follows:

§ 1218.45 Procedure.

(a) At a Council meeting, it will be considered a quorum when a minimum of nine members, or their alternates serving in the absence, are present.

* * * * *

Dated: May 27, 2010.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. 2010–13346 Filed 6–2–10; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22919; Directorate Identifier 2005–NM–087–AD; Amendment 39–14582; AD 2006–09–11]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319–100, A320–200, A321–100, and A321–200 Series Airplanes

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

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting a typographical error in an existing airworthiness directive (AD) that was published in the **Federal Register** on May 12, 2006. The error resulted in an incorrect component maintenance manual number. This AD applies to certain Airbus Model A319–100, A320–200, A321–100, and A321–200 series airplanes. This AD requires repetitive inspections for corrosion in the inside and outside lower walls of each type A, D, E, and F lavatory wall that has at least one wall-mounted cabin attendant seat, and related investigative and corrective actions if necessary.

DATES: This correction is effective June 3, 2010. The effective date of AD 2006–09–11 remains June 16, 2006.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document 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: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2141; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: On April 26, 2006, the FAA issued AD 2006–09–11, Amendment 39–14582 (71 FR 27595, May 12, 2006), for certain Airbus Model A319–100, A320–200, A321–100, and A321–200 series airplanes. The AD requires repetitive inspections for corrosion in the inside and outside lower walls of each type A, D, E, and F lavatory wall that has at least one wall-mounted cabin attendant seat, and related investigative and corrective actions if necessary.

As published, paragraphs (h)(1)(iii) and (h)(2)(ii) of the AD specifies in error Airbus Component Maintenance Manual Lavatory E 25–41–52. Airbus Component Maintenance Manual Lavatory E 25–41–52 does not exist. The correct Airbus Component Maintenance Manual Lavatory E is 25–43–52.

No other part of the regulatory information has been changed; therefore, the final rule is not republished in the **Federal Register.**

The effective date of this AD remains June 16, 2006.

§ 39.13 [Corrected]

In the **Federal Register** of May 12, 2006, on page 27597, in the third column, paragraph (h)(1)(iii) of AD 2006–09–11 is corrected to read as follows:

* * * * *

(iii) Airbus CMM Lavatory E 25–43–52.

* * * * *

In the **Federal Register** of May 12, 2006, on page 27597, in the third column, paragraph (h)(2)(ii) of AD 2006–09–11 is corrected to read as follows:

* * * * *

(ii) For lavatories D and E: Airbus Service Bulletin A320–25–1365, dated February 18, 2005, references Airbus CMM Lavatory D 25–43–51; and Airbus CMM Lavatory E 25–43–52, as applicable, as an additional source of guidance for doing the replacement.

* * * * *

Issued in Renton, Washington, on May 25, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–13231 Filed 6–2–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 65

[Docket No. FAA–2007–28518, Amendment No. 65–54]

RIN 2120–AJ08

Clarification of Parachute Packing Authorization

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule (immediately adopted).

SUMMARY: This action amends the requirements for individuals who pack, maintain, or alter main parachutes of a dual-parachute system—those with main and "back up" parachutes—to be used for parachute jumping in connection with civil aircraft of the United States. It expressly limits the authority of a non-certificated person who is not under the supervision of an appropriate current certificated parachute rigger to only pack the main parachute of a dual-parachute system when that person will be the next jumper to use the parachute. This action is intended to correct a potentially unsafe condition of parachute operations created by changes to the 2001 revision of the current rule.

DATES: This action is effective June 3, 2010. For more information on the rulemaking process, *see* the **SUPPLEMENTARY INFORMATION** section of this document.

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 DOT's complete Privacy Act Statement in the **Federal Register** (*see* 65 FR 19477–78, April 11, 2000), or you may visit *http://DocketsInfo.dot.gov.*

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to 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: Kim Barnette, Aircraft Maintenance Division, AFS–300, Federal Aviation Administration, 950 L'Enfant Plaza North, SW., Washington, DC 20024; telephone (202) 385–6403; facsimile (202) 385–6474, e-mail *kim.a.barnette@faa.gov.*

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.

The FAA is issuing this rulemaking under the authority set forth in 49 U.S.C. 44701(a)(2)(A). This regulation is within the scope of that authority because the Administrator is charged with promoting safe flight of civil aircraft by, among other things, prescribing regulations that the Administrator finds necessary for inspecting, servicing, and overhauling aircraft, aircraft engines, propellers and appliances.

Background

In 2001, the FAA amended Title 14, Code of Federal Regulations (14 CFR) § 65.111, Certificate required (*see* 66 FR 23543, May 9, 2001). The 2001 amendment was intended to: (1) Incorporate tandem parachute operations into the rule; (2) specify that a non-certificated person could pack, maintain, or alter a main parachute only if the individual was under the supervision of an appropriate current certificated parachute rigger; and (3) clarify that a non-certificated person, not under the supervision noted above, could pack a main parachute of a dual-parachute system, intended for tandem operation, only if that person was to be the next jumper to use that parachute. No other substantive changes to § 65.111 were discussed in that rulemaking, nor were any other changes intended.

In the 2001 amendment, however, the revised text of § 65.111(b) did not preserve the clarity of authority that existed in the prior rule regarding a non-certificated person. Before the 2001 amendment, the authority of a non-certificated person (who was not under the supervision of an appropriate current certificated parachute rigger) was expressly limited to packing a main parachute of a dual-parachute system for personal use; maintenance or alteration was not authorized. The parachute industry raised concerns that the resulting authority language in the 2001 amendment could be viewed as authorizing maintenance or alteration by non-certificated persons not under the supervision of an appropriate current certificated rigger. Those concerns pose significant safety concerns for the FAA and those regulated by § 65.111. Improperly performed maintenance or alteration could lead to parachute failure, which would have catastrophic results.

Only certificated riggers, or persons under their supervision, have the requisite knowledge and skill to safely perform maintenance and alteration. The FAA does not intend that the regulation be interpreted to authorize maintenance and alteration by those not qualified, nor otherwise appropriately supervised. The FAA's intention is clearly supported in other parachute-related regulations (*see* 14 CFR 91.307, 105.43(a), and 105.45(b)(1)). All of those regulations support the FAA's position that in all but "next jumper" situations, parachute packing must be accomplished by or overseen by an appropriate current certificated parachute rigger. Further, none of those sections authorize maintenance or alteration of parachutes by non-certificated persons.

The FAA is not aware of any unauthorized parachute maintenance or alteration performed as a result of any operators' misunderstanding of the current rule. Nevertheless, we want to prevent any adverse consequences by ensuring that parachute operations are performed or overseen only by persons who know and understand the requisite techniques and practices. This rule clarifies that the FAA requires that a person must hold an appropriate current parachute rigger certificate or be under the supervision of an appropriate current certificated rigger to maintain or alter main parachutes.

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by:

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

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

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

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

Good Cause for Immediate Adoption of This Final Rule on Parachute Repack Authorization

On the basis of the above information, I have determined that immediate action by the FAA is in the public interest because the rule only clarifies existing requirements and public comment is unnecessary. Further, I find that good cause exists for making this rule effective immediately upon issuance.

Small Business Regulatory Enforcement Fairness Act

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

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires the FAA to consider the impact of paperwork and other information collection burdens imposed on the public. We have determined that there are no new information collection requirements associated with these amendments.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these proposed regulations.

Economic Evaluation, Regulatory Flexibility Act, Trade Impact Assessment, and Unfunded Mandates Assessment

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

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

This rule clarifies that the FAA requires that a person must hold an appropriate current parachute rigger certificate or be under the supervision of an appropriate current certificated rigger to maintain or alteration of parachutes. This clarification is consistent with industry practice, as the revised § 65.111(b) in the 2001 amendment did not preserve the clarity of authority that existed in the prior rule regarding a non-certificated person. As the rule is consistent with industry practices, the rule is expected to impose minimal cost and provide for a future higher level of safety.

Regulatory Flexibility Act

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 objective so the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

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

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

While there are a substantial number of small parachute packing firms, the expected cost is minimal. This rule is consistent with industry practice and simply clarifies that separate from the requirement to pack parachutes, the FAA requires a person to be an appropriate current certificated parachute rigger, or to be under the supervision of an appropriate current certificated parachute rigger, to maintain or alter parachutes. Thus, the expected economic impact will be minimal with positive net benefits.

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

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), 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 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 proposed rule and determined that it has only a domestic impact and is not subject to the Trade Agreements Act requirements.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) 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 $141.3 million.

This rulemaking action does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this regulation.

Executive Order 13132, Federalism

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

Environmental Analysis

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

Regulations That Significantly Affect Energy Supply, Distribution, or Use

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

List of Subjects in 14 CFR Part 65

Air traffic controllers, Aircraft, Airmen, Airports, Alcohol abuse, Aviation safety Drug abuse, Reporting and recordkeeping requirements, Security measures.

The Amendment

■ Accordingly, the Federal Aviation Administration amends part 65 of the Federal Aviation Regulations (14 CFR Part 65) as follows:

PART 65—CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS

■ 1. The authority citation for part 65 continues to read as follows:

Authority: 5 U.S.C. 8335(a); 49 U.S.C. 106(g); 49 U.S.C. 40113; 49 U.S.C. 44701–44703; 49 U.S.C. 44707; 49 U.S.C. 44709–44711; 49 U.S.C. 45102–45103; 49 U.S.C. 45301–45302.

■ 2. Amend § 65.111 by revising the introductory text of paragraph (b); redesignating existing paragraphs (c), (d) and (e) as paragraphs (d), (e) and (f), respectively; and adding a new paragraph (c) to read as follows:

§ 65.111 Certificate required.

* * * * *

(b) No person may pack any main parachute of a dual-parachute system to be used for intentional parachute jumping in connection with civil aircraft of the United States unless that person—

* * * * *

(c) No person may maintain or alter any main parachute of a dual-parachute system to be used for intentional parachute jumping in connection with civil aircraft of the United States unless that person—

(1) Has an appropriate current certificate issued under this subpart; or

(2) Is under the supervision of a current certificated parachute rigger;

* * * * *

Issued in Washington, DC, on May 25, 2010.

J. Randolph Babbitt,

Administrator.

[FR Doc. 2010–13388 Filed 6–2–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 17F; AG Order No. 3160–2010 (2008R–10P)]

Decision-Making Authority Regarding the Denial, Suspension, or Revocation of a Federal Firearms License, or Imposition of a Civil Fine

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice has adopted as final, without change, an interim rule that amended the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") to delegate to the Director of ATF the authority to serve as the deciding official regarding the denial, suspension, or revocation of federal firearms licenses, or the imposition of a civil fine. Under the interim rule, the Director has the flexibility to delegate to another ATF official the authority to decide a revocation or denial matter, or may exercise that authority himself. Because the Director can redelegate authority to take action as the final agency decision-maker to Headquarters officials, field officials, or some combination thereof, such flexibility allows ATF to more efficiently conduct denial, suspension, and revocation hearings, and make the determination whether to impose a civil fine. This gives the agency the ability to ensure consistency in decision-making and to address any case backlogs that may occur.

DATES: This rule is effective August 2, 2010.

FOR FURTHER INFORMATION CONTACT: James P. Ficaretta, Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms, and Explosives; U.S. Department of Justice; 99 New York Avenue, NE., Washington, DC 20226; telephone: 202–648–7094.

SUPPLEMENTARY INFORMATION:

I. Background

The Attorney General is responsible for enforcing the provisions of the Gun Control Act of 1968 ("the Act"), 18 U.S.C. Chapter 44. He has delegated that responsibility to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. 28 CFR 0.130(a). ATF has promulgated regulations that implement the provisions of the Act in 27 CFR part 478.

The regulations in Subpart E of Part 478, §§ 478.71–78, relate to proceedings involving federal firearms licenses, including the denial, suspension, and revocation of a license, and the imposition of a civil fine. Prior to the 2009 amendments under the interim rule, § 478 provided as follows: Under § 478.71, whenever the Director of Industry Operations ("DIO") had reason to believe that an applicant was not qualified to receive a license under the provisions of § 478.47, he could issue a notice of denial, on ATF Form 4498, to the applicant. The notice would set forth the matters of fact and law relied upon in determining that the application should be denied, and would afford the applicant 15 days from the date of receipt of the notice in which to request a hearing to review the denial. If no request for a hearing was filed within such time, the application would be disapproved and a copy, so marked, would be returned to the applicant.

Under § 478.72, an applicant who had been denied an original or renewal license could file a request with the DIO for a hearing to review the denial of the application. On conclusion of the hearing and after consideration of all relevant facts and circumstances presented by the applicant or his representative, the DIO would render a decision confirming or reversing the denial of the application. If the decision was that the denial should stand, a certified copy of the DIO's findings and conclusions would be furnished to the applicant with a final notice of denial, ATF Form 4501. In addition, a copy of the application, marked "Disapproved," would be furnished to the applicant. If the decision was that the license applied for should be issued, the applicant would be so notified, in writing, and the license would be issued.

Section 478.73 provided that whenever the DIO had reason to believe that a firearms licensee had willfully violated any provision of the Act or part 478, a notice of revocation of the license (ATF Form 4500), could be issued. In addition, a notice of revocation, suspension, or imposition of a civil fine could be issued on Form 4500 whenever the DIO had reason to believe that a licensee had knowingly transferred a firearm to an unlicensed person and knowingly failed to comply with the requirements of 18 U.S.C. 922(t)(1), relating to a NICS (National Instant Criminal Background Check System) background check.

As specified in § 478.74, a licensee who had received a notice of suspension or revocation of a license, or imposition of a civil fine, could file a request for a hearing with the DIO. On conclusion of the hearing and after consideration of all the relevant presentations made by the licensee or the licensee's representative, the DIO would render a decision and prepare a brief summary of the findings and conclusions on which the decision was based. If the decision was that the license should be revoked or, in actions under 18 U.S.C. 922(t)(5), that the license should be revoked or suspended, or that a civil fine should be imposed, a certified copy of the summary would be furnished to the licensee with the final notice of revocation, suspension, or imposition of a civil fine on ATF Form 4501. If the decision was that the license should not be revoked, or, in actions under 18 U.S.C. 922(t)(5), that the license should not be revoked or suspended, and a civil fine should not be imposed, the licensee would be notified in writing.

Under § 478.76, an applicant or licensee could be represented by an attorney, certified public accountant, or other person recognized to practice before ATF, provided certain requirements were met. The DIO could be represented in proceedings by an attorney in the office of the Assistant Chief Counsel or Division Counsel who was authorized to execute and file motions, briefs, and other papers in the proceeding, on behalf of the DIO, in his own name as "Attorney for the Government."

Section 478.78 provided that if a licensee was dissatisfied with a post-hearing decision revoking or suspending the license, denying the application, or imposing a civil fine, he could file a petition for judicial review of such action. In such case, when the DIO found that justice so required, the DIO could postpone the effective date of suspension or revocation of a license, or authorize continued operations under the expired license pending judicial review.

II. Interim Rule

The Department of Justice published an interim rule with request for comments at 74 FR 1875 on January 14, 2009 (ATF 27P) that amended ATF's regulations to redesignate the Director, as opposed to the DIO, as the deciding official in matters dealing with the denial of an original or renewal firearms license, the suspension or revocation of a license, and the imposition of a civil fine. ATF determined that delegating the final authority with respect to those matters to the Director is necessary and proper. ATF further maintained that the Director should be able to redelegate this authority to the DIO or any other agency official through issuance of a delegation order, not through regulation. This approach is consistent with other regulations in part 478. For example, § 478.144 provides that the Director is the deciding authority with respect to applications for relief from firearms disabilities. Pursuant to ATF Order 1120.4 (69 FR 55462, September 14, 2004), the authority to make determinations on applications for relief from federal firearms disabilities was delegated to the Assistant Director (Enforcement Programs and Services).

These changes to the decision-making and related delegation authority were the only substantial changes made by the interim rule. All other aspects of the ATF processes, including notice and review provisions, remained the same. ATF believes that it is appropriate for the Director to have more flexibility to delegate or directly exercise authority to conduct a hearing and decide denial, suspension, or revocation of a federal firearms license, or the imposition of a civil fine. Such flexibility allows ATF to more efficiently conduct revocation and denial hearings, because the Director can designate Headquarters officials, field officials, or some combination thereof, as the final agency decision-maker. That flexibility gives the agency the ability to ensure consistency in decision-making and to address any case backlogs that may occur.

Comments on the interim rule were to be submitted to ATF on or before April 14, 2009.

III. Comment Analysis and Department Response

In response to the interim rule, ATF received three comments. Two commenters supported the interim regulations, while one commenter expressed opposition. Essentially, the opposing commenter expressed a concern that under the interim regulations the Director's decision is not subject to review.

According to the commenter:

The only other times in the state of American government, aside from the Presidency, where one person is afforded the opportunity to make decisions affecting

others without a system of checks and balances is by a judge. Even then, there is an appeals process by which this one individual's interpretation of legal circumstances may be reviewed. * * * To afford the director of a government agency, or any other appointed individual for that matter, the ability to "legislate" freely as he deems necessary regarding the denial, suspension, or revocation of a federally issued license seems not only unconstitutional, but potentially unethical if this one man's ruling is subject to a political agenda.

Department Response

ATF understands the issues and the concerns that the commenter raised; however, the due process "system of checks and balances" is already incorporated into the procedures for denying, suspending, or revoking a federal firearms license, or imposing a civil fine. Prior to any adverse decision, ATF must provide notice to the affected applicant or license holder and provide that person with an opportunity to present evidence in a hearing. Before the interim rule became effective, the DIO for each field division had the authority to issue the final decision. The interim rule vests this same authority to issue a final decision in the ATF Director. The Director may, in turn, delegate that authority to Headquarters officials, field officials, or some combination thereof. This gives the Director the ability to more effectively decide licensing cases and ensure consistency in decision-making.

Regardless which ATF official is authorized to make a final decision, ATF must provide notice and an opportunity to present evidence. Moreover, Congress has provided, under 18 U.S.C. 923(f), for federal court review of the final notice denying a person's application or revoking the person's license. In such a judicial review, the courts are not bound by the evidence that had been previously presented during the administrative proceedings before the agency decision. If the court decides that the agency was not authorized to deny the application or to revoke the license, the court shall order the agency to take such action as may be necessary to comply with the judgment of the court. Nothing in this rule change would alter or affect the person's due process rights to judicial review as they stood prior to the change. The change simply elevates final decision-making authority to the Director. Therefore, no changes to the rule need to be made to ensure minimum constitutional due process requirements are satisfied.

IV. Final Rule

The Department has determined that an amendment of the interim regulations is not warranted and it is, therefore, adopting the interim rule as a final rule without change.

How This Document Complies With the Federal Administrative Requirements for Rulemaking

A. Executive Order 12866

The Attorney General has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. This rule will not have an annual effect on the economy of $100 million, nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health, or safety, or State, local or tribal governments or communities.

This is a rule of agency organization, procedure, and practice. It merely redesignates the Director as the deciding official with respect to the denial, suspension, or revocation of a federal firearms license and the imposition of a civil fine.

B. Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Attorney General has determined that this regulation will not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). The interim rule was not subject to notice and comment rulemaking requirements. *Id.* 553(b)(A). This final rule, which adopts the interim regulations, is a rule of agency organization, procedure, and practice. It merely delegates to the Director the authority to make decisions with respect to the denial, suspension, imposition of a civil fine, or revocation of federal firearms licenses.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

F. Unfunded Mandates Reform Act of 1995

This rule will not 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 one 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.

G. Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

Disclosure

Copies of the interim rule, the comment received in response to the interim rule, and this final rule will be available for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Avenue, NE., Washington, DC 20226; telephone: (202) 648–7080.

Drafting Information

The author of this document is James P. Ficaretta; Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 478

Administrative practice and procedure, Arms and ammunition, Authority delegations, Customs duties and inspection, Domestic violence, Exports, Imports, Law enforcement personnel, Military personnel, Penalties, Reporting requirements, Research, Seizures and forfeitures, and Transportation.

Authority and Issuance

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

Accordingly, the interim rule amending 27 CFR part 478, which was published at 74 FR 1875 on January 14, 2009, is adopted as a final rule without change.

Dated: May 27, 2010.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2010–13392 Filed 6–2–10; 8:45 am]

BILLING CODE 4410–FY–P

POSTAL SERVICE

39 CFR Part 111

Plant-Verified Drop Shipment (PVDS)—Nonpostal Documentation

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is revising *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 705.15. 2.14 to clarify that PS Form 8125, Plant-*Verified Drop Shipment (PVDS) Verification and Clearance,* is the sole source of evidence for USPS® purposes of the transfer of the custody of pieces entered as a mailing at the time of induction; to clarify that Postal employees may, upon request, sign additional nonpostal documents when presented by transportation providers; and to require segregation of documentation presented at the time of induction.

DATES: *Effective Date:* July 6, 2010.

FOR FURTHER INFORMATION CONTACT: Susan Thomas at 202–268–8069.

SUPPLEMENTARY INFORMATION: As a result of reviews of USPS policy concerning practices at induction points of plant-verified drop shipment mailings, the Postal Service is adopting this final rule to clarify the use and purpose of PS Form 8125 as well as other documents that mailers' nonpostal transportation providers (carriers) may present at the time of induction. The final rule provides that PS Forms 8125 must be segregated from any other documentation presented at the time of mailing. This measure ensures that postal personnel will be able to easily identify and process necessary postal documentation at the time of induction, thereby promoting the efficiency of operations. Further, the final rule clarifies that a PS Form 8125 serves as the sole source of evidence for USPS purposes of the transfer of the custody of pieces entered at the time of induction. No other form of documentation serves this purpose.

The Postal Service adopts the following changes to the *Mailing Standards for the United States Postal Service,* Domestic Mail Manual (DMM), which is incorporated by reference in the *Code of Federal Regulations. See* 39 CFR Part 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

■ Accordingly, 39 CFR Part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 C.F.R. Part continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) as follows:

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

700 Special Standards

* * * * *

705 Advanced Preparation and Special Postage Payment Systems

* * * * *

15.0 Plant-Verified Drop Shipment

* * * * *

15.2 Program Participation

* * * * *

[Add new 705.15.2.14 as follows:]

15.2.14 Form 8125—Segregation and Nonpostal Documentation

PS Forms 8125 must be segregated from all other nonpostal documentation and presented separately to USPS personnel at the time of induction. Nonpostal proof-of-delivery documents such as delivery receipts or bills of lading presented by a mailer's transportation provider [carrier] are not substitutes for PS Forms 8125. USPS personnel may, upon request, sign such documents when presented by carriers. A PS Form 8125 signed by a postal employee (or electronic equivalent file in the Electronic Verification System (eVS)) serves as the sole evidence of the transfer of the custody of pieces entered as a mailing at the time of induction. The Postal Service does not consider a proof-of-delivery document such as a delivery receipt or a bill of lading furnished by a USPS customer's carrier as proof of mailing, acceptance, or the amount of mail tendered. Any signature by a postal employee or agent on any nonpostal form does not serve any mail acceptance purpose. If an inconsistency between the information on a PS Form 8125 and a carrier- or mailer-provided document designed to evidence the transfer of custody of pieces entered as a mailing at the time of induction exists, the information on PS Form 8125 prevails insofar as the USPS is concerned.

* * * * *

We will publish an amendment to 39 CFR 111 to reflect these changes.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 2010–12885 Filed 6–2–10; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2009–0705; A–1–FRL–9157–4]

Approval and Promulgation of Air Quality Implementation Plans; Rhode Island; Determination of Attainment of the 1997 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is determining that the Providence (All of Rhode Island) moderate 8-hour ozone nonattainment area has attained the 1997 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. This determination is based upon complete, quality-assured and certified ambient air monitoring data that show the area has monitored attainment of the 8-hour ozone NAAQS for the 2006–2008 monitoring period. In addition, quality-assured and certified ozone data for 2009, show that this area continues to attain the 1997 8-hour ozone NAAQS. This determination results in the suspension of the requirements for Rhode Island to submit an attainment demonstration, a reasonable further progress plan, contingency measures, and other planning State Implementation Plans for this area related to attainment of the 8-hour ozone NAAQS. These requirements shall remain suspended for so long as the area continues to attain the ozone NAAQS.

DATES: *Effective Date:* This rule is effective on July 6, 2010.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2009–0705. 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, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square, Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Richard P. Burkhart, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, telephone number (617) 918–1664, fax number (617) 918–0664, e-mail *Burkhart.Richard@epa.gov.*

SUPPLEMENTARY INFORMATION:

Throughout this document whenever "we," "us," or "our" is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

I. What action is EPA taking?

EPA is determining that the Providence (All of Rhode Island) moderate 8-hour ozone nonattainment area has attained the 1997 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. This determination is based upon complete, quality-assured and certified ambient air monitoring data that show the area has monitored attainment of the 1997 ozone NAAQS for the 2006–2008 monitoring period. In addition, quality-assured and certified ozone data for 2009, show that this area continues to attain the 1997 8-hour ozone NAAQS.

Other specific details related to the determination and the rationale for EPA's action are explained in the Notice of Proposed Rulemaking (NPR) published on February 25, 2010 (75 FR 8571) and will not be restated here. No public comments were received on the NPR.

II. What is the effect of this action?

Under the provisions of EPA's ozone implementation rule (see 40 CFR 51.918), this determination suspends the requirements for the Providence (All of Rhode Island) moderate ozone nonattainment area to submit an attainment demonstration, a reasonable further progress plan, section 172(c)(9) contingency measures, and any other planning State Implementation Plans (SIPs) related to attainment of the 1997 8-hour ozone NAAQS for so long as the area continues to attain the 1997 ozone NAAQS.

For the Rhode Island area, EPA started a Federal Implementation Plan clock on March 24, 2008 (73 FR 15416) for failure to submit an ozone attainment demonstration and Reasonable Further Progress (RFP) SIPs. This action stays the Federal Implementation Plan clock started on March 24, 2008, for both the attainment demonstration and the RFP SIP. If the area subsequently violates the 1997 8-hour standard before it is redesignated to attainment, the Federal Implementation Plan clock would restart for Rhode Island for these SIPs. It should be noted that the Rhode Island Department of Environmental Management did submit an ozone attainment demonstration and Reasonable Further Progress SIP on April 30, 2008. EPA has not taken action on these SIPs.

This action does not constitute a redesignation to attainment under CAA section 107(d)(3), because the area does not have an approved maintenance plan as required under section 175A of the CAA, nor a determination that the area has met the other requirements for redesignation. The classification and designation status of the area remains moderate nonattainment for the 1997 8-hour ozone NAAQS until such time as EPA determines that it meets the CAA requirements for redesignation to attainment. If EPA subsequently determines, after notice-and-comment rulemaking in the **Federal Register,** that the area has violated the 1997 8-hour ozone standard, the basis for the suspension of these requirements would no longer exist, and the area would thereafter have to address the pertinent requirements.

III. Final Action

EPA is determining that the Providence (All of Rhode Island) 8-hour ozone nonattainment area has attained the 1997 8-hour ozone standard based on complete, quality-assured and certified ozone monitoring data through 2008, and quality-assured and certified, ozone data for 2009 that indicate continued attainment. As provided in 40 CFR 51.918, this determination suspends the requirements for Rhode Island to submit an attainment demonstration, a reasonable further progress plan, and contingency measures under section 172(c)(9), and any other planning SIP related to attainment of the 1997 8-hour ozone NAAQS for this area, for so long as the area continues to attain the standard.

IV. Statutory and Executive Order Reviews

This action makes a determination of attainment based on air quality, and results in the suspension of certain Federal requirements, and would not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 2, 2010. 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, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 20, 2010.

Ira W. Leighton,

Acting, Regional Administrator, EPA New England.

■ Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart OO—Rhode Island

■ 2. Section 52.2088 is amended by adding paragraph (c) to read as follows:

§ 52.2088 Control strategy: Ozone.

* * * * *

(c) Determination of Attainment. Effective July 6, 2010, EPA is determining that the Providence (All of Rhode Island) 8-hour ozone nonattainment area has attained the 1997 8-hour ozone standard. Under the provisions of EPA's ozone implementation rule (*see* 40 CFR 51.918), this determination suspends the reasonable further progress and attainment demonstration requirements of section 182(b)(1) and related requirements of section 172(c)(9) of the Clean Air Act for as long as the area does not monitor any violations of the 1997 8-hour ozone standard. If a violation of the 1997 ozone NAAQS is monitored in the Providence (All of Rhode Island) 8-hour ozone nonattainment area, this determination shall no longer apply.

[FR Doc. 2010–13211 Filed 6–2–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2009–0282; FRL–9155–6]

Approval and Promulgation of State Implementation Plan Revisions; State of North Dakota; Air Pollution Control Rules, and Interstate Transport of Pollution for the 1997 $PM_{2.5}$ and 8-Hour Ozone NAAQS: "Significant Contribution to Nonattainment" and "Interference With Prevention of Significant Deterioration" Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is approving State Implementation Plan (SIP) revisions submitted by the State of North Dakota on April 6, 2009. Specifically, EPA is approving revisions to the North Dakota air pollution control rules regarding prevention of significant deterioration of air quality, and partially approving the SIP revision "Interstate Transport of Air Pollution" addressing the requirements of Clean Air Act section 110(a)(2)(D)(i) for the 1997 $PM_{2.5}$ and 8-hour ozone National Ambient Air Quality Standards (NAAQS). These revisions, referred to as the Interstate Transport of Air Pollution SIP, address the requirements of Clean Air Act section 110(a)(2)(D)(i) for the 1997 8-hour ozone and 1997 $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). In this action, EPA is approving the North Dakota Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i)(I) that emissions from the state's sources do not "contribute significantly" to nonattainment of the 1997 8-hour ozone NAAQS and the 1997 $PM_{2.5}$ NAAQS in any other state. In addition, EPA is approving the provisions of this SIP that address the requirement of section 110(a)(2)(D)(i)(II) that emissions from the state's sources do not interfere with measures required in the SIP of any other state under part C of the Clean Air Act (CAA) to prevent "significant deterioration of air quality." EPA will act at a later date on the North Dakota Interstate Transport SIP provisions that address the remaining two requirements of section 110(a)(2)(D)(i), that emissions from the state's sources do not "interfere with maintenance" of the 1997 8-hour ozone and 1997 $PM_{2.5}$ NAAQS in any other state, and do not interfere with measures required in the SIP of any other state to "protect visibility." This action is being taken under section 110 of the Clean Air Act.

DATES: *Effective Date:* This final rule is effective July 6, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2009–0282. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov*, or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through

Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Domenico Mastrangelo, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6416, *mastrangelo.domenico@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *North Dakota* mean the State of North Dakota, unless the context indicates otherwise.

Table of Contents

I. Background and Purpose

In a proposed rule action published March 31, 2010 EPA proposed approval of revisions to the State provisions on the prevention of significant deterioration (PSD) of air quality in subsection 33–15–15–01.2 of the North Dakota Administrative Code (NDAC),[1] and partial approval of the North Dakota Interstate Transport of Air Pollution SIP for the 1997 $PM_{2.5}$ and 8-hour ozone National Ambient Air Quality Standards (NAAQS). The revisions to NDAC subsection 33–15–15–01.2, and the addition to the North Dakota SIP of section 7.8, "Interstate Transport of Air Pollution," were adopted by the State of North Dakota on April 1, 2009 and submitted to EPA on April 6, 2009.

In chapter 33–15–15, NDAC, Prevention of Significant Deterioration of Air Quality, revisions were made to subsection 33–15–15–01.2, Scope. The baseline date for incorporation by reference of the federal PSD program set out at 40 CFR 52.21 was updated to August 1, 2007. In addition, various administrative corrections and clarifications were made. In our proposal to approve these revisions, EPA stated that the revisions were made to make the North Dakota PSD program consistent with federal requirements. EPA did not receive comments that persuade the Agency that the revisions are less stringent than or inconsistent with federal requirements, and thus EPA is approving them in today's final action.

Section 110(a)(2)(D)(i) of the CAA requires that a state's SIP must contain adequate provisions prohibiting any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in any other state; (2) interfere with maintenance of the NAAQS by any other state; (3) interfere with any other state's required measures to prevent significant deterioration of air quality; or (4) interfere with any other state's required measures to protect visibility. In our proposed rule EPA proposed partial approval of the North Dakota Interstate Transport of Air Pollution SIP for the 1997 $PM_{2.5}$ and 8-hour ozone NAAQS. Specifically, EPA proposed approval of the North Dakota SIP sections that addressed the first and third requirements, "significant contribution" and "interference with PSD" of the Interstate Transport CAA provisions. EPA will act at a later date on the North Dakota Interstate Transport SIP sections that address the remaining requirements: "interference with maintenance" and "interference with visibility."

To assess whether emissions from North Dakota contribute significantly to downwind nonattainment for the 1997 $PM_{2.5}$ NAAQS, North Dakota and EPA's technical analysis relied on the results of CAIR modeling and on monitoring data in neighboring downwind states. The CAIR modeling results indicated that the State contribution to the closest nonattainment area was below the "significant contribution" threshold. Monitoring data showed that in downwind states there were no monitors violating the 1997 24-hour or annual $PM_{2.5}$ NAAQS.

To assess whether emissions from North Dakota contribute significantly to downwind nonattainment for the 1997 8-hour ozone NAAQS, EPA's technical analysis relied on EPA's 2006 Guidance, recommending consideration of available EPA modeling conducted in conjunction with CAIR,[2] or in the absence of such EPA modeling, consideration of other information such as the amount of emissions, the geographic location of violating areas, meteorological data, or various other forms of information that would be relevant to assessing the likelihood of significant contribution to violations of the NAAQS in another state. Consistent with the NO_X SIP Call and CAIR, our technical analysis assessed the extent of ozone transport from North Dakota not just for areas designated nonattainment, but also for areas in violations of the NAAQS. Because EPA did not have detailed modeling for North Dakota and nearby downwind states, our approach did not rely on a quantitative determination of North Dakota's contribution but on a weight-of-evidence approach using quantitative information such as North Dakota's distance from areas with monitors showing violations of the NAAQS, modeling results outlining wind vectors for regional transport of ozone on high ozone days, CAIR modeling results for other states, and results of modeling studies for the nonattainment areas specifying the range of wind directions along which contribution of ozone transport occurred. Given that the assessments for each of these pieces of evidence are not individually definitive or outcome determinative, EPA concluded in its proposed action that the various factual and technical considerations supported a determination of no significant contribution from North Dakota emissions to the ozone nonattainment areas noted above.

EPA did not receive comments that persuade the Agency that there is such significant contribution for the 1997 ozone or $PM_{2.5}$ NAAQS and thus in today's final action EPA is making a final regulatory determination that North Dakota's emissions sources do not contribute significantly to violations of the 1997 8-hour ozone NAAQS in any other state.

II. Response to Comments

EPA received one letter from WildEarth Guardians (WG) and one letter from the Sierra Club commenting on EPA's **Federal Register** action proposing approval of the portion of the North Dakota Interstate Transport SIP that addresses the "significant contribution to nonattainment" and PSD requirements of CAA Section 110(a)(2)(D)(i) for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, and specific revisions to the air quality control rules

[1] EPA notes that in the referenced proposed rule there were references to the revision of "NDAC subsection 33–15–15–01.02" (75 FR 16027). As was clear from the context, the references were the results of typographical errors.

[2] In this action the expression "CAIR" refers to the final rule published in the May 12, 2005 **Federal Register** and entitled "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to NO_X SIP Call; Final Rule" (70 FR 25162).

addressed within that proposal. In this section EPA responds to the significant adverse comments made by the commenters.

Comment No. 1—WG opposed EPA's approval of North Dakota's revision of its PSD program, based on several alleged deficiencies in that program. Although WG does not explicitly state it, in the context of this action, which also approves the PSD portion of the interstate transport SIP noted above, WG's comments could be taken to argue that the alleged deficiencies adversely impact the measures required in other states to prevent significant deterioration of air quality in such states. To the extent WG makes this argument, EPA responds below.

As to the first deficiency, WG noted that the current federally-enforceable version of the North Dakota PSD program incorporates 40 CFR 52.21 as it stood on October 1, 2003. WG stated that the PSD program in North Dakota should be amended to reflect the effects of court opinions that vacated portions of that version of 52.21.

EPA Response—EPA disagrees with the commenter's argument that the North Dakota SIP does not reflect current requirements. North Dakota's submittal incorporated 40 CFR 52.21 as it stood on August 1, 2007. The August 1, 2007 version of 40 CFR 52.21 fully reflected the effects of federal court decisions vacating certain portions of NSR rules promulgated in 2002 and 2003.[3] Therefore, EPA believes that the North Dakota PSD program approved by EPA in this action also reflects the effects of those decisions and is therefore consistent with federal requirements.

EPA agrees with the implicit argument (mentioned above) that certain deficiencies in a state's existing SIP, or in a section 110(a)(2)(D) SIP submission itself, could affect the approvability of the section 110(a)(2)(D) SIP submission with respect to the PSD requirement. As provided in EPA's guidance for such SIP submissions for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, EPA made recommendations with respect to specific SIP revisions that it anticipated would be appropriate to address in the section 110(a)(2)(D) SIP submissions for these NAAQS, whether by reference to other submissions already made or within the same SIP submission. For example, for the requirements of the PSD element of section 110(a)(2)(D) for these NAAQS, EPA indicated that a state's SIP should reflect the current requirements for the implementation of the PSD and nonattainment NSR requirements for these NAAQS, as a means of establishing that the state's SIP would not interfere with measures to prevent significant deterioration in other states. EPA believes that this assessment is fact specific, however, and that the question of whether a state's SIP could cause such interference in another state must be examined on a case by case basis.

In this instance, because the North Dakota program now tracks the requirements of 40 CFR 52.21 as of August 1, 2007, WG's concern gives no reason to conclude that the revisions could interfere with the measures required in other states.

Comment No. 2—As another potential defect in the North Dakota PSD program, WG noted that the North Dakota PSD program adds the sentence: "[t]his term does not include effects on integral vistas," to 40 CFR 52.21(b)(29), that is, the definition of "adverse impact on visibility." WG argued that this additional language renders the PSD program less stringent than federal requirements.

EPA Response—EPA disagrees with WG's comment. In this comment, and others, WG appears to believe that per se any deviation from the language of 40 CFR 52.21 is invalid. However, the minimum federal requirements for state PSD programs are specified in 40 CFR 51.166, not in 52.21.[4] One way in which a state PSD program may meet the requirements of 51.166 is to adopt by reference the federal PSD program at 52.21, as North Dakota has here. To determine whether deviations from 52.21 in the North Dakota PSD program meet federal requirements for a state program, the program is judged against the minimum federal requirements for a state PSD program given in 51.166.

As to the requirements of 51.166, section 51.166(o)(1) creates a requirement for visibility impact analysis for new major stationary sources and major modifications. Federal requirements for protection of visibility in state SIPs are set out in subpart P of part 51. Procedures for the visibility impact analysis required by 51.166(o)(1) are given in 51.307, which, by its placement in subpart P, uses the definition of the term "adverse impact on visibility" at 51.301. North Dakota's definition is consistent with the federal definition; in fact, it matches it precisely. In addition, no integral vistas have been identified under section 51.304, so the addition of the sentence has no effect. Therefore, EPA disagrees with the comment that the North Dakota PSD program, by modifying 52.21(b)(29), does not meet federal requirements.

Comment No. 3—As another potential issue, WG noted that the North Dakota PSD program deletes references to NAAQS at 52.21(d), (k)(1), and (v)(2)(iv)(a). WG argued that the references must be restored to ensure that the NAAQS apply everywhere and that PSD increments are federal increments.

EPA Response—The cited references are replaced in the North Dakota rules by provisions that apply the state ambient air quality standards for areas within North Dakota's jurisdiction and that apply the NAAQS elsewhere. As discussed elsewhere in these responses, updates to the state ambient air quality standards, consistent with revisions to the NAAQS, were submitted by North Dakota to EPA on April 1, 2009. EPA will be acting on the revision in a separate action. Also, the North Dakota PSD program incorporates 40 CFR 52.21(c), which defines the PSD increments, by reference without modification; therefore, the North Dakota PSD increments are the federal increments.

Comment No. 4—As an additional concern, WG noted that the North Dakota PSD program replaces 40 CFR 52.21(h) with different state stack height requirements. WG argued that these requirements must be at least as stringent as federal requirements. Implicitly, WG argued that these different stack height requirements would interfere with other states's required PSD measures.

EPA Response—EPA disagrees with this comment. WG did not explain or identify any way in which the state requirements are less stringent than federal requirements. EPA has reviewed

[3] 67 FR 80186 (Dec. 31, 2002); 68 FR 61248 (Oct. 23, 2003); *New York* v. *U.S.* EPA, 413 F.3d 3 (D.C. Cir. 2005); *New York* v. *EPA,* 443 F.3d 880 (D.C. Cir. 2006).

[4] "The EPA implements the statutory PSD requirements through two sets of regulations. At 40 CFR 51.166, EPA has set minimum program requirements for States to follow in preparing, adopting, and submitting a PSD program for inclusion as part of the required SIP pursuant to Section 110(c) of the Act. At 40 CFR 52.21, EPA has promulgated a Federal PSD program requiring the Administrator's preconstruction review and approval of major new or modified stationary sources in the absence of an approved State PSD program, and for areas such as Indian Lands and Outer Continental Shelf areas that are outside of the jurisdiction of individual States." 58 FR 31622, 31623 (June 3, 1993). For states that—unlike North Dakota—lack a SIP-approved PSD program, EPA may delegate implementation of 52.21 to the state. E.g., 73 FR 53401 (Sept. 16, 2008) ("Prior to approval of Michigan's submitted PSD program, EPA delegated to Michigan (via delegation letter dated September 26, 1988) the authority to issue PSD permits through the Federal PSD rules at 40 CFR 52.21.").

the North Dakota state stack height requirements and finds that the requirements are at least as stringent as those in 40 CFR 51.166(h), which specifies the minimum stack height requirements for a state PSD program. Therefore, EPA does not believe that the provision creates a deficiency in the North Dakota PSD program or that the North Dakota SIP interferes with measures required for prevention of significant deterioration in any other state for purposes of the 1997 8-hour ozone and $PM_{2.5}$ NAAQS.

Comment No. 5—WG further argued that the North Dakota PSD program must include 40 CFR 52.21(l)(1) and must update the reference to Appendix W to part 51 in order to be consistent with current federal law requirements. WG also asserted that the North Dakota guidelines for air quality modeling are unacceptable because they are less stringent than applicable federal requirements.

EPA Response—EPA disagrees with the commenter's assessment on this point. The federal requirements for modeling in a PSD program are set out at 40 CFR 51.166(l). The North Dakota PSD provision that replaces 52.21(l)(1) is consistent with these requirements. Furthermore, the provision does not specify a particular date for incorporation of Appendix W; EPA therefore believes no update to the reference is necessary. Finally, 51.166(l) provides for modification or substitution of models in Appendix W on a case-by-case or generic basis with written approval of the Administrator. The Administrator has approved, in writing, use of the North Dakota guideline on a generic basis by approving previous submittals of the North Dakota PSD program that contained the same provision allowing for use of the guideline. Therefore, EPA believes that the North Dakota provision is consistent with federal requirements in 51.166(l).

Comment No. 6—WG also identified analyses for visibility as another alleged deficiency in the existing PSD program in North Dakota. WG noted that the state's PSD program requires visibility analysis for new source review to be prepared in accordance with state requirements. WG argued that these requirements are less stringent than federal requirements, and that the provision must therefore be deleted.

EPA Response—EPA disagrees with the commenter's assessment. In this instance, WG did not explain or identify any way in which the state requirements are less stringent than federal requirements. The federal requirements for visibility analysis procedures for new source review in state PSD programs are provided in 40 CFR 51.307. The procedures do not specify a particular method for visibility analysis. EPA has reviewed the North Dakota requirements for visibility analysis and finds they are consistent with federal requirements. Therefore, this is not a basis for disapproval of the North Dakota PSD program revision or the section 110(a)(2)(D) submission.

Comment No. 7—WG expressed concern with certain public process provisions in the North Dakota SIP. In particular, WG identified state specific provisions for public participation replacing those at 52.21(q). WG argued that the state should not be allowed to provide "summaries" of other materials it considered in making its permit decisions.[5] WG also argued that the state provisions should require the Department to respond to relevant comments.

EPA Response—EPA disagrees with the commenter's view of these specific requirements. The minimum federal requirements for public participation in a state PSD program are set out in 51.166(q). The state provision cited by WG is consistent with the requirements at 51.166(q)(2)(ii); in fact, the provision matches 51.166(q)(2)(ii) precisely. Therefore, EPA believes that the North Dakota PSD program meets federal requirements for public participation. As such, this is not a basis for disapproval of the North Dakota PSD program revision or the section 110(a)(2)(D) submission.

Comment No. 8—WG identified other procedural requirements as potential defects in the North Dakota SIP. WG noted that the North Dakota PSD program adds to 52.21(r)(2) the sentence: "[i]n cases of major construction projects involving long lead times and substantial financial commitments, the department may provide by a condition to the permit to construct a time period greater than eighteen months when such time extension is supported by sufficient documentation by the applicant." WG argued that this provision should be removed because it allows major sources to be built with stale determinations of ambient air impacts and best available control technology.

EPA Response—Federal requirements for source obligations in a state PSD program are set out at 51.166(r). This federal regulatory provision does not impose any particular time period for validity of a PSD permit. In addition, 52.21(r)(2) currently provides for extensions beyond the given eighteen-month period, if an applicant makes a satisfactory showing that an extension is justified. Thus, EPA believes that the state regulatory provision cited by the commenter is consistent with both 51.166(r) and 52.21(r)(2). Given this conclusion, EPA does not consider this a basis for disapproval of the North Dakota PSD program revision or the section 110(a)(2)(D) submission.

Comment No. 9—WG also opposed EPA's proposed approval of the North Dakota section 110(a)(2)(D) SIP submission with respect to PSD requirements for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS because the submission did not address other, more recent NAAQS. WG noted that the current EPA-approved version of the North Dakota SIP at NDAC 33–15–02 does not incorporate all current NAAQS, including the 2006 $PM_{2.5}$ NAAQS, the 2008 ozone NAAQS, and the 2010 NO_2 NAAQS. WG stated its concern that the failure to incorporate the latest NAAQS implies that these NAAQS will not be addressed in permitting and planning determinations by the state.

EPA Response—EPA disagrees with the commenter on this point. First, in this action, EPA is approving the North Dakota interstate transport SIP for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS; EPA is also approving a revision to North Dakota's PSD program. WG does not explain how a failure to incorporate the current NAAQS in the state ambient air quality standards is relevant to EPA's action on the North Dakota interstate transport SIP for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. Thus, the comment does not give grounds for disapproval of the interstate transport SIP for the NAAQS at issue in this rulemaking.

Furthermore, as noted in the proposal for this action, EPA has included the revision to North Dakota's PSD program in this action to address an issue specifically mentioned in the 2006 guidance. The guidance recommended that in order to satisfy the PSD requirement of 110(a)(2)(D)(i), the state's interstate transport SIP, or existing SIP, should meet the requirements of the Phase II implementation rule for the 1997 8-hour ozone NAAQS. In particular, this means the state's SIP should identify NO_X as a precursor to ozone, and the SIP revision submitted by North Dakota has done so. Thus, the current NAAQS are not relevant to this action.

Finally, EPA disagrees that approval of this SIP submission implies that North Dakota will not take appropriate required actions with respect to other,

[5] The commenter refers to section (g) of the provision, but from the mention of "summaries" it appears the commenter is referring to section (b).

more recent, NAAQS. Consistent with the requirements of the CAA and applicable regulations, EPA expects North Dakota to consider other more recent NAAQS in permitting decisions. As additional SIP revisions are necessary, EPA anticipates that the state will comply, as indeed it has in this very action with respect to necessary revisions for the 1997 8-hour ozone NAAQS.

Comment No. 10—WG asserted that EPA's proposed approval was based on a "flawed legal standard." According to WG, EPA erred in the proposal by explaining that various factual or technical assessments indicate that it is "highly unlikely" that emissions from North Dakota sources significantly contribute to violations of the 1997 8-hour ozone NAAQS, or to violations of the 1997 $PM_{2.5}$ NAAQS in other states. WG's position is that EPA cannot approve a SIP submission based upon "unlikelihood" because CAA Section 110(a)(2)(D)(i)(I) prohibits emissions that contribute significantly to nonattainment in other States and does not allow EPA to approve SIPs simply because a state's emissions are "unlikely" to contribute significantly to nonattainment.

EPA Response—EPA disagrees with WG's characterization of EPA's analysis and WG's interpretation of the statutory requirements. First, EPA notes that the discussion in the proposal was intended to present the various factual and technical considerations available to assess whether there is or is not significant contribution to nonattainment in other states as a result of emissions from North Dakota sources. Given that these assessments are not individually definitive or outcome determinative, EPA believes that it is entirely appropriate to present and describe the relative probative value of the various considerations accurately. Second, EPA notes that all such technical evaluations are by their nature subject to some degree of uncertainty. Indeed, the modeling that WG elsewhere contends should be the sole method for evaluating interstate transport is itself but one means of evaluating the real world impacts of emissions in light of meteorological conditions, wind direction, and other such variables, and produces a result that is itself subject to some degree of uncertainty. Third, EPA believes that it was also appropriate to describe the various factual and technical considerations and whether they indicated a "likelihood" of significant contribution to nonattainment in another state because the proposal was seeking comment from the public upon whether these considerations together supported a determination of no such significant contribution. EPA did not receive comments that persuade the Agency that there is such significant contribution, and thus in today's final action EPA is making a final regulatory determination that North Dakota emissions sources do not significantly contribute to violations of the 1997 8-hour ozone NAAQS, or to violations of the 1997 $PM_{2.5}$ NAAQS in any other state, for the reasons explained elsewhere in this notice. In other words, EPA has concluded that the existing SIP for North Dakota already contains adequate provisions to prevent emission from North Dakota sources from significantly contributing to violations of the 1997 8-hour ozone NAAQS, or to violations of the 1997 $PM_{2.5}$ NAAQS in other states and is therefore approving North Dakota's submission for this purpose.

Comment No. 11—WG argued that North Dakota and EPA did not appropriately assess impacts to nonattainment in downwind states. According to WG, North Dakota failed to assess significance of downwind impacts in accordance with EPA guidance and precedent. Although this is unclear from the comment, WG evidently believes that EPA's applicable guidance for this purpose appears only in the 1998 NO_X SIP call. WG asserts that, based on the precedent of the NO_X SIP Call, the following issues need to be addressed in determining whether or not an area is significantly contributing to nonattainment in downwind States: (a) The overall nature of the ozone problem; (b) the extent of downwind nonattainment problems to which upwind States' emissions are linked; (c) the ambient impact of the emissions from upwind States' sources on the downwind nonattainment problems; and (d) the availability of high cost-effective control measures for upwind emissions. (63 FR 57356–57376, October 27, 1998).

EPA Response—EPA disagrees with WG on this point. Section 110(a)(2)(D) does not explicitly specify how states or EPA should evaluate the existence of, or extent of, interstate transport and whether that interstate transport is of sufficient magnitude to constitute "significant contribution to nonattainment" as a regulatory matter. The statutory language is ambiguous on its face and EPA must reasonably interpret that language when it applies it to factual situations before the Agency.

EPA agrees that the NO_X SIP Call is one rulemaking in which EPA evaluated the existence of, and extent of, interstate transport. In that action, EPA developed an approach that allowed the Agency to evaluate whether there was significant contribution to ozone nonattainment across an entire region that was comprised of many states. That approach included regional scale modeling and other technical analyses that EPA deemed useful to evaluate the issue of interstate transport on that geographic scale and for the facts and circumstances at issue in that rulemaking. EPA does not agree, however, that the approach of the NO_X SIP Call is necessarily the only way that states or EPA may evaluate the existence of, and extent of, interstate transport in all situations, and especially in situations where the state and EPA are evaluating the question on a state by state basis, and in situations where there is not evidence of widespread interstate transport.

Indeed, EPA issued specific guidance making recommendations to states about how to address section 110(a)(2)(D) in SIP submissions for the 8-hour ozone and $PM_{2.5}$ NAAQS. EPA issued this guidance document, entitled "Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards" on August 15, 2006.[6] This guidance document postdated the NO_X SIP Call, and was developed by EPA specifically to address SIP submissions for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS.

Within that 2006 guidance document, EPA notes that it explicitly stated its view that the "precise nature and contents of such a submission [are] not stipulated in the statute" and that the contents of the SIP submission "may vary depending upon the facts and circumstances related to the specific NAAQS."[7] Moreover, within that guidance, EPA expressed its view that "the data and analytical tools available" at the time of the SIP submission "necessarily affect[] the content of the required submission."[8] To that end, EPA specifically recommended that states located within the geographic region covered by the "Clean Air Interstate Rule (CAIR)," comply with section 110(a)(2)(D) for the 1997 8-hour

[6] Memorandum from William T. Harnett entitled Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards (Aug. 15, 2006) ("2006 Guidance"); p. 3. An electronic copy is available for review at the regulations.gov web site as Document ID No. EPA–R08–OAR–2007–1032.0004.1.

[7] Id. at 3.

[8] Id.

ozone and $PM_{2.5}$ NAAQS by complying with CAIR itself. For states outside the CAIR rule region, however, EPA recommended that states develop their SIP submissions for section 110(a)(2)(D) considering relevant information.

EPA explicitly recommended that relevant information for section 110(a)(2)(D) submissions addressing significant contribution to nonattainment "might include, but is not limited to, information concerning emissions in the State, meteorological conditions in the State, the distance to the nearest nonattainment area in another State, reliance on modeling conducted by EPA in determining that such State should not be included within the ambit of the CAIR, or such other information as the State considers probative on the issue of significant contribution." [9] In addition, EPA recommended that states might elect to evaluate significant contribution to nonattainment using relevant considerations comparable to those used by EPA in CAIR, including evaluating impacts as of an appropriate year (such as 2010) and in light of the cost of control to mitigate emissions that resulted in significant contribution.

WG did not acknowledge or discuss EPA's actual guidance for section 110(a)(2)(D) SIP submissions for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, and thus it is unclear whether WG was aware of it. In any event, EPA believes that the North Dakota submission and EPA's evaluation of it was consistent with EPA's guidance for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. For example, as discussed in the proposal notice, the State and EPA considered information such as monitoring data in North Dakota and downwind states, geographical and meteorological information, and technical studies of the nature and sources of nonattainment problems in various downwind states. These are among the types of information that EPA recommended and that EPA considers relevant. Thus, EPA has concluded that the state's submission, and EPA's evaluation of that submission, meet the requirements of section 110(a)(2)(D) and are consistent with applicable guidance.

Finally, EPA notes that the considerations the Agency recommended to States in the 2006 Guidance document are consistent with the concepts that WG enumerated from the NO_X SIP Call context: (a) The overall nature of the ozone problem; (b) the extent of downwind nonattainment problems to which upwind State's emissions are linked; (c) the ambient impact of the emissions from upwind States' sources on the downwind nonattainment problems; and (d) the availability of high cost-effective control measures for upwind emissions. The only distinction in the case of the North Dakota submission at issue here would be that because the available evidence indicates that there is very little contribution from emissions from North Dakota sources to nonattainment in other states, it is not necessary to advance to the final step and evaluate whether the cost of controls for those sources is above or below a certain cost of control as part of determining whether the contribution constitutes "significant contribution to nonattainment" for regulatory purposes, as was necessary in the NO_X SIP Call and in CAIR.

Comment No. 12—WG argued that EPA's assessment that North Dakota will not significantly contribute to nonattainment of the ozone NAAQS in downwind States is based primarily on modeling prepared in conjunction with CAIR, and yet "EPA admits that CAIR only addressed $PM_{2.5}$ impacts."

EPA Response—EPA agrees with WG that CAIR evaluated only $PM_{2.5}$ impacts for North Dakota. However, EPA disagrees that the CAIR ozone modeling results are irrelevant to this action: as the NPR made clear, it is actually the CAIR modeling analyses for ozone transport from Minnesota—not North Dakota—that EPA considered as evidence in this action.[10] Furthermore, we do not think that within the proposed rule of March 31, 2010, EPA suggested that the assessment of impacts from North Dakota's emissions to nonattainment of the ozone NAAQS in downwind States was based primarily on modeling prepared in conjunction with CAIR. Instead, EPA made clear that the CAIR modeling analysis results for Minnesota, considered in combination with emissions levels in Minnesota and North Dakota, and their respective distances from the Illinois/Wisconsin nonattainment counties, was only one piece of relevant evidence in EPA's weight-of-evidence determination. The comment seems to reflect a misreading of our proposed rule action, or a misinterpretation of one of the pieces of evidence in our technical analysis. Thus, EPA does not see in its proposed rule the contradiction alleged by this comment.

Comment No. 13—WG reiterated its concern that the North Dakota section 110(a)(2)(D) submission was deficient because it did not strictly follow WG's summary of the structure of the analysis of interstate transport in the NO_X SIP Call: (a) The overall nature of the ozone problem; (b) the extent of downwind nonattainment problems to which upwind States' emissions are linked; (c) the ambient impact of the emissions from upwind States' sources on the downwind nonattainment problems; and (d) the availability of high cost-effective control measures for upwind emissions.

EPA Response—EPA disagrees with WG's view that any analysis of interstate transport must follow a specific formulaic structure to be approvable. As noted above, EPA issued specific guidance to states making recommendations for section 110(a)(2)(D) SIP submissions for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. Within that guidance, EPA recommended various types of information that states might wish to consider in the process of evaluating whether their sources contributed significantly to nonattainment in other states. EPA has concluded that the submission from North Dakota, augmented by EPA's own analysis, sufficiently establishes that North Dakota sources do not significantly contribute to violations of the 1997 8-hour ozone and $PM_{2.5}$ NAAQS in other states. As noted above, EPA believes that the state's submission, and EPA's analysis of it, address the same conceptual considerations that the commenter advocated.

Comment No. 14—WG asserted that North Dakota and EPA provided "no analysis" of the contribution from North Dakota to downwind states and no

[9] Id. at 5.

[10] Specifically, the relevant portion of our proposed rule reads: "The CAIR modeling domain for 8-hour ozone transport analysis included only the eastern half of North Dakota, and the CAIR modeling analysis did not determine whether NO_X emissions from North Dakota sources contributed significantly to ozone nonattainment in any downwind states. However, the CAIR modeling analysis results for Minnesota provide us the opportunity to draw inferences about ozone contribution from North Dakota sources to nonattainment in the Illinois/Wisconsin area. It must be noted that Minnesota is nearly half as distant from this nonattainment area as North Dakota (400 miles as compared with 700), and that to reach the Illinois/Wisconsin nonattainment area, ozone transport winds from Minnesota would have to have a northwesterly orientation similar to that necessary for substantial ozone transport from North Dakota. In addition, the CAIR modeling analysis estimated the Minnesota's NO_X emissions for the 2010 base year to be approximately twice as large as the NO_X emissions from North Dakota's sources (381,500 as compared with 182,800 tons.) Finally, the CAIR analysis determined that emissions from Minnesota were below the initial threshold for including states in CAIR. In light of this CAIR determination, and of Minnesota's larger NO_X emissions and shorter distance to the nonattainment area, it is plausible to conclude that NO_X emissions from North Dakota sources are not likely to contribute significantly to nonattainment of the 1997 8-hour ozone standard in the Illinois and Wisconsin counties along the southwestern shores of Lake Michigan." 75 FR 16030.

"actual assessment" of the significance of any such contribution.

EPA Response—EPA disagrees with WG's position. WG again assumes that section 110(a)(2)(D) explicitly requires the type of modeling analysis that the commenter advocates throughout its comments. Because WG apparently views the NO_X SIP Call as the applicable guidance, WG contends that any analytical approach that is not identical to that approach is impermissible. In addition, WG overlooks the fact that in other actions based upon section 110(a)(2)(D), EPA has also used a variety of analytical approaches, short of modeling, to evaluate whether specific states are significantly contributing to violations of the NAAQS in another state (e.g., the west coast states that EPA concluded should not be part of the geographic region of the CAIR rule based upon qualitative factors, and not by the zero out modeling EPA deemed necessary for some other states).

In the proposed approval, EPA explained that other forms of available information were sufficient to make the determination that there is no significant contribution from North Dakota sources to downwind nonattainment of the 1997 8-hour ozone NAAQS. As stated in the proposal:

> EPA's evaluation of whether emissions from North Dakota contribute significantly to the ozone nonattainment in these areas is based on an examination of how geographical and meteorological factors affect transport from North Dakota to the two areas noted above. Our approach does not rely on a quantitative determination of North Dakota's contribution, as EPA did for other states in its CAIR rulemaking, but on a weight-of-evidence analysis based on qualitative assessments and estimates of the relevant factors. While conclusions reached for each of the factors considered in the following analysis are not in and by themselves determinative, consideration of the likely effect of all factors provides a reliable qualitative conclusion on whether North Dakota's emissions are likely to contribute significantly to nonattainment in the DMA/NFR area and the Illinois/Wisconsin Counties.[11]

EPA acknowledged that the various forms of information considered in the proposal (such as distance, orientation of surface and regional transport winds, back trajectory analyses, monitoring data) were not individually outcome determinative, but concluded that when taken together served to establish that North Dakota sources do not significantly contribute to downwind nonattainment of the 1997 8-hour ozone NAAQS in other states. Thus, contrary to WG's assertion, EPA did perform an "analysis" and an "assessment" that was a reasonable basis for its conclusion that emissions from North Dakota do not contribute significantly to downwind ozone nonattainment, using a combination of quantitative data and qualitative analyses. EPA does not agree that only the type of analysis advocated by WG could adequately evaluate the issue and support a rational determination in this instance.

Comment No. 15—WG objected to EPA's proposed approval because North Dakota assessed impacts in downwind states by considering monitoring data in those states as a means of evaluating significant contribution to nonattainment. In other words, WG is concerned that North Dakota did not assess impacts in areas that have no monitor. WG likewise objected to EPA's "endorsement" of this approach. WG argued that this reliance on monitor data is inconsistent with both section 110(a)(2)(D) and with EPA's guidance, by which the commenter evidently means the NO_X SIP Call. In support of this assertion, WG quoted from the NO_X SIP Call proposal in which EPA addressed the proper interpretation of the statutory phrase "contribute significantly to nonattainment:"

> The EPA proposes to interpret this term to refer to air quality and not to be limited to currently-designated nonattainment areas. Section 110(a)(2)(D) does not refer to "nonattainment areas," which is a phrase that EPA interprets to refer to areas that are designated nonattainment under section 107 (section 107 (d)(1)(A)(I)).

According to WG, this statement, and similar ones in the context of the final NO_X SIP Call rulemaking, establish that States and EPA cannot utilize monitoring data to evaluate the existence of, and extent of, interstate transport. Furthermore, WG interprets the reference to "air quality" in these statements to support its contention, amplified in later comments, that EPA must evaluate significant contribution in areas in which there is no monitored nonattainment.

EPA Response—EPA disagrees with WG's arguments. First, WG misunderstands the point that EPA was making in quoted statement from the NO_X SIP Call proposal (and that EPA has subsequently made in the context of CAIR). When EPA stated that it would evaluate impacts on air quality in downwind states, independent of the current formal "designation" of such downwind states, it was not referring to air quality in the absence of monitor data. EPA's point was that it was inappropriate to wait for either initial designations of nonattainment for a new NAAQS under section 107(d)(1), or for a redesignation to nonattainment for an existing NAAQS under section 107(d)(3), before EPA could assess whether there is significant contribution to nonattainment of a NAAQS in another state.

For example, in the case of initial designations, section 107(d) contemplates a process and timeline for initial designations that could well extend for two or three years following the promulgation of a new or revised NAAQS. By contrast, section 110(a)(1) requires states to make SIP submissions that address section 110(a)(2)(D) and interstate transport "within 3 years or such shorter period as the Administrator may prescribe" of EPA's promulgation of a new or revised NAAQS. This schedule does not support a reading of section 110(a)(2)(D) that is dependent upon formal designations having occurred first. This is a key reason why EPA determined that it was appropriate to evaluate interstate transport based upon monitor data, not designation status, in the CAIR rulemaking.

WG's misunderstanding of EPA's statement concerning designation status evidently caused WG to believe that EPA's assessment of interstate transport in the NO_X SIP Call was not limited to evaluation of downwind areas with monitors. This is simply incorrect. In both the NO_X SIP Call and CAIR, EPA evaluated significant contribution to nonattainment as measured or predicted at monitors. For example, in the technical analysis for the NO_X SIP Call, EPA specifically evaluated the impacts of emissions from upwind states on monitors located in downwind states. The NO_X SIP Call did not evaluate impacts at points without monitors, nor did the CAIR rulemaking. EPA believes that this approach to evaluating significant contribution is correct under section 110(a)(2)(D), and EPA's general approach to this threshold determination has not been disturbed by the courts.[12]

Finally, EPA disagrees with WG's argument that the assessment of significant contribution to downwind nonattainment must include evaluation of impacts on non-monitored areas. First, neither section 110(a)(2)(D)(i)(I) provisions, nor the EPA guidance issued for the 1997 8-hour ozone NAAQS on August 15, 2006 support WG's position, as neither refers to any requirement or recommendation to assess air quality in

[11] 75 FR 16030.

[12] *Michigan* v. *U.S. EPA,* 213 F.3d 663, 674–681 (D.C. Cir. 2000); *North Carolina* v. *EPA,* 531 F.3d 896, 913–916 (D.C. Cir. 2008) (upholding EPA approach to determining threshold despite remanding other aspects of CAIR).

non-monitored areas.[13] The same focus on monitored data as a means of assessing interstate transport is found in the NO_X SIP Call and in CAIR. An initial step in both the NO_X SIP Call and CAIR was the identification of areas with current monitored violations of the ozone and/or $PM_{2.5}$ NAAQS.[14] The subsequent modeling analyses for NAAQS violations in future years (2007 for the SIP Call and 2010 for CAIR) likewise evaluated future violations at monitors in areas identified in the initial step. Thus, WG is simply in error that EPA has not previously evaluated the presence and extent of interstate transport under section 110(a)(2)(D) by focusing on monitoring data. Indeed, such monitoring data was at the core of both of these efforts. In neither of these rulemakings did EPA evaluate significant contribution to nonattainment in areas in which there was no monitor. This is reasonable and appropriate, because data from a properly placed federal reference method monitor is the way in which EPA ascertains that there is a violation of the 1997 8-hour ozone or $PM_{2.5}$ NAAQS in a particular area. Put another way, in order for there to be significant contribution to nonattainment for the 1997 8-hour ozone or $PM_{2.5}$ NAAQS, there must be a monitor with data showing a violation of that NAAQS. EPA has concluded that by considering data from monitored areas, its assessment of whether emissions from North Dakota contribute significantly to ozone or $PM_{2.5}$ nonattainment in downwind States is consistent with the 2006 Guidance, and with the approach used by both the CAIR rule and the NO_X SIP Call.

Comment No. 16—In support of its comments that EPA should assess significant contribution to nonattainment in nonmonitored areas, WG argued that existing modeling performed by another organization "indicates that large areas of neighboring states will likely violate the ozone NAAQS." According to WG, these likely "violations" of the ozone NAAQS were predicted for the year 2018, as reflected in a slide from a July 30, 2008 presentation before the Western Regional Air Partnership ("Review of Ozone Performance in WRAP Modeling and Relevant to Future Regional Ozone Planning"). WG asserted that: "Slide 28 of this presentation displays projected 4th highest 8-hour ozone reading for 2018 and indicates that air quality throughout large portions of the West will exceed and/or violate the 1997 ozone NAAQS. * * *"[15] In short, WG argues that modeling performed by the WRAP establishes that there will be violations of the 1997 8-hour ozone NAAQS in 2018 in non-monitored areas Western states.

EPA Response—EPA disagrees with this comment on several grounds. First, as explained in response to other comments, EPA does not agree that it is appropriate to evaluate significant contribution to nonattainment for the 1997 8-hour ozone NAAQS by modeling ambient levels in areas where there is no monitor to provide data to establish a violation of the NAAQS in question. Section 110(a)(2)(D) does not require such an approach, EPA has not taken this approach in the NO_X SIP Call or other rulemakings under section 110(a)(2)(D), and EPA's prior analytical approach has not been disturbed by the courts.

Second, WG's own description of the ozone concentrations predicted for the year 2018 as projecting "violations" of the ozone NAAQS is inaccurate. Within the same sentence, quoted above, slide 28 is described as displaying the projected 4th max ozone reading for the year 2018, and as indicating that "* * * air quality * * * will exceed or *violate* [our emphasis] the 1997 ozone NAAQS." By definition, a one year value of the 4th max above the NAAQS only constitutes an exceedance of the NAAQS; to constitute a violation of the 1997 8-hour ozone NAAQS, the standard must be exceeded for three consecutive years at the same monitor. Thus, even if the WRAP presentation submitted by WG were technically sound, the conclusion drawn from it by WG is inaccurate and does not support its claim of projected violations of the NAAQS in western States south and west of North Dakota.

EPA has also reviewed the WRAP presentation submitted by WG, and believes that there was a substantial error in the WRAP modeling software that led to overestimation of ground level ozone concentrations. A recent study conducted by Environ for the Four Corners Air Quality Task Force (FCAQTF; Stoeckenius *et al.,* 2009) has demonstrated that excessive vertical transport in the CMAQ and CAMx models over high terrain was responsible for overestimated ground level ozone concentrations due to downward transport of stratospheric ozone.[16] Environ has developed revised vertical velocity algorithms in a new version of CAMx that eliminated the excessive downward transport of ozone from the top layers of the model. This revised version of the model is now being used in a number of applications throughout high terrain areas in the West. In conclusion, EPA believes that this key inadequacy of the WRAP model, noted above, makes it inappropriate support for WG's concerns about large expanses of 8-hour ozone nonattainment areas projected for 2018 in areas without monitors.

Finally, it must be noted that even if the ozone exceedances predicted for the year 2018 were based on a sound modeling analysis, even the closest areas showing exceedances are several hundred miles southwest of North Dakota and, as indicated in our proposed rule, the northeasterly winds required for ozone transport from North Dakota to these areas are a rarity (75 FR 16030).

Comment No. 17—As additional support for its assertion that EPA should require modeling to assess ambient levels in unmonitored portions of other States, WG relied on an additional study entitled the "Uinta Basin Air Quality Study (UBAQS)." The commenter argued that the UBAQS study further supports its concern that limiting the evaluation of downwind impacts only to areas with monitors fails to assess ozone nonattainment in non-monitored areas. According to the commenter, UBAQS modeling results show that: (a) The Wasatch front region is currently exceeding and will exceed in 2012 the 1997 8-hour ozone NAAQS; and (b) based on 2005 meteorological data, portions of the four counties in the southwest corner of Utah are also currently in nonattainment and will be in nonattainment in 2012.[17]

EPA Response—As noted above, EPA does not agree that it is appropriate to assess significant contribution to nonattainment for the 1997 8-hour

[13] 2006 Guidance, p. 5.

[14] "Based on this approach, we predicted that in the absence of additional control measures, 47 counties *with air quality monitors* [emphasis ours] would violate the 8-hour ozone NAAQS in 2010. * * *" From the CAIR proposed rule of January 30, 2004 (69 FR 4566, 4581). The NO_X SIP call proposed rule action reads: "* * * For current nonattainment areas, EPA used air quality data for the period 1993 through 1995 to determine which counties are violating the 1-hour and/or 8-hour NAAQS. These are the most recent 3 years of fully quality assured data which were available in time for this assessment," 62 FR 60336.

[15] The presentation is available for review as Document ID # EPA–R08–OAR–2007–1032–0007.8 at Regulations.gov, Docket ID # EPA–R08–OAR–2009–0282.

[16] Stoeckenius, T.E., C.A. Emery, T.P. Shah, J.R. Johnson, L.K. Parker, A.K. Pollack, 2009. "Air Quality Modeling Study for the Four Corners Region." Prepared for the New Mexico Environment Department, Air Quality Bureau, Santa Fe, NM, by ENVIRON International Corporation, Novato, CA.

[17] The southwestern area referred to by the commenter includes portions of Washington, Iron, Kane, and Garfield Counties.

ozone NAAQS in the way advocated by WG. Even taking the UBAQS modeling results at their face value, however, EPA does not agree that the 8-hour ozone nonattainment (current and projected) in the Wasatch Front Range area supports the commenter's concerns about the need to evaluate the possibility of significant contribution to nonattainment in non-monitored areas. EPA sees several problems with the commenter's interpretation of the UBAQS analysis results for counties in Utah's southwestern corner: "based on 2005 meteorological data, portions of Washington, Iron, Kane, and Garfield Counties are also in nonattainment and will be in nonattainment in 2012."

First, WG's interpretation of the predicted ozone concentrations shown in Figures 4–3a and 4–3b (pages 5 and 6 of the comment letter) is inaccurate. A close review of the legend in these figures indicates that the highest ozone concentrations predicted by the model for portions of the counties noted above are somewhere between 81.00 and 85.99 ppb, but a specific concentration is not provided. If the ozone concentration is actually predicted to be smaller than or equal to 84.9 ppb, then the area is attaining; if it is predicted as greater than 84.9 ppb then it is not attaining. This means that current and predicted design values for the southwestern Utah area identified in Figures 4–3a and 4–3b could both be in attainment or both in nonattainment, or one of them in attainment and the other in nonattainment, for the 1997 8-hour ozone NAAQS.

Second, even if the design values predicted for these unmonitored areas were at the top of the 81.00–85.99 ppb range, their reliability would remain questionable. The UBAQS itself identifies and illustrates major shortcomings of its modeling analysis, only to neglect assessing the impact of these shortcomings on the modeling results.[18] The study deviates in at least two significant ways from EPA's 2007 guidance on SIP modeling.[19] One issue is the UBAQS modeling reliance on fewer than the five years of data recommended by EPA to generate a current 8-hour ozone design value (DVC). UBAQS relaxed this requirement so that sites with as little as 1 year of data were included as DVCs in the analysis. The other issue is the computation of the relative responsive factor (RRF), which directly affects the modeling's future design value (DVF).[20] Again due to unavailability of data satisfying EPA's recommendation that the RRF be based on a minimum of five days of ozone concentrations above 85 ppb, UBAQS modeling uses RRFs based on one or more days of ozone concentrations above 70 ppb.[21] EPA concludes that the modeling analysis results used by the WG are unreliable for projecting non-attainment status and therefore do not support its comments.

Finally, the predicted attainment status of unmonitored areas in the southwestern corner of Utah is not relevant to our assessment of whether emissions from North Dakota contribute significantly to downwind ozone nonattainment. The counties identified that draw the commenter's attention are almost a 1,000 miles from Bismarck, North Dakota, in a southwestern direction. As indicated in our response to the previous comment, the northeasterly winds required for ozone transport from North Dakota to these areas are a rarity.

Comment No. 18—In support of its arguments that EPA should not limit assessment of significant contribution to nonattainment through evaluation of impacts at monitors, but include, through modeling analysis, impacts where there are no such monitors, the commenter cited a past statement by EPA to the effect that the monitor network in the western United States needs to be expanded. The quoted statements included EPA's observation that "[v]irtually all States east of the Mississippi River have at least two to four non-urban O3 monitors, while many large mid-western and western States have one or no non-urban monitors." 74 FR 34,525 (July 16, 2009). From this statement, the commenter argues that it is not appropriate for EPA to limit evaluation of significant contribution to nonattainment in other states relying on monitoring data instead of modeling ambient levels. The comment also indicates that States with few or no non-urban monitors include "Idaho, Nebraska, Nevada, Montana, and Oregon, which may be affected by North Dakota emissions."

EPA Response—EPA does not disagree that there are relatively few monitors in the western states, and that relatively few monitors are currently located in non-urban areas of western states. However, the commenter failed to note that the quoted statement from EPA concerning the adequacy of western monitors came from the Agency's July 16, 2009 proposed rulemaking entitled "Ambient Ozone Monitoring Regulations: Revisions to Network Design Requirements." This statement was thus taken out of context, because EPA was in that proposal referring to changes in state monitoring networks that it anticipates will be necessary in order to implement *not* [emphasis added] the 1997 8-hour ozone NAAQS that are the subject of this rulemaking, but rather the next iteration of the ozone NAAQS for which there are concerns that there will be a need to evaluate ambient levels in previously unmonitored areas of the western United States. The fact that additional monitors may be necessary in the future for newer ozone NAAQS does not automatically mean that the existing ozone monitoring networks are insufficient for the 1997 8-hour ozone NAAQS, as the commenter implies. Indeed, states submit annual monitor network reports to EPA and EPA evaluates these to insure that they meet the applicable requirements. For example, North Dakota itself submits just such a report on an annual basis, and EPA reviews it for adequacy.[22] All other states submit comparable reports.

Finally, EPA disagrees that monitored and unmonitored areas in the western States identified above by the commenter may be affected by emissions from North Dakota. As noted in the proposed rule, the easterly or northeasterly winds that would be needed to transport emissions from North Dakota to these States are rare.[23] Similarly rare is the possibility of impacts on these States from North Dakota's emissions.

Comment No. 19—WG objected to EPA's proposed approval of the North Dakota SIP submission because neither North Dakota nor EPA performed a specific modeling analysis to assure that emissions from North Dakota sources do not significantly contribute to nonattainment in downwind States. According to the commenter, EPA's decision to use a qualitative approach to determine whether emissions from North Dakota contribute significantly to downwind nonattainment is not consistent with its own preparation of a regional model to evaluate such impacts from other states as part of CAIR.

[18] See "UBAQS," pages 4–27 to 4–29.

[19] EPA. 2007. Guidance on the Use of Models and other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, PM2.5 and Regional Haze. Office of Air Quality Planning and Standards, Air Modeling Group. Research Triangle Park, North Carolina (*http://www.epa.gov/scram001/guidance/guide/final-03-pm-rh-guidance.pdf*).

[20] DVC × RRF = DVF.

[21] See UBAQS, p. 4–28.

[22] See, for example: "Annual Report. North Dakota Air Quality Monitoring, Data Summary, 2008." dated June 2009, North Dakota Department of Health. A is available for review at the regulations.gov Web site, under Docket ID No EPA–R08–OAR–2009–0282.

[23] See our assessment of ozone transport from North Dakota emissions to Colorado, 75 FR 16030.

EPA Response—EPA disagrees with WG's belief that only modeling can establish whether or not there is significant contribution from one state to another. First, as noted above, EPA does not believe that section 110(a)(2)(D) requires modeling. While modeling can be useful, EPA believes that other forms of analysis can be sufficient to evaluate whether or not there is significant contribution to nonattainment. For this reason, EPA's 2006 Guidance recommended other forms of information that states might wish to evaluate as part of their section 110(a)(2)(D) submissions for the 1997 8-hour ozone NAAQS. EPA has concluded that its qualitative approach to the assessment of significant contribution to downwind ozone nonattainment is consistent with EPA's 2006 Guidance.

Second, EPA notes that WG's position also reflects a misunderstanding of the approach EPA used in the remanded CAIR due to WG's exclusive focus on those States that were selected for the modeling analysis. A wider understanding of the CAIR approach would recognize that EPA decided, based on other criteria, that it was not necessary to conduct modeling for certain western states: "[i]n analyzing significant contribution to nonattainment, we determined it was reasonable to exclude the Western U.S., including the States of Washington, Idaho, Oregon, California, Nevada, Utah, and Arizona from further analysis due to geography, meteorology, and topography. Based on these factors we concluded that the $PM_{2.5}$ and 8-hour ozone nonattainment problems are not likely to be affected significantly by pollution transported across these States' boundaries * * *." (69 FR 4581, January 30, 2004).

EPA has taken a similar approach to assess whether North Dakota contributes significantly to violations of the 1997 8-hour ozone and $PM_{2.5}$ NAAQS in downwind states. In the proposed action, EPA explained several forms of substantive and technically valid evidence that led to the conclusion that emissions from North Dakota sources do not contribute significantly to nonattainment, in accordance with the requirement of Section 110(a)(2)(D).

Comment No. 20—In further support of its argument that EPA must use modeling to evaluate whether there is significant contribution to nonattainment under section 110(a)(2)(D), WG noted that EPA itself asks other agencies to perform such modeling in other contexts. As examples, the commenter cited four examples in which EPA commented on actions by other agencies in which EPA recommended the use of modeling analysis to assess ozone impacts prior to authorizing oil and gas development projects. As supporting material, the comment includes quotations from and references to EPA letters to Federal Agencies on assessing impacts of oil and gas development projects.[24] WG questioned why EPA's recommendation for such an approach in its comments to other Federal Agencies, did not result in its use of the same approach to evaluate the impacts from North Dakota emissions and to insure compliance with Section 110(a)(2)(D)(i)(I). The commenter reasoned that the emissions that would result from the actions at issue in the other agency decisions, such as selected oil and gas drilling projects, would be of less magnitude and importance than the statewide emissions at issue in an evaluation under section 110(a)(2)(D).

EPA Response—As explained above, EPA disagrees with WG's fundamental argument that modeling is required to evaluate significant contribution to nonattainment, whether by section 110(a)(2)(D), by EPA guidance, or by past EPA precedent. EPA's applicable guidance made recommendations as to different approaches that can lead to the satisfaction of the interstate transport requirements for significant contribution to nonattainment in other states. Even EPA's own CAIR analysis relied on a combination of qualitative and quantitative analyses, as explained above. As indicated in our response to Comment No. 19, the CAIR analysis excluded the Western States on the based on a qualitative assessment of the region's topography, geography and meteorology.[25]

EPA believes that the commenter's references to EPA statements commenting on the actions of other agencies are inapposite. As WG is aware, those comments were made in the context of the evaluation of the impacts of various federal actions pursuant to NEPA, not the Clean Air Act. As explained above, in the context of section 110(a)(2)(D), EPA does not agree that modeling is always required to make that different evaluation, and EPA itself has relied on other more qualitative evidence when it deemed that evidence sufficient to reach a reasoned determination.

Comment No. 21—In further support of its argument that EPA should always require modeling to evaluate significant contribution to nonattainment, WG referred to EPA regulations governing nonattainment SIPs. The commenter noted 40 CFR 51.112(a)(1), which states that: "[t]he adequacy of a control strategy shall be demonstrated by means of applicable air quality models, data bases, and other requirements specified in appendix W of [Part 51] (Guideline on Air Quality Models)." The commenter argues that this regulation appears to support the commenter's position that modeling is required to satisfy the significant contribution element of 110(a)(2)(D).

EPA Response—EPA disagrees with this comment. The cited language implies that the need for control strategy requirements has already been demonstrated, and sets a modeling analysis requirement to demonstrate the adequacy of the control strategy developed to achieve the reductions necessary to prevent an area's air quality from continuing to violate the NAAQS. EPA's determination that emissions from North Dakota do not contribute significantly to nonattainment for the 1997 8-hour ozone standard in any other states eliminates the need for a control strategy aimed at satisfying the section 110(a)(2)(D) requirements. Moreover, EPA interprets the language at 40 CFR 51.112(a): "[e]ach plan must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements," to refer to modeling for attainment demonstrations, an integral part of nonattainment area SIPs under part D of the CAA. This interpretation was upheld by the Sixth Circuit Court of Appeals. *Wall* v. *U.S. EPA,* 265 F.3d 426, 436 (6th Cir. 2001). Thus, the commenter's cited regulation is not relevant to EPA's technical demonstration assessing whether emissions from North Dakota contribute significantly to nonattainment in any other states under section 110(a)(2)(D).

Comment No. 22—WG also objected to EPA's proposed approval of the North Dakota submission on the grounds that it was based upon a "weight-of-evidence analysis," and that no such weight of evidence test appears in the CAA generally, or in section 110(a)(2)(D) in particular. According to the commenter, there is no regulatory support for using a "weight-of-evidence" approach to assessing air quality impacts. The commenter asserted that EPA neither cited nor quoted regulations or policy that provides for this, and failed to lend

[24] WG's April 9, 2010 comment letter, pp. 9–10. Complete versions of the EPA comment letters referenced here were attached to the comment as Exhibits 3 through 6, and are viewable on the Regulations.gov Web site as Documents ID No. EPA–R08–OAR–2007–1032–0007.4 through 1032–0007.7.

[25] See: 69 FR 4581, January 30, 2004.

any specific meaning to the phrase through its proposed approval. Finally, the commenter asserted, without explaining, its belief that EPA failed to address "several relevant factors related to the determination of whether North Dakota contributes significantly to nonattainment undermines the agency's reliance on any 'weight-of-evidence' approach."

EPA Response—EPA agrees with WG that neither the CAA generally, nor section 110(a)(2)(D) specifically, include the explicit phrase "weight of evidence." It simply does not follow, however, that it is inappropriate for EPA to use such an approach in this context. As explained above, section 110(a)(2)(D) does not explicitly stipulate how EPA may assess whether there is a significant contribution to nonattainment in other states. Through past actions such as CAIR, EPA has used a weight-of-evidence approach to exclude some States from further consideration.[26] As described above, EPA's guidance issued for the 1997 8-hour ozone NAAQS, the Agency specifically recommended types of information that states might wish to rely upon to evaluate the presence of, and extent of, interstate transport for this purpose. EPA believes that a weight of evidence approach that properly considers appropriate evidence is sufficient to make a valid determination, as in this case.

Specifically, EPA's technical analysis in the March 31, 2010 proposed rule action underscores its reliance on implementation policies set in the EPA 2006 Guidance: "EPA's August 15, 2006, guidance to states concerning section 110(a)(2)(D)(i) recommended various methods by which states might evaluate whether or not its emissions significantly contribute to violations of the 1997 ozone standards in another state. Among other methods, EPA recommended consideration of available EPA modeling conducted in conjunction with CAIR, *or in the absence of such EPA modeling, consideration of other information such as the amount of emissions, the geographic location of violating areas, meteorological data, or various other forms of information that would be relevant to assessing the likelihood of significant contribution to violations of the NAAQS in another state* [our emphasis]."[27] On the basis of this guidance, North Dakota and EPA chose to assess the impacts of emissions from North Dakota sources on the closest downwind nonattainment areas (Denver, Colorado, and Illinois/Wisconsin counties along the southwestern shore of Lake Michigan) through a weight of evidence approach using quantitative information such as North Dakota's distance from areas with monitors showing violation of the NAAQS, modeling results outlining wind vectors for regional transport of ozone on high ozone days, back trajectory analyses for the downwind nonattainment areas closest to North Dakota, and results of modeling studies for the nonattainment areas specifying the range of wind directions along which contributing ozone transport occurred. EPA's use of a weight of evidence analysis is by no means unusual for the assessment of ozone impacts through long range transport. The same analytical framework was used in the 1998 NO_X SIP Call, as indicated under Section II.C., entitled "Weight-of-Evidence Determination of Covered States."[28] The differences between the specific types of evidence used in the NO_X SIP Call and in our analysis do not invalidate the use of the weight-of-evidence approach.

As for the commenter's argument that EPA "fails to lend any specific meaning to the phrase through its proposed approval," the Agency's technical analysis described in the proposal did specify the characteristics, including limitations, of a weight of evidence analysis: "[f]urthermore * * * EPA notes that no single piece of information in the following discussion is by itself dispositive of the issue. Instead, the total weight of all the evidence taken together supports the conclusion that emissions from North Dakota sources are unlikely to contribute significantly to violations of the 1997 8-hour ozone standard in any other state," (75 FR 16034).

Finally, as to the commenter's assertion that EPA failed to consider "several relevant factors" and thus failed to conduct an appropriate weight of evidence evaluation, EPA cannot weigh the validity of this comment in the absence of an explanation of what these factors might be.

Comment No. 23—The Sierra Club opposed the proposed approval on the grounds that the existing North Dakota SIP includes problematic provisions. For example, the Sierra Club pointed to provisions that it alleges will result in additional emissions that could significantly contribute to nonattainment of the NAAQS in other states. For example, Sierra Club argued that:

> "if emission violations during startup, shutdown, or malfunctions (SSM) escape enforcement, there is no way to determine that emissions from sources in North Dakota will not contribute significantly to other States' nonattainment of the NAAQS or problems with PSD compliance such as exceeding increments, short of cumulative modeling exercise assuming that all source are emitting at their physical limits without controls. See, e.g., Clean Air Act Sections 110(a)(2)(A) and (D), 42 U.S.C. Sections 7410(a)(2)(A) and (D)."[29]

EPA Response—EPA understands the concerns raised by the commenter, but does not believe that any such excess emissions would in and of themselves constitute significant contribution to nonattainment in another state. EPA notes that its technical analysis for the significant contribution element in our proposal was not premised upon distinguishing between legal and illegal, or permissible and impermissible, emissions from North Dakota sources. EPA's technical analysis, and the conclusion based on the weight of the evidence, did not depend on the precise amount of emissions from North Dakota, and did not turn upon some portion of those emissions as being the result of emissions during SSM events. Instead, EPA's evaluation was focused upon other relevant information that pertained to distance, wind direction, and the air quality status of areas in downwind states. Thus, any additional emissions from SSM events would not change the analysis or EPA's conclusion that emissions from North Dakota do not significantly contribute to nonattainment in any other state.

Furthermore, as noted below, the current version of the North Dakota provision relating to SSM, NDAC 33–15–01–13, does not create any exemption from emissions limits and does not excuse violations. PSD permit applicants and PSD permittees in North Dakota are subject to the current version of the state's regulation. Therefore, Sierra Club's concerns regarding excess emissions from sources subject to PSD are moot and do not change EPA's

[26] See: 69 FR 4581, January 30, 2004.

[27] 75 FR 16029, March 31, 2010.

[28] "As discussed above, EPA applied a multi-factor approach to identify the amounts of NO_X emissions that contribute significantly to nonattainment * * *." 1998 SIP Call, 63 FR 57381, October 27, 1998.

[29] "If emission violations are excused during startups, shutdowns, or malfunctions, and thus essentially unregulated during those periods, there is no way to determine that emissions from sources in North Dakota will not contribute significantly to other States' nonattainment of the NAAQS or problems with PSD compliance such as exceeding increments, adversely impacting air quality related values in Class I areas, or adversely impacting vegetation and visibility in all areas, short of cumulative modeling exercise assuming that all source are emitting at their physical limits without controls. See, e.g., Clean Air Act Sections 110(a)(2)(A) and (D), 42 U.S.C. Sections 7410(a)(2)(A) and (D)."

conclusion that the North Dakota SIP has adequate provisions to prohibit emissions from North Dakota from interfering with other states' required PSD programs.

Comment No. 24—As potential SIP defects affecting approvability of the section 110(a)(2)(D) SIP submission, both WG and the Sierra Club pointed to the North Dakota Administrative Code rule NDAC 33–15–01–07 that allows the North Dakota Department of Health (NDDH) to grant variances to emission limits if compliance "would cause undue hardship, would be unreasonable, impractical, or not feasible under the circumstances." WG adds that this variance provision is inappropriate and would allow additional emissions that may contribute significantly to nonattainment or interfere with PSD provisions in other States.

EPA Response—EPA agrees that this rule should be revised to provide that variances are only effective for federal law purposes when adopted as a SIP revision approved by EPA (or this provision should be removed from the SIP), and EPA plans to work with the State to clarify the SIP on this point. EPA is aware that this process requires action by the North Dakota legislature before the NDDH will be able to remove the Variance provisions from the State SIP and submit an appropriate revision to EPA.

However, EPA does not believe that this existing variance provision provides a basis for disapproval of the SIP under the facts and circumstances here. North Dakota has informed EPA that the variances granted by the NDDH under the provision during the last 15 years were only for open burning requests. In these cases, before granting a variance the NDDH requested input from the local fire department and health agency offices. North Dakota has stated that the variance provision cannot be used to avoid permitting requirements or to violate emissions limits. Furthermore, North Dakota has confirmed that the provision has not been applied to PSD permits, minor NSR permits, Title V permits, or minor operating permits, and EPA expects that such will be the case while it vigorously works with the State for its removal from the North Dakota SIP.

Moreover, EPA also disagrees with WG's additional comment that this variance provision specifically allows emissions that may contribute significantly to nonattainment or interfere with PSD provisions in other States. There is no language in rule NDAC 33–15–01–07 that reflects the commenter's interpretation.

Given the limited scope and usage of the variance provision, EPA concludes that it does not constitute interference with other states' required PSD programs. Furthermore, it does not affect EPA's factual determination that emissions from North Dakota do not significantly contribute to nonattainment in other states.

Comment No. 25—WG also expressed concern that NDAC 33–15–01–13(1) specifically allows a source to shut down air pollution control equipment for maintenance and to continue operations, so long as notification is provided to North Dakota. WG argued that such an exemption to pollution control equipment is not acceptable under the CAA.

EPA Response—EPA believes that the commenter is referring to provisions in the previous version of the provision that is no longer operative. The provision has been superseded by a revision adopted by the State on April 1, 2009 and submitted to EPA on April 6, 2009. EPA is planning to take action on the submission in the near future. The revised NDAC 33–15–01–13.1 includes at 33–15–01–13(1)(f) language that addresses the commenter's concern: "[n]othing in this subsection shall in any manner be construed as authorizing or legalizing the emissions of air contaminants in excess of the rate allowed by this article [NDAC 33–15] or a permit issued pursuant to this article."

As noted above, North Dakota has revised the provision and it currently is in effect. Thus, even before EPA takes action on the submittal of the revision, PSD permit applicants and PSD permittees must comply with the revised provision, which removes the exemption. North Dakota has confirmed that the revised provision is used in PSD permitting. Therefore, EPA believes that the superseded provision does not constitute interference with other states' required PSD measures. Furthermore, the provision—regardless of its status—does not affect EPA's factual determination that emissions from North Dakota do not significantly contribute to nonattainment in other states.

Comment No. 26—WG also argued that Rule NDAC 33–15–01–13(2) implies an exemption to compliance with emission limits in the event of a malfunction. According to the commenter, this rule not only implies an exemption for malfunction leading to a violation that lasts less than 24 hours, but gives the state unlimited discretion to allow a malfunction leading to a violation to last as long as ten days.

EPA Response—EPA again disagrees, because the commenter is evidently objecting to a previous version of this provision that is no longer operative. The provision was superseded by a revision to this rule adopted by the State on April 1, 2009 and submitted to EPA on April 6, 2009. EPA plans to take action on the submission in the near future. Under the revised provision the ten-day grace period has been removed, and the provisions only address notification requirements without any references to or exemptions of excess emissions.

North Dakota has revised the provision and it is no longer in effect. Thus, even before EPA takes action on the submittal of the revision, PSD permit applicants and PSD permittees must comply with the revised provision, which removes the ten-day grace period. Therefore, EPA believes that the superseded provision does not constitute interference with other states' required PSD measures. Furthermore, the provision—regardless of its status—does not affect EPA's factual determination that emissions from North Dakota do not significantly contribute to nonattainment in other states.

Comment No. 27—The Sierra Club expressed concern that the revised version of NDAC 33–15–01–13(2)(c) submitted by the state to EPA "does not make clear that such enforcement discretion is limited to the imposition of civil penalties and does not potentially enable sources to avoid injunctive remedies regarding excess emissions." The Sierra Club also indicated that in the revised language of rule NDAC 33–15–01–13(2)(c) "the required elements of proof in the source's report fall short of the rigorous proof requirements specified in EPA policy."

EPA Response—As noted above, the State submitted the referenced revisions to EPA on April 6, 2009, and the public, including the Sierra Club, will have an opportunity to submit substantive comments about this provision when EPA proposes action on it, as planned for the near future. EPA invites the Sierra Club to resubmit the comment at that time so that EPA may properly respond to it. EPA notes, however, that the Sierra Club appears to argue that certain portions of the 1999 EPA guidance for the affirmative defense approach to unavoidable malfunctions [30] apply to the North

[30] Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Sept. 20, 1999).

Dakota revision. As stated in that guidance, the enforcement discretion approach endorsed by EPA in earlier guidance [31] remains valid, and North Dakota selected the enforcement discretion approach. In any event, EPA is not acting upon that April 6, 2009, submission at this time.

Comment No. 28—WG and the Sierra Club also expressed concern about a provision in the North Dakota SIP related to failure of a continuous emission monitoring system (CEMS). See NDAC § 33–15–01–13(3). WG and the Sierra Club both argued that the provision is contrary to Title IV of the CAA and the regulations at 40 CFR Part 75 implementing Title IV. WG apparently believed that EPA cannot approve the North Dakota SIP section 110(a)(2)(D) revision until the provision is removed or revised.

EPA Response—EPA disagrees with WG's conclusions on this issue. As to the significant contribution element of 110(a)(2)(D)(i), as noted above, once EPA has determined—as it has here—that emissions from North Dakota do not significantly contribute to nonattainment in any other state, no substantive modification of North Dakota's SIP is required to eliminate any emissions. As to the PSD element of 110(a)(2)(D)(i), the requirements of Part 75 relate to Title IV, the acid rain title of the Clean Air Act. These requirements are simply not relevant to the North Dakota PSD program or to the PSD element of 110(a)(2)(D)(i).

Comment No. 29—As part of its objection to the proposed action, the Sierra Club identified a North Dakota SIP provision that authorizes North Dakota to allow violations of ambient air quality standards in certain circumstances. See NDAC § 33–15–02–07(4).

EPA Response—EPA disagrees that this provision provides a basis for disapproval of the section 110(a)(2)(D) submission. The provision does allow for certain exceedances of certain state ambient air quality standards. However, it does not allow for exceedances of the applicable federal NAAQS. Therefore, EPA concludes that the provision does not constitute interference with other states' required PSD programs. Furthermore, the provision does not affect EPA's factual determination that emissions from North Dakota do not significantly contribute to nonattainment in other states.

Comment No. 30—WG also identified certain provisions in the North Dakota SIP creating exceptions to certain opacity limits as a concern in the context of action on the section 110(a)(2)(D) submission. See NDAC § 33–15–03–04(4), (5). WG described the provisions as "blanket exemptions" and argued that because visible emissions are often used as an indicator for particulate matter, the exemptions "fail to prohibit emissions that could contribute significantly to nonattainment or interfere with PSD requirements." WG therefore argued that EPA cannot approve the proposed SIP revision unless the exemptions are removed or revised.

EPA Response—EPA does not endorse the exceptions cited by WG, and EPA's action here should not be construed as an approval of these exceptions, which are not the subject of this action. EPA disagrees, however, with WG's conclusions about the impact of such exceptions on today's action. First, the exceptions are not "blanket exemptions" from all opacity limits: By the express terms of NDAC 33–15–03–04, the exceptions apply only to the numeric opacity limits specified in NDAC 33–15–03–01, –02, –03, and –04. They do not create an exception from any requirements PSD may impose related to opacity.

Furthermore, the specific numeric opacity limits are unrelated to emissions limits imposed by PSD, under which BACT is determined on a case-by-case basis. Thus, the provisions cited by WG do not create any exception from BACT emissions limits or any other PSD requirements. As a result, the exceptions are not relevant to the requirements of the PSD element of 110(a)(2)(D)(i). As to the significant contribution element of 110(a)(2)(D)(i), as noted elsewhere, once EPA has factually determined—as it has here—that emissions from North Dakota do not significantly contribute to nonattainment in any other state, no modification of North Dakota's SIP is required.

Comment No. 31—As additional problematic provisions in the North Dakota SIP, WG and Sierra Club identified provisions in the North Dakota SIP creating exceptions to certain particulate matter emissions limits. See NDAC § 33–15–05–01(2)(a). WG argued that the provisions allow the state discretion to exempt sources from compliance during temporary breakdowns or cleaning of air pollution control equipment, and that therefore the North Dakota SIP fails to prohibit emissions that contribute significantly to nonattainment in other states, or that interfere with other states' required PSD measures. Sierra Club argued that the provision violates EPA policy and creates a broader exception than allowed by the enforcement discretion or affirmative defense approaches to unavoidable malfunctions.

EPA Response—EPA does not endorse the exceptions cited by the commenters, which EPA notes are not the subject of this action. EPA disagrees, however, with the commenters' conclusions. First, as to PSD requirements: The provision cited by the commenters creates an exception only to numeric, process-based emissions limits specified in Table 3 of NDAC 33–15–05–01. The provision does not create an exception from any PSD requirements, including BACT emissions limits for particulate matter. Furthermore, these specific, numeric, process-based limits are unrelated to PSD requirements, under which BACT is determined on a case-by-case basis. Thus, the exceptions in 33–15–05–01(2)(a) do not create any exception from BACT emissions limits or other PSD requirements. As a result, the exceptions are not relevant to the requirements of the PSD element of 110(a)(2)(D)(i).

As to the significant contribution element of 110(a)(2)(D)(i), EPA disagrees with WG that EPA cannot approve the North Dakota interstate transport SIP until the provision is removed or revised. As noted elsewhere, once EPA has determined—as it has here—that emissions from North Dakota do not significantly contribute to nonattainment in any other state, no modification of North Dakota's SIP is required.

Comment No. 32—The Sierra Club commented on a provision in the North Dakota SIP related to reporting of excess emissions of sulfur dioxide and other sulfur compounds. See NDAC § 33–15–06–05. The Sierra Club asserted that the provision "contains unacceptable language" and argued the SIP should be revised to make clear that the reporting requirement does not authorize or exempt excess emissions. Sierra Club also implied that this issue makes it impossible to determine whether emissions from North Dakota significantly contribute to nonattainment in other states and whether the state's SIP would interfere with measures required in other states to prevent significant deterioration of air quality with repect to the 1997 8-hour ozone and $PM_{2.5}$ NAAQS.

EPA Response—The Sierra Club did not identify any particular phrase in the

[31] See Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (Sept. 28, 1982); Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (Feb. 15, 1983) (clarifying 1982 memorandum).

existing regulatory provision as unacceptable, so EPA presumes the reference to unacceptable language is to the absence of additional clarifying language. EPA disagrees that it is necessary to revise the provision in order to approve the North Dakota interstate transport SIP. The provision does not create any explicit exemption, and EPA believes it creates no implicit exemption. As the Sierra Club agrees, the provision simply requires sources to report excess emissions of sulfur dioxide and other sulfur compounds during periods of startup, shutdown, and malfunction. A reporting requirement is not an exemption from emissions limits.

Comment No. 33—WG objected to EPA's proposed approval because "North Dakota's SIP, as written, simply does not contain any language that literally prohibits emissions that contribute significantly to nonattainment in any other state." The commenter also notes that EPA did not assess whether the SIP does or does not contain such provisions. The commenter appears to believe that 110(a)(2)(D)(i) requires a state SIP to contain explicit provisions literally prohibiting emissions that contribute significantly to nonattainment in any other state, and that, in order to approve the North Dakota interstate transport SIP, EPA must examine the SIP to determine whether it does contain such specific words.

EPA Response—EPA disagrees with the commenter's interpretation of the statutory requirements. Section 110(a)(2)(D)(i) has no language that requires a SIP to contain literal provisions prohibiting significant contribution to nonattainment in any other state, or, for that matter, to contain any particular words or generic prohibitions. Instead, EPA believes that the statute requires a state's SIP to contain substantive emission limits or other provisions that in fact ensure that sources located within the state will not produce emissions that have such an effect in other states. Therefore, EPA believes that satisfaction of the "significant contribution" requirement is not to be demonstrated through a literal requirement for a prohibition of the type advocated by the commenter.

EPA's past application of section 110(a)(2)(D) did not require the literal prohibition advocated by the commenter. For example, in 1998 NO_X SIP call (63 FR 57356, October 27, 1998) EPA indicated that "the term 'prohibit' means that SIPs must eliminate those amounts of emissions determined to contribute significantly to nonattainment * * *" As a result, the first step of the process to determine whether this statutory requirement is satisfied is the factual determination of whether a state's emissions contribute significantly to nonattainment in downwind areas. See 2005 CAIR Rule (70 FR 25162) and 1998 NO_X SIP Call (63 FR 57356). If this factual finding is in the negative, as is the case for EPA's assessment of the contribution from emissions from North Dakota, then section 110(a)(2)(D)(i)(I) does not require any changes to a state's provisions. If, however, the evaluation reveals that there is such a significant contribution to nonattainment in other states, then EPA requires the state to adopt substantive provisions to eliminate those emissions. The state could achieve these reductions through traditional command and control programs, or at its own election, through participation in a cap and trade program. Thus, EPA's approach in this action is consistent with the Agency's interpretation of 110(a)(2)(D)(i) in the 2006 guidance, the CAIR Rule, and the NO_X SIP call, none of which required the pro forma literal "prohibition" of the type advocated by the commenter.

Comment No. 34—WG argues that the requirements for stationary source permitting in the North Dakota SIP are "riddled with vagueness, discretion, uncertainty, and unenforceability," and are inadequate to ensure that sources in North Dakota will not significantly contribute to nonattainment in other states.

EPA Response—As discussed above, the first step of the process to determine whether the "significant contribution" requirement is satisfied is the factual determination of whether a State's emissions contribute significantly to nonattainment in downwind areas. If the factual finding is in the negative, as is the case for EPA's assessment of the contribution from emissions from North Dakota, then section 110(a)(2)(D)(i)(I) does not require any changes to a state's provisions. As discussed above, EPA's approach in this action is consistent with the Agency's interpretation of 110(a)(2)(D)(i) in the 2006 guidance, the CAIR Rule and the NO_X SIP Call. Therefore, EPA disagrees with the comment that EPA cannot approve the North Dakota interstate transport SIP unless EPA addresses specific provisions and state guidelines for permitting stationary sources.

Comment No. 35—The commenter argued that EPA cannot approve the section 110(a)(2)(D) submission from North Dakota because the state and EPA did not comply with 110(l). Evidently, the commenter believes that the section 110(a)(2)(D) submission is a revision to the SIP that will interfere with attainment of the 2006 $PM_{2.5}$ NAAQS and the 2008 ozone NAAQS. And, although it is not clear, the comment could be taken to make the same point for North Dakota's revision of its PSD program. The commenter argues that a section 110(l) analysis must consider all NAAQS once they are promulgated, and argues that EPA took the same position in proposing to disapprove a PM_{10} maintenance plan.

EPA Response—EPA agrees that a required section 110(l) analysis must consider the potential impact of a proposed SIP revision on attainment and maintenance of all NAAQS that are in effect and impacted by a given SIP revision. However, EPA disagrees that it failed to comply with the requirements of section 110(l) or that section 110(l) requires disapproval of the SIP submission at issue here.

Section 110(l) provides in part that: "[t]he Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * *, or any other applicable requirement of this chapter." EPA has consistently interpreted Section 110(l) as not requiring a new attainment demonstration for every SIP submission. EPA has further concluded that preservation of the status quo air quality during the time new attainment demonstrations are being prepared will prevent interference with the states' obligations to develop timely attainment demonstrations. 70 FR 58134, 58199 (October 5, 2005); 70 FR 17029, 17033 (April 4, 2005); 70 FR 53, 57 (January 3, 2005); 70 FR 28429, 28431 (May 18, 2005).

North Dakota's submission is the initial submission by the state to address the significant contribution to nonattainment element of 110(a)(2)(D)(i) for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. This submission does not revise or remove any existing emissions limit for any NAAQS, or any other existing substantive SIP provisions relevant to the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. Simply put, it does not make any substantive revision that could result in any change in emissions. As a result, the submission does not relax any existing requirements or alter the status quo air quality. Therefore, approval of the North Dakota interstate transport SIP will not interfere with attainment or maintenance of any NAAQS.

As to the PSD program, the North Dakota revision updates the incorporation date of 40 CFR 52.21 from October 1, 2003, to August 1, 2007. The

changes to § 52.21 in that period do not relax any PSD requirements. In fact, the primary substantive change was the recognition of NO_X as a precursor to ozone, a change that strengthens PSD requirements. Other changes included (as noted elsewhere in EPA's response to comments) recognition of the effects of federal cases vacating certain aspects of NSR rules promulgated in 2002 and 2003.[32] These changes do not relax any PSD requirements and in most instances strengthen them. Therefore, approval of the revision of the North Dakota PSD program will not interfere with attainment or maintenance of the NAAQS.

EPA's discussion in the notice cited by the commenter is consistent with this interpretation. In the cited action, EPA noted that "Utah ha[d] either removed or altered a number of stationary source requirements," creating the possibility of a relaxation of SIP requirements interfering with attainment, a possibility that is not present here. See 74 FR 62727 (Dec. 1, 2009). Thus, the action cited by the commenter is clearly distinguishable.

The commenter did not provide any specific basis for concluding that approval of this SIP submission would interfere with attainment or maintenance of a NAAQS, or with any other applicable requirement of the Clean Air Act. EPA concludes that approval of the submission will not make the status quo air quality worse, and is in fact consistent with the development of an overall plan capable of meeting the Act's attainment requirements. Accordingly, even assuming that section 110(l) applies to this submission, EPA finds that approval of the submission is consistent with the requirements of section 110(l).

III. Section 110(l)

Section 110(l) of the Clean Air Act states that a SIP revision cannot be approved if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress towards attainment of the NAAQS or any other applicable requirements of the Act. In this action, EPA is approving the portions of the North Dakota interstate transport SIP that address the "significant contribution" and PSD elements of section 110(a)(2)(D)(i) for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS; EPA is also approving a revision to the North Dakota PSD program. As discussed above in EPA's response to comments, the portions of the interstate transport SIP that EPA is approving do not revise or remove any existing emissions limit for any NAAQS, or any other existing substantive SIP provisions relevant to the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. Furthermore, as also discussed above, the revision to the North Dakota PSD program does not relax or remove any PSD requirement and in most cases strengthens those requirements. As a result, the SIP revision does not relax any existing requirements or alter the status quo air quality. Finally, EPA has determined that the revision is consistent with all applicable federal requirements and will not interfere with requirements of the Act related to administrative or procedural provisions. Therefore, the revision does not interfere with attainment or maintenance of the NAAQS or other applicable requirements of the Act.

IV. Final Action

The Environmental Protection Agency is approving portions of the Interstate Transport of Air Pollution SIP submitted by the State of North Dakota on April 6, 2009. Specifically, in this action EPA is approving: (a) The introductory language in the State SIP Section 7.8; (b) the "Overview" language in subsection A., Section 7.8.1; (c) the language in Section 7.8.1, subsection B., "Nonattainment and Maintenance Area Impact," that specifically addresses element (1) of section 110(a)(2)(D)(i), the requirement that the SIP contain adequate provisions prohibiting emissions from North Dakota from contributing significantly to nonattainment in any other state; and (d) Section 7.8.1, subsection C, "Impact on Prevention of Significant Deterioration (PSD)." As part of this action EPA is also approving revisions to the prevention of significant deterioration provisions in subsection 33–15–15 of the NDAC.

EPA has concluded that the State's submission, and additional evidence evaluated by EPA, establish that emissions from North Dakota sources do not significantly contribute to nonattainment of the 1997 8-hour ozone or the 1997 $PM_{2.5}$ NAAQS in any other state. Therefore, the State's SIP does not need to include additional substantive controls to reduce emissions for purposes of section 110(a)(2)(D)(i)(I) for these NAAQS. In addition, EPA has concluded that with the specific revisions addressed in this action, the State's SIP now contains adequate provisions to prevent emissions from the State's sources from interfering with measures required in the SIP of any other state under part C of the CAA to prevent "significant deterioration of air quality," in accordance with section 110(a)(2)(D)(i)(II).

V. Statutory and Executive Order Review

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

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249,

[32] 67 FR 80186 (Dec. 31, 2002); 68 FR 61248 (Oct. 23, 2003); *New York* v. *U.S. EPA,* 413 F.3d 3 (D.C. Cir. 2005); *New York* v. *EPA,* 443 F.3d 880 (D.C. Cir. 2006).

November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *August 2, 2010.* 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, Carbon moNO$_X$ide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: May 17, 2010.

James B. Martin,

Regional Administrator, Region 8.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart JJ–North Dakota

■ 2. Section 52.1820 is amended to read as follows:

■ a. In the table in paragraph (c) by revising the entry for "33–15–15–01.2."

■ b. In the table in paragraph (e) by revising the entry in "(1)" and adding entry "(21)" in numerical order to read as follows:

§ 52.1820 Identification of plan.

* * * * *

(c) * * *

STATE OF NORTH DAKOTA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date and citation [1]	Explanations
* *	* *	*	* *	*
33–15–15–01.2	Scope	4/1/09	6/3/10, 75 FR 31290	
* *;	* *	*	* *	*

[1] In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

(e) * * *.

Name of nonregulatory SIP provision	Applicable geographic or non-attainment area	State submittal date/ adopted date	EPA approval date and citation [3]	Explanations
(1) Implementation Plan for the Control of Air Pollution for the State of North Dakota.	Statewide	Submitted: 1/24/72 Adopted: 1/24/72.	5/31/72, 37 FR 10842	Excluding subsequent revisions, as follows: Chapters 1, 2, 6, 7, 9, 11, and 12; Sections 2.11, 3.7, 6.8, 6.10, 6.11, 6.13, 7.7, and 8.3; portions of subsection 7.8.1.B., subsections 7.8.1.D., and 8.3.1. Revisions to these non-regulatory provisions have subsequently been approved. See below.
Chapters:				

Name of nonregulatory SIP provision	Applicable geographic or non-attainment area	State submittal date/ adopted date	EPA approval date and citation [3]	Explanations
1. Introduction 2. Legal Authority 3. Control Strategy 4. Compliance Schedule 5. Prevention of Air Pollution Emergency Episodes 7. Review of New Sources and Modifications 8. Source Surveillance 9. Resources 10. Inter-governmental Co-operation 11. Rules and Regulations With subsequent revisions to the chapters as follows:	.....	Clarification submitted: 6/14/73 2/19/74 6/26/74 11/21/74 4/23/75.	With all clarifications: 3/2/76, 41 FR 8956.	
* *	*	*	* *	*
(21) Section 7.8, Interstate Transport of Air Pollution (only 7.8.1.A., portions of 7.8.1.B., and 7.8.1.C., see explanation.)	Statewide	Submitted: 4/09/09 Adopted: 4/01/09.	6/3/10 75 FR 31290	Includes Section 7.8, subsection Portions of 7.8.1 as indicated below: 7.8.1.A, "Overview," the language of Subsection 7.8.1.B., "Nonattainment and Maintenance Area Impact," that specifically addresses the "significant contribution to nonattainment" requirement of CAA Section 110(a)(2)(D)(i), and all of 7.8.1.C.

[3] In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

[FR Doc. 2010–13051 Filed 6–2–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–1032; FRL–9155–5]

Approval and Promulgation of State Implementation Plans; State of Colorado; Interstate Transport of Pollution Revisions for the 1997 8-hour Ozone NAAQS: "Significant Contribution to Nonattainment" Requirement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is partially approving State Implementation Plan (SIP) revisions submitted by the State of Colorado on June 18, 2009. These revisions, referred to as the Colorado Interstate Transport SIP, address the requirements of Clean Air Act section 110(a)(2)(D)(i)(I) for the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS). In this action EPA is approving the Colorado Interstate Transport SIP non-regulatory provisions that address the requirement of section 110(a)(2)(D)(i)(I) that emissions from the state's sources do not "contribute significantly" to nonattainment of the 1997 8-hour ozone NAAQS in any other state. EPA will act at a later date on the Colorado Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i)(I) that emissions from the state's sources do not "interfere with maintenance" of the 1997 8-hour ozone NAAQS in any other state. This action is being taken under section 110 of the Clean Air Act.

DATES: *Effective Date:* This final rule is effective July 6, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2007–1032. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov*, or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Domenico Mastrangelo, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6416, *mastrangelo.domenico@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Colorado* mean the State of Colorado, unless the context indicates otherwise.

Table of Contents

I. Background

Section 110(a)(2)(D)(i) of the CAA requires that a state's SIP must contain adequate provisions prohibiting any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in any other state; (2) interfere with maintenance of the NAAQS by any other state; (3) interfere with any other state's required measures to prevent significant deterioration of air quality; or (4) interfere with any other state's required measures to protect visibility. On March 31, 2010, EPA published a notice of proposed rulemaking (NPR) proposing partial approval of the State Implementation Plan (SIP) revision "State of Colorado Implementation Plan to Meet the Requirements of Clean Air Act Section 110(a)(2)(D)(i)(I)—Interstate Transport Regarding the 1997 8-Hour Ozone Standard," submitted by the State on June 18, 2009. As indicated by the title, this SIP addresses the first two of the four requirements listed above-i.e., (1), "significant contribution," and (2), "interference with maintenance." EPA's proposed rule action reviewed and proposed approval of the Colorado SIP's section addressing only the "significant contribution" requirement. EPA will act at a later date on the Colorado Interstate Transport SIP section that addresses the "interference with maintenance" requirement.

To assess whether emissions from Colorado contribute significantly to downwind nonattainment for the 1997 8-hour ozone NAAQS, EPA's technical analysis relied on EPA's 2006 Guidance, recommending consideration of available EPA modeling conducted in conjunction with CAIR,[1] or in the absence of such EPA modeling, consideration of other information such as the amount of emissions, the geographic location of violating areas, meteorological data, or various other forms of information that would be relevant to assessing the likelihood of significant contribution to violations of the NAAQS in another state. Consistent with the NO_X SIP Call and CAIR, our technical analysis assessed the extent of ozone transport from Colorado not just to areas designated nonattainment, but also to areas in violation of the NAAQS. Because EPA did not have detailed modeling for Colorado and nearby downwind states, our approach did not rely on a quantitative determination of Colorado's contribution but on a weight-of-evidence approach using quantitative information such as Colorado's distance from areas with monitors showing violations of the NAAQS, modeling results outlining wind vectors for regional transport of ozone on high ozone days, back trajectory analyses for the downwind nonattainment areas closest to the State, and results of modeling studies for the nonattainment areas specifying the range of wind directions along which contribution of ozone transport occurred. Given that the assessments for each of these pieces of evidence are not individually definitive or outcome determinative, EPA concluded in its proposed action that the various factual and technical considerations supported a determination of no significant contribution from Colorado emissions to the ozone nonattainment areas noted above. EPA did not receive comments that persuade the Agency that there is such significant contribution, and thus in today's final action EPA is making a final regulatory determination that Colorado emissions sources do not contribute significantly to violations of the 1997 8-hour ozone NAAQS in any other state.

II. Response to Comments

EPA received one letter from WildEarth Guardians (WG) commenting on EPA's **Federal Register** action proposing approval of the portion of the Colorado Interstate Transport SIP that addresses the "significant contribution to nonattainment" requirement of CAA Section 110(a)(2)(D)(i)(I) for the 1997 8-hour ozone NAAQS. In this section EPA responds to the significant adverse comments made by the commenter.

Comment No. 1—The commenter asserted that EPA's proposed approval was based on a "flawed legal standard." According to the commenter, EPA erred in the proposal by explaining that various factual or technical assessments indicate that it is "unlikely" that emissions from Colorado sources significantly contribute to violations of the 8-hour ozone NAAQS in other states. The commenter's position was that EPA cannot approve a SIP submission based upon "unlikelihood" because CAA Section 110(a)(2)(D)(i)(I) prohibits emissions that contribute significantly to nonattainment in other States and does not allow EPA to approve SIPs simply because a state's emissions are "unlikely" to contribute significantly to nonattainment.

EPA Response—EPA disagrees with the commenter's characterization of EPA's analysis and the commenter's interpretation of the statutory requirements. First, EPA notes that the discussion in the proposal was intended to present the various factual and technical considerations available to assess whether there is or is not significant contribution to nonattainment in other states as a result of emissions from Colorado sources. Given that these assessments are not individually definitive or outcome determinative, EPA believes that it is entirely appropriate to present and describe the relative probative value of the various considerations accurately. Second, EPA notes that all such technical evaluations are by their nature subject to some degree of uncertainty. Indeed, the modeling that the commenter elsewhere contends should be the sole method for evaluating interstate transport is itself but one means of evaluating the real world impacts of emissions in light of meteorological conditions, wind direction, and other such variables and produces a result that is itself subject to some degree of uncertainty. Third, EPA believes that it was also appropriate to describe the various factual and technical considerations and whether they indicated a "likelihood" of significant contribution to nonattainment in another state because the proposal was seeking comment from the public upon whether these considerations together supported a determination of no such significant contribution. EPA did not receive comments that persuade the Agency that there is such significant contribution, and thus in today's final action EPA is making a final regulatory determination that Colorado emissions sources do not significantly contribute to violations of the 1997 8-hour ozone NAAQS in any other state, for the reasons explained elsewhere in this notice. In other words, EPA has concluded that the existing SIP for Colorado already contains adequate

[1] In this action the expression "CAIR" refers to the final rule published in the May 12, 2005 **Federal Register** and entitled "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to NO_X SIP Call; Final Rule" (70 FR 25162).

provisions to prevent emissions from Colorado sources from significantly contributing to violations of the 1997 8-hour ozone NAAQS in other states and is therefore approving Colorado's submission for this purpose.

Comment No. 2—The commenter argued that Colorado and EPA did not appropriately assess impacts to nonattainment in downwind states. According to the commenter, Colorado failed to assess significance of downwind impacts in accordance with EPA guidance and precedent. Although this is unclear from the comment, the commenter evidently believes that EPA's applicable guidance for this purpose appears only in the 1998 NO_X SIP call. The commenter asserts that, based on the precedent of the NO_X SIP Call, the following issues need to be addressed in determining whether or not an area is significantly contributing to nonattainment in downwind States: (a) The overall nature of the ozone problem; (b) the extent of downwind nonattainment problems to which upwind State's emissions are linked; (c) the ambient impact of the emissions from upwind States' sources on the downwind nonattainment problems; and (d) the availability of high cost-effective control measures for upwind emissions. (63 FR 57356–57376, October 27, 1998).

EPA Response—EPA disagrees with the commenter on this point. Section 110(a)(2)(D) does not explicitly specify how states or EPA should evaluate the existence of, or extent of, interstate transport and whether that interstate transport is of sufficient magnitude to constitute "significant contribution to nonattainment" as a regulatory matter. The statutory language is ambiguous on its face and EPA must reasonably interpret that language when it applies it to factual situations before the Agency.

EPA agrees that the NO_X SIP Call is one rulemaking in which EPA evaluated the existence of, and extent of, interstate transport. In that action, EPA developed an approach that allowed the Agency to evaluate whether there was significant contribution to ozone nonattainment across an entire region that was comprised of many states. That approach included regional scale modeling and other technical analyses that EPA deemed useful to evaluate the issue of interstate transport on that geographic scale and for the facts and circumstances at issue in that rulemaking. EPA does not agree, however, that the approach of the NO_X SIP Call is necessarily the only way that states or EPA may evaluate the existence of, and extent of, interstate transport in all situations, and especially in situations where the state and EPA are evaluating the question on a state by state basis, and in situations where there is not evidence of widespread interstate transport.

Indeed, EPA issued specific guidance making recommendations to states about how to address section 110(a)(2)(D) in SIP submissions for the 8-hour ozone NAAQS. EPA issued this guidance document, entitled "Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards" on August 15, 2006.[2] This guidance document postdated the NO_X SIP Call, and was developed by EPA specifically to address SIP submissions for the 1997 8-hour ozone NAAQS.

Within that 2006 guidance document, EPA notes that it explicitly stated its view that the "precise nature and contents of such a submission [are] not stipulated in the statute" and that the contents of the SIP submission "may vary depending upon the facts and circumstances related to the specific NAAQS."[3] Moreover, within that guidance, EPA expressed its view that "the data and analytical tools available" at the time of the SIP submission "necessarily affect[] the content of the required submission."[4] To that end, EPA specifically recommended that states located within the geographic region covered by the "Clean Air Interstate Rule" (CAIR)[5] comply with section 110(a)(2)(D) for the 1997 8-hour ozone NAAQS by complying with CAIR itself. For states outside the CAIR rule region, however, EPA recommended that states develop their SIP submissions for section 110(a)(2)(D) considering relevant information.

EPA explicitly recommended that relevant information for section 110(a)(2)(D) submissions addressing significant contribution to nonattainment "might include, but is not limited to, information concerning emissions in the State, meteorological conditions in the State, the distance to the nearest nonattainment area in another State, reliance on modeling conducted by EPA in determining that such State should not be included within the ambit of the CAIR, or such other information as the State considers probative on the issue of significant contribution."[6] In addition, EPA recommended that states might elect to evaluate significant contribution to nonattainment using relevant considerations comparable to those used by EPA in CAIR, including evaluating impacts as of an appropriate year (such as 2010) and in light of the cost of control to mitigate emissions that resulted in interstate transport.

The commenter did not acknowledge or discuss EPA's actual guidance for section 110(a)(2)(D) SIP submissions for the 1997 8-hour ozone NAAQS, and thus it is unclear whether the commenter was aware of it. In any event, EPA believes that the Colorado submission and EPA's evaluation of it was consistent with EPA's guidance for the 1997 8-hour ozone NAAQS. For example, as discussed in the proposal notice, the state and EPA considered information such as monitoring data in Colorado and downwind states, geographical and meteorological information, and technical studies of the nature and sources of nonattainment problems in various downwind states. These are among the types of information that EPA recommended and that EPA considers relevant. Thus, EPA has concluded that the state's submission, and EPA's evaluation of that submission, meet the requirements of section 110(a)(2)(D) and are consistent with applicable guidance.

Finally, EPA notes that the considerations the Agency recommended to states in the 2006 guidance document are consistent with the concepts that the commenter enumerated from the NO_X SIP Call context: (a) The overall nature of the ozone problem; (b) the extent of downwind nonattainment problems to which upwind State's emissions are linked; (c) the ambient impact of the emissions from upwind States' sources on the downwind nonattainment problems; and (d) the availability of high cost-effective control measures for upwind emissions. The only distinction in the case of the Colorado submission at issue here would be that because the available evidence indicates that there is very little contribution from emissions from Colorado sources to nonattainment in other states, it is not necessary to

[2] Memorandum from William T. Harnett entitled Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards (Aug. 15, 2006) ("2006 Guidance"); p. 3. An electronic copy is available for review at the regulations.gov web site as Document ID No. EPA–R08–OAR–2007–1032.0004.1.

[3] Id. at 3.

[4] Id.

[5] In this action the expression "CAIR" refers to the final rule published in the May 12, 2005 **Federal Register** and entitled "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to NO_X SIP Call; Final Rule" (70 FR 25162).

[6] Id. at 5.

advance to the final step and evaluate whether the cost of controls for those sources is above or below a certain cost of control as part of determining whether the contribution constitutes "significant contribution to nonattainment" for regulatory purposes, as was necessary in the NO_X SIP Call and in CAIR.

Comment No. 3—The commenter argued that Colorado based its claim of no significant contribution "primarily on attainment plan modeling for the Denver Metropolitan Area/North Front Range (DMA/NFR) nonattainment area" and noted that EPA itself "does not accept" that modeling for purposes of assessing impacts on nonattainment in downwind States.

EPA Response—EPA disagrees with the commenter's characterization of the state's submission and of EPA's evaluation of it. This comment reflects an incomplete reading of EPA's evaluation of how the results of Colorado's modeling analysis for the DMA/NFR relate to an assessment of whether emissions from Colorado sources contribute significantly to downwind nonattainment of the 1997 8-hour ozone NAAQS in other states.

It is correct that the State relied upon this information in its submission to EPA. It is correct that EPA did not agree with Colorado's view that the modeling analysis results for the DMA/NFR attainment plan, in and of themselves, prove that there could be no significant contribution from Colorado sources to downwind ozone nonattainment in other states. EPA explicitly disagreed with the state's belief that: "* * * these results [of the DMA/NFR modeling analysis] demonstrate that the magnitude of ozone transport from Colorado to other States is too low to significantly contribute to nonattainment. * * *."

Nevertheless, EPA did agree that these modeling results were a relevant piece of information that could be useful when considered in conjunction with other information. EPA stated that these modeling results do support the conclusion that there is not significant transport of ozone from Colorado to other states with violations of the NAAQS: "* * * [h]owever, as a reflection of emission levels, the relatively (to the 1997 8-hour ozone NAAQS) moderate concentrations in eastern Colorado * * * somewhat reduce the probability of significant contribution from Colorado emission sources to considerably farther downwind nonattainment areas such as St. Louis, Missouri, and Chicago, Illinois." (See 75 FR 16034–35). The commenter suggests that EPA approved the State's submission based wholly upon technical support that EPA itself rejected and this is incorrect.

Comment No. 4—The commenter reiterated its concern that the Colorado section 110(a)(2)(D) submission was deficient because it did not strictly follow the commenter's summary of the structure of the analysis of interstate transport in the NO_X SIP Call: (a) The overall nature of the ozone problem; (b) the extent of downwind nonattainment problems to which upwind State's emissions are linked; (c) the ambient impact of the emissions from upwind States' sources on the downwind nonattainment problems; and (d) the availability of high cost-effective control measures for upwind emissions.

EPA Response—EPA disagrees with the commenter's view that any analysis of interstate transport must follow a specific formulaic structure to be approvable. As noted above, EPA issued specific guidance to states making recommendations for section 110(a)(2)(D) SIP submissions for the 1997 8-hour ozone NAAQS. Within that guidance, EPA recommended various types of information that states might wish to consider in the process of evaluating whether their sources contributed significantly to nonattainment in other states. EPA has concluded that the submission from Colorado, augmented by EPA's own analysis, sufficiently establishes that Colorado sources do not significantly contribute to violations of the 1997 8-hour ozone NAAQS in other states. As noted above, EPA believes that the state's submission, and EPA's analysis of it, address the same conceptual considerations that the commenter advocated.

Comment No. 5—The commenter asserted that Colorado and EPA provided "no analysis" of the contribution from Colorado to downwind states and no "actual assessment" of the significance of any such contribution.

EPA Response—EPA disagrees with the commenter's position. The commenter again assumes that section 110(a)(2)(D) explicitly requires the type of modeling analysis that the commenter advocates throughout its comments. Because the commenter apparently views the NO_X SIP Call as the applicable guidance, the commenter contends that any analytical approach that is not identical to that approach is impermissible. In addition, the commenter overlooks the fact that in other actions based upon section 110(a)(2)(D), EPA has also used a variety of analytical approaches, short of modeling, to evaluate whether specific states are significantly contributing to violations of the NAAQS in another state (*e.g.,* the west coast states that EPA concluded should not be part of the geographic region of the CAIR rule based upon qualitative factors, and not by the zero out modeling EPA deemed necessary for some other States).

In the proposed approval, EPA explained that other forms of available information were sufficient to make the determination that there is no significant contribution from Colorado sources to downwind nonattainment of the 1997 8-hour ozone NAAQS. As stated in the proposal:

> "EPA's evaluation of whether emissions from Colorado contribute significantly to ozone nonattainment in these areas [St. Louis and Chicago] relies on an examination of a variety of data and analysis that provide insight on ozone transport from Colorado to these two areas. Because EPA does not have detailed modeling for Colorado and nearby downwind states, our approach does not rely on a quantitative determination of Colorado's contribution, as EPA did for other states in its CAIR rulemaking, but on a weight-of-evidence analysis based on qualitative assessments and estimates of the relevant factors. While conclusions reached for each of the factors considered in the following analysis are not in and by themselves determinative, consideration of all of these factors provides a reliable qualitative conclusion on whether Colorado's emissions are likely to contribute significantly to nonattainment in the St. Louis and the Illinois/Wisconsin areas."

EPA acknowledged that the various forms of information considered in the proposal (such as distance, orientation of surface and regional transport winds, back trajectory analyses, monitoring data) were not individually outcome determinative, but concluded that when taken together served to establish that Colorado sources do not significantly contribute to downwind nonattainment of the 1997 8-hour ozone NAAQS in other states. Thus, contrary to the commenter's assertion, EPA did perform an "analysis" and an "assessment" that was a reasonable basis for its conclusion that emissions from Colorado do not contribute significantly to downwind ozone nonattainment, using a combination of quantitative data and qualitative analyses. EPA does not agree that only the type of analysis advocated by the commenter could adequately evaluate the issue and support a rational determination in this instance.

Comment No. 6—The commenter objected to EPA's proposed approval because Colorado assessed impacts in downwind states by considering monitoring data in those states as a means of evaluating significant contribution to nonattainment. In other

words, the commenter is concerned that Colorado did not assess impacts in areas that have no monitor. The commenter likewise objected to EPA's "endorsement" of this approach. The commenter argued that this reliance on monitor data is inconsistent with both section 110(a)(2)(D) and with EPA's guidance, by which the commenter evidently means the NO_X SIP Call. In support of this assertion, the commenter quoted from the NO_X SIP Call proposal in which EPA addressed the proper interpretation of the statutory phrase "contribute significantly to nonattainment:"

"The EPA proposes to interpret this term to refer to air quality and not to be limited to currently-designated nonattainment areas. Section 110(a)(2)(D) does not refer to 'nonattainment areas,' which is a phrase that EPA interprets to refer to areas that are designated nonattainment under section 107(section 107(d)(1)(A)(I))"

According to the commenter, this statement, and similar ones in the context of the final NO_X SIP Call rulemaking, establish that states and EPA cannot utilize monitoring data to evaluate the existence of, and extent of, interstate transport. Furthermore, the commenter interprets the reference to "air quality" in these statements to support its contention, amplified in later comments, that EPA must evaluate significant contribution in areas in which there is no monitored nonattainment.

EPA Response—EPA disagrees with the commenter's arguments. First, the commenter misunderstands the point that EPA was making in the quoted statement from the NO_X SIP Call proposal (and that EPA has subsequently made in the context of CAIR). When EPA stated that it would evaluate impacts on air quality in downwind states, independent of the current formal "designation" of such downwind states, it was not referring to air quality in the absence of monitor data. EPA's point was that it was inappropriate to wait for either initial designations of nonattainment for a new NAAQS under section 107(d)(1), or for a redesignation to nonattainment for an existing NAAQS under section 107(d)(3), before EPA could assess whether there is significant contribution to nonattainment of a NAAQS in another state.

For example, in the case of initial designations, section 107(d) contemplates a process and timeline for initial designations that could well extend for two or three years following the promulgation of a new or revised NAAQS. By contrast, section 110(a)(1) requires states to make SIP submissions that address section 110(a)(2)(D) and interstate transport "within 3 years or such shorter period as the Administrator may prescribe" of EPA's promulgation of a new or revised NAAQS. This schedule does not support a reading of section 110(a)(2)(D) that is dependent upon formal designations having occurred first. This is a key reason why EPA determined that it was appropriate to evaluate interstate transport based upon monitor data, not designation status, in the CAIR rulemaking.

The commenter's misunderstanding of EPA's statement concerning designation status evidently caused the commenter to believe that EPA's assessment of interstate transport in the NO_X SIP Call was not limited to evaluation of downwind areas with monitors. This is simply incorrect. In both the NO_X SIP Call and CAIR, EPA evaluated significant contribution to nonattainment as measured or predicted at monitors. For example, in the technical analysis for the NO_X SIP Call, EPA specifically evaluated the impacts of emissions from upwind states on monitors located in downwind states. The NO_X SIP Call did not evaluate impacts at points without monitors, nor did the CAIR rulemaking. EPA believes that this approach to evaluating significant contribution is correct under section 110(a)(2)(D), and EPA's general approach to this threshold determination has not been disturbed by the courts.[7]

Finally, EPA disagrees with the commenter's argument that the assessment of significant contribution to downwind nonattainment must include evaluation of impacts on non-monitored areas. First, neither section 110(a)(2)(D)(i)(I) provisions, nor the EPA guidance issued for the 1997 8-hour ozone NAAQS on August 15, 2006, support the commenter's position, as neither refers to any explicit mandatory or recommended approach to assess air quality in non-monitored areas.[8] The same focus on monitored data as a means of assessing interstate transport is found in the NO_X SIP Call and in CAIR. An initial step in both the NO_X SIP Call and CAIR was the identification of areas with current monitored violations of the ozone and/or $PM_{2.5}$ NAAQS.[9] The subsequent modeling analyses for NAAQS violations in future years (2007 for the SIP Call and 2010 for CAIR) likewise evaluated future violations at monitors in areas identified in the initial step. Thus, the commenter is simply in error that EPA has not previously evaluated the presence and extent of interstate transport under section 110(a)(2)(D) by focusing on monitoring data. Indeed, such monitoring data was at the core of both of these efforts. In neither of these rulemakings did EPA evaluate significant contribution to nonattainment in areas in which there was no monitor. This is reasonable and appropriate, because data from a properly placed Federal reference method monitor is the way in which EPA ascertains that there is a violation of the 1997 8-hour ozone NAAQS in a particular area. Put another way, in order for there to be significant contribution to nonattainment for the 1997 8-hour ozone NAAQS, there must be a monitor with data showing a violation of that NAAQS. EPA has concluded that by considering data from monitored areas, its assessment of whether emissions from Colorado contribute significantly to ozone nonattainment in downwind States is consistent with the 2006 Guidance, and with the approach used by both the CAIR rule and the NO_X SIP Call.

Comment No. 7—In support of its comments that EPA should assess significant contribution to nonattainment in nonmonitored areas, the commenter argued that existing modeling performed by another organization "indicates that large areas of neighboring states will be likely to violate the ozone NAAQS." According to the commenter, these likely "'violations" of the ozone NAAQS were predicted for the year 2018, as reflected in a slide from a July 30, 2008 presentation before the Western Regional Air Partnership ("Review of Ozone Performance in WRAP Modeling and Relevant to Future Regional Ozone Planning"). The commenter asserted that: "Slide 28 of this presentation displays projected 4th highest 8-hour ozone reading for 2018 and indicates that air quality in areas such as northern New Mexico, western Wyoming, southern Utah, and central Arizona will exceed and/or violate the 1997 ozone

[7] *Michigan* v. *U.S. EPA,* 213 F.3d 663, 674–681 (D.C. Cir. 2000); *North Carolina* v. *EPA,* 531 F.3d 896, 913–916 (D.C. Cir. 2008) (upholding EPA approach to determining threshold despite remanding other aspects of CAIR).

[8] 2006 Guidance, p. 5.

[9] "Based on this approach, we predicted that in the absence of additional control measures, 47 counties *with air quality monitors* [emphasis ours] would violate the 8-hour ozone NAAQS in 2010 * * *." From the CAIR proposed rule of January 30, 2004 (69 FR 4566, 4581). The NO_X SIP call proposed rule action reads: "* * * For current nonattainment areas, EPA used air quality data for the period 1993 through 1995 to determine which counties are violating the 1-hour and/or 8-hour NAAQS. These are the most recent 3 years of fully quality assured data which were available in time for this assessment," 62 FR 60336.

NAAQS * * *."[10] In short, the commenter argues that modeling performed by the WRAP establishes that there will be violations of the 1997 8-hour ozone NAAQS in 2018 in non-monitored areas of states adjacent to Colorado.

EPA Response—EPA disagrees with this comment on several grounds. First, as explained in response to other comments, EPA does not agree that it is appropriate to evaluate significant contribution to nonattainment for the 1997 8-hour ozone NAAQS by modeling ambient levels in areas where there is no monitor to provide data to establish a violation of the NAAQS in question. Section 110(a)(2)(D) does not require such an approach, EPA has not taken this approach in the NO_x SIP Call or other rulemakings under section 110(a)(2)(D), and EPA's prior analytical approach has not been disturbed by the courts.

Second, the commenter's own description of the ozone concentrations predicted for the year 2018 as projecting "violations" of the ozone NAAQS is inaccurate. Within the same sentence, quoted above, slide 28 is described as displaying the projected 4th max ozone reading for the year 2018, and as indicating that "* * * air quality * * * will exceed or *violate* [emphasis ours] the 1997 ozone NAAQS." By definition, a one year value of the 4th max above the NAAQS only constitutes an exceedance of the NAAQS; to constitute a violation of the 1997 8-hour ozone NAAQS, the standard must be exceeded for three consecutive years at the same monitor. Thus, even if the WRAP presentation submitted by the commenter were technically sound, the conclusion drawn from it by the commenter is inaccurate and does not support its claim of projected violations of the NAAQS in large areas (monitored or unmonitored) of Colorado's neighboring States.

Finally, EPA has reviewed the WRAP presentation submitted by the commenter, and believes that there was a substantial error in the WRAP modeling software that led to overestimation of ground level ozone concentrations. A recent study conducted by Environ for the Four Corners Air Quality Task Force (FCAQTF; Stoeckenius et al., 2009) has demonstrated that excessive vertical transport in the CMAQ and CAMx models over high terrain was responsible for overestimated ground level ozone concentrations due to downward transport of stratospheric ozone.[11] Environ has developed revised vertical velocity algorithms in a new version of CAMx that eliminated the excessive downward transport of ozone from the top layers of the model. This revised version of the model is now being used in a number of applications throughout high terrain areas in the West. In conclusion, EPA believes that this key inadequacy of the WRAP model, noted above, makes it inappropriate support for the commenter's concerns about large expanses of 8-hour ozone nonattainment areas projected for 2018 in areas without monitors.

Comment No. 8—As additional support for its assertion that EPA should require modeling to assess ambient levels in unmonitored portions of other states, the commenter relied on an additional study entitled the "Uinta Basin Air Quality Study (UBAQS)." The commenter argued that UBAQS further supports its concern that Colorado and EPA, having limited the evaluation of downwind impacts only to areas with monitors, failed to assess ozone nonattainment in non-monitored areas. According to the commenter, UBAQS modeling results show that: (a) The Wasatch front region is currently exceeding and will exceed in 2012 the 1997 8-hour ozone NAAQS; and (b) based on 2005 meteorological data, portions of the four counties in the southwest corner of Utah are also currently in nonattainment and will be in nonattainment in 2012.[12]

EPA Response—As noted above, EPA does not agree that it is appropriate to assess significant contribution to nonattainment for the 1997 8-hour ozone NAAQS in the way advocated by the commenter. Even taking the UBAQS modeling results at face value, however, EPA does not agree that the 8-hour ozone nonattainment (current and projected) in the Wasatch Front Range area supports the commenter's concerns about the need to evaluate the possibility of significant contribution to nonattainment in non-monitored areas. EPA sees several problems with the commenter's interpretation of the UBAQS analysis results for counties in Utah's southwestern corner: "based on 2005 meteorological data, portions of Washington, Iron, Kane, and Garfield Counties are also in nonattainment and will be in nonattainment in 2012."

First, the commenter's interpretation of the predicted ozone concentrations shown in Figures 4–3a and 4–3b (pages 5 and 6 of the comment letter) is inaccurate. A close review of the legend in these figures indicates that the highest ozone concentrations predicted by the model for portions of the counties noted above are somewhere between 81.00 and 85.99 ppb, but it is not specified. If it is actually predicted smaller than or equal to 84.9 ppb then the area is attaining the 1997 8-hour ozone NAAQS, if it is predicted as greater than 84.9 ppb then it is not attaining those NAAQS. Thus, the current and predicted design values for the southwestern Utah area identified in Figures 4–3a and 4–3b could both be in attainment or both in nonattainment, or one of them in attainment and the other in nonattainment, for the 1997 8-hour ozone NAAQS. EPA does not believe that this evidence adequately establishes that one or both areas definitely violate the NAAQS, even if the information were taken at face value.

Second, even if the design values predicted for these unmonitored areas were at the top of the 81.00–85.99 ppb range, their reliability would remain questionable. The UBAQS itself identifies and illustrates major shortcomings of its modeling analysis, only to neglect assessing the impact of these shortcomings on the modeling results.[13] The study deviates in at least two significant ways from EPA's 2007 guidance on SIP modeling.[14] One issue is the UBAQS modeling reliance on fewer than the five years of data recommended by EPA to generate a current 8-hour ozone design value (DVC). UBAQS relaxed this requirement so that sites with as little as 1 year of data were included as DVCs in the analysis. The other issue is the computation of the relative responsive factor (RRF), which directly affects the modeling's future design value (DVF).[15] Again due to unavailability of data satisfying EPA's recommendation that the RRF be based on a minimum of five days of ozone concentrations above 85

[10] The presentation is available for review as Document ID # EPA–R08–OAR–2007–1032–0007.8 at Regulations.gov, Docket ID # EPA–R08–OAR–2007–1032.

[11] Stoeckenius, T.E., C.A. Emery, T.P. Shah, J.R. Johnson, L.K. Parker, A.K. Pollack, 2009. "Air Quality Modeling Study for the Four Corners Region," pp. ES–3, ES–4, 3–4, 3–12, 3–30, 5–1. Prepared for the New Mexico Environment Department, Air Quality Bureau, Santa Fe, NM, by ENVIRON International Corporation, Novato, CA.

[12] The southwestern area referred to by the commenter includes portions of Washington, Iron, Kane, and Garfield Counties.

[13] See UBAQS, pp. 4–27 to 4–29.

[14] EPA, Guidance on the Use of Models and other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, PM2.5 and Regional Haze. Office of Air Quality Planning and Standards, Air Modeling Group. Research Triangle Park, North Carolina (2007), available at *http://www.epa.gov/scram001/guidance/guide/final-03-pm-rh-guidance.pdf.*

[15] DVC × RRF = DVF.

ppb, UBAQS modeling uses RRFs based on one or more days of ozone concentrations above 70 ppb.[16] EPA concludes that the modeling analysis results used by the WG are unreliable for projecting non-attainment status and therefore do not support its comments.

Comment No. 9—In support of its arguments that EPA should not assess significant contribution to nonattainment through evaluation of impacts at monitors instead of modeling impacts where there is no such monitor, the commenter cited a past statement by EPA to the effect that the monitor network in the western United States needs to be expanded. The quoted statements included EPA's observation that "[v]irtually all States east of the Mississippi River have at least two to four non-urban O_3 monitors, while many large mid-western and western States have one or no non-urban monitors." 74 FR 34525 (July 16, 2009). From this statement, the commenter argues that it is not appropriate for EPA to limit evaluation of significant contribution to nonattainment of the ozone NAAQS in other states relying on monitoring data instead of modeling ambient levels.

EPA Response—EPA does not disagree that there are relatively few monitors in the western states, and that relatively few monitors are currently located in non-urban areas of western states. However, the commenter failed to note that the quoted statement from EPA concerning the adequacy of western monitors came from the Agency's July 16, 2009, proposed rulemaking entitled "Ambient Ozone Monitoring Regulations: Revisions to Network Design Requirements." This statement was thus taken out of context, because EPA was in that proposal referring to changes in state monitoring networks that it anticipates will be necessary in order to implement not the 1997 8-hour ozone NAAQS that are the subject of this rulemaking, but rather the next iteration of the ozone NAAQS for which there are concerns that there will be a need to evaluate ambient levels in previously unmonitored areas of the western United States. The fact that additional monitors may be necessary in the future for newer ozone NAAQS does not automatically mean that the existing ozone monitoring networks are insufficient for the 1997 8-hour ozone NAAQS, as the commenter implies. Indeed, states submit annual monitor network reports to EPA and EPA evaluates these to insure that they meet the applicable requirements.

For example, Colorado itself submits just such a report on an annual basis, and EPA reviews it for adequacy.[17] All other states submit comparable reports. Absent a specific concern that another state's current monitor network is inadequate to evaluate ambient levels of the 1997 8-hour ozone NAAQS, EPA has no reason to believe that the evaluation of possible significant contribution from Colorado sources in reliance on those monitors is incorrect.

Comment No. 10—The commenter objected to EPA's proposed approval of the Colorado SIP submission because neither Colorado nor EPA performed a specific modeling analysis to assure that emissions from Colorado sources do not significantly contribute to nonattainment in downwind States. According to the commenter, EPA's decision to use a qualitative approach to determine whether emissions from Colorado contribute significantly to downwind nonattainment is not consistent with its own preparation of a regional model to evaluate such impacts from other states as part of CAIR.

EPA Response—EPA disagrees with the commenter's belief that only modeling can establish whether or not there is significant contribution from one state to another. First, as noted above, EPA does not believe that section 110(a)(2)(D) requires modeling. While modeling can be useful, EPA believes that other forms of analysis can be sufficient to evaluate whether or not there is significant contribution to nonattainment. For this reason, EPA's 2006 guidance recommended other forms of information that states might wish to evaluate as part of their section 110(a)(2)(D) submissions for the 1997 8-hour ozone NAAQS. EPA has concluded that its qualitative approach to the assessment of significant contribution to downwind ozone nonattainment is consistent with EPA's 2006 Guidance.

Second, EPA notes that the commenter's position also reflects a misunderstanding of the approach EPA used in the remanded CAIR due to an exclusive focus on those States that were selected for the modeling analysis. A wider understanding of the CAIR approach would recognize that EPA decided, based on other criteria, that it was not necessary to conduct modeling for certain western states: "[i]n analyzing significant contribution to nonattainment, we determined it was reasonable to exclude the Western U.S., including the States of Washington, Idaho, Oregon, California, Nevada, Utah, and Arizona from further analysis due to geography, meteorology, and topography. Based on these factors we concluded that the $PM_{2.5}$ and 8-hour ozone nonattainment problems are not likely to be affected significantly by pollution transported across these States' boundaries * * *." (69 FR 4581, January 30, 2004).

EPA has taken a similar approach to assess whether Colorado contributes significantly to violations of the 1997 8-hour ozone NAAQS in downwind states. In the proposed action, EPA explained several forms of substantive and technically valid evidence that led to the conclusion that emissions from the Colorado sources do not contribute significantly to nonattainment, in accordance with the requirement of Section 110(a)(2)(D).

Comment No. 11—In further support of its argument that EPA must use modeling to evaluate whether there is significant contribution to nonattainment under section 110(a)(2)(D), the commenter noted that EPA itself asks other agencies to perform such modeling in other contexts. As examples, the commenter cited four examples in which EPA commented on actions by other agencies in which EPA recommended the use of modeling analysis to assess ozone impacts prior to authorizing oil and gas development projects. As supporting material, the comment includes quotations from and references to EPA letters to Federal Agencies on assessing impacts of oil and gas development projects.[18] The commenter questioned why EPA's recommendation for such an approach in its comments to other Federal Agencies, did not result in its use of the same approach to evaluate the impacts from Colorado emissions and to insure compliance with Section 110(a)(2)(D)(i)(I). The commenter reasoned that the emissions that would result from the actions at issue in the other agency decisions, such as selected oil and gas drilling projects, would be of less magnitude and importance that the statewide emissions at issue in an evaluation under section 110(a)(2)(D).

EPA Response—As explained above, EPA disagrees with the commenter's fundamental argument that modeling is mandatory in all instances in order to evaluate significant contribution to nonattainment, whether by section

[16] See UBAQS, p. 4–28

[17] See, for example, "Colorado Annual Monitoring Network Plan" dated 2009–2010. Plan is available for review at the regulations.gov Web site under Docket ID No. EPA–R08–OAR–2007–1032.

[18] WG's April 9, 2010 comment letter, pp. 9–10. Complete versions of the EPA comment letters referenced here were attached to the comment as Exhibits 3 through 6, and are viewable on the Regulations.gov Web site as Documents ID No. EPA–R08–OAR–2007–1032–0007.4 through 1032–0007.7.

110(a)(2)(D), by EPA guidance, or by past EPA precedent. EPA's applicable guidance made recommendations as to different approaches that could lead to demonstration of the satisfaction of the interstate transport requirements for significant contribution to nonattainment in other states. Even EPA's own CAIR analysis relied on a combination of qualitative and quantitative analyses, as explained above. EPA's CAIR analysis excluded certain western states on the basis of a qualitative assessment of topography, geography, and meteorology.[19]

EPA believes that the commenter's references to EPA statements commenting on the actions of other agencies are inapposite. As the commenter is aware, those comments were made in the context of the evaluation of the impacts of various Federal actions pursuant to NEPA, not the Clean Air Act. As explained above, in the context of section 110(a)(2)(D), EPA does not agree that modeling is always required to make that different evaluation, and EPA itself has relied on other more qualitative evidence when it deemed that evidence sufficient to reach a reasoned determination.

Comment No. 12—In further support of its argument that EPA should always require modeling to evaluate significant contribution to nonattainment, the commenter referred to EPA regulations governing nonattainment SIPs. The commenter noted 40 CFR 51.112(a)(1), which states that: "[t]he adequacy of a control strategy shall be demonstrated by means of applicable air quality models, data bases, and other requirements specified in appendix W of [Part 51] (Guideline on Air Quality Models)." The commenter argues that this regulation appears to support the commenter's position that modeling is required to satisfy the significant contribution element of 110(a)(2)(D).

Response: EPA disagrees with this comment. The cited language implies that the need for control strategy requirements has already been demonstrated, and sets a modeling analysis requirement to demonstrate the adequacy of the control strategy developed to achieve the reductions necessary to prevent an area's air quality from continuing to violate the NAAQS. EPA's determination that emissions from Colorado do not contribute significantly to nonattainment for the 1997 8-hour ozone standard in any other state eliminates the need for a control strategy aimed at satisfying the section 110(a)(2)(D) requirements. Moreover, EPA interprets the language at 40 CFR 51.112(a): "[e]ach plan must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements," to refer to modeling for attainment demonstrations, an integral part of nonattainment area SIPs under part D of the CAA. This interpretation was upheld by the Sixth Circuit Court of Appeals. *Wall* v. *U.S. EPA,* 265 F.3d 426, 436 (6th Cir. 2001). Thus, the commenter's cited regulation is not relevant to EPA's technical demonstration assessing whether emissions from Colorado contribute significantly to nonattainment in any other states under section 110(a)(2)(D).

Comment No. 13—The commenter also objected to EPA's proposed approval of the Colorado submission on the grounds that it was based upon a "weight-of-evidence analysis," and that no such weight of evidence test appears in the CAA generally, or in section 110(a)(2)(D) in particular. According to the commenter, there is no regulatory support for using a "weight-of-evidence" approach to assessing air quality impacts. The commenter asserted that EPA neither cited nor quoted regulations or policy that provides for this, and failed to lend any specific meaning to the phrase through its proposed approval. Finally, the commenter asserted, without explaining, its belief that EPA failed to address "several relevant factors related to the determination of whether Colorado contributes significantly to nonattainment undermines the agency's reliance on any 'weight-of-evidence' approach."

EPA Response—The fact that neither the CAA generally, nor section 110(a)(2)(D) specifically, include the explicit phrase "weight of evidence" does not mean that it is inappropriate for EPA to use such an approach in this context. As explained above, section 110(a)(2)(D) does not explicitly stipulate how EPA is to assess whether there is a significant contribution to nonattainment in other states. The proper consideration, therefore, is whether EPA has a rational technical basis for its decision. Even if the term "weight of evidence" does not appear in section 110(a)(2)(D) or elsewhere in the CAA, courts have recognized EPA's reliance on such an analytical approach where reasonable.[20] As described above, EPA's guidance issued for the 1997 8-hour ozone NAAQS, the Agency specifically recommended types of information that states might wish to rely upon to evaluate the presence of, and extent of, instate transport for this purpose. EPA believes that a weight of evidence approach that properly considers appropriate evidence is sufficient to make a valid determination, as in this case.

Specifically, EPA's technical analysis in the March 31, 2010, proposed rule action underscores its reliance on implementation policies set in the EPA 2006 Guidance: "EPA's August 15, 2006, guidance to states concerning section 110(a)(2)(D)(i) recommended various methods by which states might evaluate whether or not its emissions significantly contribute to violations of the 1997 ozone standards in another state. Among other methods, EPA recommended consideration of available EPA modeling conducted in conjunction with CAIR, *or in the absence of such EPA modeling, consideration of other information such as the amount of emissions, the geographic location of violating areas, meteorological data, or various other forms of information that would be relevant to assessing the likelihood of significant contribution to violations of the NAAQS in another state* [emphasis added]." [21] On the basis of this guidance, Colorado and EPA chose to assess the impacts of emissions from Colorado sources on the closest downwind nonattainment areas (St. Louis, Missouri, and Illinois/Wisconsin counties along the southwestern shore of Lake Michigan) through a weight of evidence approach using quantitative information such as Colorado's distance from areas with monitors showing violating the NAAQS, modeling results outlining wind vectors for regional transport of ozone on high ozone days, back trajectory analyses for the downwind nonattainment areas closest to Colorado, and results of modeling studies for the nonattainment areas specifying the range of wind directions along which contributing ozone transport occurred. EPA's use of a weight of evidence analysis is by no means unusual for the assessment of ozone impacts through long range transport. The same analytical framework was used in the 1998 NO_X SIP Call, as indicated under Section II.C., entitled "Weight-of-Evidence Determination of Covered States." [22] The differences between the specific types of evidence used in the NO_X SIP Call and

[19] *See* 69 FR 4581, January 30, 2004.

[20] See, e.g., *BCCA* v. *EPA,* 355 F.3d 817 (5th Cir. 2003).

[21] 75 FR 16034, March 31, 2010.

[22] "As discussed above, EPA applied a multi-factor approach to identify the amounts of NO_X emissions that contribute significantly to nonattainment * * *." 1998 SIP Call, 63 FR 57381, October 27, 1998.

in EPA's analysis for this action do not invalidate the use of the weight-of-evidence approach.

As for the commenter's argument that EPA "fails to lend any specific meaning to the phrase through its proposed approval," the Agency's technical analysis described in the proposal did specify the characteristics, including limitations, of a weight of evidence analysis: "[f]urthermore * * * EPA notes that no single piece of information in the following discussion is by itself dispositive of the issue. Instead, the total weight of all the evidence taken together supports the conclusion that emissions from Colorado sources are unlikely to contribute significantly to violations of the 1997 8-hour ozone standard in any other state." (75 FR 16034).

Finally, as to the commenter's assertion that EPA failed to consider "several relevant factors" and thus failed to conduct an appropriate weight of evidence evaluation, EPA cannot weigh the validity of this comment in the absence of an explanation of what these factors might be.

Comment No. 14—The commenter also objected to EPA's proposed approval of the Colorado submission on the grounds that EPA did not assess the potential impacts of Colorado sources of emissions on violations of the 1997 8-hour ozone NAAQS in Arizona (Phoenix area), and Utah (Davis County area.)

EPA Response—EPA did not discuss or assess potential impacts of Colorado emissions on Arizona or Utah in the proposal. EPA first notes that, west of the Continental Divide the prevailing winds generally move from south-westerly or westerly directions, as indicated by the typical movement of weather systems.

Also, EPA notes that Davis County had a monitor indicating a violation of the NAAQS in 2007, but has not since then. Thus, there are currently no monitors in Utah with data showing violations of the 1997 8-hour ozone NAAQS and, as a consequence, there are no monitors for which it would be appropriate to evaluate the possibility of significant contribution to nonattainment from Colorado sources for the 1997 8-hour ozone NAAQS. In Arizona, the Maricopa 8-hour ozone nonattainment area, which includes Phoenix, does have monitors indicating a violation of this NAAQS. However, Phoenix lies approximately 600 miles southwest of the Colorado DMA/NFR area, and this area is generally upwind from Colorado sources. Emissions from Colorado would have to be affected by strong winds from the northeast, which are very infrequent, in order to contribute significantly to 8-hour ozone nonattainment in the Phoenix area. The rarity of northeasterly winds in Arizona may be gauged by images of wind roses for Phoenix and Tucson.[23]

Comment No. 15—The commenter argued that both Colorado and EPA relied inappropriately on a flawed ozone "nonattainment" SIP for the DMA/NFR nonattainment area as a basis for the proposed approval. According to the commenter, EPA cannot approve Colorado's section 110(a)(2)(d) submission because it relies heavily on the requirements of the ozone nonattainment area SIP for the DMA/NFR nonattainment area. The commenter argued that "many" of the provisions of the nonattainment area SIP are themselves flawed or deficient. As examples, the commenter outlined alleged deficiencies in the Colorado Air Quality Control Commission's Regulation No. 7, RACT requirements for NO_X emissions, exemptions for certain source categories of NO_X emissions, and other unspecified provisions in the DMA/NFR nonattainment area SIP.

EPA Response—EPA disagrees with the commenter's position that its proposed approval relied heavily on the nonattainment area SIP for the DMA/NFR area, and that as a consequence EPA cannot approve the Colorado section 110(a)(2)(D) submission for the significant contribution element for the 1997 8-hour ozone NAAQS. First, EPA notes that its reliance on material from, and related to, the "8-Hour Ozone Attainment Plan" was limited to considering the modeling results indicating a quick drop in ambient ozone levels from the DMA/NFR area to the easternmost Colorado counties. EPA did not purport to pass upon the adequacy or approvability of each and every aspect of that nonattainment area SIP by referring to the modeling results as a source of relevant facts to be taken into consideration.

Second, the proposal made clear that EPA's interpretation of the significance of this information is different from Colorado's: "EPA does not accept the State of Colorado Interstate Transport SIP assessment that these results demonstrate that 'the magnitude of ozone transport from Colorado to other states is too low to significantly contribute to nonattainment in * * * any other state with respect to the 0.08 ppb NAAQS.' "[24] EPA explained its own view that the relatively moderate ozone concentrations in eastern Colorado (compared to the 1997 8-hour ozone NAAQS), while not excluding a potential significant contribution from Colorado emissions to downwind nonattainment areas, reduce the probability of its occurrence.[25] This is neither the key piece, nor even one of the key pieces, of evidence upon which EPA relies for its determination that emissions from Colorado sources do not contribute significantly to downwind nonattainment areas. To the contrary, EPA considered a variety of technical data and analyses of transport factors wholly independent of and substantively stronger than the modeling results connected with the DMA/NFR nonattainment area SIP.

In addition, EPA notes that the commenter did not specify exactly how each of the purported flaws in the Colorado nonattainment area SIP for the DMA/NFR area could affect the reliability of the modeling results EPA used in the proposed rule, or the weight-of-evidence analysis that was the basis of the proposed approval of the Colorado section 110(a)(2)(D) submission for the significant contribution element. For example, the commenter did not explain what impact the specific alleged defects in Regulation 7 would have on emissions, and how any increases in emissions as a result of those defects would in turn result in significant contribution to nonattainment in other states. Absent more data or explanation supporting the commenter's general concerns, EPA cannot conclude that these alleged nonattainment SIP "defects," even if EPA ultimately agrees that they are statutory or regulatory deficiencies, result in additional emissions that have such impacts. Given this uncertainty as to the impacts of the alleged defects, if any, EPA does not agree that it is per se inappropriate to consider the modeling results in the very limited way that the Agency has done so in this action.

Furthermore, EPA does not agree with the commenter that, given the alleged defects, EPA cannot approve the Colorado interstate transport SIP for the significant contribution element of section 110(a)(2)(D)(i)(I) until the alleged defects are resolved. As discussed below, the first step of the process to determine whether this

[23] Reproductions of wind roses are available for review under Docket ID No. EPA–R08–OAR–2007–1032, and online at: *http://home.pes.com/windroses/wrgifs/_6200.GIF; http://www.wrh.noaa.gov/twc/aviation/windrose_TUS.php;* and *http://www.wrcc.dri.edu/htmlfiles/westwinddir.html*

[24] See 75 FR 16034–35, and "State of Colorado Implementation Plan to Meet the Requirements of Clean Air Act Section 110(a)(2)(D)(i)(I)—Interstate Transport Regarding the 1997 8-hour Ozone Standard," p. 17, December 12, 2009.

[25] 75 FR 16035.

element is satisfied is the factual determination of whether a State's emissions contribute significantly to nonattainment in downwind areas. If this factual finding is in the negative, as is the case for EPA's assessment of the contribution from emissions from Colorado, then section 110(a)(2)(D)(i)(I) does not require any changes to a state's provisions.

Finally, EPA does not agree that it is appropriate to address the commenter's specific substantive comments about the merits of Rule 7 in the context of this action on the section 110(a)(2)(D) SIP submission. Colorado has separately submitted its ozone nonattainment SIP for the DMA/NFR nonattainment area to the Agency, and that submission will ultimately be the subject of another rulemaking in which EPA will evaluate and act upon that specific SIP submission. The commenter may resubmit its specific substantive comments on Rule 7, and any other comments on the nonattainment SIP for the DMA/NFR area, in that later rulemaking.

Comment No. 16—The commenter also objected to EPA's proposed approval because "Colorado's SIP, as written, simply does not contain any language that prohibits emissions that contribute significantly to nonattainment in any other state." The commenter also notes that EPA did not assess whether the SIP does or does not contain such provisions. The commenter appears to have argued that 110(a)(2)(D)(i) requires a state SIP to contain an explicit provision literally prohibiting emissions that contribute significantly to nonattainment in any other state and that, in order to approve the Colorado interstate transport SIP, EPA must examine the SIP to determine whether it contains such an explicit prohibition.

EPA Response—EPA disagrees with the commenter's interpretation of the statutory requirements. Section 110(a)(2)(D)(i) has no language that requires a SIP to contain a specific provision literally prohibiting significant contribution to nonattainment in any other state, or, for that matter, to contain any particular words or generic prohibitions. Instead, EPA believes that the statute requires a state's SIP to contain substantive emission limits or other provisions that in fact ensure that sources located within the state will not produce emissions that have such an effect in other states. Therefore, EPA believes that satisfaction of the "significant contribution" requirement is not to be demonstrated through a literal requirement for a prohibition of the type advocated by the commenter.

EPA's past application of section 110(a)(2)(D) did not require the literal prohibition advocated by the commenter. For example, in 1998 NO_X SIP call (63 FR 57356, October 27, 1998) EPA indicated that "the term 'prohibit' means that SIPs must eliminate those amounts of emissions determined to contribute significantly to nonattainment * * *." As a result, the first step of the process to determine whether this statutory requirement is satisfied is the factual determination of whether a State's emissions contribute significantly to nonattainment in downwind areas. See 2005 CAIR Rule (70 FR 25162) and 1998 NO_X SIP Call (63 FR 57356). If this factual finding is in the negative, as is the case for EPA's assessment of the contribution from emissions from Colorado, then section 110(a)(2)(D)(i)(I) does not require any changes to a state's SIP. If, however, the evaluation reveals that there is such a significant contribution to nonattainment in other states, then EPA requires the state to adopt substantive provisions to eliminate those emissions. The state could achieve these reductions through traditional command and control programs, or at its own election, through participation in a cap and trade program. Thus, EPA's approach in this action is consistent with the Agency's interpretation of 110(a)(2)(D)(i) in the 2006 guidance, the CAIR Rule, and the NO_X SIP call, none of which required the *pro forma* literal "prohibition" of the type advocated by the commenter.

Comment No. 17—The commenter noted a provision for stationary source permitting in the Colorado SIP that the commenter argued is inadequate to ensure that sources in Colorado will not significantly contribute to nonattainment in other states. The commenter also argued that Colorado does not sufficiently implement a requirement in the SIP to ensure stationary sources do not cause a violation of the 1997 8-hour ozone NAAQS, because Colorado guidelines do not uniformly require ozone modeling for such sources. The commenter stated that EPA cannot approve the Colorado interstate transport SIP unless the issues commenter identifies are first resolved.

EPA Response—As discussed above, the first step of the process to determine whether the "significant contribution" requirement is satisfied is the factual determination of whether a State's emissions contribute significantly to nonattainment in downwind areas. If the factual finding is in the negative, as is the case for EPA's assessment of the contribution from emissions from Colorado, then section 110(a)(2)(D)(i)(I) does not require any substantive changes to a state's SIP, nor does it require EPA to determine whether a state should require modeling in all permitting actions. As discussed above, EPA's approach in this action is consistent with the Agency's interpretation of 110(a)(2)(D)(i) in the 2006 guidance, the CAIR Rule and the NO_X SIP Call. Therefore, EPA disagrees with the comment that EPA cannot approve the Colorado interstate transport SIP unless EPA addresses specific provisions and state guidelines for permitting stationary sources.

Comment No. 18—The commenter argued that EPA cannot approve the section 110(a)(2)(D) submission from Colorado because the state and EPA did not comply with 110(l). Evidently, the commenter believes that the section 110(a)(2)(D) submission is a revision to the SIP that will interfere with attainment of the 2006 $PM_{2.5}$ NAAQS and the 2008 ozone NAAQS. The commenter argued that a section 110(l) analysis must consider all NAAQS once they are promulgated, and argued that EPA took the same position in proposing to disapprove a PM_{10} maintenance plan.

EPA Response—EPA agrees that a required section 110(l) analysis must consider the potential impact of a proposed SIP revision on attainment and maintenance of all NAAQS that are in effect and impacted by a given SIP revision. However, EPA disagrees that it failed to comply with the requirements of section 110(l) or that section 110(l) requires disapproval of the SIP submission at issue here.

Section 110(l) provides in part that: "[t]he Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * *, or any other applicable requirement of this chapter." EPA has consistently interpreted Section 110(l) as not requiring a new attainment demonstration for every SIP submission. EPA has further concluded that preservation of the status quo air quality during the time new attainment demonstrations are being prepared will prevent interference with the states' obligations to develop timely attainment demonstrations. 70 FR 58134, 58199 (October 5, 2005); 70 FR 17029, 17033 (April 4, 2005); 70 FR 53, 57 (January 3, 2005); 70 FR 28429, 28431 (May 18, 2005).

Colorado's submission is the initial submission by the state to address the significant contribution to

nonattainment element of 110(a)(2)(D)(i) for the 1997 8-hour ozone. This submission does not revise or remove any existing emissions limit for any NAAQS, or any other existing substantive SIP provisions relevant to the 1997 8-hour ozone NAAQS. Simply put, it does not make any substantive revision that could result in any change in emissions. As a result, the submission does not relax any existing requirements or alter the status quo air quality. Therefore, approval of the submission will not interfere with attainment or maintenance of any NAAQS.

EPA's discussion in the notice cited by the commenter is consistent with this interpretation. In the cited action, EPA noted that "Utah ha[d] either removed or altered a number of stationary source requirements," creating the possibility of a relaxation of SIP requirements interfering with attainment, a possibility that is not present here. See 74 FR 62727 (December 1, 2009). Thus, the action cited by the commenter is clearly distinguishable.

The commenter did not provide any specific basis for concluding that approval of this SIP submission would interfere with attainment or maintenance of a NAAQS, or with any other applicable requirement of the Clean Air Act. EPA concludes that approval of the submission will not make the status quo air quality worse, and is in fact consistent with the development of an overall plan capable of meeting the Act's attainment requirements. Accordingly, even assuming that section 110(l) applies to this submission, EPA finds that approval of the submission is consistent with the requirements of section 110(l).

III. Section 110(l)

Section 110(l) of the Clean Air Act states that a SIP revision cannot be approved if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress towards attainment of the NAAQS or any other applicable requirements of the Act. In this action, EPA is approving portions of the Colorado interstate transport SIP addressing the "significant contribution" requirements of section 110(a)(2)(D)(i)(I) for the 1997 8-hour ozone NAAQS. As discussed above in EPA's response to comments, the SIP revision that EPA is partially approving in this action does not revise or remove any existing emissions limit for any NAAQS, or any other existing substantive SIP provisions relevant to the 1997 8-hour ozone NAAQS. As a result, the SIP revision does not relax any existing requirements or alter the status quo air quality. Furthermore, EPA has determined that the revision is consistent with all applicable Federal requirements and will not interfere with requirements of the Act related to administrative or procedural provisions. Therefore, the revision does not interfere with attainment or maintenance of the NAAQS or other applicable requirements of the Act.

IV. Final Action

EPA is partially approving the Interstate Transport SIP submitted by the State of Colorado on June 18, 2009. Specifically, in this action EPA is approving the portions of that SIP submission that address the requirement of Section 110(a)(2)(D)(i)(I) that emissions from sources in that state do not "significantly contribute" to violations of the 1997 8-hour ozone NAAQS in any other state. EPA has concluded that the state's submission, and additional evidence evaluated by EPA, establish that emissions from Colorado sources do not have such an impact on other states for purposes of the 1997 8-hour ozone NAAQS. Therefore, the state's SIP does not need to include additional substantive controls to reduce emissions for purposes of section 110(a)(2)(D)(i)(I) for these NAAQS. At a later date, EPA will act on those portions of the Interstate Transport SIP that address the requirement of section 110(a)(2)(D)(i)(I) that emissions from the state's sources do not "interfere with maintenance" of the 1997 8-hour ozone NAAQS in any other state.

V. Statutory and Executive Order Review

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *August 2, 2010.*

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, Carbon moNO$_X$ide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: May 17, 2010.

Carol Rushin,

Deputy Regional Administrator, Region 8.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart G—Colorado

■ 2. Section 52.352 is added to subpart G to read as follows:

§ 52.352 Interstate transport.

Addition to the Colorado State Implementation Plan of the Colorado Interstate Transport SIP regarding the 1997 8–Hour Ozone Standard for the "significant contribution" requirement, as adopted by the Colorado Air Quality Control Commission on December 30, 2008, State effective January 30, 2009, and submitted by the Governor's designee on June 18, 2009.

[FR Doc. 2010–13050 Filed 6–2–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2008–0053; FRL–9158–1]

RIN 2060–AN47

National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Paints and Allied Products Manufacturing; Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action on amendments to the paints and allied products manufacturing area source rule. With this direct final rule, EPA is amending the definition of "material containing hazardous air pollutants." It was not EPA's intent to omit the part of this definition that addresses non-carcinogens, and this omission could potentially and erroneously include facilities as applicable to the rule when they should not be covered.

This action clarifies text of the National Emission Standards for Hazardous Air Pollutants: Paints and Allied Products Manufacturing Area Source Standards which was published on December 3, 2009. This action will not change the level of health protection the final rule provides or the standards and other requirements established by the rule.

DATES: This direct final rule is effective on September 16, 2010 without further notice, unless EPA receives relevant adverse comment by July 19, 2010. If EPA receives relevant adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the amendments in this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0053, by one of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov:* Follow the instructions for submitting comments.
- *Agency Web site: www.epa.gov/oar/docket.html.* Follow the instructions for submitting comments on the EPA Air and Radiation Docket Web site.
- *E-mail: a-and-r-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2008–0053 in the subject line of the message.
- *Fax:* Send comments to (202) 566–9744, Attention Docket ID No. EPA–HQ–OAR–2008–0053.
- *Mail:* Area Source NESHAP for Paints and Allied Products Manufacturing Docket, Environmental Protection Agency, Air and Radiation Docket and Information Center, *Mailcode:* 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attn:* Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2008–0053. 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 confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2008–0053. All documents in the docket are listed in the Federal Docket Management System index at *http://www.regulations.gov.* 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 form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding

legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Melissa Payne, Regulatory Development and Policy Analysis Group, Office of Air Quality Planning and Standards (C404–05), Environmental Protection Agency, Research Triangle Park, NC 27711. *Telephone number:* (919) 541–3609; *fax number:* (919) 541–0242; *e-mail address: payne.melissa@epa.gov.*

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

I. Why is EPA using a direct final rule?

We are publishing this rule without a prior proposed rule because we view this as a non-controversial action and anticipate no adverse comment. This action amends the definition of "material containing HAP" to include non-carcinogens in quantities of 1.0 percent by mass or more. It was the intent of EPA to include this complete definition, but we inadvertently omitted the language regarding the 1.0 percent level for non-carcinogens, as defined by the Occupational Safety and Health Administration (OSHA) at 29 CFR 1910.1200(g).

It was not EPA's intent to omit the part of this definition that addresses non-carcinogens, and this omission could potentially and erroneously include facilities as applicable to the rule that are not part of the source category as defined in the inventory, which took into account the Toxics Release Inventory (TRI) *de minimis* thresholds.

Because this is an amendment of regulatory language through a rule action, a rule redline has been created of the current rule with the amendments, and has been placed in the docket to aid the public's ability to comment on the regulatory text. If we receive relevant adverse comment on this direct final rule, we will publish a timely withdrawal in the **Federal Register** informing the public that the amendments in this rule will not take effect. Any parties interested in commenting must do so at this time.

II. Does this action apply to me?

Regulated Entities. The regulated categories and entities potentially affected by the final rule include:

Category	NAICS code [1]	Examples of regulated entities
Paint & Coating Manufacturing	325510	Area source facilities engaged in mixing pigments, solvents, and binders into paints and other coatings, such as stains, varnishes, lacquers, enamels, shellacs, and water repellant coatings for concrete and masonry.
Adhesive Manufacturing	325520	Area source facilities primarily engaged in manufacturing adhesives, glues, and caulking compounds.
Printing Ink Manufacturing	325910	Area source facilities primarily engaged in manufacturing printing inkjet inks and inkjet cartridges.
All Other Miscellaneous Chemical Product and Preparation Manufacturing.	325998	Area source facilities primarily engaged in manufacturing indelible ink, India ink writing ink, and stamp pad ink.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in 40 CFR 63.11599, subpart CCCCCCC (NESHAP for Area Sources: Paints and Allied Products Manufacturing). If you have any questions regarding the applicability of this action to a particular entity, consult either the state delegated authority or the EPA regional representative, as listed in 40 CFR 63.13 of subpart A (General Provisions).

III. Where can I get a copy of this document?

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

IV. Why are we amending the rule?

Our intention in this area source rule was to reflect the TRI *de minimis* thresholds for both carcinogens (0.1 percent HAP concentration) and non-carcinogens (1.0 percent HAP concentration) in the definition of "material containing HAP" however, only the threshold for carcinogens is currently reflected. To correct this error, we are amending the rule to add the 1.0 percent concentration threshold for non-carcinogens.

These concentration levels are consistent with the OSHA Hazard Communication Standard requirements for development of a Material Safety Data Sheet (MSDS), which is how paints and allied products manufacturers receive information on the toxicity of the raw materials they use (*See* 29 FR 1910.1200(g)). The concentration level for hazardous chemicals is 1.0 percent, unless the chemical is an OSHA-defined carcinogen. The concentration level for OSHA-defined carcinogens is 0.1 percent. We inadvertently omitted mentioning the 1.0 percent for non-carcinogens portion of the definition in the definition for "material containing HAP" in the area source standards for Paints and Allied Products Manufacturing (40 FR 63.11607).

The amendment will not change the level of health protection the rule provides or the standards established by the rule. To quote the TRI rule that codified the concentration levels, "EPA does not expect that the processing and use of mixtures containing less than the de minimis concentration would, in most instances, contribute significantly to the threshold determinations or releases of listed toxic chemicals from any given facility." (53 FR 4509). In other words, mixtures with concentration levels under the *de minimis* levels are not concentrations of concern under TRI.

Furthermore, this amendment will accurately reflect the regulated source category, as non-carcinogens with less than 1.0 percent by mass were not intended to be regulated as part of the source category, because the source category as defined excluded sources below this level. Also, the complete *de mimimis* threshold definition may encourage manufacturers to replace some carcinogenic raw materials with noncarcinogenic raw materials. No costs or other impacts are associated with this amendment.

V. What amendments are we making to the rule?

On December 3, 2009 the EPA published the national emission standards for hazardous air pollutants (NESHAP) for area source paints and allied products manufacturing facilities as subpart CCCCCCC in 40 CFR part 63 (74 FR 63504). This action corrects the error in this regulation.

As currently written, 40 CFR 63.11607 defines "material containing HAP" as "a material containing benzene, methylene chloride, or compounds of cadmium, chromium, lead, and/or nickel, in amounts greater than or equal to 0.1 percent by weight, as shown in formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the material. Benzene and methylene chloride are volatile HAP. Compounds of cadmium, chromium, lead and/or nickel are metal HAP." The correct definition is, "* * * in amounts greater than or equal to 0.1 percent by weight for carcinogens or 1.0 percent by weight for non-carcinogens, as shown in * * * (emphasis added). This single change provides further clarification to the applicability provisions that are referenced in the final rule, as well as accurately reflecting the thresholds used in the TRI and reference at the time the source category was defined. This action notifies interested parties of the corrections.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The proposed amendments result in no changes to the information collection requirements of the existing standards of performance and will have little or no impact on the information collection estimate of projected cost and hour burden made and approved by the Office of Management and Budget (OMB) during the development of the existing standards of performance. Therefore, the information collection requests have not been amended. However, OMB has previously approved the information collection requirements contained in the existing regulations (subpart CCCCCCC, 40 CFR part 63) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* and has assigned OMB control number 2060–0633 (ICR 23487.02). The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

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

For the purposes of assessing the impacts of this direct final rule on small entities, a small entity is defined as: (1) A small business that meets the Small Business Administration size standards for small businesses found at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this direct final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Although this direct final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. If adopted, the amended definition for "material containing HAP" will not adversely impact small entities, as the thresholds for the noncarcinogenic HAP are below the TRI levels of concern for this source category.

D. Unfunded Mandates Reform Act

This direct final does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or to the private sector in any one year. This direct final is not expected to impact State, local, or tribal governments. Thus, this rule would not be subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA).

This final rule would also not be subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This direct final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This direct final rule does not impose any requirements on State and local governments. Thus, Executive Order 13132 does not apply to this 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 (65 FR 67249, November 9, 2000). This direct final rule imposes no requirements on tribal governments; thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to

influence the regulation. This action is not subject to EO 13045 because the final rule is based solely on technology performance.

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

This direct final rule is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113 (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

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

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

EPA has determined that this direct final rule would not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because this rule will not change the level of health protection the rule provides to all affected populations, including any minority or low-income population.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. EPA will submit a report containing this direct final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This direct final rule is not a "major rule" as defined by 5 U.S.C. 804(2). This direct final rule will be effective on September 16, 2010.

List of Subjects in 40 CFR Part 63

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

Dated: May 27, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I, part 63, subpart CCCCCCC of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart CCCCCCC—[Amended]

■ 2. Section 63.11607 is amended by revising the definition of *Material containing HAP* to read as follows:

§ 63.11607 What definitions apply to this subpart?

* * * * *

Material containing HAP means a material containing benzene, methylene chloride, or compounds of cadmium, chromium, lead, and/or nickel, in amounts greater than or equal to 0.1 percent by weight for carcinogens, as defined by the Occupational Safety and Health Administration at 29 CFR 1910.1200(d)(4), or 1.0 percent by weight for non-carcinogens, as shown in formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the material. Benzene and methylene chloride are volatile HAP. Compounds of cadmium, chromium, lead and/or nickel are metal HAP.

* * * * *

[FR Doc. 2010–13384 Filed 6–2–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Part 501

[Docket No. 10–04]

RIN 3072–AC37

Agency Reorganization and Delegations of Authority; Correction

AGENCY: Federal Maritime Commission.

ACTION: Correcting amendments.

SUMMARY: The Federal Maritime Commission (FMC or Commission) published in the **Federal Register** of May 26, 2010, the Final Rule for the reorganization of the Commission. The reference to the Commission's Office of Consumer Affairs and Dispute Resolution Services was inadvertently omitted from Lines of Responsibility and Functions of the Chairman. This document corrects the omission. This correction also adds the legend for the Commission's Organization Chart.

DATES: Effective June 3, 2010.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Fenneman, General Counsel, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573, (202) 523–5740, *GeneralCounsel@fmc.gov*.

SUPPLEMENTARY INFORMATION: The FMC published a Final Rule in the **Federal Register** on May 26, 2010 (75 FR 29451) concerning the reorganization of the Commission. The reference to the Commission's Office of Consumer Affairs and Dispute Resolution Services was inadvertently omitted from the Lines of Responsibility and Functions of the Chairman in sections 501.4 and 501.5. This document corrects the omission. This correction also adds the legend for the Commission's Organization Chart in Appendix A to Part 501 to assist in the understanding of the chart.

List of Subjects in 46 CFR Part 501

Administrative practice and procedure, Authority delegations, Organization and functions, Seals and insignia.

■ For the reasons stated in the supplementary information, the Federal Maritime Commission amends 46 CFR Part 501 as follows.

PART 501—THE FEDERAL MARITIME COMMISSION—GENERAL

■ 1. The authority citation for Part 501 continues to read as follows:

Authority: 5 U.S.C. 551–557, 701–706, 2903 and 6304; 31 U.S.C. 3721; 41 U.S.C. 414 and 418; 44 U.S.C. 501–520 and 3501–3520; 46 U.S.C. 301–307, 40101–41309, 42101–42109, 44101–44106; Reorganization Plan No. 7 of 1961, 26 FR 7315, August 12, 1961; Pub. L. 89–56, 70 Stat. 195; 5 CFR Part 2638; Pub. L. 104–320, 110 Stat. 3870.

§ 501.4 [Amended]

■ 2. In § 501.4(a), add "the Office of Consumer Affairs and Dispute Resolution Services" after "the Office of Administrative Law Judges" and before "the Office of Equal Employment Opportunity".

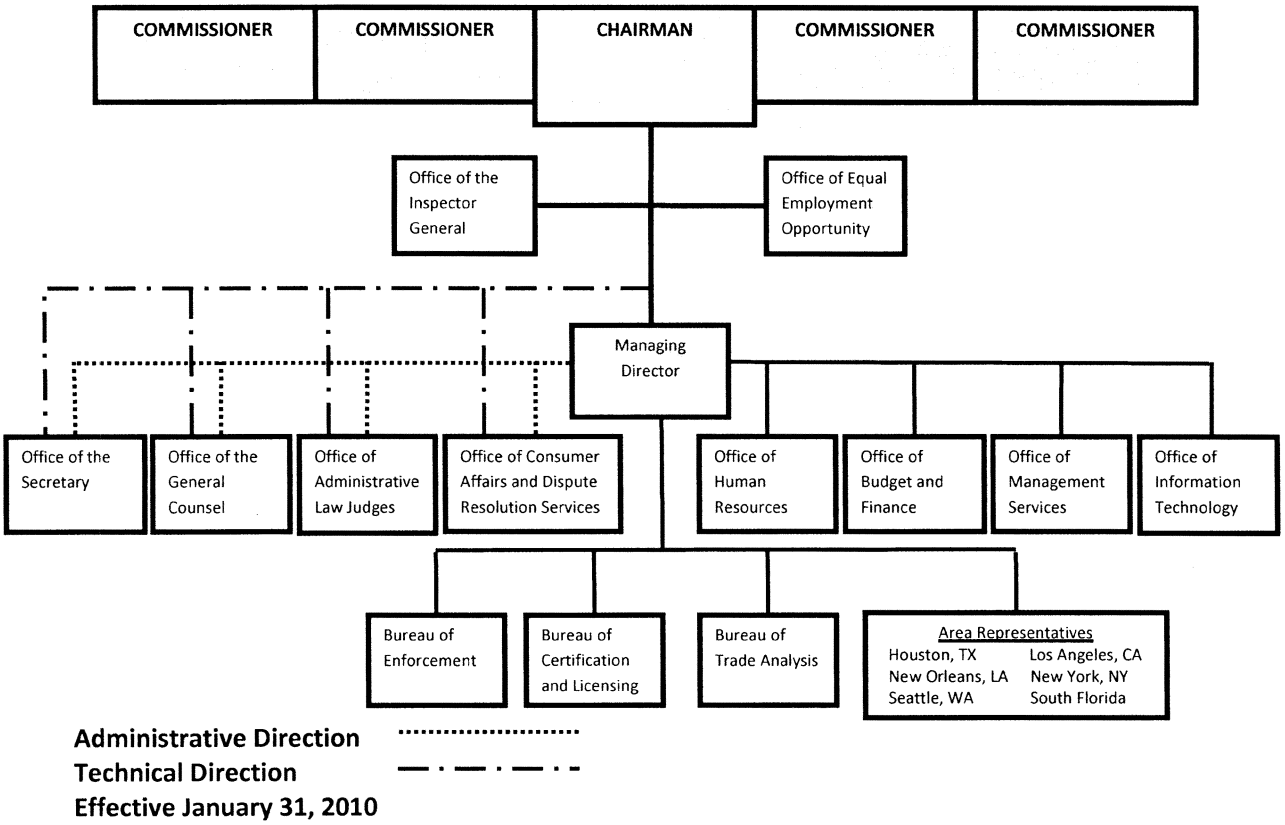
§ 501.5 [Amended]

■ 3. In § 501.5(a), add "Consumer Affairs and Dispute Resolution Services" after "Administrative Law Judges" and before "and Managing Director".

■ 4. Revise Appendix A to Part 501 to read as follows:

Appendix A to Part 501—Federal Maritime Commission Organization Chart

Federal Maritime Commission Organization Chart



By the Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2010–13270 Filed 6–2–10; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910131363–0087–02]

RIN 0648–XW74

Fisheries of the Exclusive Economic Zone Off Alaska; Rock Sole, Flathead Sole, and "Other Flatfish" by Vessels Participating in the Amendment 80 Limited Access Fishery in Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for rock sole, flathead sole, and "other flatfish" by vessels participating in the Amendment 80 limited access fishery in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2010 halibut bycatch allowance specified for the trawl rock sole, flathead sole, and "other flatfish" fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), May 28, 2010, through 2400 hrs, A.l.t., December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery

Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2010 halibut bycatch allowance specified for the trawl rock sole, flathead sole, and "other flatfish" fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI is 139 metric tons as established by the final 2010 and 2011 harvest specifications for groundfish in the BSAI (75 FR 11778, March 12, 2010).

In accordance with § 679.21(e)(3)(vi)(B) and § 679.21(e)(7)(v), the Administrator, Alaska Region, NMFS, has determined that the 2010 halibut bycatch allowance specified for the trawl rock sole, flathead sole, and "other flatfish" fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI has been caught. Consequently, NMFS is closing directed fishing for rock sole, flathead sole, and "other flatfish" by vessels participating in the Amendment 80 limited access fishery in the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for rock sole, flathead sole, and "other flatfish" by vessels participating in the Amendment 80 limited access fishery in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of May 27, 2010.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

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

Dated: May 28, 2010

Carrie Selberg,

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

[FR Doc. 2010–13351 Filed 5–28–10; 4:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 75, No. 106
Thursday, June 3, 2010

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 ENERGY

10 CFR Part 430

[Docket No. EERE–2010–BT–STD–0011]

RIN 1904–AC22

Energy Efficiency Program: Energy Conservation Standards Furnace Fans: Public Meeting and Availability of the Framework Document

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of public meeting and availability of the framework document.

SUMMARY: The U.S. Department of Energy (DOE) is initiating the rulemaking and data collection process to consider establishing new energy conservation standards or energy use standards for the use of electricity for purposes of circulating air through duct work of residential heating and cooling systems (hereinafter referred to as "furnace fans"). To inform interested parties and to facilitate this process, DOE has prepared a framework document that details the analytical approach and scope of coverage for the rulemaking, and identifies several issues on which DOE is particularly interested in receiving comment. DOE will hold an informal public meeting to discuss and receive comments on its analytical approach and the issues it will address in this rulemaking proceeding. DOE welcomes written comments from the public on any subject within the scope of this rulemaking. A copy of the framework document is available at: *http://www.eere.energy.gov/buildings/appliance_standards/residential/furnace_fans.html.*

DATES: DOE will hold a public meeting on Friday, June 18, 2010, from 9 a.m. to 4 p.m., in Washington, DC. DOE must receive requests to speak at the public meeting before 4 p.m., Friday, June 4, 2010. DOE must receive a signed original and an electronic copy of the statement to be given at the public meeting before 4 p.m., Friday, June 11, 2010. DOE will accept written comments, data, and information regarding the framework document before and after the public meeting, but no later than July 6, 2010.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please note that foreign nationals planning to participate in the public meeting are subject to advance security screening procedures. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 so that the necessary procedures can be completed.

Interested parties may submit comments, identified by docket number EERE–2010–BT–STD–0011 and/or Regulation Identifier Number (RIN) 1904–AC22, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: FurnFans-2010-STD-0011@ee.doe.gov.* Include docket number EERE–2010–BT–STD–0011 and/or RIN 1904–AC22 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Framework Document for Furnace Fans, Docket No. EERE–2010–BT–STD–0011 and/or RIN 1904–AC22, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Sixth Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. Please submit one signed paper original.

Docket: For access to the docket to read background documents, a copy of the transcript of the public meeting, or comments received, go to the U.S. Department of Energy, Resource Room of the Building Technologies Program, Sixth Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards first at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Mr. Mohammed Khan, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–7892. E-mail: *Mohammed.Khan@ee.doe.gov.*

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9507. E-mail: *Eric.Stas@hq.doe.gov.*

For information on how to submit or review public comments and on how to participate in the public meeting, contact Ms. Brenda Edwards, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone (202) 586–2945. E-mail: *Brenda.Edwards@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: Part A of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163, (42 U.S.C. 6291–6309) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances. Subsequent amendments to EPCA have given DOE expanded authority to regulate the energy efficiency of several other products, including the use of electricity for purposes of circulating air through duct work of residential heating and cooling systems (furnace fans), which is the focus of this notice. Section 135(c) of the Energy Policy Act (EPACT) of 2005, Public Law 109–58, amended section 325 of EPCA by giving DOE the authority to consider and prescribe energy conservation standards or energy use standards for electricity used for the purposes of circulating air through duct work. (42 U.S.C. 6295(f)(4)(D)) Section 304 of the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110–140, further amended section 325 of EPCA by mandating that the Secretary publish a final rule establishing energy conservation or energy use standards "not later than December 31, 2013." (42 U.S.C. 6295(f)(4)(D)) This framework document is being published as a first step towards meeting this statutory requirement.

In addition to requiring DOE to establish new energy conservation standards or energy use standards for furnace fans, EPCA generally directs DOE to establish test procedures for new covered products, such as furnace fans. (42 U.S.C. 6295(r)) Furthermore, section 310(3) of the Energy Independence and Security Act of 2007 (EISA 2007) amended EPCA to require that any new or amended energy conservation standard adopted after July 1, 2010, shall address standby mode and off mode energy use pursuant to 42 U.S.C. 6295(o). (42 U.S.C. 6295(gg)(3)) Pursuant to these mandates, DOE is also initiating a furnace fan test procedure rulemaking at this time. Accordingly, DOE is including in this framework document its preliminary review of any industry test procedures or testing methods used to characterize the performance of furnace fans in all modes of operation. DOE has also outlined a number of issues for comment regarding the testing of furnace fans, and it will consider the feedback received in response to this framework document in its development of a proposed test procedure for furnace fans. DOE intends to issue a separate notice of proposed rulemaking (NOPR) addressing the test procedures for furnace fans. When the furnace fan test procedure final rule is published, DOE will have complied with EPCA's statutory requirements for test procedures.

To initiate the furnace fan rulemaking, DOE has prepared a framework document to explain the issues, analyses, and processes it anticipates using in considering the development of new energy conservation standards or energy use standards for furnace fans. Also included in this framework document is a detailed summary of a preliminary test procedure that DOE is considering for use in developing its own test procedure and for use in the development of energy conservation standards for furnace fans.

The main focus of the public meeting noted above will be to discuss the analyses presented and issues identified in the framework document. At the public meeting, DOE will make a number of presentations, invite discussion on the rulemaking process as it applies to certain furnace fans, and solicit comments, data, and information from participants and other interested parties. DOE will also invite comment on its preliminary determination of the scope of coverage for the furnace fan energy conservation standard and its preliminary analysis of the development of a test procedure for furnace fans.

DOE encourages those who wish to participate in the public meeting to obtain the framework document and to be prepared to discuss its contents. A copy of the framework document is available at: *www.eere.energy.gov/buildings/appliance_standards/residential/furnace_fans.html.*

Public meeting participants need not limit their comments to the issues identified in the framework document. DOE is also interested in comments on other relevant issues that participants believe would affect energy conservation standards or energy use standards for this product, applicable test procedures, or the preliminary determination on the scope of coverage. DOE invites all interested parties, whether or not they participate in the public meeting, to submit in writing by July 6, 2010 comments and information on matters addressed in the framework document and on other matters relevant to DOE's consideration of new standards for furnace fans.

The public meeting will be conducted in an informal, facilitated, conference style. There shall be no discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by U.S. antitrust laws. A court reporter will record the proceedings of the public meeting, after which a transcript will be available for purchase from the court reporter and placed on the DOE Web site at: *www.eere.energy.gov/buildings/appliance_standards/residential/furnace_fans.html.*

After the public meeting and the close of the comment period, DOE will begin collecting data, conducting the analyses as discussed in the framework document and at the public meeting, and reviewing the public comments. These actions will be taken to develop an energy conservation standards NOPR and separate test procedure NOPR for furnace fans.

DOE considers public participation to be a very important part of the process for setting energy conservation standards. DOE actively encourages the participation and interaction of the public during the comment period in each stage of the rulemaking process. Beginning with the framework document, and during each subsequent public meeting and comment period, interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in the standards rulemaking process. Anyone who wishes to participate in the public meeting, receive meeting materials, or be added to the DOE mailing list to receive future notices and information about this rulemaking should contact Ms. Brenda Edwards at (202) 586–2945, or via e-mail at *Brenda.Edwards@ee.doe.gov*.

Issued in Washington, DC, on May 27, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2010–13387 Filed 6–2–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0482; Directorate Identifier 2009–NM–225–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: There have been several Stick Pusher Capstan Shaft failures causing severe degradation of the stick pusher function. This directive is issued to revise the first flight of the day check of the stall protection system to detect degradation of the stick pusher function. It also introduces a new repetitive maintenance task to limit exposure to dormant failure of the stick pusher capstan shaft. Dormant loss or severe degradation of the stick pusher function could result in reduced controllability of the airplane. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by July 19, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room

W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Bruce Valentine, Avionics and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7328; fax (516) 794–5531.

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–2010–0482; Directorate Identifier 2009–NM–225–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 have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

Transport Canada Civil Aviation, which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2009–36, dated September 2, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> There have been several Stick Pusher Capstan Shaft failures causing severe degradation of the stick pusher function. This directive is issued to revise the first flight of the day check of the stall protection system to detect degradation of the stick pusher function. It also introduces a new repetitive maintenance task to limit exposure to dormant failure of the stick pusher capstan shaft.

Dormant loss or severe degradation of the stick pusher function could result in reduced controllability of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Temporary Revision (TR) 2A–43, dated May 7, 2008, to Appendix A—Certification Maintenance Requirements of Part 2 of the Bombardier CL–600–2B19 Maintenance Requirements Manual; and Canadair Regional Jet TR RJ/178–1, dated March 8, 2010, to Canadair Regional Jet Airplane Flight Manual CSP A–012. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 601 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $51,085, or $85 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc.: Docket No. FAA–2010–0482; Directorate Identifier 2009–NM–225–AD.

Comments Due Date

(a) We must receive comments by July 19, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, serial numbers 7003 through 7990 inclusive, and 8000 and subsequent.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (h)(1) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight controls.

Reason

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

There have been several Stick Pusher Capstan Shaft failures causing severe degradation of the stick pusher function. This directive is issued to revise the first flight of the day check of the stall protection system to detect degradation of the stick pusher function. It also introduces a new repetitive maintenance task to limit exposure to dormant failure of the stick pusher capstan shaft.

Dormant loss or severe degradation of the stick pusher function could result in reduced controllability of the airplane.

Compliance

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

Actions

(g) Do the following actions.

(1) Within 30 days after the effective date of this AD, revise the Limitations section of Canadair Regional Jet Airplane Flight Manual (AFM) CSP A–012 to include the information in Canadair Regional Jet Temporary Revision (TR) RJ/178–1, dated March 8, 2010; as specified in the TR. The Canadair Regional Jet TR RJ/178–1, dated March 8, 2010, introduces procedures for performing a stall protection system test. Operate the airplane according to the limitations and procedures in the Canadair Regional Jet TR RJ/178–1, dated March 8, 2010.

Note 2: This may be done by inserting a copy of Canadair Regional Jet TR RJ/178–1, dated March 8, 2010, into the Canadair Regional Jet AFM CSP A–012. When this Canadair Regional Jet TR has been included in general revisions of the Canadair Regional Jet AFM, the general revisions may be inserted in the AFM, provided the relevant information in the general revision is identical to that in the Canadair Regional Jet TR.

(2) Within 30 days after the effective date of this AD, revise Appendix A—Certification Maintenance Requirements of Part 2 of the Bombardier CL–600–2B19 Maintenance Requirements Manual (MRM) by incorporating the information in Bombardier TR 2A–43, dated May 7, 2008; as specified in the TR. The initial compliance time for the new MRM task identified in the TR is at the later of the times specified in paragraphs (g)(2)(i) and (g)(2)(ii) of this AD. Thereafter, except as provided by paragraph (h)(1) of this AD, no alternative task intervals may be used. The TR to the MRM introduces procedures for a function check of the stick pusher capstan.

(i) Prior to the accumulation of 5,000 total flight hours.

(ii) Within 500 flight hours after the effective date of this AD.

Note 3: The actions required by paragraph (g)(2) of this AD may be done by inserting a copy of Bombardier TR 2A–43, dated May 7, 2008, to Appendix A—Certification Maintenance Requirements of Part 2 of the Bombardier CL–600–2B19 MRM. When this Bombardier TR has been included in general revisions of the Bombardier MRM, the Bombardier TR may be removed from the MRM, provided the relevant information in the general revision is identical to that in Bombardier TR 2A–43, dated May 7, 2008.

FAA AD Differences

Note 4: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office, ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York, 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

(4) *Special Flight Permits:* We are not allowing special flight permits, as described in Section 21.197 and Section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199).

Related Information

(i) Refer to MCAI Canadian Airworthiness Directive CF–2009–36, dated September 2, 2009; and Bombardier TR 2A–43, dated May 7, 2008, to Appendix A—Certification Maintenance Requirements of Part 2 of the Bombardier CL–600–2B19 Maintenance Requirements Manual, dated May 7, 2008; and Canadair Regional Jet TR RJ/178–1, dated March 8, 2010, to Canadair Regional Jet Airplane Flight Manual CSP A–012; for related information.

Issued in Renton, Washington, on May 25, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–13305 Filed 6–2–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0547; Directorate Identifier 2009–NM–234–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 757 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Model 757 airplanes. This proposed AD would require a detailed inspection of the inboard and outboard main track downstop assemblies and a torque application to the main track downstop assembly nuts of slat numbers 1 through 10, excluding the outboard track of slats 1 and 10, a detailed inspection of all slat track housings, and related corrective actions if necessary. This proposed AD results from reports of fuel leaking from the front spar of the wing through the slat track housing. We are proposing this AD to detect and correct incorrectly installed main track downstop assemblies, which, when the slat is retracted, could cause a puncture in the slat track housing leading to a fuel leak and potential fire.

DATES: We must receive comments on this proposed AD by July 19, 2010.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. 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;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0547; Directorate Identifier 2009–NM–234–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received two reports of fuel leaking from the front spar of the wing through the slat track housing. In at least one case, the source of the fuel leak was from a puncture of the slat track housing caused by a roller that had fallen into the slat track housing. The roller, which was not a component of the slat installation or the slat track support rib, subsequently punctured the slat track housing when the slat was retracted. While fuel leaking from a punctured slat track housing could lead to a fire, in both cases, no fires were reported.

Relevant Service Information

We have reviewed Boeing Special Attention Bulletin 757–57–0068, dated September 15, 2009. That service bulletin describes procedures for doing a detailed inspection of the inboard and outboard main track downstop assemblies and for applying torque to the main track downstop assembly nuts of slat numbers 1 through 10, excluding the outboard track of slats 1 and 10. That service bulletin also describes procedures for doing a detailed inspection of both inboard and outboard slat track housings of slat numbers 1 through 10 for foreign object debris or visible damage, and doing corrective actions if necessary. Boeing Special Attention Bulletin 757–57–0068, dated September 15, 2009, specifies the following corrective actions:

- Removing and reinstalling incorrectly installed main track downstop assemblies.
- Replacing damaged or missing main track downstop assembly parts.
- Removing foreign object debris.
- Repairing or replacing damaged slat track housings.
- Contacting Boeing for repair instructions.

Boeing Special Attention Bulletin 757–57–0068, dated September 15, 2009, specifies that the detailed inspections of the main track downstop assembles and the slat track housings be done before 24 months after the date on that service bulletin. That service bulletin also specifies that application of torque to the main track downstop assembly nuts be done before 24 months after the date on that service bulletin. That service bulletin also specifies that corrective actions be done before further flight.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between

the Proposed AD and the Service Bulletin." The proposed AD would also require sending the inspection results to Boeing.

Differences Between the Proposed AD and the Service Bulletin

Boeing Special Attention Bulletin 757–57–0068, dated September 15, 2009, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD would affect 645 airplanes of U.S. registry. We also estimate that it would take about 19 work-hours per product to comply with this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $1,041,675, or $1,615 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a "significant regulatory action" under Executive Order 12866,

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2010–0547; Directorate Identifier 2009–NM–234–AD.

Comments Due Date

(a) We must receive comments by July 19, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all The Boeing Company Model 757–200, –200PF, –200CB, and –300 series airplanes, certificated in any category.

Subject

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

Unsafe Condition

(e) This AD results from reports of fuel leaking from the front spar of the wing through the slat track housing. The Federal Aviation Administration is issuing this AD to detect and correct incorrectly installed main track downstop assemblies, which, when the slat is retracted, could cause a puncture in the slat track housing leading to a fuel leak and potential fire.

Compliance

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

Inspection and Torque Application

(g) Except as required by paragraph (h) of this AD, at the applicable time specified in paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 757–57–0068, dated September 15, 2009: Perform a detailed inspection of the inboard and outboard main track downstop assemblies of slat numbers 1 through 10, excluding the outboard main track downstop assemblies of slat numbers 1 and 10 and perform a detailed inspection of all slat track housings for foreign object debris, visible damage, and missing parts, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–57–0068, dated September 15, 2009. At the applicable time specified in paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 757–57–0068, dated September 15, 2009, apply torque to the main track down stop assembly nuts to make sure they have been correctly installed, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–57–0068, dated September 15, 2009. Do all applicable corrective actions before further flight, in accordance with Boeing Special Attention Service Bulletin 757–57–0068, dated September 15, 2009.

Exceptions to the Service Bulletin

(h) Where Boeing Special Attention Service Bulletin 757–57–0068, dated September 15, 2009, specifies a compliance time "after the date on this service bulletin," this AD requires compliance at the specified time after the effective date of this AD.

(i) Where Boeing Special Attention Service Bulletin 757–57–0068, dated September 15, 2009, specifies to contact Boeing for appropriate action: Before further flight, repair the damage using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Chris Hartman, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 917–6432; fax (425) 917–6590. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

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

Office. The AMOC approval letter must specifically reference this AD.

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

Issued in Renton, Washington, on May 24, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–13306 Filed 6–2–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0483; Directorate Identifier 2010–NM–065–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 757 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Model 757 airplanes. This proposed AD would require changing the lower fixed leading edge panel assemblies immediately outboard of the nacelles at slats 4 and 7. This proposed AD results from reports of Model 757 airplanes in service that have drain holes and unsealed panel assemblies in the fixed leading edge adjacent to the inboard end of slats 4 and 7 that are too close to the hot portion of the engines. We are proposing this AD to prevent fuel leaking onto an engine and a consequent fire.

DATES: We must receive comments on this proposed AD by July 19, 2010.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com*; Internet *https://www.myboeingfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. 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*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tak Kobayashi, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6499; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0483; Directorate Identifier 2010–NM–065–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

The manufacturer has reported that Model 757 airplanes in service have drain holes and unsealed panel assemblies in the fixed leading edge adjacent to the inboard end of slats 4 and 7 that are too close to the hot portion of the engines. This condition, if not corrected, could result in fuel leaking onto an engine and a consequent fire.

Relevant Service Information

We have reviewed Boeing Special Attention Service Bulletin 757–57–0070, dated January 27, 2010. The service bulletin describes procedures for changing the lower fixed leading edge panel assemblies immediately outboard of the nacelles at slats 4 and 7. A design change adds new drain holes and seals ribs adjacent to the new drain holes which will create new drain paths to direct fluid drainage from the adjacent slat track housings safely away from the hot portion of the engines.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD would affect 697 airplanes of U.S. registry. We also estimate that it would take about 9 work-hours per product to comply with this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $533,205, or $765 per product.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for

safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

1. Is not a "significant regulatory action" under Executive Order 12866,

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2010–0483; Directorate Identifier 2010–NM–065–AD.

Comments Due Date

(a) We must receive comments by July 19, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all The Boeing Company Model 757–200, –200PF, –200CB, and –300 series airplanes, certificated in any category.

Subject

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

Unsafe Condition

(e) This AD results from reports of Model 757 airplanes in service that have drain holes and unsealed panel assemblies in the fixed leading edge adjacent to the inboard end of slats 4 and 7 that are too close to the hot portion of the engines. The Federal Aviation Administration is issuing this AD to prevent fuel leaking onto an engine and a consequent fire.

Compliance

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

Action

(g) Within 60 months after the effective date of this AD, change the lower fixed leading edge panel assemblies immediately outboard of the nacelles at slats 4 and 7, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–57–0070, dated January 27, 2010.

Alternative Methods of Compliance (AMOCs)

(h)(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. Send information to *Attn:* Tak Kobayashi, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6499; fax (425) 917–6590. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Issued in Renton, Washington, on May 25, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–13307 Filed 6–2–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0384; Directorate Identifier 2010–NE–18–AD]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney PW4000 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Pratt & Whitney PW4000 series turbofan engines. This proposed AD would require a one-time visual inspection of the No. 3 bearing oil pressure tube, part number (P/N) 51J041–01, P/N 50J604–01, or P/N 50J924–01. Tubes that are found cracked or repaired would be required to be removed from service. This proposed AD would also prohibit repaired tubes from being installed. This proposed AD results from one report of a repaired No. 3 bearing oil tube that caused an engine in-flight shutdown, seven reports of repaired No. 3 bearing oil pressure tubes found cracked that led to unscheduled engine removals, and one report of a test cell event from a repaired tube that cracked. We are proposing this AD to prevent cracking of No. 3 bearing oil pressure tubes which could result in internal oil fire, failure of the high-pressure turbine (HPT) disks, uncontained engine failure, and damage to the airplane.

DATES: We must receive any comments on this proposed AD by August 2, 2010.

ADDRESSES: Use one of the following addresses to comment on this proposed AD.

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

FOR FURTHER INFORMATION CONTACT: James Gray, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803;

e-mail: james.gray@faa.gov; telephone (781) 238–7742; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA–2010–0384; Directorate Identifier 2010–NE–18–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Examining the AD Docket

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

Discussion

In August 2009, we received a report of a Pratt & Whitney PW4000 series turbofan engine failure during flight. Investigation revealed that the engine had an internal oil fire caused by a cracked No. 3 bearing oil pressure tube, and that the tube was previously weld-repaired. That fire led to failure of the high-pressure compressor rear shaft and damage to the HPT stages 1–2 air seal and HPT disks. Since 2007, we have also received seven other reports of repaired No. 3 bearing oil pressure tubes cracking, resulting in unscheduled engine removals. The operational interaction of the tube and diffuser case can cause wear. A weld-repaired tube can exhibit decreased capability and be more likely to crack than a tube that has not been repaired. Because of the type of environment these tubes operate in, tubes that are cracked or repaired, or if suspected that the tube was repaired, would be required to be removed from service. Operating the engines with cracked No. 3 bearing oil pressure tubes, if not corrected, could result in internal oil fire, failure of the HPT disks, uncontained engine failure, and damage to the airplane.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD, which would require:

- A one-time visual inspection of the No. 3 bearing oil pressure tube, P/N 51J041–01, P/N 50J604–01, or P/N 50J924–01; and
- Removal from service if found cracked or repaired, or if suspected that the tube was repaired; and
- A prohibition on installing repaired tubes.

Costs of Compliance

We estimate that this proposed AD would affect 973 PW4000 series turbofan engines installed on airplanes of U.S. registry. We also estimate that it would take about 10 minutes per engine to perform the proposed one-time visual inspection when the tube has been removed, and that the average labor rate is $85 per work-hour. Required parts would cost about $9,154 per engine. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $8,923,383.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Pratt & Whitney: Docket No. FAA–2010–0384; Directorate Identifier 2010–NE–18–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by August 2, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the following Pratt & Whitney turbofan engines, with No. 3 bearing oil pressure tube, part number (P/N) 51J041–01, P/N 50J604–01, or P/N 50J924–01, installed:

PW4000–94″ Engines

(1) PW4000–94″ engines affected are PW4050, PW4052, PW4056, PW4060, PW4060A, PW4060C, PW4062, PW4062A, PW4152, PW4156, PW4156A, PW4158, PW4160, PW4460, PW4462, and PW4650, including models with any dash number suffix.

PW4000–100″ Engines

(2) PW4000–100″ engines affected are PW4164, PW4168, PW4168A, PW4164C, PW4164C/B, PW4170, PW4168A–1D, PW4168–1D, PW4164–1D, PW4164C–1D, and PW4164C/B–1D, including models with any dash number suffix.

PW4000–112″ Engines

(3) PW4000–112″ engines affected are PW4074, PW4074D, PW4077, PW4077D, PW4084, PW4084D, PW4090, PW4090–3, PW4090D, and PW4098, including models with any dash number suffix.

(4) These engines are installed on, but not limited to, Airbus A300, A310, and A330 series, Boeing MD–11, 747, 767, and 777 series, airplanes.

Unsafe Condition

(d) This AD results from one report of a repaired No. 3 bearing oil pressure tube that cracked and caused an engine in-flight shutdown, one report of a test cell event, and eight reports since 2007, of repaired No. 3 bearing oil pressure tubes found cracked that led to unscheduled engine removals. We are issuing this AD to prevent cracking of No. 3 bearing oil pressure tubes which could result in internal oil fire, failure of the high-pressure turbine disks, uncontained engine failure, and damage to the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed the next time the No. 3 bearing oil pressure tube is removed from the engine after the effective date of this AD, unless the actions have already been done.

One-Time Visual Inspection of the No. 3 Bearing Oil Pressure Tube

(f) Perform a one-time visual inspection of the exterior of the No. 3 bearing oil pressure tube for cracks and evidence of being repaired.

(1) Remove the tube from service if any cracks are found.

(2) Remove the tube from service if found repaired, or if suspected that the tube was repaired.

(g) After the effective date of this AD, do not install any repaired No. 3 bearing oil pressure tube into any engine.

(h) Guidance on the No. 3 bearing oil pressure tube visual inspection can be found in:

(1) Pratt & Whitney Clean, Inspect, Repair Manual PN 51A357, 72–41–20 for PW4000–94″ and PW4000–100″ series engines; or

(2) Pratt & Whitney Clean, Inspect, Repair Manual PN 51A750, 72–41–20 for PW4000–112″ series engines.

Alternative Methods of Compliance

(i) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(j) Contact James Gray, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: james.gray@faa.gov;* telephone (781) 238–7742; fax (781) 238–7199, for more information about this AD.

(k) Contact Pratt & Whitney, 400 Main St., East Hartford, CT 06108, telephone (860) 565–7700; fax (860) 565–1605, for a copy of the repair manuals referenced in paragraphs (h)(1) and (h)(2) of this AD.

Issued in Burlington, Massachusetts, on May 27, 2010.

Peter A. White,

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

[FR Doc. 2010–13314 Filed 6–2–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0546; Directorate Identifier 2009–NM–215–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–120, –120ER, –120FC, –120QC, and –120RT Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: It has been found that some fuel quantity probes may fail during the airplane life leading to an erroneous fuel quantity indication to the crew. This erroneous indication may lead to the airplane being operated with less fuel than indicated which may lead to an uncommanded in-flight shutdown of one or both engines due to fuel starvation. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by July 19, 2010.

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

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

For service information identified in this proposed AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim—12227–901 São Jose dos Campos—SP—BRASIL; telephone: +55 12 3927–5852 or +55 12 3309–0732; fax: +55 12 3927–7546; e-mail: *distrib@embraer.com.br;* Internet: *http://www.flyembraer.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. 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;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 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–2010–0546; Directorate Identifier 2009–NM–215–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 have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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 Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil, has issued Brazilian Airworthiness Directive 2009–07–04, effective July 13, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> It has been found that some fuel quantity probes may fail during the airplane life leading to an erroneous fuel quantity indication to the crew. This erroneous indication may lead to the airplane being operated with less fuel than indicated which may lead to an uncommanded in-flight shutdown of one or both engines due to fuel starvation.
>
> * * * * *

Required actions include determining the real fuel quantity on each tank using the dripless measuring sticks, comparing the results of the fuel quantity measurement with the fuel master indicator and repeater indicator readings for each tank, and corrective actions as applicable. Corrective actions include replacing the measuring stick and its relevant magnetic float, replacing the master fuel quantity indicator, and replacing the repeater indicator, as applicable; inspecting defective tank units for contamination, corrosion and integrity of components, and repairing or replacing as necessary; inspecting system wiring from the connector at the wing root to the master indicator for condition and continuity; and correcting the fuel quantity indication system; as applicable. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Embraer has issued Sections 28–41–00 and 28–42–00 of Chapter 28 of the EMBRAER EMB120 Aircraft Maintenance Manual, Revision 24, dated March 30, 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Differences Between This AD and the MCAI

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 77 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $13,090, or $170 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Empresa Brasileira de Aeronautica S.A. (EMBRAER): Docket No. FAA–2010–0546; Directorate Identifier 2009–NM–215–AD.

Comments Due Date

(a) We must receive comments by July 19, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–120, –120ER, –120FC, –120QC, and –120RT airplanes, certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 28: Fuel.

Reason

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

It has been found that some fuel quantity probes may fail during the airplane life leading to an erroneous fuel quantity indication to the crew. This erroneous indication may lead to the airplane being operated with less fuel than indicated which may lead to an uncommanded in-flight shutdown of one or both engines due to fuel starvation.

Required actions include determining the real fuel quantity on each tank using the dripless measuring sticks, comparing the results of the fuel quantity measurement with the fuel master indicator and repeater indicator readings for each tank, and corrective actions as applicable. Corrective actions include replacing the measuring stick and its relevant magnetic float, replacing the master fuel quantity indicator, and replacing the repeater indicator, as applicable; inspecting defective tank units for contamination, corrosion and integrity of components, and repairing or replacing as necessary; inspecting system wiring from the connector at the wing root to the master indicator for condition and continuity; and correcting the fuel quantity indication system; as applicable.

Compliance

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

Actions

(g) Within 600 flight hours or 180 days after the effective date of this AD, whichever occurs first, with at least 400 kg (882 lb) of fuel on each tank, determine the real fuel quantity on each tank using the dripless measuring sticks, in accordance with Sections 28–41–00 and 28–42–00 of Chapter 28 of the EMBRAER EMB120 Aircraft Maintenance Manual, Revision 24, dated March 30, 2009. Before further flight, compare the results of the fuel quantity measurement with the fuel master indicator and repeater indicator readings for each tank and do the applicable action in paragraph (g)(1), (g)(2), or (g)(3) of this AD.

(1) If the difference of the two measurements is greater than 60 kg (132 lb) on both tanks, before further flight do all applicable corrective actions including correcting the FQIS, in accordance with Sections 28–41–00 and 28–42–00 of Chapter 28 of the EMBRAER EMB120 Aircraft Maintenance Manual, Revision 24, dated March 30, 2009.

(2) If the difference of the two measurements is greater than 60 kg (132 lb) on only one tank, and the conditions in paragraphs (g)(2)(i), (g)(2)(ii), and (g)(2)(iii) of this AD are met, do all applicable corrective actions including correcting the FQIS, in accordance with Sections 28–41–00 and 28–42–00 of Chapter 28 of the EMBRAER EMB120 Aircraft Maintenance Manual, Revision 24, dated March 30, 2009, within 10 days after determining the real fuel quantity as specified in paragraph (g) of this AD.

(i) Before further flight after each refueling, the actions required in paragraph (g) of this AD are done;

(ii) Both fuel flow indicators are operating properly; and

(iii) The fuel used or fuel remaining function of the totalizer is operating properly.

(3) If the difference of the two measurements is greater than 60 kg (132 lb) on only one tank, and any condition in paragraph (g)(2)(i), (g)(2)(ii), or (g)(2)(iii) of this AD is not met, before further flight do all applicable corrective actions including correcting the FQIS, in accordance with Sections 28–41–00 and 28–42–00 of Chapter 28 of the EMBRAER EMB120 Aircraft Maintenance Manual, Revision 24, dated March 30, 2009.

(h) Repeat the actions required in paragraph (g) of this AD thereafter at intervals not to exceed 600 flight hours or 180 days, whichever occurs first.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: This AD requires doing all applicable corrective actions in accordance with Sections 28–41–00 and 28–42–00 of Chapter 28 of the EMBRAER EMB120 Aircraft Maintenance Manual, Revision 24, dated March 30, 2009. Corrective actions include replacing the measuring stick and its relevant magnetic float, replacing the master fuel quantity indicator, and replacing the repeater indicator, as applicable; inspecting defective tank units for contamination, corrosion and integrity of components, and repairing or replacing as necessary; inspecting system wiring from the connector at the wing root to the master indicator for condition and continuity; and correcting the fuel quantity indication system; as applicable. The MCAI does not provide a corrective action and only requires a repetitive functional check of the FQIS in accordance with Section 28–42–00 of Chapter 28 of the EMBRAER EMB120 Aircraft Maintenance Manual, Revision 24, dated March 30, 2009. This difference has been coordinated with Agência Nacional de Aviação Civil (ANAC).

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(j) Refer to MCAI Brazilian Airworthiness Directive 2009–07–04, effective July 13, 2009; and Sections 28–41–00 and 28–42–00 of Chapter 28 of the EMBRAER EMB120 Aircraft Maintenance Manual, Revision 24, dated March 30, 2009; for related information.

Issued in Renton, Washington, on May 25, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–13304 Filed 6–2–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3500

[Docket No. FR–5352–A–01]

RIN 2502–A178

Real Estate Settlement Procedures Act (RESPA): Strengthening and Clarifying RESPA's "Required Use" Prohibition Advance Notice of Proposed Rulemaking

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Through this Advance Notice of Proposed Rulemaking (ANPR), HUD commences the process of initiating rulemaking directed to strengthening and clarifying the prohibition against the "required use" of affiliated

settlement service providers in residential mortgage transactions under section 8 of RESPA. HUD has received complaints that some homebuyers are committing to use a builder's affiliated mortgage lender in exchange for construction discounts or discounted upgrades, without sufficient time to research their contracts or to comparison shop. The purpose of this ANPR is to solicit information that can be used to inform any future revision or clarification of the regulatory definition of the "required use" of affiliated settlement service providers in residential mortgage transactions.

With this ANPR, HUD seeks comment from an array of sources with experience or knowledge of affiliated business arrangements in residential mortgage transactions. HUD also welcomes comment on actions in addition or as an alternative to rulemaking that would better address concerns with affiliated business arrangements in residential mortgage transactions.

DATES: *Comment Due Date:* September 1, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this ANPR to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the Federal Information Relay Service at 800–877–8339 (this is not a toll-free number). Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Teresa Payne, Deputy Assistant Secretary for Regulatory Affairs and Manufactured Housing, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 9162, Washington, DC 20410–8000; telephone number 202–708–6401 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the Federal Information Relay Service at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

In the late 1960s, Congress became concerned about the excessive cost of settlement services for residential mortgage loans. Congress found that many homebuyers had very little knowledge about the settlement process and that homebuyers often did not shop for, and were not involved in, choosing the settlement service providers that they would be required to pay at settlement. Instead, in many areas of the country, the delivery of settlement services was controlled by a system of referrals by those in a position to refer settlement business (such as builders, real estate agents, and lawyers), resulting in "kickbacks" by settlement service providers to those who referred business to them. In this system, settlement service providers did not compete for business by providing a quality service at a reasonable cost to homebuyers. Rather, settlement service providers generated business by providing the most lucrative kickbacks to those in a position to refer business to them.

Through the adoption of RESPA and subsequent amendments, Congress sought to change the way in which homebuyers retained settlement service providers for federally related mortgage loans. The term "federally related mortgage loan," as defined in section 3 of RESPA, includes nearly all residential mortgage loans for one- to four-family homes. In order to encourage consumers to shop for settlement services, and cause settlement service providers to compete for homebuyers' business, RESPA requires that the nature and costs of real estate settlement services be disclosed in advance to the consumer, and it forbids the payment of referral fees, kickbacks, and unearned fees for real estate settlement services.[1]

RESPA defines an "affiliated business arrangement" as "an arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider." (12 U.S.C. 2602(7).) In RESPA-covered transactions, referrals to affiliated settlement service providers are subject to civil and criminal liability under section 8 of RESPA (Section 8), because the referrer's return on investment in the affiliate can be considered a prohibited kickback or thing of value for the referral. (*See* 12 U.S.C. 2607(a).) However, Section 8(c)(4) provides an exemption for affiliate referrals that allows for returns on ownership interest if the referrals involve an affiliated business arrangement and three other conditions are met. The three other conditions are: (1) The referral is accompanied by a disclosure of affiliation and estimated charges by the provider to which the consumer is referred, (2) the consumer is not "required to use" a particular settlement service provider; and (3) the arrangement does not involve otherwise

[1] In July 2008, Congress reaffirmed its interest in protecting consumers by directing HUD to recommend legislative reforms to RESPA that would "promote more transparent disclosures, allowing consumers to better shop and compare mortgage loan terms and settlement costs." *See* 12 U.S.C. 1515(b).

prohibited compensation. (*See* 12 U.S.C. 2607(c)(4).) Requiring the use of an affiliate is thus presumed to involve a violation of Section 8, insofar as it violates a condition for exemption from liability under Section 8.

The definition of "required use" in HUD's existing RESPA regulations reads as follows:

> Required use means a situation in which a person must use a particular provider of a settlement service in order to have access to some distinct service or property, and the person will pay for the settlement service of the particular provider or will pay a charge attributable, in whole or in part, to the settlement service. However, the offering of a package or (combination of settlement services) or the offering of discounts or rebates to consumers for the purchase of multiple settlement services does not constitute a required use. Any package or discount must be optional to the purchaser. The discount must be a true discount below the prices that are otherwise generally available, and must not be made up by higher costs elsewhere in the settlement process. (24 CFR 3500.2)

On November 17, 2008 at 73 FR 68204, HUD published a final rule amending its RESPA regulations at 24 CFR part 3500 to further the purposes of RESPA, including protecting consumers from kickbacks and referral fees that tend to unnecessarily increase settlement costs.[2] In support of that rulemaking, HUD had received consumer complaints and comments about certain affiliated business practices. These complaints and comments included concerns that residential developers and homebuilders would offer to reduce the cost of a home (for example, by adding free construction upgrades, or discounting the home price) if the homebuyer used the developer's affiliated mortgage lender. Buyers also complained that, in some instances, because the timing of the contract with the builder precluded the buyer from shopping, the affiliated lender used by the homebuyer was able to charge settlement costs or interest rates that were not competitive with those of nonaffiliated lenders. The complaints indicated that these incentivized referrals to affiliate lenders may be steering techniques that effectively "require the use" of the affiliate.

In order to address concerns about the operation and effect of these incentivized affiliate referrals, the November 17, 2008, RESPA final rule included a revised definition of "required use" that was to take effect on January 16, 2009. The revised definition of "required use" in the November 17, 2008, final rule would have provided as follows:

> Required use means a situation in which a person's access to some distinct service, property, discount, rebate, or other economic incentive, or the person's ability to avoid an economic disincentive or penalty, is contingent upon the person using or failing to use a referred provider of settlement services. In order to qualify for the affiliated business exemption under § 3500.15, a settlement service provider may offer a combination of bona fide settlement services at a total price (net of the value of the associated discount, rebate, or other economic incentive) lower than the sum of the market prices of the individual settlement services and will not be found to have required the use of the settlement service providers as long as: (1) The use of any such combination is optional to the purchaser; and (2) the lower price for the combination is not made up by higher costs elsewhere in the settlement process. (*See* 73 FR 68239–68240)

As a result of litigation challenging the revised definition,[3] HUD deferred the effective date for the revised definition, and subsequently withdrew the revision by final rule published on May 15, 2009 (74 FR 22822). When HUD withdrew the revised definition, it left in place the existing definition of "required use" pending new rulemaking on the subject. HUD's final rule withdrawing the revised definition of "required use" noted that public comments received in response to the proposed withdrawal had highlighted the potential complexity of existing affiliated business arrangement practices and the need for further clarity on the application of "required use" to such practices. The comments also underscored the need for HUD to continue to pursue reform in this area in order to protect consumers from harmful steering and referral practices.

In withdrawing the definition, HUD stated its intention to pursue new rulemaking on the subject of "required use." In the May 15, 2009, final rule, HUD also reiterated its commitment to the goals of RESPA reform and to addressing referral practices that result in required use.

II. This ANPR

HUD remains committed to furthering RESPA's goal of protecting homebuyers against unnecessarily high settlement costs by addressing both incentivized affiliate referrals and penalties that could adversely affect not only individual borrowers, but also competition in the provision of settlement services. HUD also remains committed to preserving the benefits of voluntary contracts that involve true discounts. In advance of proposing a new rule on this subject, HUD is publishing this ANPR to request information on the practices to be addressed by this rulemaking.

HUD requests information from all interested members of the public, including individual consumers, consumer advocacy organizations, housing counseling agencies, the real estate and mortgage industry, and federal, state, and local consumer protection and enforcement agencies. In addition to information about individual consumers' experiences, HUD requests information that includes empirical data, studies, and analyses regarding affiliated business arrangement practices, and that responds to the specific questions presented in this ANPR. In particular, HUD seeks information that would enable an assessment of the benefits and costs of possible regulatory alternatives. For instance, have economic incentives to use affiliated lenders facilitated inflated appraisals or lowered underwriting standards in the lending market? Has required use played any role in creating recent situations where borrowers are more likely to be "underwater?" Commenters are encouraged to provide data that would inform analysis of both the magnitude of the required use problem and the potential regulatory options to address the problem.

From individual consumers who have purchased new homes and from consumer advocates, HUD seeks information about consumers' experiences with lenders referred by builders.

From state and local consumer protection agencies and state attorneys general, HUD seeks comment and information regarding complaints received and/or investigations undertaken with respect to business arrangements that steer consumers to use affiliated settlement businesses.

To develop the necessary and appropriate protections for consumers from detrimental practices that may result from affiliated business arrangements, HUD requests further information about the structure, scope, frequency, timing, and effects of affiliated practices that impair consumers' ability to evaluate the true costs of a mortgage transaction, thereby limiting consumer choice and steering

[2] Additional information regarding the RESPA regulatory amendments, and specifically changes made by HUD subsequent to its RESPA proposed rule of March 14, 2008, published at 73 FR 14030, is provided in the preamble to the November 17, 2008, final rule.

[3] *See National Association of Home Builders, et al.* v. *Shaun Donovan, et al.,* Civ. Action No. 08–CV–1324, United States District Court for the Eastern District of Virginia, Alexandria Division.

consumers into unnecessarily high settlement costs.

HUD invites comment on any aspect of referral arrangements in residential mortgage transactions that may assist HUD in developing any new or revised protections, but HUD specifically requests information on the following questions, and requests that commenters provide as detailed and factual information or evidence as possible in responding to these questions.

1. *Tailoring "required use" to reach abusive incentive schemes, but not beneficial discounts or packages.* The definition of "required use" in the November 17, 2008, RESPA final rule, sought to prevent detrimental referral practices among affiliates, while preserving discounts offered by settlement service providers for packaged settlement services.

Some commenters have suggested that builders' incentive programs discourage homebuyers from comparison shopping for the best loan, because: (1) The value of some of the incentives offered by builders for the use of their affiliated lender (*e.g.,* kitchen upgrades) are difficult for consumers to quantify when comparing the loan terms and settlement costs of the affiliated lender with those of nonaffiliated lenders; and (2) often, in order to get the incentive a builder is offering, a new homebuyer must commit to the use of the builder's affiliated lender at the time that the contract for the construction of the home is executed, which may be many months before settlement will occur and long before the typical consumer would begin shopping for a lender; and (3) that the builder encourages the buyer to commit to the contract before the buyer has time to fully consider alternatives and comparison shop.

To assist in determining whether these claims are correct, HUD asks:

(a) What types of discounts and incentives are tied to the use of an affiliated settlement service provider such as a mortgage lender? For example, are construction upgrades, and discounts, such as free or reduced costs for options such as fireplaces, flooring upgrades, kitchen upgrades (such as granite countertops, stainless steel appliances), or decks and finished basements frequently offered? Is closing cost assistance or interest rate guarantees usually part of the incentive package? Are these incentives delivered as coupons for services, merchandise, discount deposit bank accounts, etc.?

(b) In a new home purchase transaction, at what points in time are incentives for the use of a builder-affiliated lender discussed with a potential homebuyer? Do such discussions occur with sales representatives at the initial time consumers inspect homes, and are they presented by the sales representative or are they presented only in response to a consumer request? Does the issue of incentives also arise when the contract for the purchase of the home is signed or does it arise at some point later in the process? At what point are affiliated-business arrangement disclosures provided to consumers?

(c) At what point, generally, in a new home purchase transaction, are the homebuyers expected to determine whether or not they will use a builder-affiliated lender? Is a decision expected of the homebuyer at the time that the contract for the purchase of the house is signed or at some point later in the process? Are there standard contract provisions specifying the package or combination of settlement services that are provided? Are homebuyers expected to contact the affiliated lender within a certain period of time before or after the contract has been signed?

(d) Is there evidence demonstrating that homebuyers who are offered incentives by builders to use builder-affiliated lenders are as likely or less likely to engage in comparison shopping for a lender as are those homebuyers who are not offered an incentive to use a builder-affiliated lender? Is there empirical data demonstrating a difference in the use of affiliated lenders between first-time homebuyers and other homebuyers?

(e) Is there evidence that buyers using affiliated lenders pay higher rates of interest or higher closing costs than those that use unaffiliated lenders?

(f) Is there evidence demonstrating that homebuyers benefit from some types of incentives and not from others or by incentives offered by some types of business but not others? Incentives could include benefits such as discounts on the costs of settlement, payment of settlement services, and discounts on upgrades to the house.

2. *Forward Loan Commitments.* A forward loan commitment (forward commitment), in its simplest definition, is a pledge to provide a loan at a future date. It is HUD's understanding that in the homebuilding industry, some large-scale homebuilders purchase forward commitments from lenders pursuant to which the lenders make an aggregate amount of mortgage financing available to the homebuilder's customers under the terms of the commitment. Some commenters on the March 14, 2008, RESPA proposed rule expressed concern about the effect of a revised definition of "required use" on the ability of homebuilders to purchase forward commitments.

To better understand forward commitments and their use in mortgage loan transactions, HUD seeks comment on the following:

(a) How are forward commitments purchased and used as described above, and are there alternative types, terms, or uses for builder-purchased forward commitments?

(b) Is there evidence as to the prevalence of builder-purchased forward commitments?

(c) What is the benefit to homebuyers of forward commitments in mortgage loan transactions from affiliated as well as nonaffiliated lenders?

3. *Other Issues.* A concern raised through comments submitted on the March 14, 2008, RESPA proposed rule is that certain incentives are built into the cost of the home and are therefore not true discounts. Commenters also stated a belief that an affiliated lender has a special, potentially improper, interest in financing a house at any price set by a seller. In this regard, HUD asks:

(a) Is there any data that home sellers are providing discounts or upgrades to buyers who agree to use affiliated businesses based on prices that are different from those offered to buyers who decline such offers?

(b) Is there any evidence that home sellers either include or do not include in the listed price of the house the cost of the incentives that they offer for the use of an affiliated lender?

(c) Do homes sold with incentives to the homebuyer appraise at the pre- or post-incentive price? Is it possible to isolate the effects of standard builder construction upgrades and custom upgrades requested by the consumer on the appraised value?

(d) How do affiliate-originated mortgages perform compared to the local average (e.g., in the case of default or the homeowner being "under water" statistics)?

(e) How do prices of new construction homes financed by affiliated lenders compare with prices of new construction homes financed by nonaffiliates? That is, is there evidence that builders do not negotiate down to or near to incentivized prices in the absence of an incentive to use an affiliate?

(f) Is there data on the extent to which the current affiliated business disclosure encourages consumers to comparison shop with nonaffiliated service providers before signing contracts? Can the affiliated business disclosure be improved to inform consumers of the

advantages and disadvantages of affiliated lending practices?

4. *State and Local Experience.* State and local consumer and enforcement agencies, through their investigatory and prosecutorial experiences, may be able to contribute valuable information regarding practices that steer consumers to overpriced settlement service providers, as well as provide information about successful and unsuccessful means of preventing such abuse. To these agencies especially, HUD asks:

(a) What has been and continues to be the impact of state and local regulatory enforcement in this area?

(b) What rules and forms of enforcement have proven most effective?

(c) Is there evidence available regarding specific anticompetitive or anticonsumer practices that can be provided by state law enforcement?

(d) Can state laws regulating builder-affiliated business arrangements provide an approach for evaluating options?

5. *One-Stop Shopping.* In the process of withdrawing the revised definition of "required use" in the November 17, 2008, RESPA final rule, HUD received comments indicating that limiting referrals to affiliates adversely affects one-stop shopping options that could benefit consumers. Accordingly, HUD asks whether there is any way to quantify the benefit to homebuyers of one-stop shopping. Additionally, is there any evidence that homebuyers derive greater benefit from one-stop shopping than from comparison shopping for the best loan terms and settlement costs?

6. *Incentives vs. Disincentives or Penalties.* HUD requests comments on the relationship between incentives to use an affiliated settlement service provider and disincentives or penalties for using a nonaffiliated settlement service provider, and how incentives and disincentives might be treated in the new regulation. To assist in the development of distinctions or equivalencies between incentives and disincentives, HUD asks for information concerning cases where an incentive to use a certain provider would not have the same effect as a disincentive for failure to use another provider.

While HUD specifically seeks comments on the foregoing questions, HUD welcomes additional information that will help inform HUD's views on this issue.

Dated: May 27, 2010.

David H. Stevens,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2010–13350 Filed 6–2–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF EDUCATION

34 CFR Chapter VI

Promoting Postbaccalaureate Opportunities for Hispanic Americans (PPOHA) Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Proposed requirements.

SUMMARY: The Assistant Secretary for Postsecondary Education proposes requirements under the PPOHA Program. The Assistant Secretary may use one or more of these requirements for competitions in fiscal year (FY) 2010 and later years. We take this action to establish appropriate requirements for the PPOHA Program. We have based these requirements on existing rules for the Hispanic-Serving Institutions (HSI) Program, authorized by Title V of the Higher Education Act of 1965, as amended (HEA), because the PPOHA Program and the HSI Program are governed by some common provisions and support similar institutions. We are proposing to limit the number of applications an eligible institution can submit under the PPOHA to ensure that more HSIs have an opportunity for assistance under the PPOHA Program. We are also proposing a limitation on the use of PPOHA Program funds for direct student assistance to ensure that institutions use the grant funds to best meet the broad purposes of the statute.

DATES: We must receive your comments on or before July 6, 2010.

ADDRESSES: Address all comments about this notice to Dr. Maria E. Carrington, U.S. Department of Education, 1990 K Street, NW., Room 6036, Washington, DC 20006–8513.

If you prefer to send your comments by e-mail, use the following address: *maria.carrington@ed.gov.* You must include the term "PPOHA Program Notice of Proposed Requirements" in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Dr. Maria E. Carrington: (202) 502–7548, or by e-mail: *maria.carrington@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this notice. To ensure that your comments have maximum effect in developing the notice of final requirements, we urge you to identify clearly the specific proposed requirement that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed requirements. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this notice in Room 6036, 1990 K Street, NW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Purpose of Program: The purposes of the PPOHA Program are to: (1) Expand postbaccalaureate educational opportunities for, and improve the academic attainment of, Hispanic students; and (2) expand the postbaccalaureate academic offerings as well as enhance the program quality in the institutions of higher education that are educating the majority of Hispanic college students and helping large numbers of Hispanic and low-income students complete postsecondary degrees.

Program Authority: 20 U.S.C.1102–1102c, 20 U.S.C.1161aa–1.

Proposed Requirements

Background

The PPOHA Program is authorized by Title V, part B, sections 511 through 514 of the HEA. It was added to the HEA by the Higher Education Opportunity Act of 2008, Public Law 110–315. The PPOHA Program supports HSIs that offer a postbaccalaureate certificate or degree granting program.

There are overlapping statutory provisions that govern both the PPOHA Program and the HSI Program, which is authorized by sections 501 to 504 of the HEA. For example, in defining the term "Hispanic-serving institution" for purposes of the PPOHA Program, Congress adopted the definition of that term from the program authority for the HSI Program. In addition, the PPOHA Program provides development grants like the HSI Program. Congress also applied the general provisions of the HSI Program (see sections 521 through 528 of the HEA) to the PPOHA Program.

In FY 2009, the Department conducted its first grant competition under the PPOHA Program. Under the General Education Provisions Act (GEPA), the Department can establish requirements for the first competition it holds under a new or substantially revised program authority without subjecting those requirements to the Administrative Procedure Act's rulemaking requirements. (*See* section 437(d)(1) of GEPA). The Department established requirements for the FY 2009 PPOHA Program grant competition in a notice inviting applications that it published in the **Federal Register** on June 18, 2009 (74 FR 28913). The requirements established for the FY 2009 grant competition included (1) using the HSI Program regulations in 34 CFR 606.2(a) and (b) and 34 CFR 606.3 through 606.5 for purposes of determining eligibility for the PPOHA Program and (2) using the "tie-breaker for development grants" provisions from the HSI Program regulations in 34 CFR 606.23(b)(1) and (b)(2). Given the overlap between the PPOHA Program and the HSI Program, the Department determined that it was appropriate to use these regulations from the HSI program for the PPOHA Program.

Congress has appropriated $22 million for the PPOHA Program for FY 2010. To conduct an effective competition using these funds, the Department has determined that it is necessary to establish requirements for the FY 2010 competition and for future competitions under the PPOHA Program. Specifically, we propose again to use the HSI Program regulations in 34 CFR 606.2(a) and (b) and 34 CFR 606.3 through 606.5 for purposes of determining eligibility, and the regulations in 34 CFR 606.23(b)(1) and (b)(2) for breaking ties for development grants in this competition.

As we explained in the notice inviting applications for the FY 2009 competition, we believe these requirements are appropriate for the following reasons:

Eligibility Criteria (Use of 34 CFR 606.2(a) and (b), 606.3 through 606.5). The regulations for the HSI Program (34 CFR part 606) include eligibility criteria for a "Hispanic-serving institution" as used in section 502 of the HEA (20 U.S.C. 1101a). The definition of a "Hispanic-serving institution" in section 502 of the HEA also applies to the PPOHA Program. Accordingly, we are using the eligibility criteria from the HSI Program (34 CFR 606.2(a) and (b) and 606.3, 606.4, and 606.5) for the PPOHA Program. The use of these regulations will enable applicants under the PPOHA Program to determine whether they meet the definitional requirements of an HSI.

Tie-breaker for Development Grants (Use of 34 CFR 606.23(b)(1) and (b)(2)). Through the PPOHA Program, the Department provides development grants like those currently awarded under the HSI Program. In light of the similar eligibility criteria for these two programs, the Assistant Secretary has decided to adopt for the PPOHA Program the regulations for tie-breakers used in the HSI Program.

In addition to the eligibility and tie breaker requirements, we also propose to establish the following two additional requirements:

(1) A limitation on the number of applications an eligible institution can submit under the PPOHA Program.

(2) A limitation on the use of PPOHA Program funds for direct student assistance.

We propose to limit the number of applications an eligible institution can submit under the PPOHA Program to one per fiscal year. This proposed limitation would ensure that more HSIs have an opportunity for assistance under the PPOHA Program.

We also propose to limit the amount of PPOHA Program funds a grantee can use to provide direct student assistance to no more than 20 percent. While section 513(a)(4) of the HEA allows grant funds to be used to support low-income, postbaccalaureate students with scholarships, fellowships, and other financial assistance to permit the enrollment of these students in postbaccalaureate certificate or degree-granting programs, the primary emphasis of the PPOHA Program is to expand postbaccalaureate academic offerings and enhance program quality rather than to provide direct student financial assistance.

Proposed Requirements

The Assistant Secretary proposes the following requirements for this program. We may apply one or more of these requirements in any year in which this program is in effect.

Proposed Requirement 1—Eligibility Criteria (Use of 34 CFR 606.2(a) and (b), 606.3 Through 606.5)

Hispanic-Serving Institution (HSI): To qualify as an eligible HSI for the Promoting Postbaccalaureate Opportunities for Hispanic Americans (PPOHA) Program under sections 502 and 512(b) of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1101a and 1102a), an institution of higher education (IHE) must—

(a) Have an enrollment of needy students, as defined in section 502(b) of the HEA (section 502(a)(2)(A)(i) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(i));

(b) Have, except as provided in section 522(b) of the HEA, average educational and general expenditures that are low, per full-time equivalent (FTE) undergraduate student, in comparison with the average educational and general expenditures per FTE undergraduate student of institutions that offer similar instruction (section 502(a)(2)(A)(ii) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(ii));

Note: To demonstrate an enrollment of needy students and low average educational and general expenditures per FTE undergraduate student, an IHE must be designated as an "eligible institution" in accordance with 34 CFR 606.3 through 606.5 and the notice inviting applications for designation as an eligible institution for the fiscal year for which the grant competition is being conducted.

(c) Be accredited by a nationally recognized accrediting agency or association that the Secretary has determined to be a reliable authority as to the quality of education or training offered, or making reasonable progress toward accreditation, according to such an agency or association (section 502(a)(2)(A)(iv) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(iv));

(d) Be legally authorized to provide, and provide within the State, an educational program for which the institution awards a bachelor's degree (section 502(a)(2)(A)(iii) of the HEA; 20 U.S.C. 1101a(a)(2)(A)(iii)); and

(e) Have an enrollment of undergraduate FTE students that is at least 25 percent Hispanic students at the end of the award year immediately preceding the date of application (section 502(a)(5)(B) of the HEA; 20 U.S.C. 1101a(a)(5)(B)).

Note 1: Funds for the PPOHA Program will be awarded each fiscal year; thus, for this program, the "end of the award year immediately preceding the date of application" refers to the end of the fiscal year prior to the application due date. The

end of the fiscal year occurs on September 30 for any given year.

Note 2: In considering applications for grants under this program, the Department will compare the data and documentation the institution relied on in its application with data reported to the Department's Integrated Postsecondary Education Data System (IPEDS), the IHE's State-reported enrollment data, and the institutional annual report. If different percentages or data are reported in these various sources, the institution must, as part of the eligibility process, explain the reason for the differences. If the IPEDS data show that less than 25 percent of the institution's undergraduate FTE students are Hispanic, the burden is on the institution to show that the IPEDS data are inaccurate. If the IPEDS data indicate that the institution has an undergraduate FTE less than 25 percent, and the institution fails to demonstrate that the IPEDS data are inaccurate, the institution will be considered ineligible.

Proposed Requirement 2—Use of Tie-Breaking Factors

To resolve ties in the reader scores of applications for development grants, the Department will award one additional point to an application from an institution of higher education (IHE) that has an endowment fund for which the market value per full-time equivalent (FTE) student is less than the comparable average current market value of the endowment funds per FTE student at similar type IHEs. In addition, to resolve ties in the reader scores of applications for PPHOA development grants, the Department will award one additional point to an application from an IHE that has expenditures for library materials per FTE student that are less than the comparable average expenditures for library materials per FTE student at similar type IHEs. (34 CFR 606.23(a)(1) and (2)).

For the purpose of these funding considerations, we will use 2008–2009 data.

If a tie remains after applying the tie-breaker mechanism above, priority will be given for Individual Development Grants to applicants that have the lowest endowment values per FTE student. (34 CFR § 606.23(b)(1))

Proposed Requirement 3—Limit on Applications From an Eligible Institution

In any fiscal year, an eligible institution may submit only one application for a grant under the PPOHA Program. This restriction is intended to ensure that more Hispanic-serving institutions have an opportunity for assistance under Title V of the Higher Education Act of 1965, as amended.

Proposed Requirement 4—Limit on Use of Funds for Direct Student Assistance

A PPOHA Program grantee may use no more than 20 percent of its total PPOHA Program grant award to provide financial support—in the form of scholarships, fellowships, and other student financial assistance—to low-income students.

Final Requirements: We will announce the final requirements in a notice in the **Federal Register**. We will determine the final requirements after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing additional requirements subject to meeting applicable rulemaking requirements.

Note: This notice does not solicit applications. In any year in which we choose to use one or more of these requirements, we invite applications through a notice in the **Federal Register**.

Executive Order 12866: This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this proposed regulatory action.

The potential costs associated with this proposed regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this proposed regulatory action, we have determined that the benefits of the proposed requirements justify the costs.

We have determined, also, that this proposed regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*. To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Delegation of Authority: The Secretary of Education has delegated authority to Daniel T. Madzelan, Director, Forecasting and Policy Analysis for the Office of Postsecondary Education, to perform the functions and duties of the Assistant Secretary for Postsecondary Education.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.031M.

Dated: May 25, 2010.

Daniel T. Madzelan,

Director, Forecasting and Policy Analysis.

[FR Doc. 2010–13318 Filed 6–2–10; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0158; FRL–9158–2]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone and the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve submittals from the State of Delaware pursuant to the Clean Air Act (CAA) sections 110(k)(2) and (3). These submittals address the infrastructure elements specified in the CAA section 110(a)(2) necessary to implement, maintain, and enforce the 1997 8-hour ozone and fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS), and the 2006 $PM_{2.5}$ NAAQS. This proposed action is limited to the

following infrastructure elements which were subject to EPA's completeness findings pursuant to CAA section 110(K)(1) for the 1997 8-hour ozone NAAQS, dated March 27, 2008, and the 1997 $PM_{2.5}$ NAAQS, dated October 22, 2008: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), or portions thereof.

DATES: Written comments must be received on or before July 6, 2010.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2010–0158 by one of the following methods:

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

B. *E-mail: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2010–0158, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2010–0158. 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Ellen Wentworth, (215) 814–2034, or by e-mail at *wentworth.ellen@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On July 18, 1997, EPA promulgated a revised 8-hour ozone NAAQS (62 FR 38856) and a new $PM_{2.5}$ NAAQS (62 FR 38652). The revised ozone NAAQS is based on 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm. The new $PM_{2.5}$ NAAQS established a health-based $PM_{2.5}$ standard of 15.0 micrograms per cubic meter ($\mu g/m^3$) based on a 3-year average of annual mean $PM_{2.5}$ concentrations, and a 24-hour standard of $65\mu g/m^3$ based on a 3-year average of the 98th percentile of 24-hour concentrations. EPA strengthened the 24-hour $PM_{2.5}$ NAAQS from $65\mu g/m^3$ to $35\mu g/m^3$ on October 17, 2006 (71 FR 61144).

Section 110(a) of the CAA requires States to submit State Implementation Plans (SIPs) that provide for the implementation, maintenance, and enforcement of new or revised NAAQS within three years following the promulgation of such NAAQS. In March of 2004, Earthjustice initiated a lawsuit against EPA for failure to take action against States that had not made SIP submissions to meet the requirements of sections 110(a)(1) and (2) for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, i.e., failure to make a "finding of failure to submit the required SIP 110(a) SIP elements." On March 10, 2005, EPA entered into a Consent Decree with Earthjustice that obligated EPA to make official findings in accordance with section 110(k)(1) of the CAA as to whether States have made required complete SIP submissions, pursuant to sections 110(a)(1) and (2), by December 15, 2007 for the 1997 8-hour ozone NAAQS, and by October 5, 2008 for the 1997 $PM_{2.5}$ NAAQS. EPA made such findings for the 1997 8-hour ozone NAAQS on March 27, 2008 (73 FR 16205) and on October 22, 2008, (73 FR 62902) for the 1997 $PM_{2.5}$ NAAQS. These completeness findings did not include findings relating to: (1) Section 110(a)(2)(C) to the extent that such subsection refers to a permit program as required by part D Title I of the CAA; (2) section 110(a)(2)(I); and (3) section 110(a)(2)(D)(i), which has been addressed by a separate finding issued by EPA on April 25, 2005 (70 FR 21147). Therefore this action does not cover these specific elements.

II. Summary of State Submittals

Delaware provided multiple submittals to satisfy section 110(a)(2) requirements that are the subject of this proposed action for the 1997 8-hour ozone NAAQS, and the 1997 and 2006 $PM_{2.5}$ NAAQS. The submittals shown in Table 1 addressed the infrastructure elements, or portions thereof, identified in section 110(a)(2) that EPA is proposing to approve.

TABLE 1—110(a)(2) ELEMENTS OR PORTIONS THEREOF, EPA IS PROPOSING TO APPROVE FOR THE 1997 OZONE AND $PM_{2.5}$ AND THE 2006 $PM_{2.5}$ NAAQS

Submittal date	1997 8-Hour ozone	1997 $PM_{2.5}$	2006 $PM_{2.5}$
December 13, 2007	A, B, C, D(ii), E, F, G, H, J, K, L, M	A, B, C, D(ii), E, F, G, H, J, K, L, M.	
March 12, 2008	.....	C and J.	
September 19, 2008	G.		

TABLE 1—110(a)(2) ELEMENTS OR PORTIONS THEREOF, EPA IS PROPOSING TO APPROVE FOR THE 1997 OZONE AND $PM_{2.5}$ AND THE 2006 $PM_{2.5}$ NAAQS—Continued

Submittal date	1997 8-Hour ozone	1997 $PM_{2.5}$	2006 $PM_{2.5}$
September 16, 2009	A, B, C, D(ii), E, F, G, H, J, K, L, M	A, B, C, D(ii), E, F, G, H, J, K, L, M	A, B, C, D(ii), E, F, G, H, J, K, L, M.
March 10, 2010	.....	G	G.

EPA has analyzed the above identified submissions and is proposing to make a determination that such submittals meet the requirements of section 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), or portions thereof. A detailed summary of EPA's review and rationale for approving Delaware's submittals may be found in the Technical Support Document (TSD) for this action, which is available on line at *http://www.regulations.gov,* Docket number EPA–R03–OAR–2010–0158.

III. Proposed Action

EPA is proposing to approve Delaware's submittals that provide the basic program elements specified in the CAA sections 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), or portions thereof, necessary to implement, maintain, and enforce the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, and the 2006 $PM_{2.5}$ NAAQS. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely proposes to approve 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 Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, pertaining to Delaware's section 110(a)(2) infrastructure requirements for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, and the 2006 $PM_{2.5}$ NAAQS 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, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: May 21, 2010.

William C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2010–13379 Filed 6–2–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1120]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

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

DATES: Comments are to be submitted on or before September 1, 2010.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1120, to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Kevin C. Long, Acting Chief,

Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

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

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

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

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

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

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

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

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

List of Subjects in 44 CFR Part 67

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

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

PART 67—[AMENDED]

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

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

§ 67.4 [Amended]

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

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Tazewell County, Illinois, and Incorporated Areas				
Bull Run Creek	Approximately 900 feet upstream of the confluence with Prairie Creek.	None	+655	Unincorporated Areas of Tazewell County, Village of Morton
	At the upstream side of Idlewood Street extended	None	+680	
Dempsey Creek	Approximately 1.40 mile upstream of the confluence with Farm Creek.	None	+541	Unincorporated Areas of Tazewell County.
	Approximately 2.56 miles upstream of the confluence with Farm Creek.	None	+603	
Farm Creek	Approximately 770 feet upstream of the railroad bridge.	None	+740	Unincorporated Areas of Tazewell County.
	At the downstream side of Diebel Road	None	+742	
Fond Du Lac Creek	At the confluence with Farm Creek	None	+500	Unincorporated Areas of Tazewell County.
	At the downstream side of East Washington Street (IL–8).	None	+508	
Illinois River	At the upstream side of Mason Road extended	+455	+454	City of Pekin, Unincorporated Areas of Tazewell County.
	Approximately 1,950 feet upstream of Illinois Highway 9.	+458	+457	
Lick Creek	Approximately 480 feet downstream of Parkway Drive	None	+472	City of Pekin.
	Approximately 680 feet upstream of Parkway Drive	None	+476	
Mackinaw River	Approximately 0.97 mile downstream of Dee Mack Road (County Highway 6).	None	+588	Village of Mackinaw.
	Approximately 0.78 mile downstream of Dee Mack Road (County Highway 6).	None	+591	
Prairie Creek	Approximately 0.49 mile downstream of the confluence with Bull Run Creek.	None	+648	Unincorporated Areas of Tazewell County.
	Approximately 280 feet downstream of the confluence with Bull Run Creek.	None	+654	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
School Creek	At the confluence with Farm Creek	None	+509	City of East Peoria, Unincorporated Areas of Tazewell County.
	Approximately 80 feet west of Rio Drive extended	None	+622	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of East Peoria
Maps are available for inspection at City Hall, 100 South Main Street, East Peoria, IL 61611.

City of Pekin
Maps are available for inspection at City Hall, 111 South Capitol Street, Pekin, IL 61554.

Unincorporated Areas of Tazewell County
Maps are available for inspection at the McKenzie Building, 11 South 4th Street, 4th Floor, Pekin, IL 61554.

Village of Mackinaw
Maps are available for inspection at the Village Hall, 100 East Fast Street, Mackinaw, IL 61755.

Village of Morton
Maps are available for inspection at the Village Hall, 120 North Main Street, Morton, IL 61550.

Kennebec County, Maine (All Jurisdictions)

Berry Pond	Entire shoreline north of Dexter Pond Road	+245	+246	Town of Winthrop.
Echo Lake	Entire shoreline within the Town of Fayette	None	+317	Town of Fayette.
Kennebec River	Approximately 3.5 miles upstream of I–95	None	+44	Town of Vassalboro.
	Approximately 2.6 miles downstream of Carter Memorial Drive Bridge.	None	+55	
Little Pond	Entire shoreline within the Town of Rome	None	+256	Town of Rome.
Long Pond	Entire shoreline within the Town of Windsor	None	+187	Town of Windsor.
Lovejoy Pond	Entire shoreline within the Town of Fayette	None	+304	Town of Fayette.
Messalonskee Stream	At the County Road Bridge	None	+105	Town of Oakland.
	At the boundary between the City of Waterville and Somerset County.	None	+105	
North Pond	Entire shoreline within the Town of Rome	None	+256	Town of Rome.
Sebasticook River	Approximately 2,500 feet downstream of the boundary between the Town of Clinton and Waldo County.	None	+129	Township of Unity.
	At the boundary between the Town of Clinton and Waldo County.	None	+132	
Threecornered Pond	Entire shoreline north of Weeks Mills Road	None	+196	Town of Windsor.
Threemile Pond	Entire shoreline north of Weeks Mills Road	None	+185	Town of Windsor.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Town of Fayette
Maps are available for inspection at the Town Hall, 2589 Main Street, Fayette, ME 04349.

Town of Oakland
Maps are available for inspection at the Town Hall, 6 Cascade Mill Road, Oakland, ME 04963.

Town of Rome
Maps are available for inspection at the Town Hall, 8 Mercer Road, Rome, ME 04963.

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

Town of Vassalboro
Maps are available for inspection at the Town Hall, 682 Main Street, Vassalboro, ME 04989.

Town of Windsor
Maps are available for inspection at the Town Hall, 523 Ridge Road, Windsor, ME 04363.

Town of Winthrop
Maps are available for inspection at the Town Office, 17 Highland Avenue, Winthrop, ME 04364.

Township of Unity
Maps are available for inspection at the Kennebec County Office, 125 State Street, Augusta, ME 04330.

Perry County, Missouri, and Incorporated Areas

Apple Creek	At a dam/unnamed road crossing approximately 300 feet downstream of U.S. Route 61.	+400	+399	Unincorporated Areas of Perry County.
	Approximately 250 feet upstream of U.S. Route 61	+402	+403	
Apple Creek (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 3.6 miles upstream of the confluence with the Mississippi River.	None	+368	Unincorporated Areas of Perry County.
Apple Creek Tributary 3 (Backwater effects from Mississippi River).	From the confluence with Apple Creek upstream to County Road 456.	None	+368	Unincorporated Areas of Perry County.
Blue Spring Branch (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 1.1 mile upstream of Christian Street.	None	+390	Town of Lithium, Unincorporated Areas of Perry County.
Blue Spring Branch Tributary 1 (Backwater effects from Mississippi River).	From the confluence with Blue Spring Branch to approximately 0.5 mile upstream of County Road 926.	None	+390	Unincorporated Areas of Perry County.
Blue Spring Branch Tributary 3 (Backwater effects from Mississippi River).	From the confluence with Blue Spring Branch to approximately 0.4 mile upstream of County Road 916.	None	+390	Unincorporated Areas of Perry County.
Brazeau Creek (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 1.0 mile upstream of County Road 446.	None	+372	Unincorporated Areas of Perry County.
Brazeau Creek Tributary 3 (Backwater effects from Mississippi River).	From the confluence with Brazeau Creek to approximately 0.5 mile upstream of County Road 438.	None	+372	Unincorporated Areas of Perry County.
Brazeau Creek Tributary 5 (Backwater effects from Mississippi River).	From the confluence with Brazeau Creek to approximately 250 feet upstream of Missouri Route A.	None	+372	Unincorporated Areas of Perry County.
Christenson Branch Creek (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 350 feet upstream of the confluence with McClanahan Creek.	None	+385	Unincorporated Areas of Perry County.
Cinque Hommes Creek (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 3 miles upstream of County Road 322.	None	+384	Unincorporated Areas of Perry County.
Clines Branch (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 1,400 feet downstream of the intersection of Missouri Route D and County Road 438.	None	+378	Unincorporated Areas of Perry County.
Doodlebug Branch (Backwater effects from Mississippi River).	From the confluence with Cinque Hommes Creek to approximately 4,000 feet upstream.	None	+382	Unincorporated Areas of Perry County.
Dry Fork (Backwater effects from Mississippi River).	From the confluence with Cinque Hommes Creek to approximately 1.4 mile upstream.	None	+384	Unincorporated Areas of Perry County.
Dry Fork Tributary 1 (Backwater effects from Mississippi River).	From the confluence with Dry Fork to approximately 0.6 mile upstream.	None	+384	Unincorporated Areas of Perry County.
Falls Branch (Backwater effects from Mississippi River).	From the confluence with Blue Spring Branch to approximately 0.8 mile upstream of Missouri Route M.	None	+390	Unincorporated Areas of Perry County.
McClanahan Creek (Backwater effects from Mississippi River).	From the confluence with Christenson Branch Creek to approximately 0.9 mile upstream of the confluence with Christenson Branch Creek.	None	+385	Unincorporated Areas of Perry County.
Mississippi River	At the Cape Girardeau County boundary	+370	+368	Town of Lithium, Unincorporated Areas of Perry County.
	At the Ste. Genevieve County boundary	+393	+391	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Mississippi River Tributary 21 (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 0.45 mile upstream of the confluence with the Mississippi River.	None	+376	Unincorporated Areas of Perry County.
Mississippi River Tributary 25 (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 0.8 mile upstream of the confluence with the Mississippi River.	None	+378	Unincorporated Areas of Perry County.
Omete Creek (Backwater effects from Mississippi River).	From the confluence with Cinque Hommes Creek to approximately 1.0 mile upstream of County Road 340.	None	+380	Unincorporated Areas of Perry County.
Omete Creek Tributary 2 (Backwater effects from Mississippi River).	From the confluence with Omete Creek to approximately 0.73 mile upstream of Omete Creek.	None	+380	Unincorporated Areas of Perry County.
Owl Creek (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 2.2 miles upstream of the confluence with the Mississippi River.	None	+373	Unincorporated Areas of Perry County.
Patton Creek (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 0.76 mile upstream of the confluence with the Mississippi River.	None	+369	Unincorporated Areas of Perry County.
Patton Creek Tributary 1 (Backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 1.2 mile upstream of the confluence with the Mississippi River.	None	+370	Unincorporated Areas of Perry County.
Saint Laurent Creek (Backwater effects from Mississippi River).	From the county boundary to approximately 1.2 mile upstream to Missouri Route H.	None	+391	Unincorporated Areas of Perry County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Town of Lithium

Maps are available for inspection at 321 North Main Street, Suite 5, Perryville, MO 63775.

Unincorporated Areas of Perry County

Maps are available for inspection at 321 North Main Street, Suite 5, Perryville, MO 63775.

Miami County, Ohio, and Incorporated Areas

Great Miami River	Approximately 1.0 mile upstream of Peterson Road	None	+854	City of Piqua.
	Approximately 1.1 mile upstream of County Highway 25A.	None	+866	
Great Miami River	At the Montgomery County boundary	None	+791	City of Tipp City, Unincorporated Areas of Miami County.
	At State Highway 571	None	+791	
Hatfield Ditch	Approximately 750 feet upstream of Main Street	None	+914	Unincorporated Areas of Miami County.
	Approximately 2,000 feet upstream of Main Street	None	+931	
Staunton Tributary	Approximately 1,865 feet downstream of Old Staunton Road.	None	+825	City of Troy, Unincorporated Areas of Miami County.
	Approximately 350 feet downstream of Stonyridge Avenue.	None	+830	
Stillwater River	At the Montgomery County boundary	None	+832	City of Union, Unincorporated Areas of Miami County, Village of West Milton.
	Approximately 0.8 mile downstream of State Highway 55.	None	+832	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.

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

Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Piqua
Maps are available for inspection at 201 West Water Street, Piqua, OH 45356.

City of Tipp City
Maps are available for inspection at 260 South Garber Drive, Tipp City, OH 45371.

City of Troy
Maps are available for inspection at City Hall, 100 South Market Street, Troy, OH 45373.

City of Union
Maps are available for inspection at 118 North Main Street, Union, OH 45322.

Unincorporated Areas of Miami County
Maps are available for inspection at 201 West Main Street, Troy, OH 45373.

Village of West Milton
Maps are available for inspection at 701 South Miami Street, West Milton, OH 45383.

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

Dated: May 14, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–13264 Filed 6–2–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1126]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

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

DATES: Comments are to be submitted on or before September 1, 2010.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1126, to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

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

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

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

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

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

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

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

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

List of Subjects in 44 CFR Part 67

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

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

PART 67—[AMENDED]

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

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

§ 67.4 [Amended]

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

State	City/town/county	Source of flooding	Location**	*Elevation in feet(NGVD) + Elevation in feet(NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)	
				Existing	Modified
City of McGrath, Alaska					
Alaska	City of McGrath	Kuskokwim River	Approximately 3.23 miles downstream of the confluence with the Takotna River.	None	+338
			Approximately 1.83 mile upstream of the confluence with the Takotna River.	None	+338

* National Geodetic Vertical Datum.
# Depth in feet above ground.
+ North American Vertical Datum.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

ADDRESSES

City of McGrath
Maps are available for inspection at City Hall, Takotna Avenue and F Street, McGrath, AK 99627.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Kenai Peninsula Borough, Alaska				
Bear Creek	At the confluence with Salmon Creek	None	+170	Kenai Peninsula Borough.
	At the outflow from Bear Lake	None	+255	
Grouse Creek	At the confluence with Lost Creek	None	+189	Kenai Peninsula Borough.
	At the outflow from Grouse Lake	None	+220	
Kwechack Creek (Including Flows Outside of the Levees).	At the confluence with Salmon Creek	None	+136	Kenai Peninsula Borough.
	Approximately 1.4 mile upstream of the Brono Road bridge.	None	+336	
Resurrection River	At the confluence with Resurrection Bay	+17	+16	City of Seward, Kenai Peninsula Borough.
	Approximately 1.6 mile upstream of the Alaskan Railroad, near the intersection of Wilma Bypass and Herman Leirer Road.	+75	+74	
Salmon Creek	At the confluence with Resurrection Bay	+17	+16	City of Seward, Kenai Peninsula Borough.
	At the confluence with Grouse Creek and Lost Creek, just downstream of Timber Lane Drive.	None	+189	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Salmon Creek Overflow	At the confluence with Salmon Creek	None	+68	Kenai Peninsula Borough.
	At the divergence from Salmon Creek	None	+148	
Salmon Creek Split	At the confluence with Salmon Creek	None	+41	Kenai Peninsula Borough.
	At the divergence from Salmon Creek	None	+88	
Salmon Creek/Resurrection River Split.	At the confluence with Resurrection River	None	+38	Kenai Peninsula Borough.
	At the outflow from Salmon Creek	None	+40	
Sawmill Creek	At the confluence with Resurrection Bay	None	+16	City of Seward, Kenai Peninsula Borough.
	Approximately 1.3 mile upstream of Nash Road	None	+183	
Sawmill Creek Split	At the divergence from Sawmill Creek	None	+12	City of Seward.
	At the confluence with Resurrection Bay	None	+16	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate.

Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Seward
Maps are available for inspection at 410 Adams Street, Seward, AK 99664.

Kenai Peninsula Borough
Maps are available for inspection at 144 North Binkley Street, Soldotna, AK 99669.

Duval County, Florida, and Incorporated Areas

Big Davis Creek	Just upstream of I–95	+5	+6	City of Jacksonville.
	Approximately 1.25 mile upstream of Philips Highway	+16	+17	
Big Fishweir Creek	Just upstream of Roosevelt Boulevard	None	+6	City of Jacksonville.
	Just downstream of Lakeshore Boulevard	None	+21	
Big Fishweir Creek Tributary 1.	Just upstream of the railroad	None	+10	City of Jacksonville.
	Just downstream of Cassat Avenue	None	+19	
Bigelow Branch	Just upstream of Talleyrand Avenue	None	+5	City of Jacksonville.
	Approximately 1,500 feet upstream of Buckman Street.	None	+15	
Blockhouse Creek	Approximately 6,700 feet upstream of the confluence with the Trout River.	None	+5	City of Jacksonville.
	Just downstream of Armsdale Road	None	+17	
Bonett Branch	At the confluence with Pottsburg Creek	+9	+10	City of Jacksonville.
	Just downstream of I–95	None	+19	
Box Branch	At the confluence with Pablo Creek	+4	+7	City of Jacksonville.
	At the confluence with Box Branch Tributary 1	+2	+14	
Box Branch Tributary 1	At the confluence with Box Branch	#2	+14	City of Jacksonville.
	Approximately 3,350 feet upstream of the confluence with Box Branch.	#2	+17	
Butcher Pen Creek	Just upstream of Wesconnet Road	None	+5	City of Jacksonville.
	Approximately 600 feet upstream of Randia Road	None	+17	
Caldwell Branch	Approximately 1,300 feet upstream of the confluence with Yellow Water Creek.	None	+68	City of Jacksonville.
	Approximately 4,100 feet upstream of the confluence with Caldwell Branch Tributary 2.	None	+79	
Caldwell Branch Tributary 1	At the confluence with Caldwell Branch	None	+74	City of Jacksonville.
	Approximately 6,700 feet upstream of the confluence with Caldwell Branch.	None	+81	
Caldwell Branch Tributary 2	At the confluence with Caldwell Branch	None	+77	City of Jacksonville.
	Approximately 4,000 feet upstream of the confluence with Caldwell Branch.	None	+81	
Caney Branch	Approximately 4,000 feet upstream of the confluence with Rushing Branch.	+5	+7	City of Jacksonville.
	Approximately 2.5 miles upstream of the confluence with Rushing Branch.	None	+22	
Cedar Creek	Just upstream of I–95	+5	+6	City of Jacksonville.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Just upstream of Lem Turner Road	#2	+23	
Cedar Creek Tributary 2	At the confluence with Cedar Creek	None	+13	City of Jacksonville.
	Just upstream of Terrell Road	None	+16	
Cedar Creek Tributary 6	At the confluence with Cedar Creek	+5	+8	City of Jacksonville.
	Just downstream of Biscayne Boulevard	None	+15	
Cedar Creek Tributary 7	At the confluence with Cedar Creek	#2	+18	City of Jacksonville.
	Just downstream of Lem Turner Road	#2	+19	
Cedar Creek Tributary 8	At the confluence with Cedar Creek	#2	+18	City of Jacksonville.
	Just downstream of Lem Turner Road	#2	+18	
Cedar River	Approximately 1,500 feet upstream of the confluence with Cedar River Tributary 1.	+5	+6	City of Jacksonville.
	Approximately 3,000 feet upstream of the confluence with Cedar River Tributary 16.	None	+42	
Cedar River Tributary 1	At the confluence with the Cedar River	None	+5	City of Jacksonville.
	Approximately 50 feet upstream of Lakeshore Boulevard.	None	+6	
Cedar River Tributary 12	At the confluence with the Cedar River	None	+8	City of Jacksonville.
	Approximately 150 feet upstream of Lane Avenue	None	+11	
Cedar River Tributary 13	At the confluence with the Cedar River	None	+8	City of Jacksonville.
	Approximately 100 feet upstream of Normandy Boulevard.	None	+29	
Cedar River Tributary 14	At the confluence with the Cedar River	+16	+14	City of Jacksonville.
	Approximately 900 feet upstream of the confluence with Cedar River Tributary 18.	None	+17	
Cedar River Tributary 15	At the confluence with Cedar River Tributary 14	None	+17	City of Jacksonville.
	Approximately 1,300 feet upstream of the confluence with Cedar River Tributary 14.	None	+18	
Cedar River Tributary 16	At the confluence with the Cedar River	None	+21	City of Jacksonville.
	Approximately 2,200 feet upstream of the confluence with the Cedar River.	None	+22	
Cedar River Tributary 17	At the confluence with the Cedar River	None	+20	City of Jacksonville.
	Approximately 350 feet upstream of Beaver Street	None	+25	
Cedar River Tributary 19	Approximately 700 feet upstream of the confluence with the Cedar River.	+10	+12	City of Jacksonville.
	Approximately 250 feet upstream of Grace Terrace	+10	+12	
Cedar Swamp Creek	At the confluence with Pablo Creek	+8	+9	City of Jacksonville.
	Approximately 3,400 feet upstream of Huffman Boulevard.	None	+37	
Cedar Swamp Creek Tributary 1.	At the confluence with Cedar Swamp Creek	None	+29	City of Jacksonville.
	Just downstream of Beach Boulevard	None	+33	
Cedar Swamp Creek Tributary 2.	At the confluence with Cedar Swamp Creek	None	+28	City of Jacksonville.
	At the confluence with Pablo Creek Tributary 3	None	+34	
Christopher Creek	At the confluence with Christopher Creek Tributary 1	+4	+5	City of Jacksonville.
	Approximately 50 feet upstream of Old Saint Augustine Road.	None	+20	
Christopher Creek Tributary 1.	At the confluence with Christopher Creek	+4	+5	City of Jacksonville.
	Approximately 50 feet upstream of Dupont Avenue	None	+11	
Cormorant Branch	Approximately 1,800 feet upstream of Julington Creek Road.	+3	+4	City of Jacksonville.
	Just upstream of Ricky Drive	None	+17	
Craig Creek	Just upstream of Hendricks Avenue	None	+5	City of Jacksonville.
	Just downstream of I–95	None	+21	
Deep Bottom Creek	Just upstream of Scott Mill Road	None	+5	City of Jacksonville.
	Just downstream of Hampton Road	None	+19	
Deep Bottom Creek Tributary 1.	At the confluence with Deep Bottom Creek	None	+18	City of Jacksonville.
	Just downstream of Hartley Road	None	+19	
Deer Creek	Approximately 900 feet upstream of the Saint Johns River.	None	+4	City of Jacksonville.
	Approximately 4,400 feet upstream of the Saint Johns River.	None	+9	
Dunn Creek	Approximately 3,600 feet upstream of the confluence with Rushing Branch.	+5	+6	City of Jacksonville.
	Just upstream of Bernard Road	+21	+22	
Dunn Creek Tributary 1	At the confluence with Dunn Creek	+5	+8	City of Jacksonville.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Just downstream of Shamrock Avenue	None	+19	
Dunn Creek Tributary 2	At the confluence with Dunn Creek	+12	+14	City of Jacksonville.
	Approximately 3,500 feet upstream of Webb Road	None	+22	
Durbin Creek	At the confluence with Julington Creek	+3	+4	City of Jacksonville.
	At the St. Johns County boundary	+10	+9	
Durbin Creek Tributary 1	At the confluence with Durbin Creek	None	+7	City of Jacksonville.
	Just downstream of Philips Highway	None	+19	
East Branch	Just upstream of Bessent Road	None	+5	City of Jacksonville.
	Approximately 100 feet upstream of the confluence with East Branch Tributary 1.	#2	+14	
East Branch Tributary 1	At the confluence with East Branch	#2	+14	City of Jacksonville.
	Approximately 60 feet upstream of Lem Turner Road	None	+14	
Fishing Creek	Just upstream of Timiquana Road	+5	+7	City of Jacksonville.
	Approximately 1,500 feet upstream of Jammes Road	None	+21	
Fishing Creek Tributary 1	At the confluence with Fishing Creek	None	+8	City of Jacksonville.
	Approximately 300 feet upstream of 103rd Street	None	+30	
Ginhouse Creek	Just upstream of Fort Caroline Road	+5	+6	City of Jacksonville.
	Approximately 50 feet downstream of Bradley Road	None	+38	
Goodbys Creek	Approximately 2,400 feet upstream of Sanchez Road	+4	+5	City of Jacksonville.
	Approximately 800 feet downstream of Praver Drive	+15	+16	
Goodbys Creek Tributary 1	Approximately 1,000 feet downstream of Sunbeam Road.	+8	+9	City of Jacksonville.
	Approximately 9,300 feet upstream of the confluence with Goodbys Creek.	None	+23	
Goodbys Creek Tributary 2	Just downstream of the end of San Rae Road	+5	+4	City of Jacksonville.
	Approximately 1,750 feet upstream of Runnymeade Road.	None	+20	
Goodbys Creek Tributary 3	At the confluence with Goodbys Creek	+7	+9	City of Jacksonville.
	Approximately 100 feet upstream of Philips Highway	None	+22	
Goodbys Creek Tributary 4	At the confluence with Goodbys Creek Tributary 2	None	+17	City of Jacksonville.
	Approximately 3,200 feet upstream of the confluence with Goodbys Creek Tributary 2.	None	+21	
Goodbys Creek Tributary 5	At the confluence with Goodbys Creek	+4	+5	City of Jacksonville.
	Approximately 2,000 feet upstream of the confluence with Goodbys Creek.	+8	+5	
Greenfield Creek	Approximately 350 feet downstream of Atlantic Boulevard.	+7	+8	City of Jacksonville.
	Approximately 1,500 feet upstream of Hodges Boulevard.	+13	+17	
Gulley Branch	At the confluence with the Trout River	None	+5	City of Jacksonville.
	Approximately 1,650 feet upstream of Dunn Avenue	None	+18	
Half Creek	At the confluence with the Trout River	None	+5	City of Jacksonville.
	Approximately 400 feet upstream of V.C. Johnson Road.	None	+17	
Half Creek Tributary 1	At the confluence with Half Creek	None	+13	City of Jacksonville.
	Approximately 1,000 feet upstream of V.C. Johnson Road.	None	+21	
Half Creek Tributary 2	At the confluence with Half Creek	None	+17	City of Jacksonville.
	Approximately 580 feet upstream of the confluence with Half Creek.	None	+18	
Hogan Creek	Just upstream of Bay Street	+4	+6	City of Jacksonville.
	Approximately 1,050 feet upstream of 11th Street	None	+21	
Hogpen Creek	Just upstream of San Pablo Road	+5	+6	City of Jacksonville.
	Approximately 1,050 feet upstream of San Pablo Road.	+5	+6	
Hogpen Creek Tributary 1	At the confluence with Hogpen Creek	None	+6	City of Jacksonville.
	Approximately 1,350 feet upstream of Canyon Falls Drive.	None	+13	
Hopkins Creek	At the confluence with Pablo Creek	None	+5	City of Atlantic Beach, City of Neptune Beach.
	Approximately 1,100 feet upstream of Cutlass Drive	None	+7	
Hopkins Creek Tributary 1	At the confluence with Hopkins Creek Tributary 2	None	+4	City of Jacksonville Beach, City of Neptune Beach.
	Approximately 1,700 feet upstream of the confluence with Hopkins Creek.	None	+4	
Hopkins Creek Tributary 2	At the confluence with Hopkins Creek	None	+4	City of Neptune Beach.
	Just downstream of Bay Street	None	+8	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Hopkins Creek Tributary 3	At the confluence with Hopkins Creek Tributary 2	None	+6	City of Jacksonville Beach, City of Neptune Beach.
	Just upstream of 15th Avenue	None	+9	
Jones Creek	Approximately 800 feet upstream of Monument Road	+9	+10	City of Jacksonville.
	At the upstream confluence with Jones Creek Tributary 1.	None	+39	
Jones Creek Tributary 1	At the downstream confluence with Jones Creek	+18	+23	City of Jacksonville.
	At the upstream confluence with Jones Creek	None	+39	
Jones Creek Tributary 2	At the confluence with Jones Creek	None	+4	City of Jacksonville.
	Approximately 150 feet upstream of State Route 9A ..	None	+44	
Julington Creek	Approximately 2,800 feet upstream of Julington Tributary 8.	+3	+4	City of Jacksonville.
	Just upstream of Hood Road	None	+23	
Julington Creek Tributary 1 ..	At the confluence with Julington Creek	None	+17	City of Jacksonville.
	Just downstream of Deer Creek Club Road	None	+28	
Julington Creek Tributary 4 ..	At the confluence with Julington Creek	None	+9	City of Jacksonville.
	Approximately 50 feet downstream of I–295	None	+22	
Julington Creek Tributary 5 ..	At the confluence with Julington Creek	None	+7	City of Jacksonville.
	Approximately 500 feet upstream of Greenland Oaks Drive.	None	+16	
Julington Creek Tributary 8 ..	At the confluence with Julington Creek	None	+2	City of Jacksonville.
	Approximately 850 feet upstream of Julington Creek Road.	None	+18	
Little Cedar Creek	Approximately 2,800 feet upstream of I–95	+5	+6	City of Jacksonville.
	Just upstream of Owens Road	#2	+25	
Little Cedar Creek Tributary 1.	At the confluence with Little Cedar Creek	None	+9	City of Jacksonville.
	Approximately 6,650 feet upstream of I–95	None	+24	
Little Cedar Creek Tributary 2.	At the confluence with Little Cedar Creek	None	+5	City of Jacksonville.
	Approximately 150 feet upstream of I-95	None	+6	
Little Fishweir Creek	Just upstream of St. Johns Avenue	None	+5	City of Jacksonville.
	Just downstream of Roosevelt Boulevard	None	+17	
Little Pottsburg Creek	Just upstream of the Hart Expressway	None	+5	City of Jacksonville.
	Approximately 600 feet upstream of I-95	None	+19	
Little Pottsburg Creek Tributary 1.	At the confluence with Little Pottsburg Creek	None	+10	City of Jacksonville.
	Approximately 600 feet upstream of Hickman Road ...	None	+21	
Little Pottsburg Creek Tributary 2.	At the confluence with Little Pottsburg Creek	None	+12	City of Jacksonville.
	Approximately 50 feet downstream of Spring Glen Road.	None	+20	
Little Pottsburg Creek Tributary 3.	At the confluence with Little Pottsburg Creek	None	+12	City of Jacksonville.
	Approximately 1,250 feet upstream of the confluence with Little Pottsburg Creek.	None	+14	
Little Sixmile Creek	At the confluence with the Ribault River	None	+12	City of Jacksonville.
	Approximately 2,700 feet upstream of 5th Street	None	+17	
Little Sixmile Creek Tributary 1.	At the confluence with Little Sixmile Creek	None	+13	City of Jacksonville.
	Just upstream of Shawland Road	None	+15	
Little Sixmile Creek Tributary 2.	At the confluence with Little Sixmile Creek Tributary 1	None	+15	City of Jacksonville.
	Approximately 750 feet upstream of Dahlia Road	None	+18	
Little Sixmile Creek Tributary 3.	At the confluence with Sixmile Creek	None	+13	City of Jacksonville.
	Just downstream of Lucoma Drive	None	+13	
Little Trout River	At the confluence with the Trout River	None	+4	City of Jacksonville.
	Approximately 1,000 feet upstream of the confluence with Little Trout River Tributary 4.	None	+15	
Little Trout River Tributary 4	At the confluence with the Little Trout River	None	+15	City of Jacksonville.
	Approximately 1,200 feet upstream of the confluence with the Little Trout River.	None	+15	
Little Trout River Tributary 6	At the confluence with the Little Trout River	None	+9	City of Jacksonville.
	Approximately 600 feet downstream of Plummer Road.	None	+13	
Little Trout River Tributary 10	At the confluence with the Little Trout River	None	+4	City of Jacksonville.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 2,600 feet upstream of the confluence with the Little Trout River.	None	+9	
Long Branch	Just upstream of Buffalo Avenue	None	+5	City of Jacksonville.
	Approximately 400 feet upstream of Liberty Street	None	+12	
Long Branch Tributary 1	Approximately 400 feet upstream of Liberty Street	None	+12	City of Jacksonville.
	Approximately 1,100 feet upstream of Liberty Street	None	+14	
Magnolia Gardens Creek	At the confluence with the Ribault River	None	+2	City of Jacksonville.
	Approximately 300 feet upstream of Cleveland Road	None	+19	
McCoy Creek	At the end of Oak Street	+6	+7	City of Jacksonville.
	Just upstream of Commonwealth Avenue	+19	+20	
McCoy Creek North Branch	At the confluence with McCoy Creek	+16	+17	City of Jacksonville.
	Just upstream of 3rd Street	None	+20	
McCoy Creek Southwest Branch.	At the confluence with McCoy Creek	+10	+12	City of Jacksonville.
	Just upstream of College Street	None	+17	
McCoy Creek Tributary 5	Just upstream of Roselle Road at the confluence with McCoy Creek Southwest Branch.	None	+14	City of Jacksonville.
	Approximately 50 feet upstream of Gilmore Street	None	+15	
McGirts Creek	At the confluence with the Ortega River	+59	+58	City of Jacksonville.
	Approximately 1,000 feet upstream of Halsems Road	None	+75	
McGirts Creek Tributary 11	At the confluence with McGirts Creek	None	+60	City of Jacksonville.
	Approximately 1.3 mile upstream of the confluence with McGirts Creek.	#2	+74	
McGirts Creek Tributary 12	At the confluence with McGirts Creek	None	+63	City of Jacksonville.
	Approximately 1,200 feet upstream of William Avenue	#2	+80	
McGirts Creek Tributary 14	At the confluence with McGirts Creek	None	+59	City of Jacksonville.
	Approximately 1,750 feet upstream of Joes Road	None	+79	
Mill Dam Branch	At the confluence with Pablo Creek	+18	+21	City of Jacksonville.
	3,750 feet upstream of Leaby Road	#2	+43	
Mill Dam Branch Canal	At the confluence with Mill Dam Branch	None	+27	City of Jacksonville.
	Approximately 100 feet upstream of Gate Parkway	None	+34	
Mill Dam Branch	At the confluence with Mill Dam	None	+38	City of Jacksonville.
	Approximately 100 feet upstream of Beach Boulevard	#2	+38	
Mill Dam Branch	At the confluence with Mill Dam	None	+38	City of Jacksonville.
	Approximately 50 feet upstream of Anniston Road	None	+41	
Mill Dam Branch Tributary 5	At the confluence with Mill Dam Branch at Lantana Lakes Drive.	None	+41	City of Jacksonville.
	Just upstream of Forest Boulevard	None	+45	
Miller Creek	At the confluence with the Saint Johns River	None	+6	City of Jacksonville.
	Approximately 400 feet upstream of Camden Avenue	None	+18	
Miller Creek Tributary 1	At the confluence with Miller Creek	None	+16	City of Jacksonville.
	Just downstream of Stillman Street	None	+16	
Miramar Tributary	At the confluence with the Saint Johns River	None	+5	City of Jacksonville.
	Approximately 1,200 feet upstream of Orlando Circle West.	None	+13	
Moncrief Creek	At the confluence with the Trout River	None	+2	City of Jacksonville.
	Approximately 250 feet upstream of 9th Street	None	+21	
Moncrief Creek Tributary 4	At the confluence with Moncrief Creek	None	+17	City of Jacksonville.
	Approximately 250 feet upstream of Spring Grove Avenue.	None	+19	
Mount Pleasant Creek	Approximately 3,400 feet upstream of Ashley Melisse Boulevard.	+6	+7	City of Jacksonville.
	Just downstream of General Doolittle Drive	None	+36	
Mount Pleasant Creek Tributary 3.	At the confluence with Tiger Pond Creek	None	+6	City of Jacksonville.
	Approximately 2,050 feet upstream of Ashley Melisse Boulevard.	None	+26	
Mount Pleasant Creek Tributary 4.	Approximately 1,150 feet upstream of Blue Eagle Way.	None	+23	City of Jacksonville.
	At the confluence with Mount Pleasant Creek	None	+26	
Mount Pleasant Creek Tributary 6.	At the confluence with Mount Pleasant Creek	None	+27	City of Jacksonville.
	Just downstream of Running River Road	None	+35	
New Rose Creek	At the confluence with the Saint Johns River	None	+7	City of Jacksonville.
	Just upstream of Saint Augustine Road	None	+21	
New Rose Creek Tributary 1	At the confluence with New Rose Creek	None	+6	City of Jacksonville.
	Approximately 100 feet upstream of Grant Road	None	+22	
Newcastle Creek	At the confluence with the Saint Johns River	None	+7	City of Jacksonville.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 200 feet downstream of Greenfern Lane.	None	+27	
Newcastle Creek Tributary 1	At the confluence with Newcastle Creek	None	+14	City of Jacksonville.
	Approximately 700 feet upstream of the confluence with Newcastle Creek.	None	+18	
Ninemile Creek	At the confluence with the Trout River	None	+5	City of Jacksonville.
	Approximately 1,250 feet upstream of Smalley Road	None	+22	
Ninemile Creek Tributary 1	At the confluence with Ninemile Creek	None	+10	City of Jacksonville.
	Approximately 1,600 feet upstream of Old Kings Road	None	+14	
Ninemile Creek Tributary 2	At the confluence with Ninemile Creek	None	+20	City of Jacksonville.
	Approximately 1,500 feet upstream of the railroad	None	+21	
Ninemile Creek Tributary 6	At the confluence with Ninemile Creek	None	+9	City of Jacksonville.
	Approximately 2,100 feet upstream of Old Kings Road	None	+22	
North Fork Sixmile Creek	At the confluence with Sixmile Creek	+19	+20	City of Jacksonville.
	Approximately 3,300 feet upstream of Fish Road west	None	+75	
North Fork Sixmile Creek Tributary 1.	At the confluence with North Fork Sixmile Creek	None	+21	City of Jacksonville.
	Approximately 3,600 feet upstream of Bulls Bay Highway.	None	+23	
Oldfield Creek	Approximately 400 feet upstream of the confluence with Oldfield Tributary 4.	+6	+5	City of Jacksonville.
	At the confluence with Oldfield Creek Tributary 7	None	+26	
Oldfield Creek Tributary 1	Approximately 1,000 feet downstream of Old Saint Augustine Road.	+12	+11	City of Jacksonville.
	Approximately 100 feet downstream of I–295	None	+22	
Oldfield Creek Tributary 2	At the confluence with Oldfield Creek	None	+16	City of Jacksonville.
	Approximately 50 feet upstream of Old Saint Augustine Road.	None	+19	
Oldfield Creek Tributary 3	At the confluence with Oldfield Creek	None	+23	City of Jacksonville.
	Approximately 2,250 feet upstream of the confluence with Oldfield Creek.	None	+25	
Oldfield Creek Tributary 4	At the confluence with Oldfield Creek	None	+5	City of Jacksonville.
	Approximately 25 feet upstream of Hood Landing Road.	None	+25	
Oldfield Creek Tributary 7	Approximately 450 feet upstream of Knottingby Drive	None	+26	City of Jacksonville.
	At the confluence with Oldfield Creek	None	+26	
Open Creek	Approximately 2,000 feet upstream of the confluence with Open Creek Tributary 1.	+9	+8	City of Jacksonville.
	Approximately 1,900 feet upstream of Open Creek Tributary 4.	+24	+23	
Open Creek Tributary 1	Approximately 2,200 feet upstream of Crosswater Boulevard.	+9	+10	City of Jacksonville.
	Approximately 4,700 feet upstream of Crosswater Boulevard.	None	+19	
Open Creek Tributary 2	At the confluence with Open Creek	+11	+13	City of Jacksonville.
	Approximately 200 feet upstream of Wm. Davis Parkway.	None	+22	
Open Creek Tributary 3	At the confluence with Open Creek	None	+4	City of Jacksonville.
	Approximately 1,450 feet upstream of San Pablo Parkway.	None	+14	
Open Creek Tributary 4	At the confluence with Open Creek	None	+23	City of Jacksonville.
	Approximately 1,300 feet upstream of Highland Glen Way.	None	+30	
Ortega River	Approximately 2,000 feet downstream of Collins Road	+5	+4	City of Jacksonville.
	Approximately 5,400 feet upstream of Normandy Boulevard at the confluence with McGirts Creek.	+59	+58	
Ortega River Tributary 1	At the confluence with the Ortega River	None	+4	City of Jacksonville.
	Just downstream of Jubal Lane	None	+20	
Ortega River Tributary 2	At the confluence with the Ortega River	None	+39	City of Jacksonville.
	Approximately 900 feet upstream of Old Middleburg Road.	None	+68	
Ortega River Tributary 3	At the confluence with the Ortega River	None	+34	City of Jacksonville.
	Approximately 250 feet upstream of Steamboat Springs Drive.	None	+85	
Ortega River Tributary 4	At the confluence with the Ortega River	None	+28	City of Jacksonville.
	Just downstream of Connie Jean Road	None	+71	
Ortega River Tributary 5	At the confluence with the Ortega River	None	+20	City of Jacksonville.
	Just downstream of I–295	None	+25	

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Ortega River Tributary 6	Approximately 1,600 feet upstream of Argyle Forest Boulevard.	None	+8	City of Jacksonville.
	Just downstream of I–295	None	+21	
Ortega River Tributary 7	Approximately 600 feet upstream of Argyle Forest Boulevard.	None	+8	City of Jacksonville.
	Just upstream of I–295	None	+18	
Ortega River Tributary 10	At the confluence with the Ortega River	None	+22	City of Jacksonville.
	Approximately 1,000 feet upstream of Brett Forest Drive.	None	+67	
Ortega River Tributary 11	At the confluence with the Ortega River	None	+20	City of Jacksonville.
	Approximately 20 feet downstream of Collins Road	None	+40	
Pablo Creek	Approximately 2,500 feet upstream of the Duval County line.	+4	+5	City of Jacksonville.
	At the confluence with Sawmill Slough/Buckhead Branch.	+19	+22	
Pablo Creek Tributary 1	At the confluence with Pablo Creek	None	+11	City of Jacksonville.
	Approximately 50 feet downstream of J. Turner Butler Boulevard.	None	+35	
Pablo Creek Tributary 2	At the confluence with Pablo Creek	None	+12	City of Jacksonville.
	Approximately 6,300 feet upstream of Kernan Boulevard.	#2	+36	
Pablo Creek Tributary 3	At the confluence with Pablo Creek Tributary 2	None	+22	City of Jacksonville.
	Approximately 6,000 feet upstream of the confluence with Cedar Swamp Creek Tributary 2.	None	+34	
Pickett Branch	At the confluence with Cedar Creek	None	+9	City of Jacksonville.
	Just downstream of Yankee Clipper Drive	None	+21	
Pickett Branch Tributary 3	At the confluence with Pickett Branch	None	+19	City of Jacksonville.
	Just upstream of Pecan Park Road	None	+21	
Pickett Branch Tributary 4	At the confluence with Pickett Branch	None	+20	City of Jacksonville.
	Just downstream of Pecan Park Road	None	+20	
Pickett Branch Tributary 5	At the confluence with Pickett Branch	None	+21	City of Jacksonville.
	Just upstream of Pecan Park Road	None	+21	
Pottsburg Creek	Approximately 1 mile downstream of Beach Boulevard.	+4	+5	City of Jacksonville.
	Just upstream of Baymeadows Road	+18	+17	
Pottsburg Creek Tributary 5	At the confluence with Pottsburg Creek	None	+9	City of Jacksonville.
	Approximately 300 feet upstream of Spring Park Road.	None	+20	
Puckett Creek	Approximately 100 feet upstream of State Route A1A	None	+6	City of Atlantic Beach, City of Jacksonville.
	Approximately 1,050 feet upstream of Fairway Villas Drive.	None	+7	
Red Bay Branch	Approximately 700 feet downstream of Arlington Expressway.	+5	+8	City of Jacksonville.
	Approximately 4,100 feet upstream of Lone Star Road	None	+22	
Red Bay Branch Tributary 1	At the confluence with Red Bay Branch	None	+9	City of Jacksonville.
	Just downstream of Lone Star Road	None	+13	
Ribault River	Approximately 3,000 feet downstream of Howell Drive	+6	+5	City of Jacksonville.
	At the confluence with Sixmile Creek	+8	+12	
Ribault River Tributary 2	At the confluence with Ribault Creek	None	+11	City of Jacksonville.
	Approximately 70 feet downstream of Edgewood Drive.	None	+11	
Ribault River Tributary 5	At the confluence with Ribault Creek	None	+11	City of Jacksonville.
	Approximately 2,200 feet upstream of the confluence with Ribault Creek.	None	+11	
Ribault River Tributary 8	At the confluence with Ribault Creek	None	+9	City of Jacksonville.
	Approximately 1,600 feet upstream of Clyde Drive	None	+11	
Ribault River Tributary 9	At the confluence with Ribault Creek	None	+11	City of Jacksonville.
	Approximately 300 feet upstream of West Virginia Avenue.	None	+11	
Rowell Creek	At the confluence with Sal Taylor Creek	None	+52	City of Jacksonville.
	Approximately 650 feet upstream of Secluded Avenue	None	+80	
Rowell Creek Tributary 2	At the confluence with Rowell Creek	None	+78	City of Jacksonville.
	Approximately 3,700 feet upstream of New World Avenue.	None	+82	
Rushing Branch	Approximately 1,800 feet upstream of Yellow Bluff Road.	+5	+6	City of Jacksonville
	Just upstream of Cedar Point Road	None	+19	

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		Effective	Modified	
Rushing Branch Tributary 1 ..	At the confluence with Rushing Branch	None	+9	City of Jacksonville.
	Just upstream of New Berlin Road	None	+13	
Sal Taylor Creek	Approximately 3,700 feet upstream of the confluence with Yellow Water Creek.	None	+50	City of Jacksonville.
	At the confluence with Rowell Creek Tributary 1 approximately 2,800 feet east of Aviation Avenue.	None	+76	
Sal Taylor Creek Tributary 2	At the confluence with Sal Taylor Creek	None	+61	City of Jacksonville.
	Approximately 1,500 feet upstream of the confluence with Sal Taylor Creek Tributary 3.	#2	+67	
Sal Taylor Creek Tributary 3	At the confluence with Sal Taylor Creek Tributary 2 ...	#2	+66	City of Jacksonville.
	Approximately 3,400 feet upstream of the confluence with Sal Taylor Creek Tributary 2.	None	+70	
Sal Taylor Creek Tributary 4	At the confluence with Sal Taylor Creek	None	+69	City of Jacksonville.
	Approximately 800 feet upstream of 103rd Street	None	+80	
Sandalwood Canal	Approximately 1,100 feet upstream of San Pablo Road.	+8	+6	City of Jacksonville.
	Approximately 2 miles upstream of Kernan Boulevard	None	+35	
Sawmill Slough/Buckhead Branch.	At the confluence with Pablo Creek	+21	+23	City of Jacksonville.
	Approximately 2,300 feet upstream of J. Turner Butler Boulevard.	+30	+29	
Sawmill Slough/Buckhead Branch Tributary 1.	At the confluence with Sawmill Slough/Buckhead Branch.	+21	+25	City of Jacksonville.
	Approximately 1,200 feet upstream of J. Turner Butler Boulevard.	+28	+27	
Sawmill Slough/Buckhead Branch Tributary 2.	At the confluence with Sawmill Slough/Buckhead Branch.	None	+34	City of Jacksonville.
	Approximately 550 feet upstream of the confluence with Sawmill Slough/Buckhead Branch.	None	+34	
Seaton Creek	At the confluence with Thomas Creek	None	+9	City of Jacksonville.
	At the confluence with Seaton Creek Tributary 2	None	+13	
Seaton Creek Tributary 1	At the confluence with Seaton Creek	None	+9	City of Jacksonville.
	Approximately 2 miles upstream of Arnold Road	#2	+17	
Seaton Creek Tributary 2	At the confluence with Seaton Creek	None	+13	City of Jacksonville.
	Just upstream of Arnold Road	None	+18	
Second Puncheon Branch	At the confluence with Pablo Creek	+18	+21	City of Jacksonville.
	Just downstream of Beach Boulevard	None	+44	
Second Puncheon Branch Tributary 1.	At the confluence with Second Puncheon Branch	None	+27	City of Jacksonville.
	Approximately 100 feet downstream of Point Meadows Drive.	None	+34	
Second Puncheon Branch Tributary 3.	At the confluence with Second Puncheon Branch	None	+31	City of Jacksonville.
	Just downstream of Courtyards Lane	None	+40	
Second Puncheon Branch Tributary 4.	At the confluence with Second Puncheon Branch	None	+32	City of Jacksonville.
	Approximately 2,000 feet upstream of the confluence with Second Puncheon Branch.	None	+39	
Second Puncheon Branch Tributary 5.	At the confluence with Second Puncheon Branch	None	+42	City of Jacksonville.
	Just upstream of Gate Parkway	None	+45	
Second Puncheon Branch Tributary 6.	At the confluence with Second Puncheon Branch	None	+43	City of Jacksonville.
	Approximately 1,400 feet upstream of the confluence with Second Puncheon Branch.	None	+50	
Sherman Creek	Just downstream of Pioneer Drive	+7	+6	City of Atlantic Beach, City of Jacksonville.
	Approximately 100 feet upstream of Seminole Road ..	None	+7	
Sherman Creek Canal	At the confluence with Sherman Creek	+8	+6	City of Atlantic Beach, City of Jacksonville.
	Just downstream of Fleet Landing Boulevard	+8	+7	
Silversmith Creek	At the confluence with Pottsburg Creek	None	+4	City of Jacksonville.
	Approximately 2,250 feet upstream of Silversmith Tributary 1.	None	+20	
Silversmith Creek Tributary 1	At the confluence with Silversmith Creek	None	+13	City of Jacksonville.
	Approximately 50 feet upstream of Century 21 Drive ..	None	+24	
Sixmile Creek	At the confluence with the Ribault River	+9	+12	City of Jacksonville.

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	Approximately 3,100 feet upstream of Commonwealth Avenue.	None	+68	
Sixmile Creek Tributary 6	At the confluence with Sixmile Creek	None	+34	City of Jacksonville.
	Approximately 3,000 feet upstream of railroad	None	+56	
Sixmile Creek Tributary 9	At the confluence with Sixmile Creek	None	+17	City of Jacksonville.
	Just downstream of Pritchard Road	None	+17	
St. Mary's River Tributary	Just upstream of Beaver Street	None	+81	City of Jacksonville.
	Approximately 3,700 feet upstream of I–10	None	+82	
Strawberry Creek	Approximately 2,400 feet upstream of the confluence with Pottsburg Creek.	+4	+5	City of Jacksonville.
	Approximately 50 feet downstream of Merril Road	+36	+35	
Sweetwater Creek	At the confluence with Julington Creek	+6	+9	City of Jacksonville.
	Approximately 2,300 feet upstream of Vineyard Lake Road North.	#2	+29	
Tacito Creek	Approximately 2,000 feet upstream of Scott Mill Road	None	+5	City of Jacksonville.
	Approximately 3,300 feet upstream of Scott Mill Road	None	+8	
Tiger Hole Swamp	At the confluence with Pottsburg Creek	+13	+14	City of Jacksonville.
	Approximately 1,650 feet upstream of J. Turner Butler Boulevard.	None	+23	
Tiger Pond Creek	At the confluence with Mt. Pleasant Creek	+6	+3	City of Jacksonville.
	Approximately 1,600 feet upstream of McCormick Road.	None	+28	
Tiger Pond Creek Tributary 1	At the confluence with Tiger Pond Creek	None	+14	City of Jacksonville.
	Approximately 300 feet upstream of Kernan Forest Boulevard.	None	+20	
Tributary 1 to Miramar Tributary.	At the confluence with Miramar Tributary	None	+8	City of Jacksonville.
	Approximately 1,000 feet upstream of Greenridge Road.	None	+11	
Tributary to Little Sixmile Creek Tributary 1.	At the confluence with Little Sixmile Creek Tributary 1	None	+15	City of Jacksonville.
	Just downstream of Edgewood Avenue	None	+19	
Tributary to Ortega River Tributary 1.	At the confluence with Ortega River Tributary 1	None	+4	City of Jacksonville.
	Just downstream of Ovella Road	None	+10	
Trout River	Approximately 2,000 feet upstream of New Kings Road.	+5	+6	City of Jacksonville.
	Just downstream of Cisco Gardens Road	None	+61	
Trout River Tributary 2	At the confluence with the Trout River	None	+21	City of Jacksonville.
	Approximately 1,200 feet upstream of Jones Road	None	+52	
Trout River Tributary 3	At the confluence with the Trout River	None	+13	City of Jacksonville.
	Approximately 100 feet upstream of the Norfolk Southern Railway.	None	+19	
Trout River Tributary 7	At the confluence with Trout River Tributary 2	#2	+32	City of Jacksonville.
	Just downstream of Jones Road	None	+49	
Trout River Tributary 8	At the confluence with the Trout River and Trout River Tributary 9.	None	+39	City of Jacksonville.
	Approximately 1,600 feet upstream of Pines Plantation Road.	None	+55	
West Branch	Just downstream of Bessent Road	None	+5	City of Jacksonville.
	Approximately 1,200 feet upstream of Dunn Avenue	None	+12	
West Branch Tributary 1	At the confluence with West Branch	None	+9	City of Jacksonville.
	Approximately 500 feet upstream of North Campus Boulevard.	None	+18	
West Branch Tributary 2	At the confluence with West Branch	None	+11	City of Jacksonville.
	Approximately 50 feet upstream of Dunn Avenue	None	+11	
Williamson Creek	At the confluence with the Cedar River	None	+5	City of Jacksonville.
	Just downstream of Wilson Boulevard	None	+25	
Williamson Creek Tributary 3	At the confluence with Williamson Creek	None	+9	City of Jacksonville.
	Just downstream of Wilson Boulevard	None	+25	
Williamson Creek Tributary 4	At the confluence with Williamson Creek	None	+9	City of Jacksonville.
	Approximately 50 feet downstream of Lucente Road	None	+23	
Wills Branch	At the confluence with the Cedar River	+5	+7	City of Jacksonville.
	Approximately 400 feet upstream of Ramona Boulevard.	None	+62	
Wills Branch Tributary 1	At the confluence with Wills Branch	None	+9	City of Jacksonville.
	Just downstream of Frank H. Peterson Academy Road.	None	+64	

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Wills Branch Tributary 2	At the confluence with Wills Branch Tributary 1	None	+34	City of Jacksonville.
	Approximately 1,400 feet upstream of Fouraker Road	None	+47	
Wills Branch Tributary 3	At the confluence with Wills Branch	None	+23	City of Jacksonville.
	Just downstream of I–10	None	+82	
Wills Branch Tributary 4	At the confluence with Wills Branch Tributary 3	None	+50	City of Jacksonville.
	Approximately 1,600 feet upstream of Herlong Road ..	None	+77	
Wills Branch Tributary 5	At the confluence with Wills Branch Tributary 1	None	+10	City of Jacksonville.
	Approximately 50 feet downstream of Dayton Road ...	None	+25	
Wills Branch Tributary 6	At the confluence with Wills Branch Tributary 1	None	+17	City of Jacksonville.
	Approximately 50 feet upstream of Spring Branch Drive.	None	+50	
Yellow Water Creek Tributary 1.	Just upstream of Bicentennial Drive	None	+62	City of Jacksonville.
	Approximately 5,200 feet upstream of Bicentennial Drive.	None	+78	

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

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Atlantic Beach
Maps are available for inspection at the City Building, 800 Seminole Road, Atlantic Beach, FL 32233.

City of Jacksonville
Maps are available for inspection at City Hall, 117 West Duval Street, Jacksonville, FL 32202.

City of Jacksonville Beach
Maps are available for inspection at City Hall, 11 North 3rd Street, Jacksonville Beach, FL 32250.

City of Neptune Beach
Maps are available for inspection at City Hall, 116 1st Street, Neptune Beach, FL 32266.

Macon County, Illinois, and Incorporated Areas

Friends Creek	Approximately 130 feet upstream of IL–48	None	+645	Village of Argenta.
	Approximately 1,440 feet upstream of IL–48	None	+646	
Long Creek	At Baltimore Avenue	+621	+619	City of Decatur.
	At IL–121	+624	+627	
Long Creek Tributary	At the confluence with Long Creek	+622	+619	City of Decatur.
	Approximately 600 feet upstream of Lost Bridge Road	+623	+620	
Sand Creek	At South Shores Drive (County Highway 31)	None	+619	Unincorporated Areas of Macon County.
	Approximately 20 feet upstream of the railroad tracks	None	+619	
Sangamon River	Approximately 1.1 mile downstream of the confluence with Steven Creek.	+604	+602	City of Decatur, Unincorporated Areas of Macon County.
	Approximately 1,400 feet upstream of Nesbit Bridge ..	+620	+625	
South Spring Creek	At the confluence with the Sangamon River	None	+608	City of Decatur.
	Approximately 1,100 feet downstream of Heritage Road.	None	+649	
Spring Creek	Approximately 200 feet upstream of the confluence with Stevens Creek.	+621	+620	Unincorporated Areas of Macon County.
	Approximately 0.6 mile upstream of Spring Creek Tributary.	+658	+659	
Spring Creek Tributary	At the confluence with Spring Creek	+656	+657	Unincorporated Areas of Macon County.
	At the downstream side of Mound Road	+660	+659	
Stevens Creek	Approximately 400 feet upstream of the confluence with the Sangamon River.	+604	+603	Unincorporated Areas of Macon County, Village of Forsyth.
	Approximately 150 feet upstream of I-72	+644	+645	
Stevens Creek Tributary A ...	At the confluence with Stevens Creek	+620	+619	Unincorporated Areas of Macon County.

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	Approximately 1,230 feet upstream of Trump Hill Lane.	+620	+619	
Stevens Creek Tributary B ...	At the confluence with Stevens Creek	+631	+629	Unincorporated Areas of Macon County
	Approximately 985 feet upstream of the confluence with Stevens Creek.	+631	+630	

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Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Decatur
Maps are available for inspection at City Hall, 1 Gary K. Anderson Plaza, Decatur, IL 62523.

Unincorporated Areas of Macon County
Maps are available for inspection at the Macon County Courthouse, 141 South Main Street, Decatur, IL 62523.

Village of Argenta
Maps are available for inspection at the Village Hall, 330 North Warren, Argenta, IL 62501.

Village of Forsyth
Maps are available for inspection at the Village Hall, 301 South Route 51, Forsyth, IL 62535.

Ste. Genevieve County, Missouri, and Incorporated Areas

Mississippi River	At the easternmost portion of the county near the confluence with the Kaskaskia River.	+394	+392	City of Ste. Genevieve, Unincorporated Areas of Ste. Genevieve County.
	Approximately 2 miles upstream of the confluence with Isle du Bois Creek.	+405	+404	
Old Mississippi River Channel.	Approximately 0.66 mile downstream of the confluence with Walnut Creek.	+393	+391	City of St. Mary, Unincorporated Areas of Ste. Genevieve County.
	Approximately 2.75 miles upstream of the confluence with Walnut Creek.	+394	+392	
St. Laurent Branch	At the confluence with St. Laurent Creek	+393	+391	City of St. Mary, Unincorporated Areas of Ste. Genevieve County.
	Just upstream of Mulberry Street	+393	+391	
St. Laurent Creek	At the confluence with Old Mississippi River Channel	+393	+391	City of St. Mary, Unincorporated Areas of Ste. Genevieve County.
	At the confluence with St. Laurent Branch	+393	+391	
Walnut Creek	At the confluence with Old Mississippi River Channel	+393	+392	City of St. Mary.
	Approximately 1,940 feet upstream of Old Mississippi River Channel.	+393	+392	

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+ North American Vertical Datum.
# Depth in feet above ground.
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Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

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ADDRESSES

City of St. Mary
Maps are available for inspection at 782 3rd Street, St. Mary, MO 63673.

City of Ste. Genevieve
Maps are available for inspection at 165 South 4th Street, Ste. Genevieve, MO 63670.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Unincorporated Areas of Ste. Genevieve County				
Maps are available for inspection at 165 South 4th Street, Ste. Genevieve, MO 63670.				
McHenry County, North Dakota, and Incorporated Areas				
Mouse River	Approximately 1.25 mile upstream of U.S. Route 2	+1461	+1462	Unincorporated Areas of McHenry County.
	Approximately 3.26 miles upstream of U.S. Route 2	+1462	+1462	

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

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate.

Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of McHenry County

Maps are available for inspection at 407 Main Street, South, Towner, ND 58788

Cameron County, Pennsylvania (All Jurisdictions)				
Bennett Branch Sinnemahoning Creek.	Approximately 0.60 mile downstream of Sterling Run Road.	None	+809	Township of Gibson.
	Approximately 0.55 mile downstream of Sterling Run Road.	None	+814	
Driftwood Branch Sinnemahoning Creek.	Approximately 1,835 feet downstream of Castle Garden Road.	None	+905	Township of Gibson.
	Approximately 980 feet downstream of Castle Garden Road.	None	+905	
Driftwood Branch Sinnemahoning Creek.	Approximately 1.28 mile downstream of the confluence with Sinnemahoning Portage Creek.	None	+1000	Township of Portage.
	Approximately 1.18 mile downstream of the confluence with Sinnemahoning Portage Creek.	None	+1001	
Sinnemahoning Creek	Approximately 980 feet downstream of Castle Garden Road.	None	+809	Township of Gibson.
	Approximately 90 feet upstream of the confluence with Boyer Run.	None	+809	

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

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate.

Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Township of Gibson

Maps are available for inspection at the Gibson Township Municipal Building, 7657 Bridge Street, Driftwood, PA 15834.

Township of Portage

Maps are available for inspection at the Portage Township Municipal Building, 523 Sizer Run, Emporium, PA 15832.

Lancaster County, South Carolina, and Incorporated Areas				
Cane Creek	Approximately 0.7 mile downstream of Grace Avenue	+434	+430	Unincorporated Areas of Lancaster County.
	Approximately 1.0 mile downstream of Old Lansford Road.	+434	+433	
Catawba River	Approximately 2.3 miles upstream of Waxahaw Creek	None	+465	Unincorporated Areas of Lancaster County.
	Approximately 0.5 mile downstream of the confluence with Catawba River Tributary 1.	None	+481	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 0.6 mile upstream of the confluence with Catawba River Tributary 11.	None	+484	
	Approximately 1 mile upstream of the confluence with Catawba River Tributary 11.	None	+486	
Sugar Creek	At the confluence with the Catawba River	+488	+486	Unincorporated Areas of Lancaster County.
	Approximately 1.2 mile upstream of McAlpine Creek	+535	+537	
Wateree Lake (Catawba River).	At the Lancaster/Fairfield/Kershaw county boundary	None	+240	Unincorporated Areas of Lancaster County.
	Approximately 3.3 miles upstream of the Lancaster/Fairfield/Kershaw county boundary.	None	+244	

* National Geodetic Vertical Datum.
≤+ North American Vertical Datum.
Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate.

Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Lancaster County

Maps are available for inspection at the Building and Zoning Department, 101 North Main Street, Lancaster, SC 29720.

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

Dated: May 19, 2010.

Edward L. Connor,

Acting Federal Insurance and Mitigation Administrator, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–13265 Filed 6–2–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1108]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

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

DATES: Comments are to be submitted on or before September 1, 2010.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1108, to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

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

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

made final, and for the contents in those buildings.

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

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

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

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

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

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

List of Subjects in 44 CFR Part 67

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

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

PART 67—[AMENDED]

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

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

§ 67.4 [Amended]

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

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Leake County, Mississippi, and Incorporated Areas				
Pearl River	Approximately 1.0 mile downstream of State Highway 35.	None	+341	City of Carthage.
	Approximately 1.0 mile upstream of State Highway 35.	None	+343	
Tuscolameta Creek	Approximately 555 feet downstream of State Highway 35.	None	+356	Town of Walnut Grove.
	Approximately 0.5 mile upstream of State Highway 35.	None	+357	

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

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Carthage
Maps are available for inspection at City Hall, 212 West Main Street, Carthage, MS 39051.
Town of Walnut Grove
Maps are available for inspection at the Town Hall, 139 Main Street, Walnut Grove, MS 38189.

Stone County, Mississippi, and Incorporated Areas				
Church House Branch	Approximately 0.5 mile downstream of East 5th Avenue.	None	+211	City of Wiggins.
	Approximately 385 feet upstream of East Borders Avenue.	None	+245	
Flint Creek	Approximately 574 feet downstream of Clubhouse Drive.	None	+171	City of Wiggins, Unincorporated Areas of Stone County.
	Approximately 1,290 feet upstream of State Highway 29.	None	+187	
Flint Creek Tributary 2	At the confluence with Flint Creek	None	+174	City of Wiggins.
	Approximately 350 feet upstream of Annis Lane	None	+254	
Four Mile Creek	Approximately 1 mile downstream of South Azalea Drive.	None	+168	City of Wiggins, Unincorporated Areas of Stone County.
	Approximately 345 feet upstream of West Miles Avenue.	None	+261	
Four Mile Creek Tributary 1	At the confluence with Four Mile Creek	None	+214	City of Wiggins.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 1,845 feet upstream of West Bond Avenue.	None	+261	
Red Creek Tributary	Approximately 0.5 mile downstream of Mill Avenue	None	+166	City of Wiggins, Unincorporated Areas of Stone County.
	Approximately 1,345 feet upstream of State Highway 29.	None	+220	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
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Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Wiggins

Maps are available for inspection at City Hall, 117 North 1st Street, Wiggins, MS 39577.

Unincorporated Areas of Stone County

Maps are available for inspection at the Stone County Courthouse, 323 East Cavers Street, Wiggins, MS 39577.

Franklin County, Missouri, and Incorporated Areas

Birch Creek	Approximately 0.4 mile downstream of Denmark Road.	None	+499	City of Union, Unincorporated Areas of Franklin County.
	Approximately 440 feet downstream of Prairie Dell Road.	None	+543	
Bourbeuse River Tributary	Approximately 0.6 mile upstream of the confluence with the Bourbeuse River.	None	+500	City of Union, Unincorporated Areas of Franklin County.
	Just downstream of Prairie Dell Road	None	+550	
Busch Creek	At the confluence with Dubois Creek	+486	+491	City of Washington, Unincorporated Areas of Franklin County.
	Approximately 460 feet upstream of Schroeder Lane.	None	+582	
Dubois Creek	Approximately 1,688 feet downstream of the confluence with Busch Creek.	+486	+491	City of Washington, Unincorporated Areas of Franklin County.
	Just downstream of State Highway 100	+486	+491	
Fiddle Creek	Approximately 165 feet downstream of Labadie Bottom Road.	+479	+483	Unincorporated Areas of Franklin County.
	Approximately 0.8 mile upstream of County Highway T.	+482	+483	
Labadie Creek	At the confluence with the Missouri River	+481	+485	Unincorporated Areas of Franklin County.
	Approximately 0.5 mile downstream of County Highway T.	+485	+486	
Little Tavern Creek	Approximately 1.0 mile downstream of County Highway T.	+478	+480	Unincorporated Areas of Franklin County.
	Approximately 0.5 mile downstream of County Highway T.	+478	+480	
Missouri River	Approximately 3.3 miles downstream of the confluence with Fiddle Creek.	+474	+476	City of Berger, City of New Haven, City of Washington, Unincorporated Areas of Franklin County.
	Approximately 0.6 mile downstream of the confluence with Little Berger Creek.	+514	+516	
Saint Johns Creek	Approximately 1.2 mile downstream of West Link Drive.	+494	+495	City of Washington, Unincorporated Areas of Franklin County.
	Approximately 1,475 feet downstream of State Highway 100.	+494	+495	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
South Branch Busch Creek	At the confluence with Busch Creek	+486	+491	City of Washington, Unincorporated Areas of Franklin County.
	Approximately 0.8 mile upstream of State Highway 100.	None	+500	
Southwest Branch Busch Creek.	At the confluence with Busch Creek	+486	+493	City of Washington, Unincorporated Areas of Franklin County.
	Approximately 0.5 mile upstream of State Highway 47.	+513	+514	
Unnamed Tributary to Busch Creek.	At the confluence with Busch Creek	None	+537	City of Washington, Unincorporated Areas of Franklin County.
	Approximately 1,520 feet upstream of State Highway 100.	None	+552	

* National Geodetic Vertical Datum.

+ North American Vertical Datum.

Depth in feet above ground.

∧ Mean Sea Level, rounded to the nearest 0.1 meter.

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Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Berger

Maps are available for inspection at 405 Rosalie Avenue, Berger, MO 63014.

City of New Haven

Maps are available for inspection at 101 Front Street, New Haven, MO 63068.

City of Union

Maps are available for inspection at 500 East Locust Street, Union, MO 63084.

City of Washington

Maps are available for inspection at 405 Jefferson Street, Washington, MO 63090.

Unincorporated Areas of Franklin County

Maps are available for inspection at 8 North Church Street, Suite B, Union, MO 63084.

Tillamook County, Oregon, and Incorporated Areas

Dougherty Slough	At the confluence with Hoquarten Slough	+14	+16	City of Tillamook, Unincorporated Areas of Tillamook County.
	At the divergence from the Wilson River	+31	+33	
Goodspeed Road Storage Area.	Approximately 2,000 feet west along Sissek Road from Goodspeed Road.	None	+14	Unincorporated Areas of Tillamook County.
Hall Slough	At the confluence with the Wilson River	None	+14	City of Tillamook, Unincorporated Areas of Tillamook County.
	Approximately 0.64 mile upstream of U.S. Route 101.	None	+20	
Hall Slough Left Bank Overflow.	At the confluence with Outlet From Wilson River Loop Storage Area.	None	+19	Unincorporated Areas of Tillamook County.
	At the divergence from Hall Slough	None	+19	
Hall Slough River Bank Overflow.	At the confluence with Makinster Road Storage Area.	None	+15	City of Tillamook, Unincorporated Areas of Tillamook County.
	Approximately 1,450 feet upstream of the Oregon Coast Highway.	None	+18	
Hoquarten Slough	At the confluence with the Trask River	+13	+15	City of Tillamook, Unincorporated Areas of Tillamook County.
	Approximately 500 feet upstream of the Wilson River Road.	None	+27	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Hoquarten Slough Left Bank Overflow.	At the confluence with Hoquarten Slough	None	+16	City of Tillamook, Unincorporated Areas of Tillamook County.
	At the divergence from Hoquarten Slough	None	+16	
Hoquarten Slough Left Bank Storage Area.	Approximately 1,300 feet west of the intersection of 1st Street and Birch Avenue.	None	+15	City of Tillamook, Unincorporated Areas of Tillamook County.
Hoquarten Slough Right Bank Overflow.	At the confluence with Hoquarten Slough	None	+16	City of Tillamook, Unincorporated Areas of Tillamook County.
	At the divergence from Hoquarten Slough	None	+18	
Kilchis River	Approximately 1,900 feet downstream of U.S. Route 101.	None	+14	Unincorporated Areas of Tillamook County.
	Approximately 1.3 mile upstream of Myrtle Creek	None	+56	
Kilchis River Left Bank Overflow.	At the confluence with the Kilchis River	None	+28	Unincorporated Areas of Tillamook County.
	Approximately 1,700 feet upstream of Curil Road	None	+29	
Makinster Road Storage Area.	At Makinster Road	None	+15	City of Tillamook, Unincorporated Areas of Tillamook County.
Miami River	Just downstream of U.S. Route 101	+12	+14	City of Garibaldi, Unincorporated Areas of Tillamook County.
	Approximately 1,200 feet upstream of New Miami River Road.	+88	+86	
Miami River Left Bank Overflow Downstream.	At the confluence with the Miami River	None	+15	Unincorporated Areas of Tillamook County.
	Approximately 0.5 mile upstream of the confluence with Illingsworth Creek.	None	+22	
Miami River Left Bank Overflow Upstream.	At the confluence with the Miami River	None	+24	Unincorporated Areas of Tillamook County.
	Approximately 0.53 mile upstream of Moss Creek Road.	None	+31	
Old Trask River	At the confluence with the Tillamook River	None	+15	Unincorporated Areas of Tillamook County.
	At the divergence from the Trask River	None	+16	
Old Trask River Overflow Outlet from Goodspeed Storage Area.	At the confluence with the Trask River	None	+14	Unincorporated Areas of Tillamook County.
	At the divergence from Old Trask River	None	+15	
	At the confluence with the Wilson River	None	+14	
	Just downstream of Goodspeed Road	None	+15	
Outlet from Wilson River Loop Storage.	At the confluence with Dougherty Slough	None	+20	Unincorporated Areas of Tillamook County.
	Approximately 400 feet downstream of Wilson River Loop.	None	+25	
Overflow from Hall Slough Left Bank Overflow.	At the confluence with Goodspeed Road Storage Area.	None	+14	City of Tillamook, Unincorporated Areas of Tillamook County.
	Approximately 1,750 feet upstream of the Oregon Coast Highway.	None	+18	
Overflow from Wilson River Right Bank Overflow.	At the confluence with the Wilson River	None	+17	Unincorporated Areas of Tillamook County.
	Approximately 1,400 feet upstream of Boquist Road.	None	+18	
Overflow from Wilson River Split Flow 2.	At the confluence with the Tillamook River	None	+14	Unincorporated Areas of Tillamook County.
	At the divergence from Wilson River Split Flow 2	None	+14	
Overflow from Wilson River Split Flow 3.	Approximately 600 feet downstream of the divergence from Wilson River Split Flow 3.	None	+14	Unincorporated Areas of Tillamook County.
	At the divergence from Wilson River Split Flow 3	None	+14	
Stasek Slough	Approximately 80 feet downstream of U.S. Route 101.	None	+14	Unincorporated Areas of Tillamook County.
	Approximately 1,500 feet upstream of Alderbrook Road.	None	+26	
Tillamook Left Bank Storage Area.	Just south of the intersection of Netars Highway and Abbey Lane.	None	+16	Unincorporated Areas of Tillamook County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Tillamook River	At the confluence with Tillamook Bay	+12	+14	Unincorporated Areas of Tillamook County.
	Just downstream of Bewley Creek Road	None	+27	
Tillamook River Left Bank Overflow.	At the confluence with the Tillamook River	None	+14	Unincorporated Areas of Tillamook County.
	At the divergence from the Tillamook River	None	+14	
Tillamook River Right Bank Overflow.	At the confluence with the Tillamook River Road Storage Area.	None	+16	Unincorporated Areas of Tillamook County.
	At the divergence from the Tillamook River	None	+19	
Tillamook River Road Storage Area.	Just south of Matejeck Road	None	+16	Unincorporated Areas of Tillamook County.
Trask River	At the confluence with the Tillamook River	+12	+14	City of Tillamook, Unincorporated Areas of Tillamook County.
	Approximately 600 feet upstream of Cedar Creek	None	+95	
Trask River Left Bank Overflow 1.	At the confluence with Tillamook River Right Bank Overflow.	None	+17	Unincorporated Areas of Tillamook County.
	Just downstream of Blimp Boulevard	None	+29	
Trask River Left Bank Overflow 2.	At the confluence with the Trask River	None	+33	Unincorporated Areas of Tillamook County.
	Approximately 1,100 feet upstream of Long Prairie Road.	None	+38	
Trask River Right Bank Overflow.	At the confluence with the Trask River	None	+16	City of Tillamook, Unincorporated Areas of Tillamook County.
	Approximately 80 feet upstream of McCormick Loop Road.	None	+24	
Trask River Right Bank Overflow Storage Area.	Approximately 600 feet south of the intersection of 12th Street and Marolf Loop Road.	None	+24	Unincorporated Areas of Tillamook County.
Trask River Right Bank Storage Area.	Approximately 2,000 feet northeast along U.S. Route 101 from the intersection of Nelsen Road and U.S. Route 101.	None	+24	Unincorporated Areas of Tillamook County.
Trask River Split Flow to Tillamook River.	At the confluence with the Tillamook River	None	+14	Unincorporated Areas of Tillamook County.
	At the divergence from the Trask River	None	+14	
Wilson River	Approximately 0.57 mile upstream of the confluence with Tillamook Bay.	+15	+14	City of Tillamook, Unincorporated Areas of Tillamook County.
	Approximately 1,800 feet upstream of Mills Bridge	+65	+66	
Wilson River Left Bank Overflow 1.	At the confluence with the Wilson River	None	+34	Unincorporated Areas of Tillamook County.
	At the divergence from the Wilson River	None	+41	
Wilson River Left Bank Overflow 2.	At the confluence with Dougherty Slough	None	+29	Unincorporated Areas of Tillamook County.
	Approximately 1,700 feet upstream of Donaldson Road.	None	+37	
Wilson River Loop Storage Area.	Approximately 1,400 feet south along Wilson Loop Road from Sollie Smith Road.	None	+32	Unincorporated Areas of Tillamook County.
Wilson River Right Bank Overflow.	At the confluence with the Wilson River	None	+19	Unincorporated Areas of Tillamook County.
	At the divergence from the Wilson River	None	+25	
Wilson River Right Bank Storage Area.	Approximately 650 feet south of the intersection of Aldercrest Road and Sollie Smith Road.	None	+33	Unincorporated Areas of Tillamook County.
Wilson River Split Flow 1	At the convergence with the Wilson River	None	+14	Unincorporated Areas of Tillamook County.
	At the divergence from the Wilson River	None	+14	
Wilson River Split Flow 2	At the confluence with Tillamook Bay	None	+14	Unincorporated Areas of Tillamook County.
	At the divergence from the Wilson River	None	+15	
Wilson River Split Flow 2 and 3 Storage Area.	Just east of Wilson River Split Flow 2	None	+14	Unincorporated Areas of Tillamook County.
Wilson River Split Flow 3	At the confluence with Wilson River Split Flow 2	None	+14	Unincorporated Areas of Tillamook County.
	At the divergence from the Wilson River	None	+15	
Wilson River Split Flow to Tillamook River.	At the confluence with the Tillamook River	None	+14	Unincorporated Areas of Tillamook County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	At the divergence from the Wilson River	None	+14	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Garibaldi
Maps are available for inspection at 107 6th Street, Garibaldi, OR 97118.
City of Tillamook
Maps are available for inspection at 210 Laurel Avenue, Tillamook, OR 97141.

Unincorporated Areas of Tillamook County

Maps are available for inspection at 201 Laurel Avenue, Tillamook, OR 97141.

Marlboro County, South Carolina, and Incorporated Areas

Great Pee Dee River	Approximately 2.8 miles downstream of U.S. Route 1.	None	+93	Unincorporated Areas of Marlboro County.
	Approximately 1.1 mile upstream of the confluence with Marks Creek.	None	+110	

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+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
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Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Marlboro County

Maps are available for inspection at the Marlboro County Courthouse, 105 Main Street, Bennettsville, SC 29512.

Union County, South Carolina, and Incorporated Areas

Broad River	Approximately 10 feet downstream of State Highway 49.	None	+367	Township of Lockhart.
	Approximately 1.1 mile upstream of State Highway 49.	None	+412	
Canal	Approximately 28 feet downstream of State Highway 49.	None	+393	Township of Lockhart.
	Just downstream of the Lockhart Dam	None	+409	

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

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Township of Lockhart
Maps are available for inspection at the Town Hall, 118 Mill Street, Lockhart, SC 29364.

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

Dated: May 19, 2010.

Edward L. Connor,

Acting Federal Insurance and Mitigation Administrator, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–13266 Filed 6–2–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1117]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

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

DATES: Comments are to be submitted on or before September 1, 2010.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1117, to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

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

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

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

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

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

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

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

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

List of Subjects in 44 CFR Part 67

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

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

PART 67—[AMENDED]

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

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

§ 67.4 [Amended]

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

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Santa Cruz County, Arizona, and Incorporated Areas				
Ephraim Canyon Wash	At the confluence with Nogales Wash	+3806	+3810	City of Nogales.
	Approximately 1,900 feet downstream of I–19	+3897	+3899	
Mariposa Canyon	At the confluence with Nogales Wash	+3740	+3746	City of Nogales, Unincorporated Areas of Santa Cruz County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 1.3 mile upstream of SR 189	None	+3965	
Nogales Wash	Approximately 1,300 feet upstream of Old Tucson Road.	+3647	+3644	City of Nogales, Unincorporated Areas of Santa Cruz County.
	Approximately 100 feet upstream of West International Street.	+3873	+3872	
Potrero Creek	At the confluence with Al Harrison Wash	+3650	+3646	City of Nogales.
	Approximately 0.7 mile upstream of West Meadow Hills Drive.	+3725	+3726	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Nogales

Maps are available for inspection at 2150 North Congress Drive, Nogales, AZ 85621.

Unincorporated Areas of Santa Cruz County

Maps are available for inspection at 2150 North Congress Drive, Nogales, AZ 85621.

Boyle County, Kentucky, and Incorporated Areas

Balls Branch (Backwater effects from Clarks Run) Clarks Run.	From the confluence with Clarks Run to approximately 0.7 mile upstream of the confluence with Clarks Run.	None	+875	Unincorporated Areas of Boyle County.
	At approximately 1.2 miles upstream of Goggin Road	None	+849	City of Danville, Unincorporated Areas of Boyle County.
	At approximately 0.6 mile downstream of Alum Springs Cross Pike.	None	+965	
Dix River Tributary 2 (Backwater effects from Herrington Lake) Herrington Lake.	From the confluence with Herrington Lake to approximately 1,158 feet upstream of the confluence with Herrington Lake.	None	+760	Unincorporated Areas of Boyle County.
	Entire shoreline	None	+760	Unincorporated Areas of Boyle County.
Spears Creek	At approximately 0.6 mile upstream of the confluence with Herrington Lake.	None	+788	City of Danville, Unincorporated Areas of Boyle County.
	At approximately 780 feet upstream of the North Danville Bypass.	None	+919	

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+ North American Vertical Datum.
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ADDRESSES

City of Danville

Maps are available for inspection at City Hall, 455 West Main Street, Danville, KY 40422.

Unincorporated Areas of Boyle County

Maps are available for inspection at the Boyle County Courthouse, 321 West Main Street, Danville, KY 40422.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Logan County, Kentucky, and Incorporated Areas				
Proctor Branch	Approximately 400 feet upstream of Bismarck Lane	None	+525	City of Russellville, Unincorporated Areas of Logan County.
	Approximately 0.3 mile upstream of the confluence with Proctor Branch Tributary A.	None	+599	
Proctor Branch Tributary A	Just upstream of the confluence with Proctor Branch	None	+585	City of Russellville.
	Approximately 1,100 feet upstream of the confluence with Proctor Branch.	None	+601	
Proctor Branch Tributary B	At the confluence with Proctor Branch	None	+579	City of Russellville, Unincorporated Areas of Logan County.
	Approximately 200 feet downstream of Hi-View Drive	None	+592	
Town Branch	Approximately 800 feet downstream of Concord Road	None	+517	City of Russellville, Unincorporated Areas of Logan County.
	Just downstream of Newton Road	None	+563	
	Just upstream of West 9th Street (U.S. Route 431)	None	+621	
	Approximately 1,900 feet upstream of West 9th Street (U.S. Route 431).	None	+623	
Town Branch Tributary D	Approximately 350 feet upstream of the confluence with Town Branch Tributary E.	None	+607	Unincorporated Areas of Logan County.
	Approximately 700 feet upstream of Warren Road	None	+643	

* National Geodetic Vertical Datum.

+thnsp;North American Vertical Datum.

Depth in feet above ground.

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ADDRESSES

City of Russellville

Maps are available for inspection at 168 South Main Street, Russellville, KY 42276.

Unincorporated Areas of Logan County

Maps are available for inspection at 299 West 3rd Street, Russellville, KY 42276.

Woodford County, Kentucky, and Incorporated Areas				
Brushy Run (Backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 0.4 mile upstream of the confluence with the Kentucky River.	None	+542	Unincorporated Areas of Woodford County.
Bucks Run (Backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 125 feet downstream of Buck Run Road.	None	+519	Unincorporated Areas of Woodford County.
Clear Creek (Backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 2.5 miles upstream of the confluence with the Kentucky River.	None	+531	Unincorporated Areas of Woodford County.
Craig Creek (Backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1,220 feet upstream of Gun Club Road.	None	+527	Unincorporated Areas of Woodford County.
Glenns Creek (Backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1.2 mile upstream of the confluence with the Kentucky River.	+511	+513	Unincorporated Areas of Woodford County.
Grier Creek (Backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 200 feet downstream of Shryocks Ferry Road.	None	+524	Unincorporated Areas of Woodford County.
Kentucky River	Approximately 2.3 miles downstream of Kentucky River Tributary 92.	+508	+514	Unincorporated Areas of Woodford County.
	Approximately 5.0 miles upstream of Kentucky River Tributary 5.	+545	+547	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Kentucky River Tributary 5 (Backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 950 feet upstream of the confluence with the Kentucky River.	None	+543	Unincorporated Areas of Woodford County.
Kentucky River Tributary 84 (Backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 510 feet upstream of the confluence with the Kentucky River.	None	+539	Unincorporated Areas of Woodford County.
Kentucky River Tributary 92 (Backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1,770 feet upstream of the confluence with the Kentucky River.	None	+515	Unincorporated Areas of Woodford County.
Lee Branch	Just upstream of Leestown Pike	+778	+780	City of Midway, Unincorporated Areas of Woodford County.
	At approximately 860 feet upstream of Old Frankfort Pike.	None	+827	
Lee Branch Tributary 4 (Backwater effects from Lee Branch).	From the confluence with Lee Branch to approximately 720 feet upstream of the confluence with Lee Branch.	None	+810	Unincorporated Areas of Woodford County.
Lee Branch Tributary 6 (Backwater effects from Lee Branch).	From the confluence with Lee Branch to approximately 1,145 feet upstream of the confluence with Lee Branch.	None	+802	City of Midway, Unincorporated Areas of Woodford County.
Lee Branch Tributary 7 (Backwater effects from Lee Branch).	From the confluence with Lee Branch to approximately 351 feet upstream of Midway College Road.	None	+802	City of Midway, Unincorporated Areas of Woodford County.

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

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Midway

Maps are available for inspection at City Hall, 101 East Main Street, Midway, KY 40347.

Unincorporated Areas of Woodford County

Maps are available for inspection at the Woodford County Courthouse, 103 South Main Street, Versailles, KY 40383.

Marion County, Mississippi, and Incorporated Areas

Pearl River	Approximately 5.5 miles downstream of State Highway 98.	+136	+134	City of Columbia, Unincorporated Areas of Marion County.
	Approximately 5 miles upstream of State Highway 35	+156	+154	

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ADDRESSES

City of Columbia

Maps are available for inspection at 201 2nd Street, Columbia, MS 39429.

Unincorporated Areas of Marion County

Maps are available for inspection at 250 Broad Street, Columbia, MS 39429.

Yellowstone County, Montana, and Incorporated Areas

Cove Creek	Approximately 200 feet upstream of Rimrock Road	+3373	+3375	City of Billings, Unincorporated Areas of Yellowstone County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Cove Creek East Overflow ...	Approximately 270 feet downstream of Molt Road	+3572	+3571	City of Billings, Unincorporated Areas of Yellowstone County.
	Approximately 25 feet upstream of Rimrock Road	None	+3370	
Fivemile Creek	Approximately 1,700 feet upstream of Rimrock Road	None	+3382	City of Billings, Unincorporated Areas of Yellowstone County.
	Downstream of Old Fivemile Creek Road	None	+3085	
Yellowstone River	Approximately 55 feet downstream of Alexander Road	None	+3225	City of Billings, Unincorporated Areas of Yellowstone County.
	Approximately 150 feet upstream of Musselshell Trail Road.	None	+2728	
	Approximately 545 upstream of U.S. Route 212 South	+3273	+3274	

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ADDRESSES

City of Billings

Maps are available for inspection at 510 North Broadway, 4th Floor, Billings, MT 59101.

Unincorporated Areas of Yellowstone County

Maps are available for inspection at 217 North 27th Street, Billings, MT 59101.

Arlington County, Virginia

Four Mile Run	At the confluence with the Potomac River	None	+10	Arlington County.
	Just downstream of Jefferson Davis Memorial Highway (U.S. Route 1).	None	+11	
Pimmit Run (Backwater effects from Potomac River).	From the confluence with the Potomac River to a point located approximately 112 feet downstream of Chain Bridge Road.	None	+40	Arlington County.
Potomac River	At the confluence with Four Mile Run	None	+10	Arlington County.
	Approximately 0.39 mile upstream of Chain Bridge Road.	None	+41	

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ADDRESSES

Arlington County

Maps are available for inspection at the Arlington County Government Building, 2100 Clarendon Boulevard, Arlington, VA 22021.

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

Dated: May 14, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–13267 Filed 6–2–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1105]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

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

DATES: Comments are to be submitted on or before September 1, 2010.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1105, to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

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

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

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

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

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

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

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

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

List of Subjects in 44 CFR Part 67

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

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

PART 67—[AMENDED]

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

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

§ 67.4 [Amended]

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

Flooding source(s)	Location of referenced elevation	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Christian County, Illinois, and Incorporated Areas				
Sangamon River	Approximately 1,350 feet downstream of 1725 East Road extended.	None	+574	Unincorporated Areas of Christian County.
	Approximately 200 feet upstream of Meridan Road extended.	None	+587	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.

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Depth in feet above ground.
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** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Christian County
Maps are available for inspection at the Christian County Courthouse, 101 South Main Street, Taylorville, IL 62568.

Knox County, Illinois, and Incorporated Areas

Cedar Creek	Approximately 0.51 mile upstream of West Knox Road.	None	+731	City of Galesburg, Unincorporated Areas of Knox County.
	Approximately 350 feet upstream of Farnham Street ..	None	+777	
Spoon River	Approximately 0.47 mile downstream of Knox County Highway 39.	None	+537	Unincorporated Areas of Knox County.
	Approximately 0.39 mile upstream of Knox County Highway 39.	None	+538	
Tributary to Swegle Creek	Approximately 1,200 feet upstream of Terwilliger Street extended.	None	+539	Unincorporated Areas of Knox County.
	Approximately 1,260 feet upstream of Terwilliger Street extended.	None	+539	

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ADDRESSES

City of Galesburg
Maps are available for inspection at City Hall, 55 West Tompkins Street, Galesburg, IL 61401.

Unincorporated Areas of Knox County
Maps are available for inspection at the Knox County Courthouse, 200 South Cherry Street, Galesburg, IL 61401.

Piatt County, Illinois, and Incorporated Areas

North East Tributary	Approximately 200 feet downstream of State Street ...	None	+652	City of Monticello, Unincorporated Areas of Piatt County.
	Approximately at the downstream side of State Street	None	+656	
North Unnamed Creek	Approximately 1,000 feet downstream of Front Street	None	+646	City of Monticello, Unincorporated Areas of Piatt County.
	Approximately 940 feet upstream of Market Street	None	+650	
Sangamon River	Approximately 2.52 miles downstream of the abandoned railroad bridge in the City of Monticello.	None	+644	City of Monticello, Unincorporated Areas of Piatt County.
	Approximately at the downstream side of the railroad	None	+649	
Unnamed Tributary to Sangamon River.	At the confluence with the Sangamon River	None	+645	City of Monticello, Unincorporated Areas of Piatt County.
	Approximately 610 feet upstream of County Farm Road.	None	+645	

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		Effective	Modified	

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Monticello

Maps are available for inspection at City Hall, 210 North Hamilton Street, Monticello, IL 61856.

Unincorporated Areas of Piatt County

Maps are available for inspection at the Piatt County Courthouse, 101 West Washington Street, Monticello, IL 61856.

Franklin County, Kansas, and Incorporated Areas

Marias des Cygnes River	At South East Street	None	+882	City of Rantoul
	Approximately 800 feet upstream of Vermont Road	None	+882	

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ADDRESSES

City of Rantoul

Maps are available for inspection at 120 East Main Street, Rantoul, KS 66079.

Howell County, Missouri, and Incorporated Areas

Burton Branch	Approximately 2,200 feet upstream of Davis Lane	None	+1022	City of West Plains, Unincorporated Areas of Howell County.
	Approximately 3,700 feet upstream of Davis Lane	None	+1031	
Drainage Ditch Number 1	Approximately 315 feet upstream of the City of Willow Springs corporate limits.	None	+1255	Unincorporated Areas of Howell County.
	Approximately 3,400 feet upstream of the City of Willow Springs corporate limits.	None	+1279	
Drainage Ditch Number 4	Approximately 1,300 feet upstream of U.S. Route 60/63.	None	+1197	City of Willow Springs, Unincorporated Areas of Howell County.
	Approximately 525 feet upstream of County Road 3280.	None	+1225	
Eleven Point River	Approximately 1,500 feet downstream of the City of Willow Springs corporate limits.	None	+1183	City of Willow Springs, Unincorporated Areas of Howell County
	Approximately 425 feet upstream of the City of Willow Springs corporate limits.	None	+1289	
Jam Up Creek	Approximately at Country Road 3160	None	+1098	Unincorporated Areas of Howell County
	Approximately 100 feet upstream of Country Road 3890.	None	+1099	
Mustion Creek	Approximately 330 feet downstream of the City of West Plains corporate limits.	None	+997	Unincorporated Areas of Howell County.
	Approximately 160 feet downstream of the City of West Plains corporate limits.	None	+998	
South Fork Howell Creek	Just upstream of Katherine Street	None	+1025	Unincorporated Areas of Howell County.
	Approximately 400 feet upstream of Katherine Street	None	+1027	

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+ North American Vertical Datum.
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∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

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

ADDRESSES

City of West Plains
Maps are available for inspection at 1910 Holiday Lane, West Plains, MO 65775.

City of Willow Springs
Maps are available for inspection at 900 West Main Street, Willow Springs, MO 65793.

Unincorporated Areas of Knox County
Maps are available for inspection at 4 Courthouse, West Plains, MO 65775.

Johnson County, Missouri, and Incorporated Areas

Clear Fork	Approximately 550 feet downstream of County Road 751.	None	+701	City of Knob Noster, Unincorporated Areas of Johnson County.
	Approximately 1,750 feet upstream of U.S. Route 50	None	+724	
Hughes Branch	Approximately 550 feet downstream of County Road 75.	None	+737	Unincorporated Areas of Johnson County.
	Approximately 100 feet upstream of State Highway 132.	None	+745	
	Approximately 200 feet upstream of State Street	None	+769	
	Approximately 2,000 feet upstream of State Street	None	+778	
Tributary 2	Approximately 50 feet downstream of State Highway 132.	None	+749	Unincorporated Areas of Johnson County.
	Approximately 300 feet upstream of State Highway 132.	None	+750	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
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Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Knob Noster
Maps are available for inspection at 218 North State Street, Knob Noster, MO 65336.

Unincorporated Areas of Johnson County
Maps are available for inspection at 122 Hout Street, Suite A, Warrensburg, MO 64093.

Lawrence County, Missouri, and Incorporated Areas

Kelly Creek Tributary	Approximately 300 feet upstream of the City of Monett corporate limits.	None	+1370	Unincorporated Areas of Lawrence County.
	Approximately 1,600 feet upstream of the City of Monett corporate limits.	None	+1390	
Tributary No 1	Approximately 50 feet upstream of the confluence with Unnamed Tributary.	None	+1326	Unincorporated Areas of Lawrence County.
	Approximately 275 feet upstream of State Highway 37	None	+1333	
Unnamed Tributary	Approximately 200 feet upstream of the county boundary.	None	+1290	Unincorporated Areas of Lawrence County.
	Approximately 40 feet downstream of the City of Monett corporate limits.	None	+1335	
Unnamed Tributary Number 1.	Approximately 200 feet downstream of Washington Avenue.	None	+1372	City of Aurora.
	Approximately 525 feet upstream of Union Street	None	+1406	
Unnamed Tributary Number 2.	Approximately 600 feet upstream of South Street	None	+1359	City of Aurora.
	Approximately 100 feet upstream of Prospect Street	None	+1402	
Unnamed Tributary Number 3.	Approximately 250 feet upstream of the confluence with Unnamed Tributary Number 2.	None	+1376	City of Aurora.
	At Tyler Drive	None	+1390	
Unnamed Tributary Number 4.	Approximately 215 feet upstream of Saint Louis Street.	None	+1361	City of Aurora.
	Approximately 650 feet upstream of Lincoln Avenue	None	+1381	

* National Geodetic Vertical Datum.

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

+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

ADDRESSES

City of Aurora

Maps are available for inspection at 2 West Pleasant Street, Aurora, MO 65605.

Unincorporated Areas of Lawrence County

Maps are available for inspection at 1 East Courthouse Square, Mt. Vernon, MO 65712.

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

Dated: May 14, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–13268 Filed 6–2–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1109]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

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

DATES: Comments are to be submitted on or before September 1, 2010.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1109, to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

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

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

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

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

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

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

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

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

List of Subjects in 44 CFR Part 67

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

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

PART 67—[AMENDED]

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

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

§ 67.4 [Amended]

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

Flooding source(s)	Location of referenced elevation	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Franklin Parish, Louisiana, and Incorporated Areas				
Ash Slough	Just upstream of Riser Road	None	+69	Unincorporated Areas of Franklin Parish.
	Approximately 700 feet downstream of Wyman Road.	None	+70	
Batey Bayou	Just downstream of Kansas Street	None	+65	Town of Wisner, Unincorporated Areas of Franklin Parish.
	Approximately 800 feet upstream of State Highway 15.	None	+72	
Cypress Slough	Just upstream of Kansas Street	None	+65	Unincorporated Areas of Franklin Parish.
	Just downstream of Maple Street	None	+73	
Turkey Creek	Approximately 500 feet upstream of Highway 3201.	None	+64	Unincorporated Areas of Franklin Parish.
	Approximately 0.5 mile upstream of Alice Shaw Road.	None	+69	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Town of Wisner

Maps are available for inspection at the Town Hall, 9530 Natchez Street, Wisner, LA 71378.

Unincorporated Areas of Franklin Parish.

Maps are available for inspection at the Franklin Parish Police Jury, 6558 Main Street, Winnsboro, LA 71295.

Madison Parish, Louisiana, and Incorporated Areas				
Bayou Macon	Just upstream of Atkins Road	None	+75	Unincorporated Areas of Madison Parish.
	Just downstream of Bryant Road	None	+79	

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+ North American Vertical Datum.
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Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Madison Parish

Maps are available for inspection at Madison Parish Police Jury, 100 North Cedar Street, Tallulah, LA 71282.

Flooding source(s)	Location of referenced elevation	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Gallatin County, Montana, and Incorporated Areas				
Bridger Creek	Approximately 1.0 mile downstream of Story Mill Road.	+4687	+4688	City of Bozeman.
	Just downstream of Story Mill Road	+4730	+4731	
Buster Gulch	Approximately 0.9 mile upstream of Airport Road.	+4478	+4480	Unincorporated Areas of Gallatin County.
	Approximately 4.2 miles upstream of Airport Road.	None	+4568	
East Gallatin River	Just downstream of Airport Road	+4461	+4463	City of Bozeman, Unincorporated Areas of Gallatin County.
	Approximately 2.1 miles downstream of Story Hill Road.	+4789	+4791	
East Gallatin River Golf Course Reach	Just upstream of the confluence with East Gallatin River Springhill Reach.	None	+4604	City of Bozeman.
	Approximately 0.5 mile upstream of the confluence with East Gallatin River Springhill Reach.	None	+4617	
East Gallatin River Overflow Reach	Approximately 1,300 feet downstream of Springhill Road.	None	+4596	City of Bozeman, Unincorporated Areas of Gallatin County.
	Approximately 2.6 miles upstream of Springhill Road.	None	+4674	
East Gallatin River Spillway Reach	Just upstream of the confluence with East Gallatin River Overflow Reach.	None	+4591	City of Bozeman.
	Approximately 0.5 mile upstream of the confluence with East Gallatin River Overflow Reach.	None	+4603	
East Gallatin River Springhill Reach	Just upstream of the confluence with the East Gallatin River.	None	+4594	City of Bozeman.
	Just downstream of the confluence with East Gallatin River Golf Course Reach.	None	+4604	
Jefferson River	Approximately 0.6 mile downstream of Old Town Road.	+4058	+4061	Unincorporated Areas of Gallatin County.
	Approximately 120 feet upstream of Frontage Road.	+4088	+4090	
Madison River	Approximately 0.8 mile downstream of Frontage Road.	+4054	+4058	Unincorporated Areas of Gallatin County.
	Approximately 1.2 mile upstream of I-90	+4081	+4083	

* National Geodetic Vertical Datum.

+ North American Vertical Datum.

Depth in feet above ground.

∧ Mean Sea Level, rounded to the nearest 0.1 meter.

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Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

ADDRESSES

City of Bozeman

Maps are available for inspection at 411 East Main Street, Bozeman, MT 59771.

Unincorporated Areas of Gallatin County

Maps are available for inspection at 311 West Main Street, Bozeman, MT 59771.

Flooding source(s)	Location of referenced elevation	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Lincoln County, New Mexico, and Incorporated Areas				
Brady Canyon	At the confluence with the Rio Ruidoso ...	+6744	+6746	Unincorporated Areas of Lincoln County, Village of Ruidoso.
	Approximately 1,100 feet upstream of Ash Drive.	None	+6948	
Carrizo Creek	At the confluence with the Rio Ruidoso ...	+6552	+6553	Unincorporated Areas of Lincoln County, Village of Ruidoso.
	Just upstream of Carrizo Canyon Road ...	+6749	+6751	
Cedar Creek	At the confluence with the Rio Ruidoso ...	+6530	+6534	Unincorporated Areas of Lincoln County, Village of Ruidoso.
	Approximately 500 feet upstream of Musket Ball Drive.	None	+7160	
Cherokee Bill Canyon	At the confluence with the Rio Ruidoso ...	+6445	+6446	Unincorporated Areas of Lincoln County, Village of Ruidoso.
	Approximately 1,800 feet upstream of Dunagan Trail.	+6690	+6693	
Musketball Creek	Just upstream of Cedar Creek Drive	None	+7150	Unincorporated Areas of Lincoln County.
	Approximately 285 feet upstream of Musketball Drive.	None	+7216	
North Fork Cedar Creek	Approximately 1,750 feet downstream of Spring Canyon Road.	None	+7160	Unincorporated Areas of Lincoln County.
	Just downstream of Watson Road	None	+7302	
Rio Bonito	Approximately 650 feet downstream of State Highway 48.	None	+6845	Unincorporated Areas of Lincoln County.
	Just downstream of the Bonito Lake Dam	None	+7318	
Rio Ruidoso	Approximately 1.0 mile downstream of County Road 17.	None	+5188	Unincorporated Areas of Lincoln County, Village of Ruidoso, Village of Ruidoso Downs.
	Approximately 800 feet upstream of Malone Road.	+7167	+7168	
Salado Creek	Approximately 320 feet upstream of U.S. Route 380.	None	+6382	Unincorporated Areas of Lincoln County, Village of Capitan.
	Approximately 110 feet upstream of Dean Drive.	None	+6484	
South Fork Cedar Creek	Approximately 480 feet downstream of Chuck Wagon Road.	None	+7160	Unincorporated Areas of Lincoln County.
	Approximately 330 feet upstream of Jarratt Drive.	None	+7233	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
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Flooding source(s)	Location of referenced elevation	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧Elevation in meters (MSL)		Communities affected
		Effective	Modified	

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Lincoln County

Maps are available for inspection at the County Floodplain Manager's Office, 115 Kansas City Road, Ruidoso, NM 88345.

Village of Capitan

Maps are available for inspection at the County Floodplain Manager's Office, 115 Kansas City Road, Ruidoso, NM 88345.

Village of Ruidoso

Maps are available for inspection at 313 Cree Meadows Drive, Ruidoso, NM 88345.

Village of Ruidoso Downs

Maps are available for inspection at the Planning and Zoning Department, 313 Cree Meadows Drive, Ruidoso, NM 88345.

Fairfield County, Ohio, and Incorporated Areas

Baltimore Tributary	At the confluence with Pawpaw Creek	None	+847	Unincorporated Areas of Fairfield County, Village of Baltimore.
	Approximately 0.41 mile downstream of Roley Road.	None	+860	
Buckeye Lake	Entire shoreline	None	+893	Unincorporated Areas of Fairfield County, Village of Millersport.
Clark Run	At the confluence with Rush Creek	+807	+804	Unincorporated Areas of Fairfield County.
	Approximately 586 feet upstream of the confluence with Rush Creek.	+807	+805	
Claypool Run	At the confluence with the Ohio Canal	+839	+838	Unincorporated Areas of Fairfield County.
	Approximately 200 feet downstream of Brook Road.	None	+909	
Crumley Creek	At the confluence with Hunters Run	+908	+905	Unincorporated Areas of Fairfield County.
	Approximately 850 feet upstream of the confluence with Hunters Run.	+908	+914	
Georges Creek	Approximately 1,588 feet downstream of Conrail Railroad.	+800	+798	City of Pickerington.
	At the upstream side of Pickerington Ridge Road.	None	+815	
Greenfield Creek	At the confluence with the Ohio Canal	+833	+830	Unincorporated Areas of Fairfield County.
	Approximately 1,400 upstream of Coonpath Road.	None	+898	
Greenfield Creek Escape	At the confluence with Claypool Run	+840	+839	Unincorporated Areas of Fairfield County.
	Approximately 2,000 feet downstream of Election House Road.	+858	+854	
Greenfield Creek Split	At the confluence with Greenfield Creek	None	+865	Unincorporated Areas of Fairfield County.
	Approximately 2,000 feet upstream of the confluence with Greenfield Creek.	None	+872	
Hocking River	Approximately 100 feet downstream of Sugar Grove Road.	+807	+808	City of Lancaster, Unincorporated Areas of Fairfield County.
	Approximately 650 feet upstream of the confluence with Wilson Creek.	None	+886	

Flooding source(s)	Location of referenced elevation	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Hocking River Lateral D	At the confluence with the Hocking River	+830	+826	City of Lancaster.
	Approximately 125 feet downstream of Collins Road.	+834	+830	
Hunters Run	At the confluence with the Hocking River	+819	+815	City of Lancaster, Unincorporated Areas of Fairfield County.
	Approximately 250 feet downstream of Mt. Zion Road.	None	+967	
Ohio Canal	At the confluence with the Hocking River	+831	+825	City of Lancaster, Unincorporated Areas of Fairfield County.
	At the confluence with Ohio Canal Lateral A.	+841	+844	
Ohio Canal Lateral A	At the confluence with the Ohio Canal	+841	+844	Unincorporated Areas of Fairfield County.
	Approximately 705 feet downstream of U.S. Route 33.	+846	+848	
Pawpaw Creek	At the confluence with Walnut Creek	None	+844	Unincorporated Areas of Fairfield County, Village of Baltimore.
	Approximately 1,169 feet upstream of North Main Street.	None	+868	
Rush Creek	Approximately 0.8 mile downstream of the confluence with Clark Run.	+802	+800	Unincorporated Areas of Fairfield County.
	Approximately 283 feet upstream of the confluence with Clark Run.	+807	+803	
South Fork Licking River	At the upstream side of Walnut Road at the west crossing of the South Fork Licking River.	+890	+886	Unincorporated Areas of Fairfield County.
	At the upstream side of Walnut Road at the east crossing of the South Fork Licking River.	+885	+892	
Stonewall Creek	At the confluence with Hunters Run	+861	+860	Unincorporated Areas of Fairfield County.
	Approximately 0.46 mile upstream of U.S. Route 22.	None	+899	
Sycamore Creek	At the confluence with Walnut Creek	+772	+773	City of Pickerington, Unincorporated Areas of Fairfield County.
	Approximately 505 feet upstream of DeCarlo Lane.	None	+1019	
Tributary B	At the upstream side of Paradise Road	None	+791	Unincorporated Areas of Fairfield County.
	Approximately 956 feet upstream of Paradise Road.	None	+791	
Unnamed Tributary to Sycamore Creek	At the confluence with Sycamore Creek	+840	+841	City of Pickerington, Unincorporated Areas of Fairfield County.
	Approximately 0.44 mile upstream of Doty Road.	None	+881	
Unnamed Tributary to Walnut Creek (Backwater effects from Walnut Creek).	At the confluence with Walnut Creek	None	+867	Unincorporated Areas of Fairfield County, Village of Thurston.
	Approximately 1,240 feet upstream of the confluence with Walnut Creek.	None	+867	

Flooding source(s)	Location of referenced elevation	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Willow Run	At the confluence with Sycamore Creek ..	+815	+816	City of Pickerington, Unincorporated Areas of Fairfield County.
	Approximately 250 feet downstream of Refugee Road.	None	+918	
Wilson Creek	At the confluence with the Hocking River	None	+884	Unincorporated Areas of Fairfield County.
	Approximately 200 feet downstream of Mt. Zion Road.	None	+903	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

ADDRESSES

City of Lancaster
Maps are available for inspection at 121 East Chestnut Street, Lancaster, OH 43130.

City of Pickerington
Maps are available for inspection at 100 Lockville Road, Pickerington, OH 43147.

Unincorporated Areas of Fairfield County
Maps are available for inspection at 210 East Main Street, Lancaster, OH 43130.

Village of Baltimore
Maps are available for inspection at 103 West Market Street, Baltimore, OH 42105.

Village of Millersport
Maps are available for inspection at 2245 Refugee Street, Millersport, OH 43046.

Village of Thurston
Maps are available for inspection at 2215 Main Street, Thurston, OH 43157.

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

Dated: May 14, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–13269 Filed 6–2–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 611

[Docket No. FTA–2010–0009]

RIN 2132–AB02

Major Capital Investment Projects

AGENCIES: Federal Transit Administration (FTA), DOT.

ACTION: Advance Notice of Proposed Rulemaking; request for comments.

SUMMARY: This advance notice of proposed rulemaking (ANPRM) seeks public comment regarding the Federal Transit Administration's (FTA) New Starts and Small Starts project justification criteria. In particular, FTA seeks public input on how to improve its calculation of "cost effectiveness," including whether FTA should measure quantifiable benefits other than reduced travel time. In addition, FTA seeks comment on how it should evaluate environmental benefits and economic development effects. Information gathered from this ANPRM will inform FTA's broader effort, next year, to amend the regulations that govern its New Starts and Small Starts programs.

DATES: Comments must be received by August 2, 2010. Late-filed comments will be considered to the extent practicable. The public should know the dates, times, and locations of the first two public outreach sessions are as follows: (1) Monday, June 7, 4:30 p.m. to 6:30 p.m., EST, 500 South Salisbury Street, Raleigh, North Carolina (Raleigh Convention Center); (2) Tuesday, June 8, 2:30 p.m. to 4:30 p.m., PST, 655 Burrard Street, Vancouver, British Columbia, Canada V6C 2R7 (Hyatt Regency Hotel).

FOR FURTHER INFORMATION CONTACT: Elizabeth Day, Office of Planning and Environment, (202) 366–5159; for questions of a legal nature, Christopher Van Wyk, Office of Chief Counsel, (202) 366–1733. FTA is located at 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 9 a.m. to 5:30 p.m., EST, Monday through Friday, except Federal holidays.

ADDRESSES: You may submit comments identified by the docket number FTA–2010–0009 by any of the following methods:

1. *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments on the U.S. Government electronic docket site.

2. *Fax:* 202–493–2251.

3. *Mail:* U.S. Department of Transportation, 1200 New Jersey Ave., SE., Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Ave., SE., Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name (Federal Transit Administration) and Docket number (FTA–2010–0009) for this notice at the beginning of your comments. You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed stamped postcard. Note that all comments received will be posted without change to *www.regulations.gov* including any personal information provided and will be available to internet users. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477). *Docket:* For access to the docket to read background documents and comments received, go to *http://www.regulations.gov* at any time or to the U.S. Department of Transportation, 1200 New Jersey Ave., SE., Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590 between 9 a.m. and 5 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Introduction

This ANPRM seeks new ideas through public comment on a funding program for new or expanded transit systems that involves a large amount of technical information and analysis. As such, this document is being issued to provide a general overview of FTA's current approach to evaluating and rating major capital investment projects ("New Starts" and "Small Starts") in support of its funding decisions, and, to ask questions that will assist FTA in its development of a Notice of Proposed Rulemaking. Because this document avoids technical terminology and detailed discussion, it is necessary to refer to other sources where additional information can be obtained for commenters who would like to know more of the details behind FTA's current process. To aid in that effort, FTA will place all of the documents cited in this notice in the public docket at *www.regulations.gov* under the docket number for this rulemaking effort (FTA–2010–0009). Interested persons may also consult the FTA public Web site, *http://www.fta.dot.gov,* for further information on these subjects.

Background

The New Starts and Small Starts programs, established in Section 5309(d) and (e) of Title 49, U.S. Code, are FTA's primary capital funding programs for new or extended transit systems across the country, including rapid rail, light rail, commuter rail, bus rapid transit, and ferries. Under this discretionary program, proposed projects are evaluated and rated as they seek FTA approval for a multi-year federal funding commitment to finance project construction. Currently, overall ratings for New Starts and Small Starts proposed projects are based on summary ratings for two categories of criteria—project justification and local financial commitment. Within these two categories, projects are evaluated and rated against several individual criteria specified in statute. Details on how projects are currently evaluated and rated are set forth in the FTA regulations at 49 CFR Part 611, which can be found at the following web address: *http://edocket.access.gpo.gov/cfr_2008/octqtr/49cfr611.htm.*

Several statutory changes since 49 CFR part 611 was first written have modified the evaluation process, including the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) enacted on August 10, 2005, and the SAFETEA–LU Technical Corrections Act of 2008, signed on June 6, 2008. FTA's most recent policy guidance on the evaluation process (issued to address the SAFETEA–LU Technical Corrections Act), was announced on July 29, 2009 and is available in the **Federal Register** at 74 FR 37763; it is also set forth in Appendix B of FTA's "FY 2011 Annual Report on Funding Recommendations" available at *http://www.fta.dot.gov/publications/reports/reports_to_congress/publications_11092.html.*

This ANPRM seeks comment on three of the evaluation criteria under the project justification category: Cost effectiveness, environmental benefits, and economic development benefits. Although FTA also evaluates other statutory criteria for projects, those other criteria will be addressed in the notice of proposed rulemaking following this ANPRM.

Cost Effectiveness

Since April of 2005, FTA has had in place a budget decision approach that required at least a Medium rating on cost effectiveness for a project to be considered for funding in the President's annual budget.

Members of the transit community criticized FTA's approach on the cost effectiveness criterion, and questioned the methodology FTA uses to calculate cost effectiveness. Specifically, the transit community expressed concern that receiving a Low- or Medium-low cost effectiveness rating "trumped" other project justification criteria established by law. Critics also noted that sometimes projects were designed to achieve a Medium cost effectiveness rating to remain in the funding pipeline while sacrificing other potentially important considerations, such as station locations and/or design features to accommodate ridership growth. On January 13, 2010, Secretary Ray LaHood announced the end of that approach. This new direction presents FTA with an opportunity to rethink how it evaluates cost effectiveness for projects seeking New Starts and Small Starts funding.

While the other project justification criteria characterize the effectiveness of projects in addressing the objectives identified by the statute, cost effectiveness characterizes the extent to which benefits are in scale with project costs. In its current cost effectiveness measure, FTA includes the direct mobility benefits of the project, expressed as time savings. FTA defines mobility benefits as any measurable change in travel times, walking, waiting, transfers, and other attributes of travel on the transportation system. FTA's definition of mobility benefits includes time savings to highway users caused by congestion relief but FTA has not as yet been able to accept projections of highway time savings because of their unreliability and inconsistency. Instead, in determining cost effectiveness ratings, FTA credits all projects with an allowance for highway time savings that is equal to 20 percent of the project-specific transit time savings. FTA is sponsoring research on better methods to predict highway time savings so that project-specific highway time savings can be included in the mobility benefits that are compared to project costs.

FTA has not included other impacts among the project-specific benefits used to compute the current cost effectiveness measure because of the difficulties in summing, in a common

unit of measurement, the broad range of other benefits. Instead, in determining cost effectiveness ratings, FTA credits all projects with an allowance for other benefits that is equal to 100 percent of the project-specific time savings. FTA is seeking comment in this ANPRM on ways to quantify and value other benefits so that they can be included as project-specific benefits, rather than a general allowance, in the comparison against project costs.

For more information how FTA calculates cost effectiveness, see Appendix B of FTA's "FY 2011 Annual Report on Funding Recommendations" available at *http://www.fta.dot.gov/publications/reports/reports_to_congress/publications_11092.html.*

In general, quantitative measures require evaluating the incremental (or added) benefits of implementing a proposed project against some alternative. FTA is seeking comment on what the basis for comparison should be. Currently, New Starts and Small Starts projects are evaluated against a "baseline alternative," which is defined as the "best that can be done" to address identified transportation needs in the corridor without a major capital investment in new infrastructure. The baseline alternative generally includes lower cost actions such as traffic engineering, enhanced bus service and other transit operational changes, and modest capital improvements such as reserved lanes, park-and-ride lots, and transit terminals. Although less expensive than the proposed project, the baseline alternative may still result in substantial costs, particularly in complex study areas with significant transportation problems.

Consistent with current law, FTA will continue to use cost effectiveness as one of the principal criteria for project justification. FTA is open to new ideas, however, regarding the direction the agency should take to improve how it evaluates cost effectiveness, including whether and how non-mobility benefits should be measured and how they could be calculated on a project-specific basis as part of that criterion, as well as how determinations of a baseline alternative could be improved if one continues to be used.

Questions on Cost Effectiveness

FTA seeks specific comment on the following questions:

1. How might FTA better evaluate cost effectiveness?

2. What, if any, additional benefits such as environmental benefits, equity considerations (*e.g.,* the social benefits of low income ridership), and benefits of economic development attributed to a specific project could FTA include in the measure of cost effectiveness? What specific benefits should be included in the calculation of cost effectiveness?

3. If you believe that FTA should include other benefits in the measure of cost effectiveness, how can FTA best quantify those benefits? Please include specifics on how FTA would quantify and measure these benefits.

4. Are there simpler measures of cost effectiveness that FTA could use? If so, what are they? Please be specific.

5. How should FTA evaluate projects across cities with varying levels of transit service? In other words, should FTA continue to compare projects against a "baseline alternative"? Should FTA consider additional benefit categories such as convenience for riders, reduced congestion, reduced travel time as a result of reduced congestion, reduction in the number of accidents due to reduced congestion, fuel costs (or other variable cost) savings for individuals who would be using the projects and/or the benefit to national security of additional transportation options? If so, how should these be measured?

6. Should FTA measure the benefits of projects based on the opening year of those projects or retain the current methodology which is based on the planning forecast year (which is approximately 20 years in the future)? Please explain the rationale for your response. If 20-year estimates are used, should FTA require project sponsors to support the reasonableness of their land use forecasts 20 years into the future? If so, how might project sponsors support their conclusions? Should FTA consider using forecasting periods other than opening year or 20-year? If so, what forecast year should FTA consider, and why?

Environmental Benefits

Since the environmental benefits criterion was first added as a project justification criterion in the Intermodal Surface Transportation Efficiency Act of 1991, FTA has attempted through various methods, with limited success, to meaningfully measure and compare the environmental benefits of transit projects in different environmental settings throughout the country.

For a number of years, FTA used an air quality approach based on a regional forecast of the changes in vehicle miles of travel (VMT) for the proposed project compared to the New Starts baseline alternative in the forecast year. (*See* Appendix A in 49 CFR part 611 for more explanation of the baseline alternative.) The results of that approach proved unsatisfactory because any one project has only a minor effect on total regional air quality. The results also did not take into account the severity of the metropolitan area's air quality problems or the size of the population exposed to polluted air.

Although FTA has focused solely on air quality for environmental benefits, the statute is written broadly enough to allow FTA to take into account other factors such as noise pollution, energy consumption, reductions in local infrastructure costs achieved through compact land use development, and the cost of suburban sprawl.

To gain a sharper perspective on the issue of environmental benefits, FTA convened a two-day colloquium in October 2008 in which a number of experts discussed different types of environmental benefits associated with transit projects. The record of that meeting ("Comparing the Environmental Benefits of Transit Projects: Proceedings from a Colloquium—October 28 & 29, 2008") is available at *http://www.fta.dot.gov/documents/FTA_Environmental BenefitProceedings.pdf* and on compact disc through the Volpe National Transportation Systems Center. FTA is also actively participating in a Transit Cooperative Research Program study on the environmental benefits of transit projects. This work has helped to inform the questions posed below.

Moreover, the President recently signed Executive Order 13514 ("Federal Leadership in Environmental, Energy, and Economic Performance"; October 5, 2009), which is germane to evaluating and rating the environmental benefits of New Starts and Small Starts projects. As part of a broad strategy, E.O. 13514 obliges Federal agencies to advance integrated planning of infrastructure at regional and local levels; align Federal policies to promote sustainable technologies and opportunities for locally generated renewable energy; and take a leadership role in reducing greenhouse gas emissions. FTA seeks to incorporate the goals and objectives of E.O. 13514 into the New Starts and Small Starts programs to maximize the land use efficiencies created through locating transit projects in areas that facilitate sustainable development. The text of E.O. 13514 is available at *http://edocket.access.gpo.gov/2009/pdf/E9-24518.pdf.*

Questions on Environmental Benefits

FTA seeks specific comment on the following questions:

1. How might FTA better measure environmental benefits?

2. In measuring environmental benefits, should FTA consider a broad

definition of *environment,* as does the National Environmental Policy Act, which includes consideration of both the human and natural environment? Or, should FTA focus on the environmental performance in specific areas such as air quality emissions, energy use, greenhouse gas emissions, or water quality? Should FTA look at project-specific environmental benefits such as change in energy use and/or pollutant emissions? Should FTA consider other characteristics such as assessing the degree to which a proposed New Starts project fits into a State or Regional Sustainability Plan or whether a transit agency's capital program is operating under an official Environmental Management System (EMS) or has attained the EMS certification of the International Standards Organization (ISO 14001)? Would it be best to have a combination? Please be specific in what metrics you think should be considered.

3. Should the environmental benefits evaluation consider the steps a project sponsor takes to mitigate the construction impacts of New Starts projects in addition to the environmental effects of their operation? Should the origin and methods to obtain construction or vehicle materials; energy type and use; and water consumption be considered in the overall evaluation of environmental benefits?

4. Should FTA consider the reduction in single occupant vehicle usage as part of its evaluation of environmental benefits? What method should be used to measure the changes in vehicle miles travelled resulting from implementation of a project? Please be specific about how FTA should measure this.

5. Should FTA consider certification of the planned facility through the Leadership in Energy and Environmental Design (LEED) Green Building Rating System; low impact development of transit facilities; or energy production with windmills or solar panels?

6. In measuring the environmental benefits of a project, how might FTA take into account the goals and objectives of Executive Order 13514? Should a project be evaluated and rated on how well it maximizes the land use efficiencies created through locating the project in areas that facilitate sustainable development?

7. To what extent, if any, can technology improvements—lower carbon transport technologies, the use of emerging light weight materials, improved engine designs, or bio-fuel applications, for example—be said to reflect environmental benefits of transit proposals? How would such improvements be measured and compared?

8. Should environmental benefits be included in the cost effectiveness measure? How can environmental benefits be compared across projects, and incorporated into FTA funding decisions?

Economic Development Benefits

FTA has defined economic development as the extent to which a proposed New Starts or Small Starts project is likely to enhance additional, transit-supportive development. Currently, FTA rates the economic development effects of major transit investments on the basis of the transit-supportive plans and policies in place and the demonstrated performance and impact of those policies. These "on the ground" indicators characterize the environment in which a project would be built and are not intended to predict future development outcomes.

In order to guide future research in this area, FTA convened a panel of experts in late 2007 to consider the potential methodologies available for measuring the economic development effects of New Starts and Small Starts projects. Some experts on the panel noted that FTA may be able to achieve this goal in two ways: (1) Through the use of quantitative models to estimate the impacts of transit projects on land values; and (2) through the use of integrated transportation/land-use models to predict changes in land-use patterns that might result from transit projects and the various benefits associated with those changes. The record of that meeting ("Measuring the Economic Development Benefits of Transit Projects: Proceedings of an Expert Panel Workshop," March 2008) is available at *http://www.fta.dot.gov/documents/Econ_Dev_Expert_Panel_Report.pdf.* FTA is sponsoring two ongoing Transit Cooperative Research Program (TCRP) projects (Reference numbers H–39 and SH–12) to study the impact of transit on economic development.

FTA also issued a discussion paper on new, alternative ways of evaluating economic development effects in a **Federal Register** notice published on January 26, 2009. This paper ("Discussion Paper on the Evaluation of Economic Development," October 2008) is available at *http://www.fta.dot.gov/planning/newstarts/planning_environment_5615.html.* FTA received comments on the discussion paper from eleven respondents and has considered those comments in formulating the questions listed below.

Questions on Economic Development Effects

FTA seeks specific comment on the following questions:

1. How might FTA better measure the impact of transit on local land use patterns and/or economic development?

2. Should FTA continue to use its current approach for evaluating the economic development effects of major transit investments?

3. Should FTA define economic development differently? If so, how?

4. Should FTA use either a qualitative or a quantitative approach (or both) for evaluating the economic development effects of New Starts and Small Starts projects? Should FTA consider a qualitative approach for evaluating land use policies or a quantitative approach for predicting changes in land use values and patterns (or both) as a proxy for evaluating economic development benefits?

5. What scale should be used to measure economic development? At a corridor level or at the metropolitan area level?

6. How should FTA distinguish between the land use effects and the economic development effects of a proposed project? How should they be measured?

7. Can a New Starts or Small Starts project generate new economic development that would otherwise not have occurred in the surrounding area? If so, how might that economic development be measured? Should FTA consider the overall economic health of a metropolitan area when estimating the potential for a New Starts or Small Starts project to foster economic development?

8. How should FTA assess whether the plans, policies, and incentives intended to promote economic development would lead to transit oriented development that provides jobs and services within the corridor? Should FTA consider the economic development effects of the project on adjacent corridors? Should FTA consider commitments by developers or funding offered by developers as evidence of future economic development benefits? What time horizon should be used for considering economic development effects?

9. Should FTA consider changes in land values as evidence of potential economic growth in a station area or project corridor? How would FTA quantify recent and future changes in land values? How can FTA avoid double counting benefits given that changes in land values may be caused in part by the improved accessibility from the

project that FTA already measures as part of cost effectiveness? Should FTA consider the extent to which existing affordable housing and commercial space can be maintained in the corridor after implementation of a transit project there?

10. Should economic development be a part of the cost effectiveness measure?

Public Outreach Sessions

The meetings listed below are the first two in a series of outreach sessions that will provide a forum for FTA staff to make oral presentations on this ANPRM and allow meeting attendees an opportunity to pose questions to the speakers. Additionally, the sessions are intended to encourage interested parties and stakeholders to submit their comments directly to the official docket per the instructions found in the **ADDRESSES** section of this notice. Further outreach sessions, once scheduled, will be announced in a subsequent **Federal Register** notice.

The dates, times, and locations of the first two public outreach sessions are: (1) Monday, June 7, 4:30 pm to 6:30 pm, EST, 500 Fayetteville Street, Raleigh, NC 27601 (Marriott City Center Hotel), concurrent with the conference on "Environment and Energy: Better Delivery of Better Transportation Solutions," sponsored by the Transportation Research Board; (2) Tuesday, June 8, 2:30 pm to 4:30 pm, PST, Vancouver, British Columbia, Canada, 655 Burrard Street, Vancouver, British Columbia, Canada V6C 2R7 (Hyatt Regency Hotel), concurrent with the "2010 Rail Conference" sponsored by the American Public Transportation Association. All locations are ADA-accessible. Individuals attending a meeting who are hearing or visually impaired and have special requirements, or a condition that requires special assistance or accommodations, should call Elizabeth Day, Office of Planning and Environment, at (202) 366–5159.

Regulatory Notices

All comments received on this ANPRM will be available for examination in the docket at *http://www.regulations.gov.*

Executive Order 12866 and DOT Regulatory Policies and Procedures

This rulemaking is a significant regulatory action pursuant to section 3(f) of Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11032). This ANPRM was reviewed by the Office of Management and Budget.

Executive Order 12866 requires agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." Because this ANPRM does not contain specific proposals, it is not possible at this time to perform a cost-benefit analysis.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), FTA must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. Because this ANPRM does not contain specific proposals, it is not possible to perform that analysis at this time. This ANPRM does, however, seek input from the public, including small entities, on the implementation of the New Starts and Small Starts programs, including what, if any, significant economic impacts might result.

Executive Order 13132: Federalism

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may 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. This ANPRM asks questions about FTA's implementation of the New Starts and Small Starts programs, and FTA specifically invites State and local governments with an interest in this rulemaking to provide feedback on those questions.

Regulation Identifier Number (RIN)

The U.S. DOT assigns a regulation identifier number (RIN) 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 may be used to cross-reference this action with the Unified Agenda.

Issued in Washington, DC, this 1st day of June, 2010.

Peter Rogoff,

Administrator.

[FR Doc. 2010–13423 Filed 6–1–10; 11:15 am]

BILLING CODE 4910–57–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS- R4-ES-2010-0024]; [MO 92210-0-0009-B4]

RIN 1018-AX25

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Mississippi Gopher Frog

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to designate critical habitat for the Mississippi gopher frog (*Rana sevosa*) [= *Rana capito sevosa*] under the Endangered Species Act of 1973, as amended (Act). A total of 792 hectares (1,957 acres) in 11 units are proposed for critical habitat designation. The proposed critical habitat is located within Forrest, Harrison, Jackson, and Perry Counties, Mississippi.

DATES: We will consider comments from all interested parties until August 2, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by July 19, 2010.

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

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments on Docket No. FWS-R4-ES-2010-0024.
- U.S. mail or hand delivery: Public Comments Processing, Attn: FWS-R4-ES-2010-0024; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Stephen Ricks, Field Supervisor, U.S. Fish and Wildlife Service, Mississippi Fish and Wildlife Office, 6578 Dogwood

View Parkway, Jackson, MS 39213; telephone: 601-321-1127; facsimile: 601-965-4340. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether the benefit of designation would be outweighed by threats to the species caused by the designation, such that the designation of critical habitat is not prudent.

(2) Comments or information that may assist us in identifying or clarifying the physical and biological features essential to the conservation of the Mississippi gopher frog.

(3) Specific information on:

- The amount and distribution of Mississippi gopher frog habitat,
- What areas occupied at the time of listing and that contain physical and biological features essential to the conservation of the species,
- What special management considerations or protections may these features require, and
- What areas not occupied at the time of listing are essential for the conservation of the species and why.

(4) Land-use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities (e.g., small businesses or small governments) or families, and the benefits of including or excluding areas that exhibit these impacts.

(6) Whether any specific areas we are proposing as critical habitat should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(7) Information on any quantifiable economic costs or benefits of the proposed designation of critical habitat.

(8) Information on the projected and reasonably likely impacts of climate change on the Mississippi gopher frog, and any special management needs or protections that may be needed in the critical habitat areas we are proposing.

(9) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(10) The appropriateness of the taxonomic name change of the Mississippi gopher frog from *Rana capito sevosa* to *Rana sevosa*.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. If your written comments provide personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Mississippi Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this proposed rule. For more information on the Mississippi gopher frog, refer to the final rule listing the species as endangered, which was published in the **Federal Register** on December 4, 2001 (66 FR 62993). See also the discussion of habitat in the Physical and Biological Features section below.

Taxonomy and Nomenclature

Subsequent to the listing of the Mississippi gopher frog, taxonomic research was completed which indicated that the listed entity is different from other gopher frogs and warrants acceptance as its own species, *Rana sevosa* (Young and Crother 2001, pp. 382-388). The herpetological scientific community has accepted this taxonomic change, and, as a result, we announce our intention to revise our List of Endangered and Threatened Wildlife to reflect this change in nomenclature. The common name for *Rana sevosa* used in the most recent taxonomic treatment for reptiles and amphibians is dusky gopher frog (Crother *et al.* 2003, p. 197). However, we will continue to use the common name, Mississippi gopher frog, to describe the listed entity in order to avoid confusion with some populations of the eastern *Rana capito*, for which the common name of dusky gopher frog is still popularly used.

The subspecies, dusky gopher frog (*Rana capito sevosa*), originally described those gopher frogs occurring in western Florida, Alabama, Mississippi, and Louisiana. The listing at 50 CFR 17.11 is of a distinct population segment (DPS) representing those dusky gopher frogs occurring west of the Mobile and Tombigbee Rivers in Alabama, Mississippi, and Louisiana. As discussed above, taxonomic research has elevated the dusky gopher frog to full species status. Therefore, while we are proposing a change to the listing in 50 CFR 17.11(h) to update the species name to *Rana sevosa*, the listed entity actually would not change; the same frogs would retain protection under the Act as an endangered species. We also propose to remove the State of Florida from the "Historical range" column of the table entry in 50 CFR 17.11(h) since this delineated the entire range, including unlisted portions, of the subspecies, *Rana capito sevosa*. The historic range column of the table entry in 50 CFR 17.11 (h) has been changed to reflect the historic range of the listed entity, *Rana sevosa*. As a result of the name change, the species occupying the eastern portion of the range that includes the State of Florida is the unlisted *Rana capito*.

Geographic Range, Habitat, and Threats

The Mississippi gopher frog has a very limited historical range in Alabama, Mississippi, and Louisiana. At the time of listing in 2001, this species occurred at only one site, Glen's Pond, in the DeSoto National Forest in Harrison County, Mississippi (66 FR 62993). Mississippi gopher frog habitat includes both upland sandy habitats—historically forest dominated by longleaf pine (*Pinus palustris*) —and isolated temporary wetland breeding sites

embedded within the forested landscape. Adult and subadult frogs spend the majority of their lives underground in active and abandoned gopher tortoise (*Gopherus polyphemus*) burrows, abandoned mammal burrows, and holes in and under old stumps (Richter *et al.* 2001, p. 318). Frequent fires are necessary to maintain the open canopy and ground cover vegetation of their aquatic and terrestrial habitat. The Mississippi gopher frog was listed as an endangered species due to its low population size and because of ongoing threats to the species and its habitat (66 FR 62993). Primary threats to the species include urbanization and associated development and road building; fire suppression; two potentially fatal amphibian diseases known to be present in the population; and the demographic effects of small population size (66 FR 62993; Sisson 2003, pp. 5, 9; Overstreet and Lotz 2004, pp. 1-13).

Current Status

Since the time of listing on December 4, 2001, we have used information from surveys and reports prepared by the Alabama Department of Conservation and Natural Resources; Louisiana Department of Wildlife and Fisheries/ Natural Heritage Program; Mississippi Museum of Natural Science/Mississippi Department of Wildlife, Fisheries, and Parks; Mississippi gopher frog researchers; and Service data and records to search for additional locations occupied, or with the potential to be occupied, by the Mississippi gopher frog. After reviewing the available information from the areas in the three States that were historically occupied by the Mississippi gopher frog, we determined that most of the potential restorable habitat for the species occurred in Mississippi. Wetlands throughout the coastal counties of Mississippi have been identified by using U.S. Geological Survey topographic maps, National Wetland Inventory maps, Natural Resource Conservation Service county soil survey maps, and satellite imagery. Although historically the Mississippi gopher frog was commonly found in the coastal counties of Mississippi (Allen 1932, p. 9; Neill 1957, p. 49), very few of the remaining ponds provide potential appropriate breeding habitat (Sisson 2003, p. 6). Field surveys conducted in Alabama and Louisiana have been unsuccessful in documenting the continued existence of Mississippi gopher frogs in these States (Pechmann *et al.* 2006, pp. 1-23; Bailey 2009, pp. 1-2). However, two new naturally occurring populations of the Mississippi gopher frog were found in Jackson County, Mississippi (Sisson 2004, p. 8). Due to the paucity of available suitable habitat for the Mississippi gopher frog, we have worked with our State, Federal, and nongovernmental partners to identify and restore upland and wetland habitats to create appropriate translocation sites for the species. We identified 15 ponds and associated forested uplands which we considered to have restoration potential. These sites occur on the DeSoto National Forest (Harrison, Forrest, and Perry Counties), the Ward Bayou Wildlife Management Area (Jackson County), and two privately owned sites (Jackson County). We have used Glen's Pond and its surrounding uplands on the DeSoto National Forest, Harrison County, Mississippi, as a guide in our management efforts. Ongoing habitat management is being conducted at these areas to restore them as potential relocation sites for the Mississippi gopher frog. Habitat management at one of the privately owned sites (Unit 3) reached the point where we believed a translocation effort could be initiated. Tadpoles and metamorphic frogs have been released in 2004, 2005, 2007, and 2008, at a pond restored for use as a breeding site (Sisson *et al.* 2008, p. 16). In December 2007, Mississippi gopher frogs were heard calling at the site, and one egg mass was discovered (Baxley and Qualls 2007, pp. 14-15). As a result, we consider this site to be currently occupied by the species, bringing the total number of currently occupied sites to four.

Previous Federal Action

The Mississippi gopher frog (*Rana capito sevosa*) distinct population segment of the gopher frog (*Rana capito*) (see Taxonomy and Nomenclature discussion above) was listed as an endangered species under the Act on December 4, 2001 (66 FR 62993). The Service found that designation of critical habitat was prudent at the time of listing. However, the development of a designation was deferred due to budgetary and workload constraints.

On November 27, 2007, the Center for Biological Diversity and Friends of Mississippi Public Lands filed a lawsuit against the Service and the Secretary of the Interior for our failure to timely designate critical habitat for the Mississippi gopher frog (*Friends of Mississippi Public Lands and Center for Biological Diversity* v. *Kempthorne* (07-CV-02073)). In a court-approved settlement, the Service agreed to submit to the **Federal Register** a new prudency determination, and if the designation was found to be prudent, a proposed designation of critical habitat, by May 30, 2010, and a final designation by May 30, 2011.

Critical Habitat

Background

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.

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 under 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(a)(2)of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification

finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

To be considered for inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species. Areas supporting the essential physical or biological features are identified, to the extent known using the best scientific data available, as the habitat areas that provide essential life cycle needs of the species. Habitat within the geographical area occupied by the species at the time of listing that contains features essential to the conservation of the species meets the definition of critical habitat only if these features may require special management consideration or protection. Under the Act and regulations at 50 CFR 424.12, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed only when we determine that the best available scientific data demonstrate that those 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. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. In particular, we recognize that climate change may cause changes in the suitability of occupied habitat. Climate change may lead to increased frequency and duration of severe storms and droughts (McLaughlin *et al.* 2002, p. 6074; Golladay *et al.* 2004, p. 504; Seager *et al.* 2009, p. 5043). During a period of drought from 2004 to 2007, rainfall during the Mississippi gopher frog breeding season was insufficient to support recruitment of metamorphic frogs to the population (Sisson 2004, p. 7; Sisson 2005, pp. 11-12; Baxley and Qualls 2006, pp. 7-9; Baxley and Qualls 2007, p. 13).

The information currently available on the effects of global climate change and increasing temperatures does not make sufficiently precise estimates of the location and magnitude of the effects. Nor are we currently aware of any climate change information specific to the habitat of the Mississippi gopher frog that would indicate what areas may become important to the species in the future. Therefore, we are unable to determine what additional areas, if any, may be appropriate to include in the proposed critical habitat for this species; however, we specifically request information from the public on the currently predicted effects of climate change on the Mississippi gopher frog and its habitat. Additionally, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated critical habitat area is unimportant or may not be required for recovery of the species.

Areas that are important to the conservation of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), section 7 consultations, or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations at 50 CFR 424.12(a)(1) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species; or (2) the designation of critical habitat would not be beneficial to the species.

There is no documentation that the Mississippi gopher frog is threatened by taking or other human activity. In the absence of finding that the designation of critical habitat would increase threats to the species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits include: (1) Triggering consultation, under section 7 of the Act, in new areas for action in which there may be a Federal nexus where consultation would not otherwise occur, because, for example, an area is or has become unoccupied or the occupancy is in question; (2) identifying the physical and biological features essential to the Mississippi gopher frog and focusing conservation activities on these essential features and the areas that support them; (3) providing educational benefits to State or county governments or private entities engaged in activities or long-range planning in areas essential to the conservation of the species; and (4) preventing people from causing inadvertent harm to the species. Conservation of the Mississippi gopher frog and the essential features of the habitat will require habitat protection and restoration, which will be facilitated by knowledge of habitat locations and the physical and biological features of those habitats.

Therefore, since we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that the designation of critical habitat for the Mississippi gopher frog is prudent.

Critical Habitat Determinability

As stated above, section 4(a)(3) of the Act requires the designation of critical habitat concurrently with the species' listing "to the maximum extent prudent and determinable." Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(1) Information sufficient to perform required analyses 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.

When critical habitat is not determinable, the Act provides for an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the Mississippi gopher frog, the historical distribution of the Mississippi gopher frog, and the habitat characteristics where they currently survive. This and other information represent the best scientific and commercial data available and led us to conclude that the designation of critical habitat is determinable for the Mississippi gopher frog.

Methods

As required by section 4(b) of the Act, we used the best scientific and commercial data available in determining which areas within the geographical area occupied by the species at the time of listing contain the physical and biological features essential to the conservation of the Mississippi gopher frog that may require special management considerations or protections, and which areas outside of the geographical area occupied at the time of listing are essential for the conservation of the species.

We reviewed the available information pertaining to historical and current distributions, life histories, and habitat requirements of this species. Our sources included peer-reviewed scientific publications; unpublished survey reports; unpublished field observations by the Service, State, and other experienced biologists; notes and communications from qualified biologists or experts; Service publications such as the final listing rule for the Mississippi gopher frog; and Geographic Information System (GIS) data (such as species occurrence data, habitat data, land use, topography, digital aerial photography, and ownership maps).

Physical and Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and the regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied at the time of listing to propose as critical habitat, we consider the physical and biological features essential to the conservation of the species which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We consider the specific physical and biological features to be the primary constituent elements (PCEs; see "**Primary Constituent Elements**" below) laid out in the appropriate quantity and spatial arrangement for the conservation of the species. We derive the PCEs required for the species from the biological needs of the Mississippi gopher frog as described in the Background section of this proposed rule and the final listing rule (66 FR 62993). To identify the physical and biological features essential to the conservation of the Mississippi gopher frog, we have relied on current conditions at locations where the species survives, the limited information available on this species and its close relatives, as well as factors associated with the decline of other amphibians that occupy similar habitats in the lower Southeastern Coastal Plain (U.S. Fish and Wildlife Service 2001, pp. 62993-63002).

Space for Individual and Population Growth and for Normal Behavior

Mississippi gopher frogs are terrestrial amphibians endemic to the longleaf pine ecosystem. They spend most of their lives underground and occur in forested habitat consisting of fire-maintained, open-canopied woodlands historically dominated by longleaf pine, with naturally occurring slash pine (*P. elliotti*) in wetter areas. Frequent fires also support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds (Hedman *et al.* 2000, p. 233; Kirkman *et al.* 2000, p. 373). Historically, fire-tolerant longleaf pine dominated the uplands; however, much of the original habitat has been converted to pine (often loblolly (*P. taeda*) or slash pine) plantations and has become a closed-canopy forest unsuitable as habitat for gopher frogs (Roznik and Johnson 2009a, p. 265).

During the breeding season, Mississippi gopher frogs leave their subterranean retreats in the uplands and migrate to their breeding sites during rains associated with passing cold fronts. Breeding sites are ephemeral (seasonally flooded) isolated ponds (not connected to other water bodies) located in the uplands. Both forested uplands and isolated wetlands (see further discussion of isolated wetlands in *Sites for Breeding, Reproduction, and Rearing of Offspring* section) are needed to provide space for individual and population growth and normal behavior.

Few data are available on the distance between the wetland breeding and upland terrestrial habitats of post-larval and adult Mississippi gopher frogs. After breeding, adult Mississippi gopher frogs leave pond sites during major rainfall events. Richter *et al.* (2001, pp. 316-321) used radio transmitters to track a total of 13 adult frogs at Glen's Pond, the primary Mississippi gopher frog breeding site, located in Harrison County, Mississippi. The farthest movement recorded was 299 meters (m) (981 feet (ft)) by a frog tracked for 63 days from the time of its exit from the breeding site (Richter *et al.* 2001, p. 318). In Florida, closely related Florida gopher frogs (*Rana capito aesopus*) have been found up to 2 kilometers (km) (1.2 miles (mi) from their breeding sites (Carr 1940, p. 64; Franz *et al.* 1988, p. 82), although how frequently gopher frogs make these long-distance movements is not known (see discussion in Roznik *et al.* 2009, p. 192). It is difficult to interpret habitat use from the available movement data we have for the Mississippi gopher frog. However, we have calculated the area of a circle, using the value of 350 m (1,148 ft) as the radius around a point represented by the breeding site, to define the area of habitat we believe would protect the majority of a Mississippi gopher frog population's breeding and upland habitat. We chose the value of 350 m (1,148 ft) by using the known farthest distance movement for the Mississippi gopher frog of 299 m (rounded up to 300 m) and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use as recommended by Semlitsch and Bodie (2003, pp. 1222-1223). Due to the low number of occupied sites for the species, we are conducting habitat management at potential relocation sites

with the hope of establishing new populations (see discussion above at **Geographic Range, Habitat, Threats, and Status** section). When possible, we are managing wetlands within 1,000 m (3,281 ft) of each other, in these areas, as a block in order to create multiple breeding sites and metapopulation structure (defined as neighboring local populations close enough to one another that dispersing individuals could be exchanged (gene flow) at least once per generation) in support of recovery (Marsh and Trenham 2001, p. 40; Richter *et al.* 2003, p. 177).

Due to fragmentation and destruction of habitat, the current range of naturally occurring Mississippi gopher frogs has been reduced to three sites. In addition, the gopher tortoise, whose burrows are considered to be optimal terrestrial habitat for gopher frogs, is a rare and declining species that is listed as a threatened species under the Act within the range of the Mississippi gopher frog. Fragmentation of the frog's habitat has subjected the species' small, isolated populations to genetic isolation and reduction of space for reproduction, development of young, and population maintenance; thus, fragmentation has increased the likelihood of population extinction (U.S. Fish and Wildlife Service 2001, pp. 62993-63002). Genetic variation and diversity within a species are essential for recovery, adaptation to environmental changes, and long-term viability (capability to live, reproduce, and develop) (Harris 1984, pp. 93-107). Long-term viability is founded on the existence of numerous interbreeding local populations throughout the range (Harris 1984, pp. 93-107). Connectivity of Mississippi gopher frog breeding and nonbreeding habitat within the geographic area occupied by the species must be maintained to support the species' survival (Semlitsch 2002, p. 624; Harper *et al.* 2008, p. 1205). Additionally, connectivity of these sites with other areas outside the geographical area occupied currently by the Mississippi gopher frog is essential for the conservation of the species (Semlitsch 2002, p. 624; Harper *et al.* 2008, p. 1205).

Based on the biological information and needs discussed above, it is essential to protect ephemeral isolated ponds and associated forested uplands, and connectivity of these areas, to accommodate breeding, growth, and other normal behaviors of the Mississippi gopher frog and to promote genetic flow within the species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Mississippi gopher frog tadpoles eat periphyton (microscopic algae, bacteria, and protozoans) from surfaces of emergent vegetation or along the pond bottom, as is typical of pond-type tadpoles (Duellman and Trueb 1986, p. 159). Juvenile and adult gopher frogs are carnivorous. Insects found in their stomachs have included carabid (*Pasimachus* sp.) and scarabaeid (genera *Canthon* sp. and *Ligryus* sp.) beetles (Netting and Goin 1942, p. 259) and *Ceuthophilus* crickets (Milstrey 1984, p. 10). Mississippi gopher frogs are gape-limited (limited by the size of the jaw opening) predators with a diet probably similar to that reported for other gopher frogs, including frogs, toads, beetles, hemipterans, grasshoppers, spiders, roaches, and earthworms (Dickerson 1906, p. 196; Carr 1940, p. 64). Within the pine uplands, a diverse and abundant herbaceous layer consisting of native species, maintained by frequent fires, is important to maintain the prey base for juvenile and adult Mississippi gopher frogs. Wetland water quality and an open canopy (Skelly *et al.* 2002, p. 983) are important to the maintenance of the periphyton that serves as a food source for Mississippi gopher frog tadpoles.

Based on the biological information and needs discussed above, we believe it is essential that Mississippi gopher frog habitat consist of ephemeral, isolated ponds with emergent vegetation, and open-canopied pine uplands with a diverse herbaceous layer, to provide for adequate food sources for the frog.

Cover or Shelter

Amphibians need to maintain moist skin for respiration (breathing) and osmoregulation (controlling the amounts of water and salts in their bodies) (Duellman and Trueb 1986, pp. 197-222). Since Mississippi gopher frogs disperse from their aquatic breeding sites to the uplands where they live as adults, desiccation (drying out) can be a limiting factor in their movements. Thus, it is important that areas connecting their wetland and terrestrial habitats are protected in order to provide cover and appropriate moisture regimes during their migration. Richter *et al.* (2001, pp. 317-318) found that during migration, Mississippi gopher frogs used clumps of grass or leaf litter for refuge. Protection of this connecting habitat may be particularly important for juveniles as they move out of the breeding pond for the first time. Studies of migratory success in post-metamorphic amphibians have demonstrated the importance of high levels of survival of these individuals to population maintenance and persistence (Rothermel 2004, pp. 1544-1545).

Both adult and juvenile Mississippi gopher frogs spend most of their lives underground in forested uplands (Richter *et al.* 2001, p. 318). Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees (Richter *et al.* 2001, p. 318). Availability of appropriate underground sites is especially important for juveniles in their first year. Survival of juvenile gopher frogs in north-central Florida was found to be dependent on their use of underground refugia (Roznik and Johnson 2009b, p. 431). Mortality for a frog occupying an underground refuge was estimated to be only four percent of the likelihood of mortality for a frog not occupying an underground refuge (Roznik and Johnson 2009b, p. 434).

Based on the biological information and needs discussed above, we believe it is essential that Mississippi gopher frog habitat have appropriate connectivity habitat between wetland and upland sites to support survival during migration. Additionally, we believe it is essential that non-wetland habitats contain a variety of underground retreats such as gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees to provide cover and shelter for the Mississippi gopher frog.

Sites for Breeding, Reproduction, or Rearing

Mississippi gopher frog breeding sites are isolated ponds that dry completely on a cyclic basis. Faulkner (66 FR 62994) conducted hydrologic research at the Glen's Pond site on DeSoto National Forest, Harrison County, Mississippi. He described the pond as a depressional feature on a topographic high. The dominant source of water to the pond is rainfall within a small, localized watershed that extends 61 to 122 m (200 to 400 ft) from the pond's center. Substantial winter rains are needed to ensure that the pond fills sufficiently to allow hatching, development, and metamorphosis (change to adults) of larvae. The timing and frequency of rainfall are critical to the successful reproduction and recruitment of Mississippi gopher frogs. Adult frogs move to wetland breeding sites during heavy rain events, usually from January to late March (Richter and Seigel 2002, p. 964). Studies at Glen's Pond indicate that this breeding pond is

approximately 1.5 hectares (ha) (3.8 acres (ac)) when filled and attains a maximum depth of 1.1 m (3.6 ft) (Thurgate and Pechmann 2007, p. 1846). The pond is hard-bottomed, has an open canopy, and contains emergent and submergent vegetation. It is especially important that a breeding pond have an open canopy: though the mechanism is unclear, it is believed an open canopy is critical to tadpole development. Experiments conducted by Thurgate and Pechmann (2007, pp. 1845-1852) demonstrated the lethal and sublethal effects of canopy closure on Mississippi gopher frog tadpoles. The general habitat attributes of the other three Mississippi gopher frog breeding ponds are similar to those of Glen's Pond. Female Mississippi gopher frogs attach their eggs to rigid vertical stems of emergent vegetation (Young 1997, p. 48). Breeding ponds typically dry in early to mid-summer, but on occasion have remained wet until early fall (Richter and Seigel 1998, p. 24). Breeding ponds of closely related gopher frogs in Alabama and Florida have similar structure and function to those of the Mississippi gopher frog (Bailey 1990, p. 29; Palis 1998, p. 217; Greenberg 2001, p. 74).

An unpolluted wetland with water free of predaceous fish, sediment, pesticides, and chemicals associated with road runoff is important for egg development, tadpole growth and development; and successful mating and egg-laying by adult frogs.

Based on the biological information and needs discussed above, we believe that in order to provide for breeding and development of the species, it is essential that Mississippi gopher frog habitat contain isolated ponds with hard bottoms, open canopies, and emergent vegetation, and water free of predaceous fish, sediment, pesticides, and chemicals associated with road runoff.

In summary, based on the biological information and needs described above, essential Mississippi gopher frog habitat consists of upland forested terrestrial habitat, maintained by frequent fires, and unpolluted isolated wetland breeding sites, and the connectivity of these sites, to accommodate feeding, breeding, growth, and other normal behaviors of the Mississippi gopher frog and to promote genetic flow within the species.

Based on our current knowledge of life history, biology, and ecology of the Mississippi gopher frog and the requirements of the habitat to sustain the essential life history functions of the species, we determined that the PCEs specific to the Mississippi gopher frog are:

(1) Breeding ponds, geographically isolated from other waterbodies and embedded in forests historically dominated by longleaf pine communities, that are small (generally <0.4 to 4.0 hectares (ha) (<1 to 10 acres (ac)), ephemeral, and acidic. Specific conditions necessary in breeding ponds to allow for successful reproduction of Mississippi gopher frogs are: An open canopy with emergent herbaceous vegetation for egg attachment; an absence of large, predatory fish which prey on frog larvae; water quality such that frogs, their eggs, or larvae are not exposed to pesticides or chemicals and sediment associated with road runoff; and surface water that lasts for a minimum of 195 days during the breeding season to allow a sufficient period for larvae to hatch, mature, and metamorphose.

(2) Upland forested nonbreeding habitat historically dominated by longleaf pine, adjacent and accessible to and from breeding ponds, that is maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover and gopher tortoise burrows, small mammal burrows, stump holes, or other underground habitat that the Mississippi gopher frog depends upon for food, shelter, and protection from the elements and predation; and

(3) Accessible upland connectivity habitat between breeding and nonbreeding habitats which allows for Mississippi gopher frog movements between and among such sites and that is characterized by an open canopy and abundant native herbaceous species and subsurface structure which provides shelter for Mississippi gopher frogs during seasonal movements, such as that created by deep litter cover, clumps of grass, or burrows.

Critical habitat was delineated as described above using the value of 350 m (1,148 ft) as the radius around a point represented by the breeding site, to define the area of habitat we believe would protect the majority of a Mississippi gopher frog population's breeding and upland habitat. We chose the value of 350 m (1,148 ft) by using the known farthest distance movement for the Mississippi gopher frog of 299 m (rounded up to 300 m) and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use as recommended by Semlitsch and Bodie (2003, pp. 1222-1223). When possible, we are managing wetlands within 1,000 m (3,281 ft) of each other, in these areas, as a block in order to create multiple breeding sites and metapopulation structure (defined as neighboring local populations close enough to one another that dispersing individuals could be exchanged (gene flow) at least once per generation) in support of recovery (Marsh and Trenham 2001, p. 40; Richter *et al.* 2003, p. 177).

With this proposed designation of critical habitat, we intend to conserve the physical and biological features essential to the conservation of the species, through the identification of the appropriate quantity and spatial arrangement of the PCEs sufficient to support the life history functions of the species. Each of the areas proposed as critical habitat in this rule contains sufficient PCEs to provide for one or more of the life history functions of the Mississippi gopher frog.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain physical and biological features that are essential to the conservation of the species and whether those features may require special management considerations or protection.

The essential physical and biological features within the area we are proposing for designation as critical habitat that is within the geographical area occupied by the species at the time it was listed, will require some level of management to address the current and future threats. This area of proposed critical habitat is not presently under special management or protection provided by a legally operative plan or agreement for the conservation of the Mississippi gopher frog. Various activities in or adjacent to this area of proposed critical habitat may affect one or more of the PCEs. For example, features in this proposed critical habitat designation may require special management due to threats posed by land use conversions, primarily urban development and conversion to agriculture and pine plantations; stump removal and other soil-disturbing activities which destroy the below-ground structure within forest soils; fire suppression and low fire frequencies; wetland destruction and degradation; random effects of drought or floods; off-road vehicle use; gas, water, electrical power, and sewer easements; and activities which disturb underground refugia used by Mississippi gopher frogs for foraging, protection from predators, and shelter from the elements. Other activities that may affect PCEs in the proposed critical habitat units include those listed in the **Effects of Critical Habitat Designation** section below.

The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the Mississippi gopher frog. Activities with a Federal nexus that may affect areas outside of critical habitat, such as development; road construction and maintenance; and gas, water, electrical power, and sewer easements and/or pipelines, are still subject to review under section 7 of the Act if they may affect the Mississippi gopher frog, because Federal agencies must consider both effects to the species and effects to critical habitat independently. The Service should be consulted for disturbances to areas both within the proposed critical habitat units as well as outside the proposed critical habitat designation in other geographic areas within the historical range of the Mississippi gopher frog where the species may still persist. The prohibitions of section 9 of the Act against the take of listed species also continue to apply both inside and outside of designated critical habitat.

Criteria Used to Identify Proposed Critical Habitat

Using the best scientific and commercial data available, as required by section 4(b) of the Act, we identified those areas to propose for designation as critical habitat, within the geographical area occupied by the species at the time of listing, that contain those physical and biological features essential to the conservation of the Mississippi gopher frog and which may require special management considerations or protection. We also considered the area outside the geographical area occupied by the species at the time of listing that is essential for the conservation of the Mississippi gopher frog. Many of the areas we considered for inclusion are part of ongoing recovery initiatives for this species.

We used the best scientific data available in determining areas that contain the features that are essential to the conservation of the Mississippi gopher frog that are those physical and biological features laid out in the appropriate quantity and spatial arrangement for the conservation of the species (see the Physical and Biological Features section). We are proposing to designate as critical habitat one site within the geographical area that was occupied by the Mississippi gopher frog at the time of listing, and which is known to be currently occupied. We are also proposing to designate additional areas, both currently occupied and unoccupied, as critical habitat. We have determined that these areas, which are outside the geographical area occupied by the species at the time of listing, are essential to the conservation of the species because they provide additional habitat for maintenance of newly discovered populations and for population expansion which is needed to conserve the Mississippi gopher frog.

We began our critical habitat analysis by evaluating the Mississippi gopher frog in the context of its historic distribution to determine what portion of its range still contains the physical and biological features that are essential to the conservation of the species. We assessed the critical life-history components of the Mississippi gopher frog, as they relate to habitat. Mississippi gopher frogs require small, acidic, depressional standing bodies of freshwater for breeding, upland pine forested habitat that has an open canopy maintained by fire for non-breeding habitat, and upland connectivity habitat areas that allow for movement between nonbreeding and breeding sites.

To determine which areas should be designated as critical habitat, we evaluated the essential physical and biological features of Mississippi gopher frog habitat as it exists within the currently occupied habitat. As discussed above, we considered the following criteria in the selection of areas that contain the essential features for the Mississippi gopher frog when designating units: (1) The historic distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Currently Occupied Habitat Proposed as Critical Habitat

As discussed above, currently occupied habitat for the Mississippi gopher frog is limited to four sites: One location on the DeSoto National Forest, Harrison County, Mississippi; one site on State land in Jackson County, Mississippi; and two sites on private land in Jackson County, Mississippi. Only the Harrison County site was occupied at the time of listing, while the remaining sites were found to be occupied, or became occupied, after the date of listing. We believe that all currently occupied areas contain those physical and biological features essential to the conservation of these species which may require special management considerations or protection and are themselves essential to the conservation of the species.

Currently Unoccupied Habitat Proposed as Critical Habitat

The currently occupied habitat of the Mississippi gopher frog is highly localized and fragmented. With such limited distribution, the Mississippi gopher frog is at high risk of extinction and highly susceptible to stochastic events. Pond-breeding amphibians are particularly susceptible to drought, as breeding cannot occur if breeding ponds do not receive adequate rainfall. Isolated populations, such as these of the Mississippi gopher frog, are highly susceptible to random events. Protection of a single, isolated, minimally viable population risks the extirpation or extinction of a species as a result of harsh environmental conditions, catastrophic events, or genetic deterioration over several generations (Kautz and Cox 2001, p. 59). To reduce the risk of extinction through these processes, it is important to establish multiple protected subpopulations across the landscape (Soulé and Simberloff 1986, pp. 25-35; Wiens 1996, pp. 73-74).

We used information from surveys and reports prepared by the Alabama Department of Conservation and Natural Resources; Mississippi Department of Wildlife, Fisheries, and Parks; and Mississippi gopher frog researchers, along with Service data and records, to search for additional locations with the potential to be occupied by the Mississippi gopher frog. Habitat in Alabama and Louisiana is severely limited, so our focus was on identifying sites in Mississippi. Wetlands throughout the coastal counties of Mississippi were identified using U.S. Geological Survey topographic maps, National Wetland Inventory maps, Natural Resource Conservation Service county soil survey maps, and satellite imagery. Habitat with the best potential of establishing the physical and biological features essential to the conservation of the Mississippi gopher frog were concentrated on the DeSoto National Forest in Forrest, Harrison, and Perry Counties in southern Mississippi. Some additional sites were found in Jackson County on Federal land being managed by the State as a Wildlife Management Area and on private land being managed as a wetland mitigation bank. Habitat restoration efforts have been successful in establishing at least one of the PCEs on each of these sites, and management is continuing, with the goal of establishing all of the PCEs at all of the sites.

The currently unoccupied sites that we are proposing as critical habitat are all within the historical range of the Mississippi gopher frog. We believe that the designation of additional areas not known to be currently occupied is essential for the conservation of the Mississippi gopher frog. The range of the Mississippi gopher frog has been severely curtailed, occupied habitats are limited and isolated, and population sizes are extremely small. While the four occupied units provide habitat for current populations, they may be at risk of extirpation and extinction from stochastic events that occur as periodic natural events or existing or potential human-induced events (U.S. Fish and Wildlife Service 2001, pp. 62993-63002). The inclusion of essential unoccupied areas will provide habitat for population translocation and will decrease the risk of extinction of the species. Based on the best scientific data, we believe that these areas not currently occupied by the Mississippi gopher frog are essential for the conservation of the species.

We have determined that, with proper protection and management, the areas we are proposing for critical habitat are adequate for the conservation of the species based on our current understanding of the species' requirements. However, as discussed in the **Critical Habitat** section above, we recognize that designation of critical habitat may not include all habitat areas that we may eventually determine are necessary for the recovery of the species and that for this reason, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

We delineated the critical habitat unit boundaries using the following steps:

(1) We used digital aerial photography using ArcMap 9.3.1 to map the specific location of the breeding site occupied by the Mississippi gopher frog at the time of listing, and those locations of potential breeding sites outside the geographical area occupied by the species at the time it was listed, both occupied and not occupied, that were determined to be essential for the conservation of the species.

(2) We delineated proposed critical habitat areas by buffering the above locations by a distance of 350 m (1,148 ft) where possible to incorporate all PCEs within the critical habitat boundaries.

(3) We used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create metapopulation structure where possible.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas, such as lands covered by buildings, roads, and other structures, because such lands lack PCEs for the Mississippi gopher frog. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical and biological features in the adjacent critical habitat.

Proposed Critical Habitat Designation

We are proposing to designate 11 units totaling approximately 792 ha (1,957 ac) as critical habitat for the Mississippi gopher frog. The critical habitat areas described below constitute our best assessment of areas that currently meet the definition of critical habitat for the Mississippi gopher frog. Table 1 identifies the proposed units for the species and shows the occupancy of the subunits within the proposed designated areas.

TABLE 1. OCCUPANCY OF MISSISSIPPI GOPHER FROG PROPOSED CRITICAL HABITAT UNITS WITH AREA ESTIMATES (HECTARES (HA) AND ACRES (AC)). TOTALS MAY NOT MATCH DUE TO ROUNDING.

Unit	County	Occupied at Time of Listing	Currently Occupied (but not known to be occupied at the time of listing)	Currently Unoccupied	Total Unit Area
1	Harrison	39 ha (96 ac)		238 ha (588 ac)	277 ha (685 ac)
2	Harrison			39 ha (96 ac)	39 ha (96 ac)
3	Jackson		39 ha (96 ac)	72 ha (178 ac)	111 ha (274 ac)
4	Jackson		39 ha (96 ac)	28 ha (69 ac)	67 ha (166 ac)
5	Jackson			39 ha (96 ac)	39 ha (96 ac)
6	Jackson		39 ha (96 ac)		39 ha (96 ac)
7	Forrest			39 ha (96 ac)	39 ha (96 ac)
8	Forrest			39 ha (96 ac)	39 ha (96 ac)
9	Perry			64 ha (158 ac)	64 ha (158 ac)
10	Perry			39 ha (96 ac)	39 ha (96 ac)
11	Perry			39 ha (96 ac)	39 ha (96 ac)
All Units	All Counties	39 ha (96 ac)	117 ha (289 ac)	636 ha (1,572 ac)	792 ha (1,957 ac)

Table 2 provides the approximate area and ownership encompassed within each critical habitat unit determined to meet the definition of critical habitat for the Mississippi gopher frog. Hectare and acre values were individually computer-

generated using GIS software, rounded to nearest whole number, and then summed.

TABLE 2. PROPOSED CRITICAL HABITAT UNITS WITH AREA ESTIMATES (HECTARES (HA) AND ACRES (AC)) AND LAND OWNERSHIP FOR THE MISSISSIPPI GOPHER FROG. TOTALS MAY NOT MATCH DUE TO ROUNDING.

Unit	County	Ownership			Total Area
		Federal	State	Private	
1	Harrison	273 ha(675 ac)		4 ha (10 ac)	277 ha (685 ac)
2	Harrison	39 ha (96 ac)			39 ha (96 ac)
3	Jackson			111 ha (274 ac)	111 ha (274 ac)
4	Jackson			67 ha (166 ac)	67 ha (166 ac)
5	Jackson	39 ha (96 ac)			39 ha (96 ac)
6	Jackson		39 ha (96 ac)		39 ha (96 ac)
7	Forrest	39 ha (96 ac)			39 ha (96 ac)
8	Forrest	39 ha (96 ac)			39 ha (96 ac)
9	Perry	56 ha (138 ac)		8 ha (20 ac)	64 ha (158 ac)
10	Perry	39 ha (96 ac)			39 ha (96 ac)
11	Perry	39 ha (96 ac)			39 ha (96 ac)
Total	All Counties	563 ha (1,391 ac)	39 ha (96 ac)	190 ha (470 ac)	792 ha (1,957 ac)

We present brief descriptions of each unit and reasons why they meet the definition of critical habitat below.

Unit 1: Harrison County, Mississippi

Unit 1 encompasses 277 ha (685 ac) on Federal and private lands in Harrison County, Mississippi. This unit, between U.S. Hwy. 49 and Old Hwy. 67, is approximately 0.9 km (0.56 mi) north of the Biloxi River. It is located approximately 3.2 km (2 mi) east of U.S. Hwy. 49 and approximately 2.8 km (1.75 mi) west of Old Hwy. 67. Within this unit, approximately 273 ha (675 ac) are in the DeSoto National Forest and 4 ha (10 ac) are in private ownership.

Thirty-nine ha (96 ac) of Unit 1 are located around the only breeding pond (Glen's Pond) known for the Mississippi gopher frog when it was listed in 2001 and, as such, are within the geographical area of the species occupied at the time of listing. Glen's Pond and the habitat surrounding it, the majority of which is on the DeSoto National Forest, support most of the known Mississippi gopher frog populations. Threats to the Mississippi gopher frog and its habitat in areas of Unit 1, within the geographical area of the species occupied at the time of listing, that may require special management and protection of PCEs 1, 2, and 3, include the potential of: Fire suppression and low fire frequencies; detrimental alterations in forestry practices that could destroy below-ground soil structures such as stump removal; hydrologic changes resulting from ditches, and/or adjacent highways and roads that could alter the ecology of the breeding pond and surrounding terrestrial habitat; wetland degradation; random effects of drought or floods; off-road vehicle use; and gas, water, electrical power, and sewer easements. On portions of Unit 1 within the geographical area of the species occupied at the time of listing, and within private ownership, special management is needed to address the threats of direct agricultural and urban development (see also discussion in **Special Management Considerations or Protections** section).

Most of Unit 1 (238 ha (588 ac)) is currently unoccupied. However, this unoccupied area consists of areas, within 1,000 m (3,281 ft) of each other or Glen's Pond, that we believe will create metapopulation structure and protect the Mississippi gopher frog from extinction. The unoccupied area surrounds three ponds on the DeSoto National Forest given the names of Reserve Pond, Pony Ranch Pond, and New Pond during on-going recovery initiatives. The U.S. Forest Service is actively managing this area to benefit the recovery of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog is at high risk of extirpation for stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which Mississippi gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. We determined that this area is essential to the conservation of the species because the ponds (PCE 1) and the surrounding uplands (PCEs 2 and 3) are suitable habitat within the dispersal range of the Mississippi gopher frog and thus provide the potential of establishing new breeding ponds and metapopulation structure which will support recovery of the species.

Unit 2: Harrison County, Mississippi

Unit 2 encompasses 39 ha (96 ac) on Federal land in Harrison County, Mississippi. This unit is located on the DeSoto National Forest approximately 8 km (5 mi) east of Old Hwy. 67 and approximately 8.5 km (5.3 mi) southeast of the community of Success.

Unit 2 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area surrounds a pond on the DeSoto National Forest given the name of Carr Bridge Road Pond during ongoing recovery initiatives when it was selected as a Mississippi gopher frog translocation site. The U.S. Forest Service is actively managing this area to

benefit the recovery of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog may be at risk of extirpation for stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which Mississippi gopher frogs could be translocated is essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. We determined that this area is essential to the conservation of the Mississippi gopher frog because it contains features essential to the conservation of the species, a potential breeding pond (PCE 1) and the surrounding uplands (PCEs 2 and 3), that provide habitat for future translocation of the species in support of Mississippi gopher frog recovery.

Unit 3: Jackson County, Mississippi

Unit 3 encompasses 111 ha (274 ac) on private land in Jackson County, Mississippi. This unit is located approximately 0.3 km (0.2 mi) north of Interstate 10 and approximately 1.6 km (1 mi) west of State Hwy. 57.

Unit 3 is not within the geographic range of the species occupied at the time of listing and contains both areas that are currently occupied and areas that are currently unoccupied. Thirty-nine ha (96 ac) of Unit 3 are currently occupied as a result of translocation efforts conducted in 2004, 2005, 2007, and 2008. Seventy-two 72 ha (178 ac) of Unit 3 are currently unoccupied. Unit 3 consists of three ponds and their surrounding upland areas and is on private land being managed as a wetland mitigation bank. It is within the acquisition boundary of the Mississippi Sandhill Crane National Wildlife Refuge and actively being managed by the landowners to benefit the recovery of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog may be at risk of extirpation for stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which Mississippi gopher frogs could be translocated is essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. We determined that this area is essential to the conservation of the species because the pond (PCE 1) and the surrounding uplands (PCEs 2 and 3) have proven to be suitable habitat for establishing a Mississippi gopher frog population, this area also provides additional breeding ponds (PCE 1) and surrounding uplands (PCEs 2 and 3) which are suitable habitats within the dispersal range of the occupied site, and this area also provides metapopulation structure which will support recovery of the species.

Unit 4: Jackson County, Mississippi

Unit 4 encompasses 67 ha (ac) on private land in Jackson County, Mississippi. This unit is located approximately 10.8 km (6.8 mi) north of Interstate 10. It is 0.47 km (0.3 mi) north of Jim Ramsey Road, approximately 3.4 km (2 mi) west of State Hwy. 57 and 6.2 km (3.9 mi) west of the community of Vancleave.

Unit 4 is not within the geographic range of the species occupied at the time of listing and contains both areas that are currently occupied and areas that are currently unoccupied. Thirty-nine ha (96 ac) of Unit 4 are located around a breeding pond, designated Mike's Pond, that was discovered to be occupied in 2004, subsequent to the listing of the Mississippi gopher frog. The remaining balance (28 ha (69 ac)) of Unit 4 is not currently occupied. This portion of Unit 4 contains an additional pond which represents a potential Mississippi gopher frog breeding site and also connectivity habitat between it and Mike's Pond. Unit 4 is being actively managed by the landowners to benefit the recovery of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area of occupied habitat, and suitable habitat into which Mississippi gopher frogs could be translocated, is essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. We determined that this area is essential to the conservation of the species because it represents habitat naturally occupied by the Mississippi gopher frog (PCEs 1, 2, and 3), and provides an additional pond (PCE 1) and surrounding uplands (PCEs 2 and 3) which are suitable habitats within the dispersal range of the occupied site. Thus, this area provides for the potential establishment of a new breeding pond and metapopulation structure which will support recovery of the species.

Unit 5: Jackson County, Mississippi

Unit 5 encompasses 39 ha (96 ac) on Federal land in Jackson County, Mississippi. This unit is located on the Ward Bayou Wildlife Management Area (WMA) approximately 5.2 km (3.3 mi) northeast of State Hwy. 57 and the community of Vancleave. This land is owned by the Army Corps of Engineers (Corps) and managed by the Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP).

Unit 5 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and its associated uplands on the WMA and has been given the name of Mayhaw Road Pond during ongoing recovery initiatives. Unit 5 is being actively managed by the Corps and MDWFP to benefit the recovery of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog may be at risk of extirpation for stochastic events, such as disease or drought. Maintaining this area of suitable habitat, into which Mississippi gopher frogs could be translocated, is essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. We determined that this area is essential to the conservation of the species because the pond (PCE 1) and the surrounding uplands (PCEs 2 and 3) are suitable habitat for attempting to establish a Mississippi gopher frog population in support of recovery of the species.

Unit 6: Jackson County, Mississippi

Unit 6 encompasses 39 ha (96 ac) on State land in Jackson County, Mississippi. This unit is located on 16th section land, approximately 4.4 km (2.8 mi) east of State Hwy. 63, 4.5 km (2.8 mi) west of the Escatawpa River, and 4.0 km (2.5 mi) northeast of Helena, Mississippi. It is held in trust by the state of Mississippi as a local funding source for education in Jackson County. The local Jackson County School board has jurisdiction and control of the land.

Unit 6 is not within the geographic range of the species occupied at the time of listing but is currently occupied. Unit 6 contains a breeding pond, designated McCoy's Pond, which was discovered subsequent to the listing of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog may be at risk of extirpation for stochastic events, such as disease or drought. Maintaining this area of currently occupied habitat is essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. We determined that this area is essential to the conservation of the species because it represents habitat naturally occupied by the Mississippi gopher frog (PCEs 1,

2, and 3) and will support recovery of the species.

Unit 7: Forrest County, Mississippi

Unit 7 encompasses 39 ha (96 ac) on Federal land in Jackson County, Mississippi. This unit is located on the DeSoto National Forest approximately 2.1 km (1.3 mi) east of U.S. Hwy. 49, approximately 1.9 km (1.2 mi) south of Black Creek, and approximately 3.2 km (2 mi) south of the community of Brooklyn, Mississippi.

Unit 7 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area surrounds a pond on the DeSoto National Forest selected as a future Mississippi gopher frog translocation site during ongoing recovery initiatives. The U.S. Forest Service is actively managing this area to benefit the recovery of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog may be at risk of extirpation for stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which Mississippi gopher frogs could be translocated is essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. We determined that this area is essential to the conservation of the Mississippi gopher frog because it contains features essential to the conservation of the species, a potential breeding pond (PCE 1) and the surrounding uplands (PCEs 2 and 3), that provide habitat for future reintroduction of the species in support of Mississippi gopher frog recovery.

Unit 8: Forrest County, Mississippi

Unit 8 encompasses 39 ha (96 ac) on Federal land in Forrest County, Mississippi. This unit is located on the DeSoto National Forest approximately 4.3 km (2.7 mi) east of U.S. Hwy. 49, approximately 4.6 km (2.9 mi) south of Black Creek, and approximately 6.1 km (3.8 mi) southeast of the community of Brooklyn, Mississippi.

Unit 8 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area surrounds a pond on the DeSoto National Forest selected as a future Mississippi gopher frog translocation site during ongoing recovery initiatives. The U.S. Forest Service is actively managing this area to benefit the recovery of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog may be at risk of extirpation for stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which Mississippi gopher frogs could be translocated is essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. We determined that this area is essential to the conservation of the Mississippi gopher frog because it contains features essential to the conservation of the species, a potential breeding pond (PCE 1) and the surrounding uplands (PCEs 2 and 3), that provide habitat for future translocation of the species in support of Mississippi gopher frog recovery.

Unit 9: Perry County, Mississippi

Unit 9 encompasses 56 ha (138 ac) on Federal land and 8 ha (20 ac) on private land in Perry County, Mississippi. This unit is located on the DeSoto National Forest at the intersection of Benndale Road and Mars Hill Road, approximately 2.6 km (1.6 mi) northwest of the intersection of the Perry County, Stone County, and George County lines and approximately 7.2 km (4.5 mi) north of State Hwy. 26.

Unit 9 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. Unit 9 surrounds two ponds on the DeSoto National Forest selected as a future Mississippi gopher frog translocation sites during on-going recovery initiatives. The U.S. Forest Service is actively managing this area to benefit the recovery of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog is at high risk of extirpation for stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which Mississippi gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. We determined that this area is essential to the conservation of the Mississippi gopher frog because it contains features essential to the conservation of the species, two potential breeding ponds (PCE 1) and the surrounding uplands (PCEs 2 and 3), that provide habitat for future translocation of the species in support of Mississippi gopher frog recovery.

Unit 10: Perry County, Mississippi

Unit 10 encompasses 39 ha (96 ac) on Federal land in Perry County, Mississippi. This unit is located on the DeSoto National Forest approximately 0.5 km (0.3 mi) northeast of the intersection of the Perry County, Stone County, and George County lines, approximately 0.23 km (0.14 mi) north of Benndale Road, and approximately 6.7 km (4.2 mi) north of State Hwy. 26.

Unit 10 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. Unit 10 surrounds a pond on the DeSoto National Forest selected as a future Mississippi gopher frog translocation site during ongoing recovery initiatives. The U.S. Forest Service is actively managing this area to benefit the recovery of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog may be at risk of extirpation for stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which Mississippi gopher frogs could be translocated is essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. We determined that this area is essential to the conservation of the Mississippi gopher frog because it contains features essential to the conservation of the species, a potential breeding pond (PCE 1) and the surrounding uplands (PCEs 2 and 3), that provide habitat for future translocation of the species in support of Mississippi gopher frog recovery.

Unit 11: Perry County, Mississippi

Unit 11 encompasses 39 ha (96 ac) on Federal land in Perry County, Mississippi. This unit is located on the DeSoto National Forest approximately 1.6 km (1.0 mi) east of Mars Hill Road, approximately 4.2 km (2.6 mi) north of the intersection of the Perry County, Stone County, and George County lines, and approximately 10.5 km (6.6 mi) north of State Hwy. 26.

Unit 11 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. Unit 11 surrounds a pond on the DeSoto National Forest selected as a future Mississippi gopher frog translocation site during on-going recovery initiatives. The U.S. Forest Service is actively managing this area to benefit the recovery of the Mississippi gopher frog. Due to its low number of remaining populations and severely restricted range, the Mississippi gopher frog may be at risk of extirpation for stochastic events such as disease or drought. Maintaining this area as suitable habitat into which Mississippi gopher frogs could be translocated is essential to decrease the potential risk of extinction of the species resulting from stochastic events and provide for the species'

eventual recovery. We determined that this area is essential to the conservation of the Mississippi gopher frog because it contains features essential to the conservation of the species, a potential breeding pond (PCE 1) and the surrounding uplands (PCEs 2 and 3), that provide habitat for future translocation of the species in support of Mississippi gopher frog recovery.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuits Courts of Appeals have invalidated our definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service*, 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report or opinion are strictly advisory.

If we list a species or designate critical habitat, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

- A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or
- A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define "reasonable and prudent alternatives" at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the Mississippi gopher frog or its designated critical habitat will require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit under section 10 of the Act or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not Federally funded, authorized, or permitted, do not require section 7 consultations.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the essential features to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the essential features to an extent that appreciably reduces the conservation value of critical habitat for the Mississippi gopher frog.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for the Mississippi gopher frog include, but are not limited to:

- Actions that would alter the hydrology or water quality of Mississippi gopher frog wetland habitats. Such activities could include, but are not limited to, discharge of fill material; release of chemicals and/or biological pollutants; clear-cutting, draining, ditching, grading, or bedding; diversion or alteration of surface or ground water flow into or out of a wetland (i.e., due to roads,

fire breaks, impoundments, discharge pipes, etc.); discharge or dumping of toxic chemicals, silt, or other pollutants (i.e., sewage, oil, pesticides, and gasoline); and use of vehicles within wetlands. These activities could destroy Mississippi gopher frog breeding sites, reduce the hydrological regime necessary for successful larval metamorphosis, and/or eliminate or reduce the habitat necessary for the growth and reproduction, and affect the prey base, of the Mississippi gopher frog.

- Forestry management actions in pine habitat that would significantly alter the suitability of Mississippi gopher frog terrestrial habitat. Such activities could include, but are not limited to, conversion of timber land to another use; timber management including clear-cutting, site preparation involving ground disturbance, prescribed burning, and unlawful pesticide application. These activities could destroy or alter the uplands necessary for the growth and development of juvenile and adult Mississippi gopher frogs.
- Actions that would significantly fragment and isolate Mississippi gopher frog wetland and upland habitats from each other. Such activities could include, but are not limited to, constructing new structures or new roads and converting forested habitat to other uses. These activities could limit or prevent the dispersal of Mississippi gopher frogs from breeding sites to upland habitat or vice versa due to obstructions to movement caused by structures, certain types of curbs, increased traffic density, or inhospitable habitat.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation. Therefore, we are not proposing exemption of any lands owned or managed by the Department of Defense from this designation of critical habitat for the Mississippi gopher frog.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate or make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If, based on this analysis, we determine that the benefits of exclusion outweigh the benefits of inclusion, we can exclude the area only if such exclusion would not result in the extinction of the species.

Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the probable economic impacts of the proposed critical habitat designation and related factors.

We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at the Federal eRulemaking Portal: *http://www.regulations.gov*, or by contacting the Mississippi Fish and Wildlife Office directly (see **FOR FURTHER INFORMATION CONTACT** section). During the development of a final designation, we will consider economic impacts, public comments, and other new information, and as an outcome of our analysis of this information, we may exclude areas from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Mississippi gopher frog are not owned or managed by the DOD, and therefore, we anticipate no impact to national security. There are no areas proposed for exclusion based on impacts to national security.

Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in

addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any conservation plans or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion of, lands from critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposed rule, we have determined that there are currently no conservation plans or other management plans for the species, and the proposed designation does not include any Tribal lands or trust resources. We anticipate no impact to Tribal lands, partnerships, or HCPs or other management plans from this proposed critical habitat designation. There are no areas proposed for exclusion from this proposed designation based on other relevant impacts.

Notwithstanding these decisions, as stated under the **Public Comments** section above, we request specific comments on whether any specific areas proposed for designation for the Mississippi gopher frog should be excluded under section 4(b)(2) of the Act from the final designation.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our proposed actions are based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made in writing within 45 days of the publication of this proposal (see **DATES** and **ADDRESSES** sections). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days before the first hearing.

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the specific information necessary to provide an adequate factual basis for determining the potential incremental regulatory effects of the designation of critical habitat for the Mississippi gopher frog to either develop the required RFA finding or provide the necessary certification statement that the designation will not have a significant impact on a substantial number of small business entities. On the basis of the development of our proposal, we have identified certain sectors and activities that may potentially be affected by a designation of critical habitat for the Mississippi gopher frog. These sectors include timber operations, industrial development, and urbanization, along with the accompanying infrastructure associated with such projects such as road, storm water drainage, and bridge and culvert construction and maintenance. We recognize that not all of these sectors qualify as small business entities. However, while recognizing that these sectors and activities may be affected by this designation, we are collecting information and initiating our analysis to determine (1) which of these sectors or activities are or involve small business entities and (2) what extent the effects are related to the Mississippi gopher frog being listed as an endangered species under Act (baseline effects) or whether the effects are attributable to the designation of critical habitat (incremental). We believe that the potential incremental effects resulting from a designation will be small. As a consequence, following an initial evaluation of the information available to us, we do not believe that there will be a significant impact on a substantial number of small business entities resulting from this designation of critical habitat for the Mississippi gopher frog. However, we will be conducting a thorough analysis to determine if this may in fact be the case. As such, we are requesting any specific economic information related to small business entities that may be affected by this designation and how the designation may impact their business. Therefore, we defer our RFA finding on this proposed designation until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866.

As discussed above, this draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce availability of the draft economic analysis of the proposed designation in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We have concluded

that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)-(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments," with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid for Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not jeopardize the continued existence of the species, or destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments because the Mississippi gopher frog occurs primarily on Federal and privately owned lands. None of these government entities fit the definition of "small governmental jurisdiction." Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Mississippi gopher frog in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for the Mississippi gopher frog does not pose significant takings implications for lands within or affected by the proposed designation.

Federalism—Executive Order 13132

In accordance with E. O. 13132 (Federalism), this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with appropriate State resource agencies in Mississippi. The critical habitat designation may have some benefit to this government in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the essential features themselves are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where state and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the physical and biological features essential to the conservation of the species within the designated areas to assist the public in understanding the habitat needs of the Mississippi gopher frog.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We

published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), E. O. 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

We have determined that there are no Tribal lands occupied at the time of listing that contain the features essential for the conservation, and no Tribal lands that are essential for the conservation of the Mississippi gopher frog. Therefore, we have not proposed designation of critical habitat for the Mississippi gopher frog on Tribal lands.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Based on an analysis of areas included in this proposal, we determined that this proposed rule to designate critical habitat for the Mississippi gopher frog is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

References Cited

A complete list of all references cited in this rulemaking is available on the Internet at *http://www.regulations.govand* upon request from the Field Supervisor, Mississippi Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Author(s)

The primary authors of this package are staff members of the Mississippi Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h), revise the entry for "Frog, Mississippi gopher" under AMPHIBIANS in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
AMPHIBIANS							
*	*	*	*	*	*	*	
Frog, Mississippi gopher	*Rana sevosa*	U.S.A. (AL,LA,MS)	Whereever found west of Mobile and Tombigbee Rivers in AL, MS, and LA	E	718	17.95(d)	NA
*	*	*	*	*	*	*	

3. In § 17.95(d), add an entry for "Mississippi gopher frog" (*Rana sevosa*) in the same alphabetical order as the species appears in § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

Mississippi gopher frog *(Rana sevosa)*

(1) Critical habitat units are depicted for Forrest, Harrison, Jackson, and Perry Counties in Mississippi, on the maps below.

(2) The primary constituent elements of critical habitat for the Mississippi gopher frog are:

(i) Breeding ponds, geographically isolated from other waterbodies and embedded in forests historically dominated by longleaf pine communities, that are small (generally <0.4 to 4.0 hectares (ha) (<1 to 10 acres (ac)), ephemeral, and acidic. Specific conditions necessary in breeding ponds to allow for successful reproduction of Mississippi gopher frogs are:

(A) An open canopy with emergent herbaceous vegetation for egg attachment;

(B) An absence of large, predatory fish that prey on frog larvae;

(C) Water quality such that frogs, their eggs, or larvae are not exposed to pesticides or chemicals and sediment associated with road runoff; and

(D) Surface water that lasts for a minimum of 195 days during the breeding season to allow a sufficient period for larvae to hatch, mature, and metamorphose.

(ii) Upland forested nonbreeding habitat historically dominated by longleaf pine, adjacent and accessible to and from breeding ponds, that is maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover and gopher tortoise burrows, small mammal burrows, stump holes, or other underground habitat that the Mississippi gopher frog depends upon for food, shelter, and protection from the elements and predation.

(iii) Accessible upland connectivity habitat between breeding and nonbreeding habitats to allow for Mississippi gopher frog movements between and among such sites and that is characterized by an open canopy and abundant native herbaceous species and subsurface structure which provides shelter for Mississippi gopher frogs during seasonal movements, such as that created by deep litter cover, clumps of grass, or burrows.

(3) Critical habitat does not include manmade structures (such as buildings, bridges, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat unit maps.* Maps were developed from USGS 7.5' quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(5) *Note:* Index Map (Map 1) follows:

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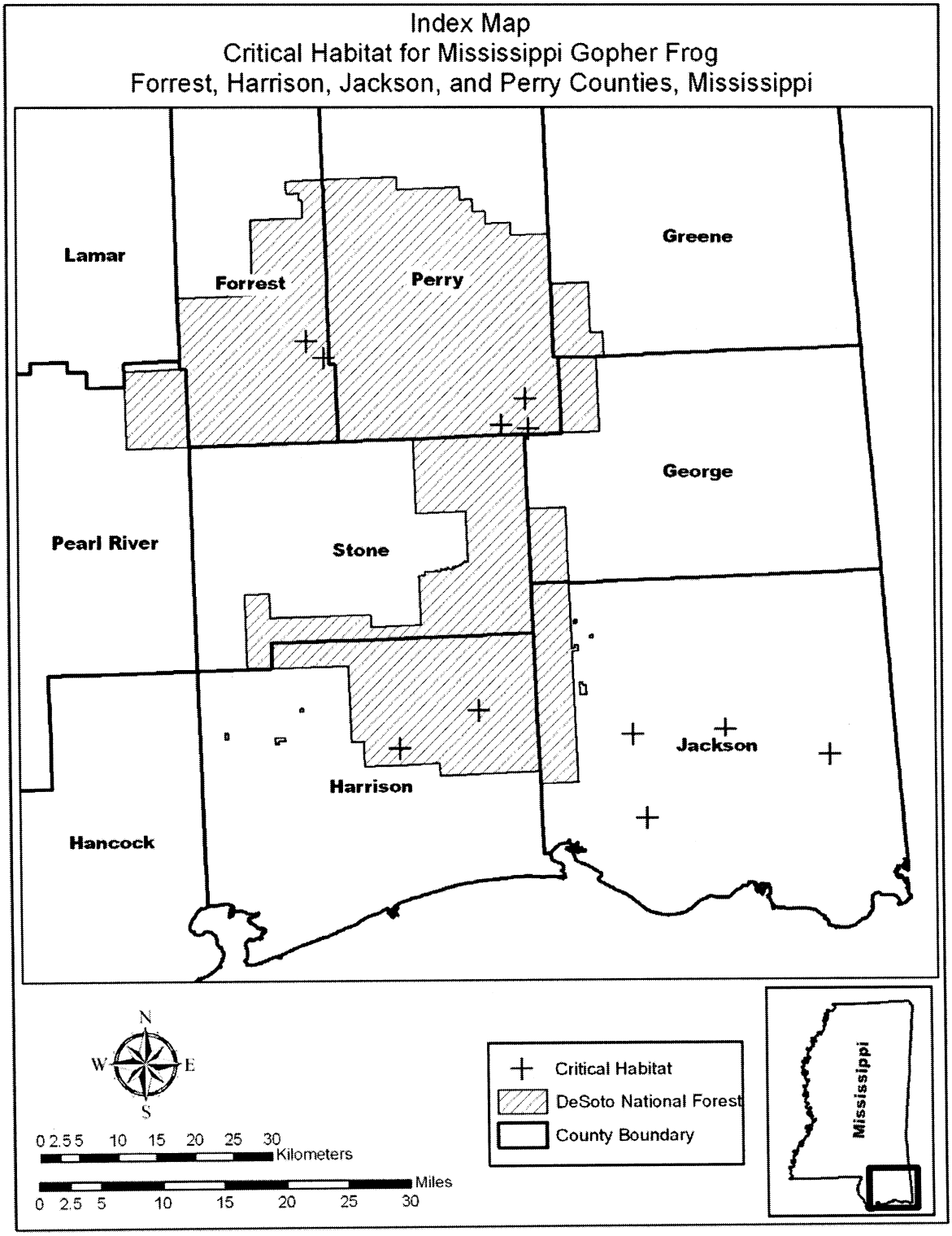


(6) Unit 1: Harrison County, Mississippi.

(i) Unit 1 from USGS 1:24,000 scale quadrangle map, Success, Mississippi.

[Reserved for textual description of Unit 1.]

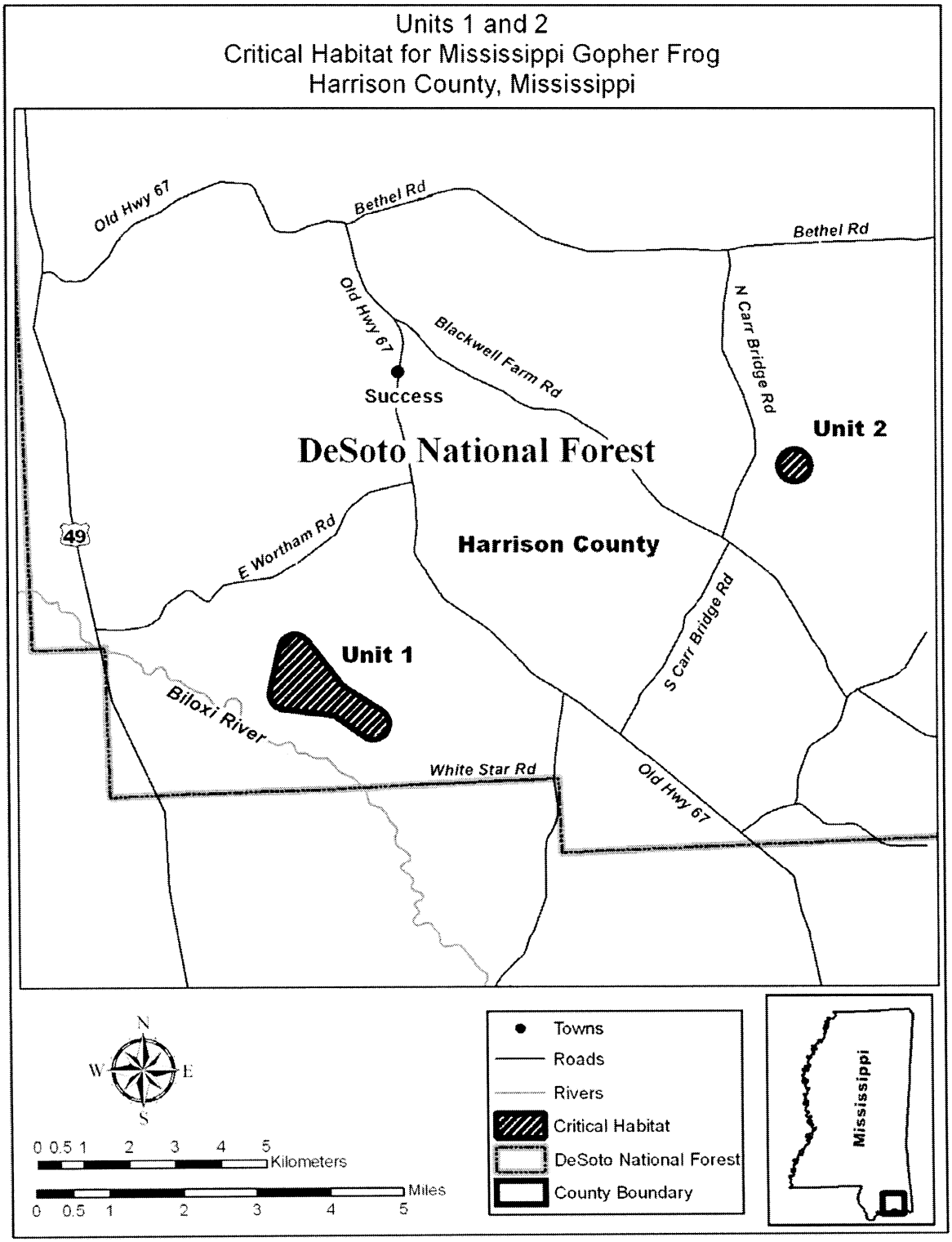
(ii) *Note:* Map of Unit 1 is provided at paragraph (7)(ii) of this entry.

(7) Unit 2: Harrison County, Mississippi.

(i) Unit 2 from USGS 1:24,000 scale quadrangle map, White Plains, Mississippi.

[Reserved for textual description of Unit 2.]

(ii) *Note*: Map of Units 1 and 2 follows:



(8) Unit 3: Jackson County, Mississippi.

(i) Unit 3 from USGS 1:24,000 scale quadrangle map Gautier North, Mississippi.

[Reserved for textual description of Unit 3.]

(ii) *Note:* Map depicting Unit 3 is provided at paragraph (10)(ii) of this entry.

(9) Unit 4: Jackson County, Mississippi.

(i) Unit 4 from USGS 1:24,000 scale quadrangle map Latimer, Mississippi.

[Reserved for textual description of Unit 4.]

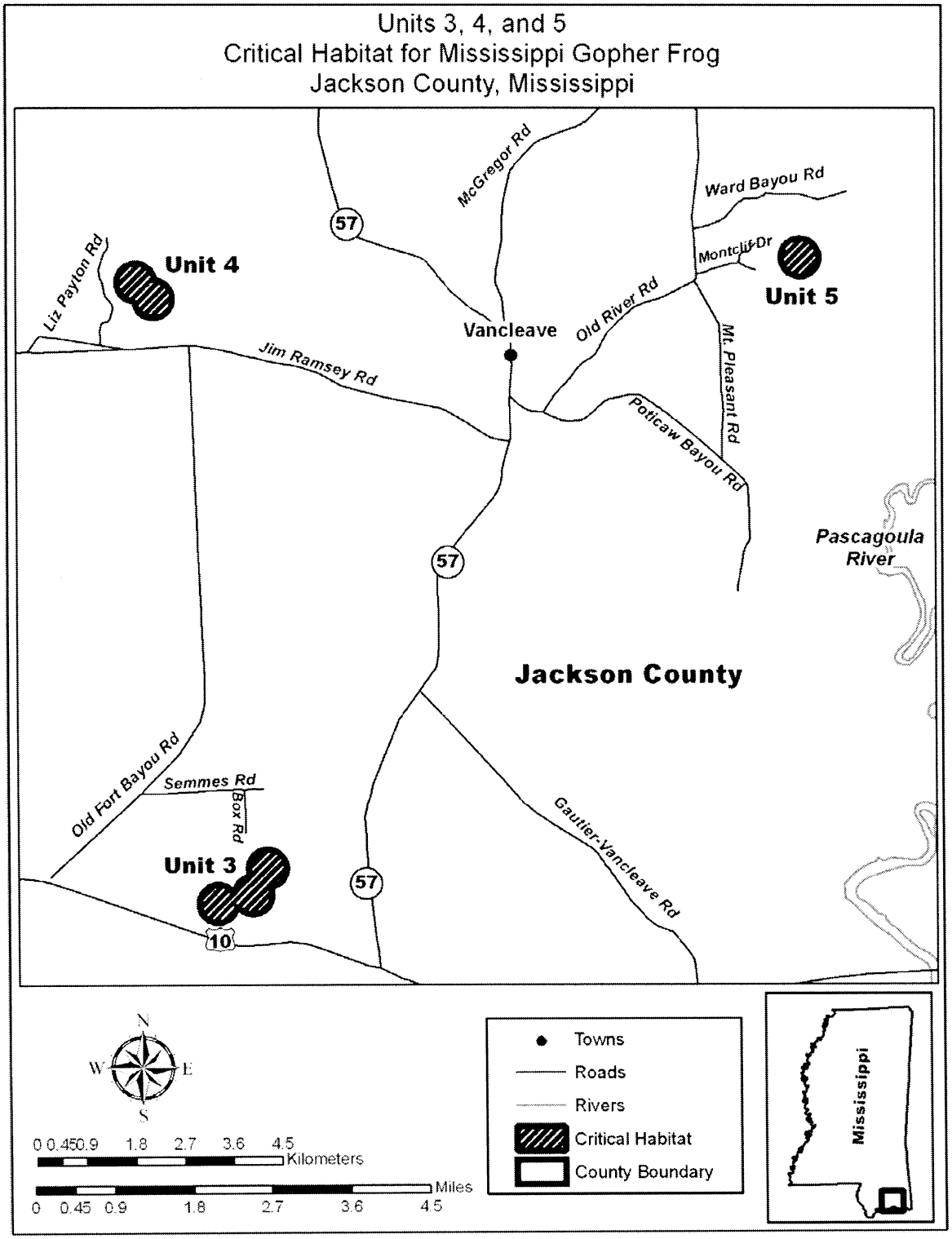
(ii) *Note:* Map depicting Unit 4 is provided at paragraph (10)(ii) of this entry.

(10) Unit 5: Jackson County, Mississippi.

(i) Unit 5 from USGS 1:24,000 scale quadrangle map Vancleave, Mississippi.

[Reserved for textual description of Unit 5.]

(ii) *Note*: Map of Units 3, 4, and 5 follows:

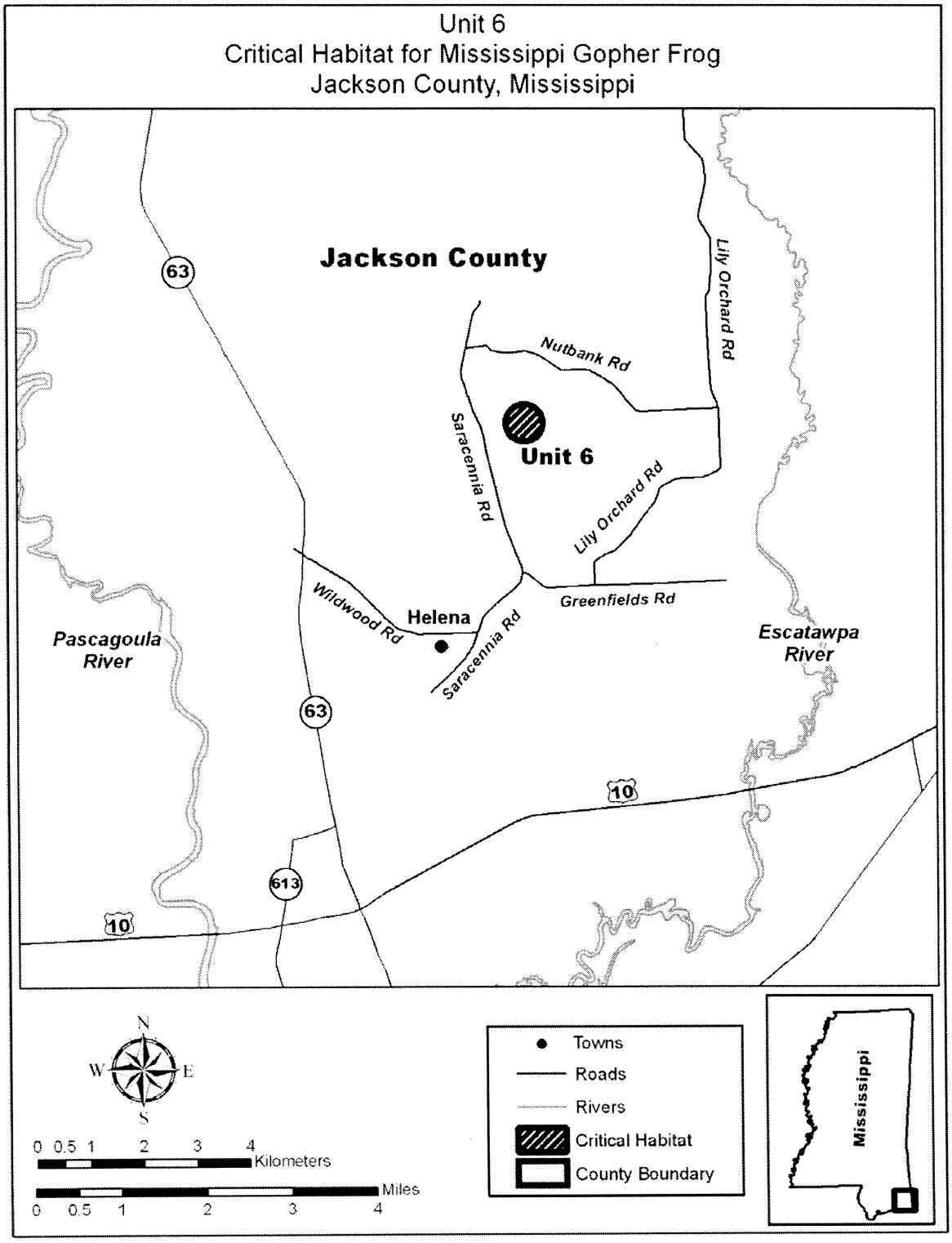


(11) Unit 6: Jackson County, Mississippi.

(i) Unit 6 from USGS 1:24,000 scale quadrangle map Big Point, Mississippi.

[Reserved for textual description of Unit 6.]

(ii) *Note*: Map of Unit 6 follows:



(12) Unit 7: Forrest County, Mississippi.

(i) Unit 7 from USGS 1:24,000 scale quadrangle map Brooklyn, Mississippi.

[Reserved for textual description of Unit 7.]

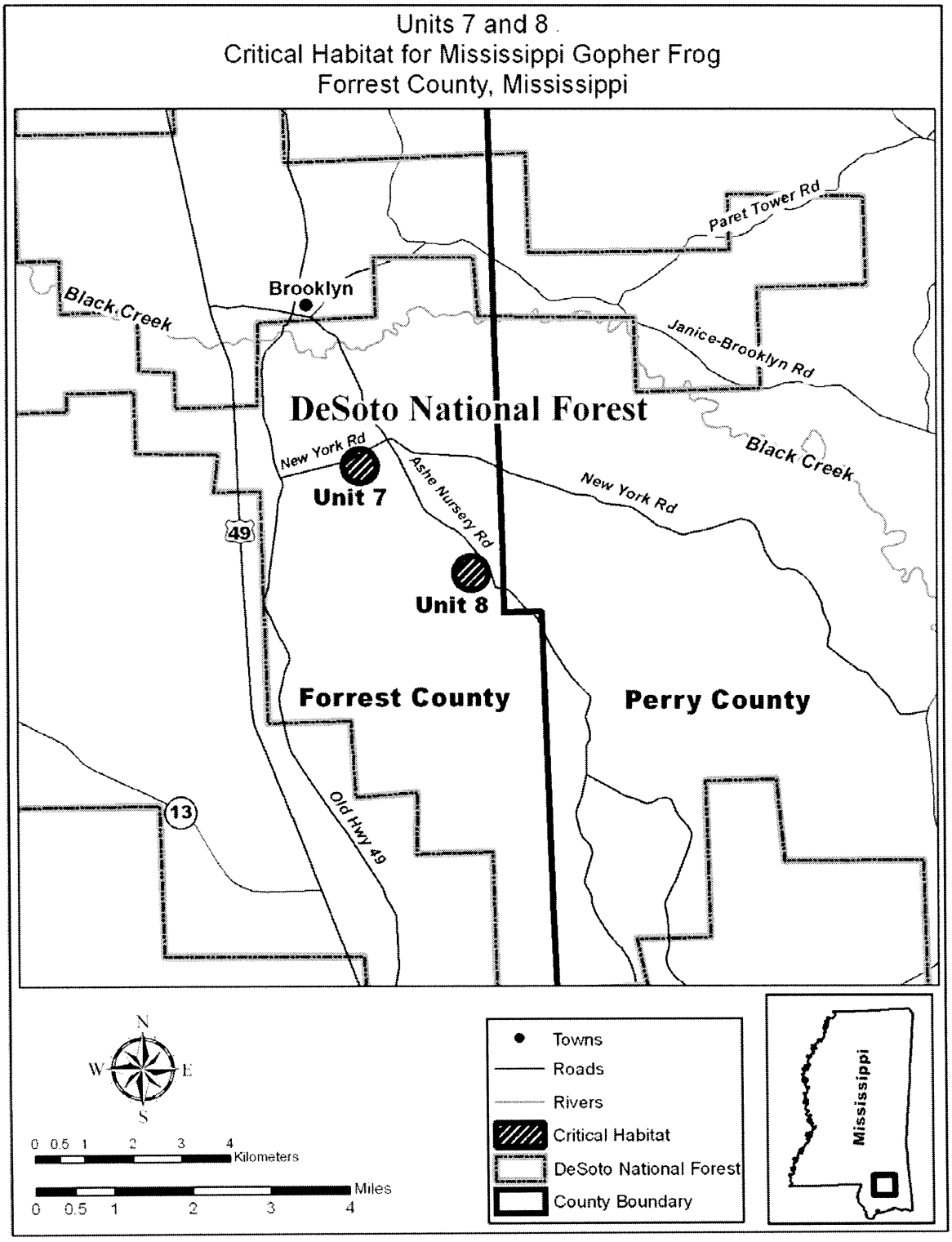
(ii) *Note:* Map depicting Unit 7 is provided at paragraph (13)(ii) of this entry.

(13) Unit 8: Jackson County, Mississippi.

(i) Unit 8 from USGS 1:24,000 scale quandrangle map Brooklyn, Mississippi.

[Reserved for textual description of Unit 8.]

(ii) *Note*: Map of Units 7 and 8 follows:



(14) Unit 9: Perry County, Mississippi.

(i) Map unit 9 from USGS 1:24,000 scale quadrangle map Barbara, Mississippi.

[Reserved for textual description of Unit 9.]

(ii) *Note:* Map depicting Unit 9 is provided at paragraph (16)(ii) of this entry.

(15) Unit 10: Perry County, Mississippi.

(i) Map unit 10 from USGS 1:24,000 scale quadrangle map Barbara, Mississippi.

[Reserved for textual description of Unit 10.]

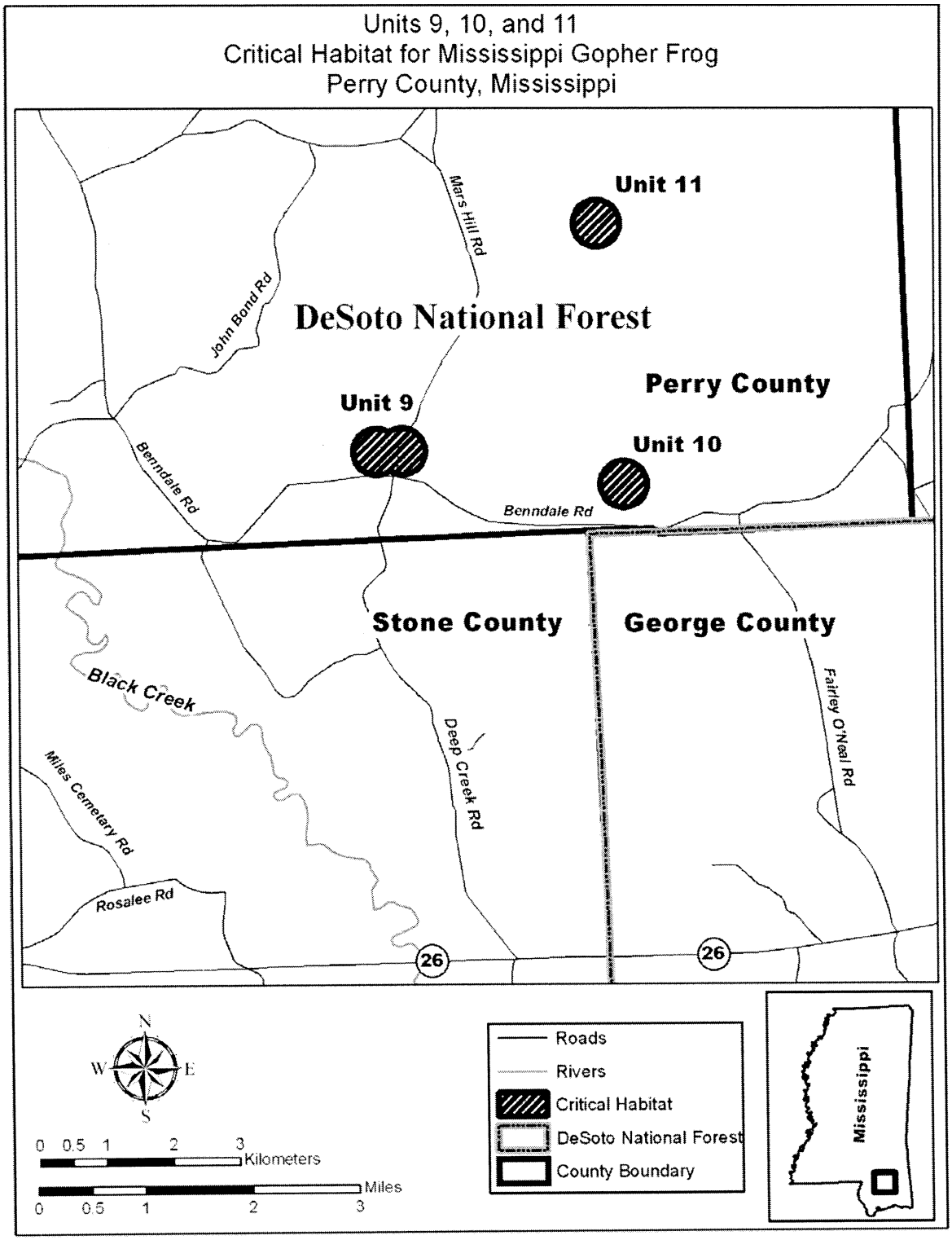
(ii) *Note:* Map depicting Unit 10 is provided at paragraph (16)(ii) of this entry.

(16) Unit 11: Perry County, Mississippi.

(i) Map unit 11 from USGS 1:24,000 scale quadrangle map Barbara, Mississippi.

[Reserved for textual description of Unit 11.]

(ii) *Note*: Map of Units 9, 10, and 11 follows:



* * * * *

Dated: May 17, 2010

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–13359 Filed 6–2– 10; 8:45 am]

BILLING CODE 4310–55–C

Notices

Federal Register
Vol. 75, No. 106
Thursday, June 3, 2010

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

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 28, 2010.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Imported Seed and Screening.

OMB Control Number: 0579–0124.

Summary of Collection: The United States Department of Agriculture (USDA) is responsible for preventing plant diseases or insect pests from entering the United States, preventing the spread of pests not widely distributed in the United States, and eradicating those imported pests when eradication is feasible. The Plant Quarantine Act and the Federal Plant Pest Act authorizes the Department to carry out this mission. Under the authority of the Federal Seed Act of 1939, as amended, the USDA regulates the importation and interstate movement of certain agricultural and vegetable seeds. The Plant Protection & Quarantine Division of USDA's Animal & Plant Health Inspection Service (APHIS) has established a seed analysis program with Canada that allows U.S. companies that import seed for cleaning or processing to enter into compliance agreements with APHIS. This program eliminates the need for sampling shipments of Canadian-origin seed at the border, and allows certain seed importers to clean seed without the direct supervision of an APHIS inspector. APHIS will collect information using forms PPQ 925, Seed Analysis Certificate and PPQ 519, Compliance Agreement.

Need and Use of the Information: APHIS will collect information from PPQ 925 and PPQ 519 to ensure that imported seeds do not pose a health threat to U.S. agriculture. If the information were not collected there would be no way of preventing noxious weeds from entering the United States.

Description of Respondents: Business or other for-profit.

Number of Respondents: 1,168.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 9,588.

Animal Plant and Health Inspection Service

Title: Commercial Transportation of Equines to Slaughter.

OMB Control Number: 0579–0160.

Summary of Collection: Sections 901–905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901) authorizes the Secretary of Agriculture to issue guidelines for regulating the commercial transportation of horses to slaughter by persons regularly engaged in that activity within the United States. To fulfill this responsibility, the Animal and Plant Health Inspection Service (APHIS) established regulations in title 9, part 88 of the Code of Federal Regulations. The minimum standards cover among other things the food, water, and rest provided to these horses while they are in transit; and to review other related issues that may be appropriate to ensuring that these animals are treated humanely. Implementing these regulations entails the use of information collection activities such as providing business information, completing an owner-shipper certificate and continuation sheet, and maintaining records of the owner/shipper certificate and continuation sheet.

Need and Use of the Information: APHIS will collect the following information: (1) Shipper's name and address and the owner's name and address; (2) description of the transporting vehicle, including the license plate number; (3) a description of the horse's physical characteristics, including its sex, coloring, distinguishing marks, permanent brands, electronic means of identification, or other characteristics that can be used to accurately identify the horse; (4) the number of the USDA back tag that has been applied to the horse for identification purposes; (5) a statement of the animal's fitness to travel, which must indicate that the horse is able to bear weight on all four limbs, is able to walk unassisted, is not blind in both eyes, is older than 6 months of age, and is not likely to give birth during the trip; (6) a description of anything unusual with regard to the physical condition of the horse, such as a wound or blindness in one eye, and any special handling needs; (7) the date, time, and place the horse was loaded on the conveyance; and (8) a statement that the horse was provided access to food, water, and rest prior to transport. This information is helpful in those instances in which APHIS must conduct a trace back investigation of any possibly stolen horses or because of disease.

Description of Respondents: Business or other for-profit.

Number of Respondents: 200.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 4,203.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2010–13330 Filed 6–2–10; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Federal Crop Insurance Corporation, Risk Management Agency (RMA), USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) this notice announces the Risk Management Agency's intention to request an extension and revision to a currently approved information collection for Notice of Funds Availability—Community Outreach and Assistance Partnership Program.

DATES: Comments on this notice will be accepted until close of business, August 2, 2010.

ADDRESSES: Interested persons are invited to submit comments by any of the following methods:

- *By Mail to:* David Wiggins or Jay Howard-Brock, Civil Rights and Community Outreach, USDA/RMA, 1400 Independence Avenue, SW., Room 6714–S, Stop 0809, Washington, DC 20250–0809.
- *E–Mail:* *David.Wiggins@rma.usda.gov*, or *Jacquea.Howard-Brock@rma.usda.gov*.

All comments will be available for public inspection during regular business hours at the same address. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Contact David Wiggins or Jay Howard-Brock, Civil Rights and Community Outreach, USDA/RMA, 1400 Independence Avenue, SW., Room 6714–S, Stop 0809, Washington, DC 20250–0809, telephone (202) 690–4789 or 202–690–2686.

SUPPLEMENTARY INFORMATION:

Title: Notice of Funds Availability—Community Outreach and Assistance Partnership Program.

OMB Number: 0563–0066.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: The Federal Crop Insurance Corporation administers cooperative agreements that will be used to provide outreach and assistance to under-served agricultural producers such as women, limited resource, socially disadvantaged and other traditionally under served farmers and ranchers (under-served agricultural producers). With this submission, RMA seeks to obtain OMB's approval for an information collection project that will assist RMA in operating and evaluating these programs. The primary objective of the information collection projects is to enable RMA to better evaluate the performance capacity and plans of organizations that are applying for funds for cooperative agreements for the Community Outreach and Assistance Partnership Program.

This information collection package will be used for evaluating applications and awarding partnership agreements, applicants are required to submit materials and information necessary to evaluate and rate the merit of proposed projects and evaluate the capacity and qualification of the organization to complete the project.

Estimate of Burden: The public reporting burden for this collection of information is estimated to average 6 hours per response for new applications and 4 hours for renewal applications.

Respondents/Affected Entities: Education institutions, community based and cooperative organizations, and non-profit organizations.

Estimated annual number of respondents: 120.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 120.

Estimated total annual burden on respondents: 1,160 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, or other collection technologies, *e.g.* permitting electronic submission of responses.

Signed in Washington, DC, on May 27, 2010.

William J. Murphy,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 2010–13253 Filed 6–2–10; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF AGRICULTURE

Rural Business—Cooperative Service

Notice of Funding Availability (NOFA) Inviting Applications for the Rural Microentrepreneur Assistance Program

AGENCY: Rural Business—Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: The Notice announces the availability of $45.1 million in program level to support rural mircoentrepreneurship in rural America and solicits applications for funds available under the Rural Microentrepreneur Assistance Program to provide direct loans, technical assistance grants, and technical assistance-only grants to microdevelopment organizations to support the development and ongoing success of rural microentrepreneurs and microenterprises. The Agency will make awards on a quarterly basis. In the event, as expected in the first quarter, all program funds are not awarded in a quarter, the remaining funds will be carried over to the subsequent quarter.

DATES: Applications for participating in this Program will be accepted on an on-going basis, but will be awarded on a quarterly basis. For Fiscal Year 2010, applications must be received by July 16, 2010 for consideration for award under Fiscal Year 2010 and September 30, 2010 for consideration for award for funds available in Fiscal Year 2010, but not obligated.

ADDRESSES: Applications and forms may be obtained from any Rural Development State Office. Applicants must submit an original complete application to the USDA Rural Development National Office and provide a copy of the application package to the USDA Rural Development State Office in the state where the applicant's project is located. The National Office address and a list of the USDA Rural Development State Offices addresses and telephone numbers are listed below.

Note: Telephone numbers listed are not toll-free.

National Office

Rural Microenterprise Assistance Program, Business Programs, Specialty Programs Lending Division, USDA Rural Development, Room 6868, South Agricultural Building, Stop 3225, 1400 Independence Avenue, SW., Washington, DC 20250–3225, (202) 720–1400.

Alabama

USDA Rural Development State Office, Sterling Centre, Suite 601, 4121 Carmichael Road, Montgomery, AL 36106–3683, (334) 279–3400/TDD (334) 279–3495.

Alaska

USDA Rural Development State Office, 800 West Evergreen, Suite 201, Palmer, AK 99645–6539, (907) 761–7705/TDD (907) 761–8905.

Arizona

USDA Rural Development State Office, 230 N. 1st Ave., Suite 206, Phoenix, AZ 85003, (602) 280–8701/TDD (602) 280–8705.

Arkansas

USDA Rural Development State Office, 700 West Capitol Avenue, Room 3416, Little Rock, AR 72201–3225, (501) 301–3200/TDD (501) 301–3279.

California

USDA Rural Development State Office, 430 G Street, # 4169, Davis, CA 95616–4169, (530) 792–5800/TDD (530) 792–5848.

Colorado

USDA Rural Development State Office, 655 Parfet Street, Room E–100, Lakewood, CO 80215, (720) 544–2903/TDD (720) 544–2976.

Delaware-Maryland

USDA Rural Development State Office, 1221 College Park Drive, Suite 200, Dover, DE 19904, (302) 857–3580/TDD (302) 857–3585.

Florida/Virgin Islands

USDA Rural Development State Office, 4440 NW 25th Place, P.O. Box 147010, Gainesville, FL 32614–7010, (352) 338–3400/TDD (352) 338–3499.

Georgia

USDA Rural Development State Office, Stephens Federal Building, 355 E. Hancock Avenue, Athens, GA 30601–2768, (706) 546–2162/TDD (706) 546–2034.

Hawaii

USDA Rural Development State Office, Federal Building, Room 311, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8380/TDD (808) 933–8321.

Idaho

USDA Rural Development State Office, 9173 West Barnes Dr., Suite A1, Boise, ID 83709, (208) 378–5600/TDD (208) 378–5644.

Illinois

USDA Rural Development State Office, 2118 West Park Court, Suite A, Champaign, IL 61821, (217) 403–6200/TDD (217) 403–6240.

Indiana

USDA Rural Development State Office, 5975 Lakeside Boulevard, Indianapolis, IN 46278, (317) 290–3100/TDD (317) 290–3343.

Iowa

USDA Rural Development State Office, Federal Building, Room 873, 210 Walnut Street, Des Moines, IA 50309, (515) 284–4663/TDD (515) 284–4858.

Kansas

USDA Rural Development State Office, 1303 S.W. First American Place, Suite 100, Topeka, KS 66604–4040, (785) 271–2700/TDD (785) 271–2767.

Kentucky

USDA Rural Development State Office, 771 Corporate Drive, Suite 200, Lexington, KY 40503, (859) 224–7300/TDD (859) 224–7422.

Louisiana

USDA Rural Development State Office, 3727 Government Street, Alexandria, LA 71302, (318) 473–7921/TDD (318) 473–7655.

Maine

USDA Rural Development State Office, 967 Illinois Avenue, Suite 4, P.O. Box 405, Bangor, ME 04402–0405, (207) 990–9160/TDD (207) 942–7331.

Massachusetts/Rhode Island/Connecticut

USDA Rural Development State Office, 451 West Street, Suite 2, Amherst, MA 01002–2999, (413) 253–4300/TDD (413) 253–4590.

Michigan

USDA Rural Development State Office, 3001 Coolidge Road, Suite 200, East Lansing, MI 48823, (517) 324–5190/TDD (517) 324–5169.

Minnesota

USDA Rural Development State Office, 375 Jackson Street, Suite 410, St. Paul, MN 55101–1853, (651) 602–7800/TDD (651) 602–3799.

Mississippi

USDA Rural Development State Office, Federal Building, Suite 831, 100 W. Capitol Street, Jackson, MS 39269, (601) 965–4316/TDD (601) 965–5850.

Missouri

USDA Rural Development State Office, 601 Business Loop 70 West, Parkade Center, Suite 235, Columbia, MO 65203, (573) 876–0976/TDD (573) 876–9480.

Montana

USDA Rural Development State Office, 900 Technology Boulevard, Suite B, P.O. Box 850, Bozeman, MT 59771, (406) 585–2580/TDD (406) 585–2562.

Nebraska

USDA Rural Development State Office, Federal Building, Room 152, 100 Centennial Mall North, Lincoln, NE 68508, (402) 437–5551/TDD (402) 437–5093.

Nevada

USDA Rural Development State Office, 1390 South Curry Street, Carson City, NV 89703–5146, (775) 887–1222/TDD (775) 885–0633.

New Jersey

USDA Rural Development State Office, 8000 Midlantic Drive, 5th Floor North, Suite 500, Mt. Laurel, NJ 08054, (856) 787–7700/TDD (856) 787–7784.

New Mexico

USDA Rural Development State Office, 6200 Jefferson Street, NE, Room 255, Albuquerque, NM 87109, (505) 761–4950/TDD (505) 761–4938.

New York

USDA Rural Development State Office, The Galleries of Syracuse, 441 South Salina Street, Suite 357, Syracuse, NY 13202–2541, (315) 477–6400/TDD (315) 477–6447.

North Carolina

USDA Rural Development State Office, 4405 Bland Road, Suite 260, Raleigh, NC 27609, (919) 873–2000/TDD (919) 873–2003.

North Dakota

USDA Rural Development State Office, Federal Building, Room 208, 220 East Rosser, P.O. Box 1737, Bismarck, ND 58502–1737, (701) 530–2037/TDD (701) 530–2113.

Ohio

USDA Rural Development State Office, Federal Building, Room 507, 200 North High Street, Columbus, OH 43215–2418, (614) 255–2400/TDD (614) 255–2554.

Oklahoma

USDA Rural Development State Office, 100 USDA, Suite 108, Stillwater, OK 74074–2654, (405) 742–1000/TDD (405) 742–1007.

Oregon

USDA Rural Development State Office, 1201 NE Lloyd Blvd., Suite 801, Portland, OR 97232, (503) 414–3300/TDD (503) 414–3387.

Pennsylvania

USDA Rural Development State Office, One Credit Union Place, Suite 330, Harrisburg, PA 17110–2996, (717) 237–2299/TDD (717) 237–2261.

Puerto Rico

USDA Rural Development State Office, IBM Building, Suite 601, 654 Munos Rivera Avenue, San Juan, PR 00918–6106, (787) 766–5095/TDD (787) 766–5332.

South Carolina

USDA Rural Development State Office, Strom Thurmond Federal Building, 1835 Assembly Street, Room 1007, Columbia, SC 29201, (803) 765–5163/TDD (803) 765–5697.

South Dakota

USDA Rural Development State Office, Federal Building, Room 210, 200 Fourth Street, SW., Huron, SD 57350, (605) 352–1100/TDD (605) 352–1147.

Tennessee

USDA Rural Development State Office, 3322 West End Avenue, Suite 300, Nashville, TN 37203–1084, (615) 783–1300.

Texas

USDA Rural Development State Office, Federal Building, Suite 102, 101 South Main, Temple, TX 76501, (254) 742–9700/TDD (254) 742–9712.

Utah

USDA Rural Development State Office, Wallace F. Bennett Federal Building, 125 South State Street, Room 4311, Salt Lake City, UT 84138, (801) 524–4320/TDD (801) 524–3309.

Vermont/New Hampshire

USDA Rural Development State Office, City Center, 3rd Floor, 89 Main Street, Montpelier, VT 05602, (802) 828–6000/TDD (802) 223–6365.

Virginia

USDA Rural Development State Office, 1606 Santa Rosa Road, Suite 238, Richmond, VA 23229–5014, (804) 287–1550/TDD (804) 287–1753.

Washington

USDA Rural Development State Office, 1835 Black Lake Boulevard SW., Suite B, Olympia, WA 98512–5715, (360) 704–7740/TDD (360) 704–7760.

West Virginia

USDA Rural Development State Office, 75 High Street, Room 320, Morgantown, WV 26505–7500, (304) 284–4860/TDD (304) 284–4836.

Wisconsin

USDA Rural Development State Office, 4949 Kirschling Court, Stevens Point, WI 54481, (715) 345–7600/TDD (715) 345–7614.

Wyoming

USDA Rural Development State Office, 100 East B, Federal Building, Room 1005, P.O. Box 11005, Casper, WY 82602–5006, (307) 233–6700/TDD (307) 233–6733.

FOR FURTHER INFORMATION CONTACT: For further information on this Notice, please contact the USDA Rural Development State Office for your respective State, as provided in the **ADDRESSES** section of this Notice.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act, the paperwork burden associated with this Notice has been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570–0062.

Overview

Federal Agency Name: Rural Business—Cooperative Service (an agency of the United States Department of Agriculture in the Rural Development mission area).

Solicitation Opportunity Title: Rural Microentrepreneur Assistance Program.

Announcement Type: Initial announcement.

Catalog of Federal Domestic Assistance Number. The CFDA number for this Notice is 10.870.

DATES: Completed applications must be received in the USDA Rural Development National Office no later than the quarterly deadlines of July 16 and September 30, 2010 to be considered for funds available in FY 2010 and, assuming availability of funds, by December 31, 2010, for the first quarter in FY 2011.

Availability of Notice and Rule. This Notice and the interim rule for the Rural Microentrepreneur Assistance Program (RMAP) are available on the USDA Rural Development Web site at *http://www.rurdev.usda.gov/BCP-LoanAndGrants.html* and at *http://www.rurdev.usda.gov/rbs/busp/bprogs.htm.*

I. Funding Opportunity Description

A. Purpose of the Program. The purpose of RMAP is to support the development and ongoing success of rural microentrepreneurs and microenterprises (businesses generally with ten employees or fewer and in need of financing in the amount of $50,000 or less as defined in 7 CFR 4280.302).

Assistance provided to rural areas under this program may include the provision of loans and grants to rural Microenterprise Development Organizations (MDOs) for the provision of microloans to rural microenterprises and microentrepreneurs; provision of business-based training and technical assistance to rural microborrowers and potential microborrowers; and other such activities as deemed appropriate by the Secretary to ensure the development and ongoing success of rural microenterprises.

B. Statutory Authority. The RMAP is authorized by Section 379E of the Consolidated Farm and Rural Development Act (7 USC 2008s). Regulations are contained in 7 CFR part 4280, subpart D.

C. Definition of Terms. The definitions applicable to this Notice are published at 7 CFR 4280.302.

II. Award Information

A. *Type of Award:* Loan and/or Grant.

B. *Fiscal Year Funds:* FY 2010.

C. *Funding Availability:* The total amount of available program level in Fiscal Year 2010 is $45.1 million. Of this total, $36.2 million will be initially available for loans, $7.6 million will be initially available for Microlender technical assistance grants, and $1.3 million will be initially available for Technical assistance-only grants. Exact funding is dependent on the quality of applicants for each funding type.

Any funds not awarded under this notice will be carried over into Fiscal Year 2011. Applications received after July 16, 2010, will be reviewed and evaluated for funding beginning October 1st. Applications for the first quarter are due September 30th. In the event some of the program funds allocated for the first quarter of Fiscal Year 2011 are not awarded, the remaining funds will be carried over to the second quarter.

D. *Approximate Number of Awards:* 82.

E. *Awards:* The minimum loan amount an MDO may borrow under this program is $50,000. The maximum loan any MDO may borrow in any given year is $500,000.

The maximum amount of a technical assistance-only grant under this program will not exceed an estimated $130,000.

Microlender Technical Assistance grants will be limited to an amount equal to not more than 25 percent of the total outstanding balance of microloans made under this program and active by the microlender as of the date the grant is awarded for the first $400,000 plus an additional 5 percent of the loan amount owed by the microborrowers to the lender under this program over $400,000 up to and including $2.5 million. Funds cannot be used to pay off the loans. During the first year of a microlender's operation under this program, the percentage will be determined based on the amount of the loan to the microlender, but will be disbursed on a quarterly basis based on the amount of microloans made. Any grant dollars obligated, but not spent, from the initial grant, will be subtracted from the subsequent year grant to ensure that obligations cover only microloans made and active.

F. *Anticipated Award Dates:*

* August 31, 2010 for applications received by July 16, 2010.

* November 15, 2010 for applications received by September 30, 2010.

* February 15, 2011 for applications received by December 31, 2010.

III. Eligibility Information

A. Eligible Applicants. To be eligible for this program, the applicant must meet the eligibility requirements in 7 CFR 4280.310.

B. Cost share requirements. The Federal share of the eligible project cost of a microborrower's project funded under this Notice shall not exceed 75 percent. The cost share requirement shall be met by the microlender in

accordance with the requirements specified in 7 CFR 4280.311(d).

C. Matching fund requirements. The MDO is required to provide a match of not less than 15 percent of the total amount of the grant in the form of matching funds, indirect costs, or in-kind goods or services.

D. Other Eligibility Requirements. Applications will only be accepted from eligible MDOs. Eligible MDOs must score a minimum of 70 points out of 100 points to be considered to receive an award. Awards will be based on ranking with the highest ranking applications being funded first, subject to available funding.

E. Completeness Eligibility. All applications must be submitted as a complete application, in one package. Applications will not be considered for funding if they do not provide sufficient information to determine eligibility or are unbound, falling apart, or otherwise not suitable for evaluation. Such applications will be returned.

IV. Fiscal Year 2010 Application and Submission Information

A. Application Submittal. Applications may be submitted in either paper or electronic format. If applications are submitted in paper format, they must be bound in a 3-ring binder and must be organized in the same order set forth in 7 CFR 4280.315. To ensure timely delivery, applicants are strongly encouraged to submit their applications using an overnight, express, or parcel delivery service.

Applicants are encouraged to submit grant only applications through the Grants.gov Web site at: *http://www.grants.gov.* Users of Grants.gov will be able to download a copy of the application package, complete it off line, and then upload and submit the application via the Grants.gov Web site. USDA Rural Development strongly encourages applicants not to wait until the application deadline date to begin the application process through Grants.gov. Applications may not be submitted by electronic mail.

When applicants enter the Grants.gov Web site, they will find information about submitting a grant application electronically through the site as well as the hours of operation. Applicants may submit all documents electronically through the Web site, including all information required for a complete application and all necessary assurances and certifications under 7 CFR 4280.315. After electronically submitting an application through the Web site, the applicant will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. USDA Rural Development may request that the applicant provide original signatures on forms at a later date.

All applicants, whether filing applications through www.Grants.gov or by paper, must have a Dun and Bradstreet Data Universal Numbering System (DUNS) number which can be obtained at no cost via a toll-free request line at 1–866–705–5711.

Please note that applicants can locate the downloadable application package for this program by the Catalog of Federal Domestic Assistance Number, which is 10.870, or FedGrants Funding Opportunity Number, which can be found at *http://www.Grants.gov.*

B. Content and Form of Submission. An application must contain all of the required elements outlined in 7 CFR 4280.315. Each application must address the applicable scoring criteria presented in 7 CFR 4280.316 for the type of funding being requested.

C. Submission Dates and Times.

The original complete application must be received by the USDA Rural Development National Office no later than 4:30 p.m. local time by the application deadline dates listed above, regardless of the postmark date.

Applications received at the USDA Rural Development National Office, unless withdrawn by the applicant, will be retained by the Agency for consideration in subsequent reviews through a total of four quarterly reviews. Applications unsuccessful after four quarters will not be considered further for an award.

V. Application Review Information

Awards under this Notice will be made on a competitive basis each quarter. Each application received in the USDA Rural Development National Office will be reviewed, scored, and ranked to determine if it is consistent with the program requirements. Applications will be scored based on the applicable scoring criteria contained in 7 CFR 4280.316. Failure to address any of the applicable scoring criteria will result in a zero-point score for that section. Applications must receive at least 70 points to be considered for funding in the quarter in which it is scored. Figure 1 illustrates the scoring associated with 7 CFR 4280.316.

BILLING CODE 3410–XY–P

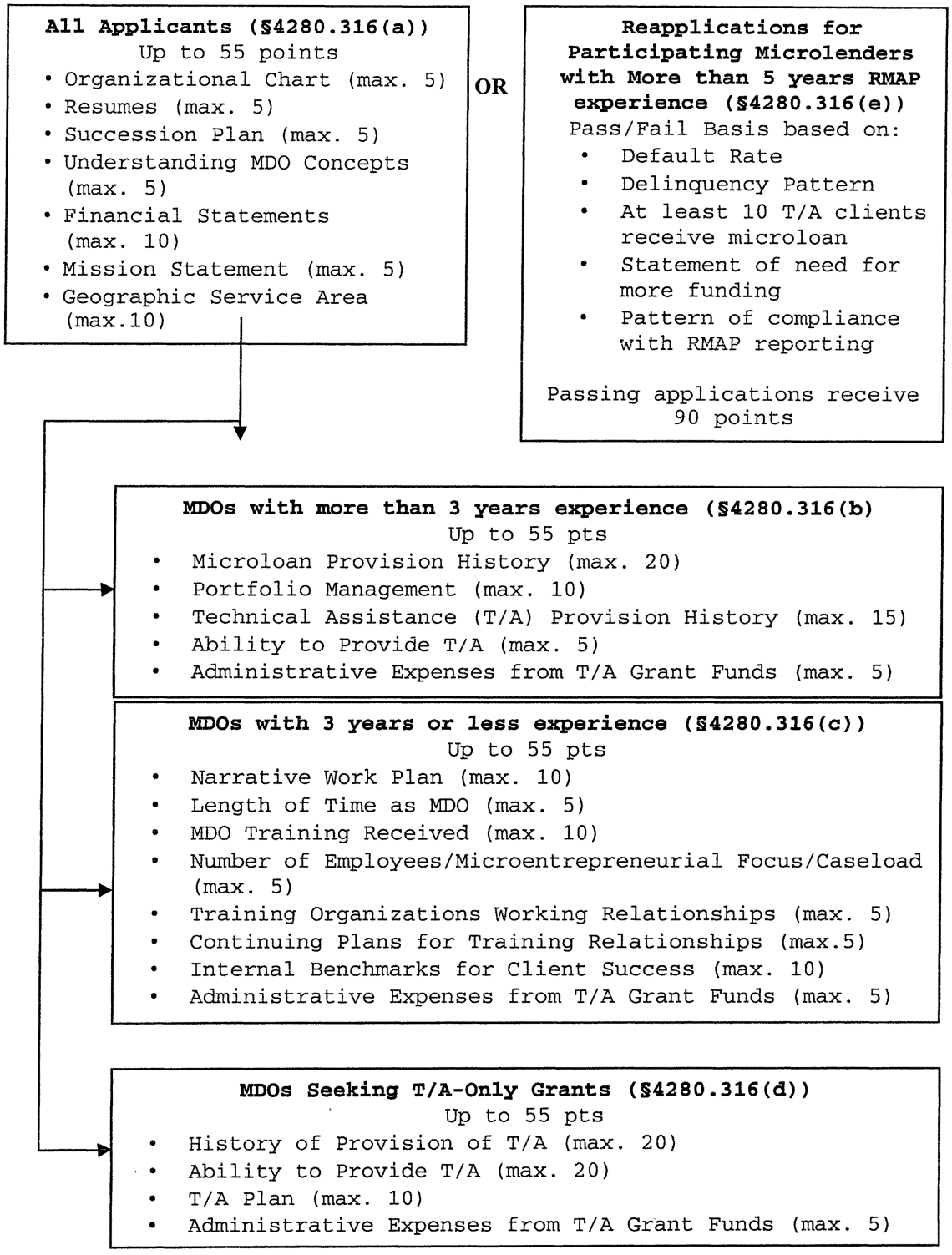


Figure 1. Summary of RMAP Scoring

VI. Award Administration Information

Successful applicants will receive notification for funding from the USDA Rural Development State Office. Applicants must comply with all applicable statutes and regulations before the award will be approved. Unsuccessful applications will receive notification by mail.

VII. Agency Contacts

For general questions about this Notice, please contact your USDA Rural Development State Office as provided in the Addresses section of this Notice.

NONDISCRIMINATION STATEMENT: The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

To file a complaint of discrimination write to USDA, Director, Office of Adjudication and Compliance, 1400 Independence Avenue, SW., Washington, DC 20250–9410 or call (800) 795–3272 (voice) or (202) 720–6382 (TDD). USDA is an equal opportunity provider, employer, and lender.

Dated: May 28, 2010.

Judith A. Canales,

Administrator, Rural Development, Business and Cooperative Programs, [OMB1]Section.

[FR Doc. 2010–13380 Filed 6–2–10; 8:45 am]

BILLING CODE 3410–XY–C

DEPARTMENT OF AGRICULTURE

Forest Service

Intermountain Region, Payette National Forest, Council Ranger District; Idaho; Mill Creek—Council Mountain Landscape Restoration Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Council Ranger District of the Payette National Forest will prepare an environmental impact statement (EIS) for the Mill Creek—Council Mountain Landscape Restoration Project. The approximate 51,900 acre project area is located about two miles east of Council, Idaho. The Mill Creek—Council Mountain Landscape Restoration Project proposes to improve wildlife habitat, reduce wildland fire hazard, encourage woody biomass utilization, contribute to the economic vitality of the communities adjacent to the Payette National Forest, and improve watershed conditions through a variety of activities including commercial and noncommercial vegetation management and road system modifications and maintenance.

DATES: Comments concerning the scope of the analysis must be received by July 6, 2010. The draft environmental impact statement is expected December 2010 and the final environmental impact statement is expected May 2011.

ADDRESSES: Send written comments to P.O. Box 567, Council, ID 83612. Comments may also be sent via e-mail to *comments-intermtn-payette-council@fs.fed.us,* or via facsimile to 208–253–0109.

It is important that reviewers provide their comments at such times and in such a way that they are useful to the Agency's preparation of the EIS. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered, however.

FOR FURTHER INFORMATION CONTACT: Steve Penny, Project Team Leader, 208–253–0164. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The Purpose of the project is to: (1) Improve wildlife habitat for white-headed woodpeckers, by restoring appropriate forested stands to historical range of variability, and improve habitat for other wildlife species as appropriate; (2) reduce wildland fire hazard in forested stands with conditions that depart from the historical range of variability; (3) encourage woody biomass utilization as a revenue source to for restoration goals; and (4) contribute to the economic vitality of the communities adjacent to the Payette NF.

Land management activities over the last century, such as fire suppression, timber harvest (especially large diameter ponderosa pine) and road construction have affected forest, grassland, shrubland plant species composition and structure, and watershed conditions. The need for this action is move landscape conditions toward the historical range of variability, and to meet 2003 Payette National Forest Land and Resource Management Plan (Forest Plan) direction.

Proposed Action

The Proposed Action includes the following restoration treatments: (1) Harvesting of sawtimber and biomass (woody material not meeting sawtimber specifications) on 4,800 acres by thinning from below to reduce tree density, crown spacing, and ladder fuels followed by underburning to promote ponderosa pine and other fire-resistant tree species reproduction, reduce non-fire resistant vegetation, and reduce fuel accumulation; (2) harvesting sawtimber and biomass on 700 acres by regeneration harvest treatments followed by prescribed burning to promote fire resistant tree species reproduction, reduce non-fire resistant vegetation, and reduce fuel accumulation; (3) underburn 2,800 acres of additional timber vegetated stands not proposed for harvest and use planned wildland fire on 12,100 acres of grass, brush, scattered timber or quaking aspen stands; and (4) thinning of 4,500 acres of tree plantations which would include some removal of biomass. Harvesting activities would be accomplished using tractor, tractor/jammer, and skyline methods. Skid trails would be designated to concentrate use in a limited amount of areas and reclaimed following harvest. There would be no harvest within 30' of intermittent streams or within 120' of perennial streams. There would be no equipment entry in riparian conservation areas (RCAs) except on existing roads or skid trails approved of in advance by the District Hydrologist or Fisheries Biologist.

To facilitate access, approximately 6 miles of temporary roads would be constructed where needed to access harvest units and landings and decommissioned after use. Approximately 5 miles of existing non-National Forest System roads would be converted to National Forest Service System roads. There would be no permanent road construction in the project area with this proposal.

To improve watershed conditions and fisheries habitat, the proposed action includes: (1) The upgrade of culverts that are undersized and restrict passage of fish and other aquatic organisms, (2) road improvement such as improving drainage and surfacing and (3) the decommission of old roadbeds that are not needed for future management or public access to reduce levels of soils impacts, and reduce drainage and erosion problems.

Lead and Cooperating Agencies

Adams County, Idaho has expressed interest becoming a cooperating agency for this project and intends to submit such a request to the Payette National Forest in late May, 2010.

Responsible Official

Payette National Forest Supervisor, Suzanne C. Rainville.

Nature of Decision To Be Made

Based on the purpose and need for the proposed action, the Responsible Official will determine whether to proceed with the action as proposed, as modified by another alternative or not at all. If an action alternative is selected, the Responsible Official will determine what design features, mitigation measures and monitoring to require.

ADDRESSES: Project information is available on the Payette National Forest Web site at *http://www.fs.fed.us/r4/payette/publications/index.shtml* (click on the Mill Creek—Council Mountain Landscape Restoration Project).

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement.

It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Dated: May 26, 2010.

Jake Strohmeyer,

Acting Forest Supervisor.

[FR Doc. 2010–13174 Filed 6–2–10; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Arizona Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Arizona Advisory Committee to the Commission will convene at 1 p.m. and adjourn at approximately 3:30 p.m. on Monday, June 21, 2010, at 500 East Coronado Road, Phoenix, Arizona. The purpose of the meeting is for the committee to discuss its education project.

Members of the public are entitled to submit written comments; the comments must be received in the regional office by July 23, 2010. The address is 300 N. Los Angeles St., Suite 2010, Los Angeles, California 90012. Persons wishing to e-mail their comments or who desire additional information should contact Angelica Trevino, Administrative Assistant, at (213) 894–3437 or (800) 877–8339 for individuals who are deaf, hearing impaired, and/or have speech disabilities or by e-mail to: *atrevino@usccr.gov.*

Hearing-impaired persons who wish to submit written comments and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Western Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *http://www.usccr.gov,* or to contact the Western Regional Office at the above e-mail or street address.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, May 28, 2010.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2010–13290 Filed 6–2–10; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of briefing and meeting.

DATE AND TIME: Friday, June 11, 2010; 9:30 a.m. EDT.

PLACE: 624 9th St., NW., Room 540, Washington, DC 20425.

Briefing Agenda

The briefing is open to the public.

Topic: Age Discrimination in Employment in the Current Economic Crisis

I. Introductory Remarks by Chairman
II. Speakers' Presentations
III. Questions by Commissioners and Staff Director
IV. Adjourn Briefing

Meeting Agenda

This meeting is open to the public.

I. Approval of Agenda
II. Program Planning
- Approval of Recommendations #2 and #3—Educational Effectiveness of Historically Black Colleges & Universities Briefing Report
- Approval of the Briefing Report—Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math (STEM) Careers
- Approval of 2011 Business Meeting Calendar
- NBPP Enforcement Project—Some of the discussion of this agenda item may be held in closed session.
- Title IX Project—Some of the discussion of this agenda item may be held in closed session.
- Discussion of Concept Paper on Attack against Asian-American Students at South Philadelphia High School

III. Staff Director's Report
IV. Adjourn

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591. TDD: (202) 376–8116.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Pamela Dunston at least seven days prior to the meeting at (202) 376–8105. TDD: (202) 376–8116.

Dated: June 1, 2010.

David Blackwood,

General Counsel.

[FR Doc. 2010–13465 Filed 6–1–10; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: 2010 Census Coverage Measurement—Person Followup & Person Followup Reinterview Operations and Respondent Debriefings.

OMB Control Number: None

Form Number(s): D–1301, D–1301(PR)..

Type of Request: New collection.

Burden Hours: 16,629.

Number of Respondents: 57,776.

Average Hours per Response: Person Followup Intervirews—15 min.; Respondent Debriefings—10 min..

Needs and Uses: The U.S. Census Bureau requests authorization from the Office of Management and Budget (OMB) to conduct the Census Coverage Measurement (CCM) Person Followup

(PFU) and Person Followup Reinterview (PFU RI) operations as part of the 2010 Census. Changes were made to this request since the notice was published in the **Federal Register** (Vol. 74, No. 249, 69061, December 30, 2009). Respondent debriefings of the CCM Person Interview (PI) and CCM PFU have been added. These are to be conducted as part of a CCM evaluation. Details of this evaluation were not yet available at the time of this notice or in time to include in the CCM PI OMB package.

The CCM program will provide estimates of net coverage error and components of census coverage (including omissions and erroneous enumerations) for housing units and persons in housing units (see Definition of Terms in Part B, Collections of Information Employing Statistical Methods). The data collection and matching methodologies for previous coverage measurement programs were designed only to measure net coverage error.

The 2010 CCM will be comprised of two samples selected to measure census coverage of housing units and the household population: The population sample (P sample) and the enumeration sample (E sample). The primary sampling unit is a block cluster, which consists of one or more contiguous census blocks. The P sample is a sample of housing units and persons obtained independently from the census for a sample of block clusters. The E sample is a sample of census housing units and enumerations in the same block cluster as the P sample. The PFU operation will contain approximately 57,776 sample addresses. The PFU RI Operation will be a sample of those cases with an estimate 8,667 sample addresses.

The paper PFU questionnaire will be used to collect address and dates of stay information for persons selected for followup to verify their residence on Census Day (April 1, 2010) and on the day of the CCM Person Interview for that household. PFU will also contain questions to resolve match and duplication status discrepancies between the CCM Person Interview and the Census.

We also will conduct a quality control operation called PFU Reinterview (PFU RI) on 15 percent of the PFU cases. The purpose of the operation is to confirm that the PFU enumerator conducted a PFU interview with an actual household member or a valid proxy respondent and to conduct a full PFU interview when falsification is suspected.

In addition to the CCM PFU and PFU RI operations, respondent debriefings of the CCM Person Interview (PI) and CCM PFU will be conducted. The purpose of the respondent debriefings is to obtain a qualitative gauge of how well the PI and PFU instruments performed the tasks they were designed to accomplish, those being to capture members of the household and assign usual residence. Census Residence Rules experts will observe approximately 220 PI and PFU personal visit interviews and ask respondent debriefing questions at approximately 110 households (80 PI households and 30 PFU households). They will clarify or verify the usual residence of the persons listed and other persons who should have been counted. The experts will audiotape all observed interviews and debriefings of respondents if permission is given by the respondent. These audiotapes are for use in evaluations.

Affected Public: Individuals or households.

Frequency: One time.

Respondent's Obligation: Mandatory (participation in debriefings is voluntary).

Legal Authority: Title 13 U.S.C., Sections 141 and 193.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or email (*bharrisk@omb.eop.gov*).

Dated: May 28, 2010.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–13354 Filed 6–2–10; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XW63

Magnuson Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

ACTION: Notice; request for comments.

SUMMARY: The Regional Administrator, Southwest Region, NMFS, has made a preliminary determination that an application for an Exempted Fishing Permit (EFP) warrants further consideration. The application was submitted by members of the Pacific sardine fishing industry, who request an exemption from seasonal closures of the directed fishery to conduct a survey designed to estimate the population size of Pacific sardine. NMFS requests public comment on the application.

DATES: Comments must be received by July 6, 2010.

ADDRESSES: You may submit comments on this notice, identified by 0648–XW63, by any one of the following methods:

- Mail: Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802.
- Fax: (562) 980–4047, Att: Joshua Lindsay.

FOR FURTHER INFORMATION CONTACT: A copy of the application can viewed at the following website *http://swr.nmfs.noaa.gov/fmd/cps/Sardine__EFP__2010__Full__Application__042910–1.pdf*; or by contacting Joshua Lindsay, Southwest Region, NMFS, (562) 980–4034.

SUPPLEMENTARY INFORMATION: On March 10, 2010, NMFS published a final rule implementing the harvest guideline (HG) and annual specifications for the 2010 Pacific sardine fishing season off the U.S. West Coast (75 FR 11068). As part of these management measures the Council recommended, and NMFS approved, that 5,000 metric tons (mt) of the maximum harvest guideline (HG) be initially subtracted and set aside for potential industry based research projects. Members of the Pacific sardine fishing industry, concerned about the difficulty of securing fishing vessels for research purposes during the normal fishing season, requested this separate allocation so that they could conduct research fishing activities after fishing is closed. The 5,000 mt set aside was intended to allow for potential research fishing in the second seasonal period (July 1 - September 14, 2009) and third seasonal period (September 15 - December 31, 2009), to continue if that period's directed fishery allocation is reached and directed fishing is closed.

NMFS approval and issuance of an EFP is required to conduct the fishing activities proposed by the applicants to occur when directed fishing is not

allowed. At the March 2010 Council meeting, the Council reviewed an EFP application that proposed to utilize the entire 5,000 mt set aside. The applicants proposed the use of 4200 mt to replicate the summer survey conducted under the EFP approved in 2009 and expand the sample size and area covered. In addition to the summer survey, the applicants proposed to use 800 mt of the set aside to run a fall pilot project to test the viability of alternative tools and methodologies. The proposal went forward for public comment and was reviewed by the Council again at their April meeting, at which time the Council recommended that NMFS approve and issue the EFP.

One of the goals set forth in the EFP application is the development of an index of biomass for Pacific sardine, with the desire that this index be included in the subsequent Pacific sardine stock assessment. If NMFS determines that an EFP cannot be issued, then the set aside will be re allocated to the third period's directed harvest allocation. Any research set aside attributed to an EFP for use during the closed fishing time in the second allocation period (prior to September 15), but not utilized, will roll into the third allocation period's directed fishery. Any research set aside attributed to an EFP for use during the closed fishing time in the third allocation period, but not utilized, will not be re-allocated.

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

Dated: May 28, 2010.

Carrie Selberg,

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

[FR Doc. 2010–13316 Filed 6–2–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XW53

Atlantic Coastal Fisheries Cooperative Management Act Provisions; Application for Exempted Fishing Permit; Horseshoe Crabs

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

ACTION: Notification of a proposal to conduct exempted fishing; request for comments.

SUMMARY: The Acting Director, Office of Sustainable Fisheries, has made a preliminary determination that the subject exempted fishing permit (EFP) application submitted by Limuli Laboratories of Cape May Court House, New Jersey, contains all the required information and warrants further consideration. The proposed EFP would allow the harvest of up to 10,000 horseshoe crabs from the Carl N. Shuster Jr. Horseshoe Crab Reserve for biomedical purposes and require, as a condition of the EFP, the collection of data related to the status of horseshoe crabs within the reserve. The Acting Director has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Atlantic States Marine Fisheries Commission's (Commission) Horseshoe Crab Interstate Fisheries Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made to issue the EFP. Therefore, NMFS announces that the Acting Director proposes to recommend that an EFP be issued that would allow up to 3 commercial fishing vessels to conduct fishing operations that are otherwise restricted by the regulations promulgated under the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act). The EFP would allow for an exemption from the Carl N. Shuster Jr. Horseshoe Crab Reserve (Reserve).

Regulations under the Atlantic Coastal Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Written comments on this action must be received on or before June 18, 2010.

ADDRESSES: Written comments should be sent to Emily Menashes, Acting Director, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, Room 13362, Silver Spring, MD 20910. Mark the outside of the envelope "Comments on Horseshoe Crab EFP Proposal." Comments may also be sent via fax to (301) 713–0596. Comments on this notice may also be submitted by e-mail to: *Horseshoe-Crab.EFP@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: Horseshoe Crab EFP Proposal.

FOR FURTHER INFORMATION CONTACT: Brian Hooker, Fishery Management Specialist, (301) 713–2334 ext. 173.

SUPPLEMENTARY INFORMATION:

Background

Limuli Laboratories submitted an application for an EFP on May 14, 2010, to collect up to 10,000 horseshoe crabs for biomedical and data collection purposes from the Reserve. The applicant has applied for, and received, a similar EFP every year from 2001–2009. The current EFP application specifies that: (1) the same methods would be used in 2010 that were used in years 2001–2009, (2) at least 15 percent of the bled horseshoe crabs would be tagged, and (3) there had not been any sighting or capture of marine mammals or endangered species in the trawling nets of fishing vessels engaged in the collection of horseshoe crabs since 1993. The project submitted by Limuli Laboratories would provide morphological data on horseshoe crab catch, would tag caught horseshoe crabs, and would use the blood from the caught horseshoe crabs to manufacture Limulus Amebocyte Lysate (LAL), an important health and safety product used for the detection of endotoxins. The LAL assay is used by medical professionals, drug companies, and pharmacies to detect endotoxins in intravenous pharmaceuticals and medical devices that come into contact with human blood or spinal fluid.

Results of 2009 EFP

No horseshoe crabs were collected from the Reserve by the applicant during the 2009 season. Thus, no results were submitted. The last year in which the applicant actually collected horseshoe crabs authorized under an EFP was 2007. Results from 2007 were published in the **Federal Register** on June 2, 2008 (73 FR 31434), and thus are not repeated here. Data collected under previous EFPs were supplied to NMFS, the Commission, and the State of New Jersey.

Proposed 2010 EFP

Limuli Laboratories proposes to conduct an exempted fishery operation using the same means, methods, and seasons proposed/utilized during the EFPs in 2001–2009. Limuli proposes to continue to tag at least 15 percent of the bled horseshoe crabs as they did in 2007. NMFS would require that the following terms and conditions be met for issuance of the EFP:

1. Limiting the number of horseshoe crabs collected in the Reserve to no more than 500 crabs per day and to a total of no more than 10,000 crabs per year;

2. Requiring collections to take place over a total of approximately 20 days during the months of July, August, September, October, and November. (Horseshoe crabs are readily available in harvestable concentrations nearshore earlier in the year, and offshore in the Reserve from July through November);

3. Requiring that a 5½ inch (14.0 cm) flounder net be used by the vessel to collect the horseshoe crabs. This condition would allow for continuation of traditional harvest gear and adds to the consistency in the way horseshoe crabs are harvested for data collection;

4. Limiting trawl tow times to 30 minutes as a conservation measure to protect sea turtles, which are expected to be migrating through the area during the collection period, and are vulnerable to bottom trawling;

5. Restricting the hours of fishing to daylight hours only, approximately from 7:30 a.m. to 5 p.m. to aid law enforcement;

6. Requiring that the collected horseshoe crabs be picked up from the fishing vessels at docks in the Cape May Area and transported to local laboratories, bled for LAL, and released alive the following morning into the Lower Delaware Bay; and

7. Requiring that any turtle take be reported to NMFS, Northeast Region Assistant Regional Administrator of Protected Resources Division within 24 hours of returning from the trip in which the incidental take occurred.

As part of the terms and conditions of the EFP, for all horseshoe crabs bled for LAL, NMFS would require that the EFP holder provide data on sex ratio and daily harvest. Also, the EFP holder would be required to examine at least 200 horseshoe crabs for morphometric data. Terms and conditions may be added or amended prior to the issuance of the EFP.

The proposed EFP would exempt three commercial vessels from regulations at 50 CFR 697.7(e) and 697.23(f) which prohibit the harvest and possession of horseshoe crabs from the Reserve on a vessel with a trawl or dredge gear aboard.

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

Dated: May 26, 2010.

Carrie Selberg,

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

[FR Doc. 2010–13313 Filed 6–2–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–912

Certain New Pneumatic Off–The-Road Tires from the People's Republic of China: Notice of Decision of the Court of International Trade Not in Harmony

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On May 14, 2010, the United States Court of International Trade ("CIT") sustained the final remand redetermination made by the Department of Commerce ("Department") pursuant to the CIT's remand of the final determination in the antidumping investigation on certain new pneumatic off–the-road tires ("OTR tires") from the People's Republic of China ("PRC"). *See Bridgestone Americas Inc. v. United States*, Consol. Ct. No. 08–00256, Slip Op. 10–55 (Ct. Int'l Trade May 14, 2010) ("*Bridgestone*"). This case arises out of the Department's Final Determination in the antidumping investigation on OTR tires from the PRC. *See Certain New Pneumatic Off–The-Road–Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008) ("*Final Determination*"); *Certain New Pneumatic Off–the-Road Tires from the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less than Fair Value and Antidumping Duty Order*, 73 FR 51624 (September 4, 2008). The final judgment in this case was not in harmony with the Department's July 2008 final determination.

EFFECTIVE DATE: May 24, 2010

FOR FURTHER INFORMATION CONTACT: Lilit Astvatsatrian or Charles Riggle, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482–6412 or (202) 482–0650, respectively.

SUPPLEMENTARY INFORMATION: In July 2008, the Department published in the **Federal Register** the *Final Determination* in the antidumping investigation on OTR tires from the PRC in which it calculated a zero dumping rate for respondent Xugong Tyres Co., Ltd. ("Xugong").

In August 2008, petitioners, Bridgestone Americas, Inc. and Bridgestone Americas Tire Operations, LLC (collectively, "Bridgestone") and Titan Tire Corporation ("Titan"), respectively, filed summons with the CIT challenging the *Final Determination* with respect to Xugong's zero dumping margin. Among their claims, Bridgestone and Titan alleged that the Department erred in its *Final Determination* by treating as indirect materials certain inputs used by Xugong in the production of subject merchandise.

In April 2009, the Department requested a voluntary remand to further explain its determination regarding the classification of the fifteen raw materials reported by Xugong as indirect materials. On August 4, 2009, the CIT remanded this matter to the Department to reconsider whether each of the fifteen inputs was a direct or indirect material, to reopen the record as appropriate, and to recalculate the margin accordingly. *See Bridgestone Americas Inc. v. United States*, Consol. Ct. No. 08–00256, Slip Op. 09–79 (Ct. Int'l Trade Aug. 4, 2009).

After receiving comments on the draft remand results, the Department on January 7, 2010, issued its final remand redetermination in which it treated Xugong's fifteen raw material inputs as direct materials and, thus, recalculated Xugong's margin by adding Xugong's fifteen raw materials as direct material inputs in the calculation of the normal value. As a result of this recalculation, Xugong's dumping rate changed from 0.00 percent to 10.01 percent. *See Bridgestone Americas Inc. v. United States*, Consol. Ct. No. 08–00256, dated January 8, 2010.

On May 14, 2010, the CIT sustained the final redetermination made by the Department pursuant to the CIT's remand of the final determination in the antidumping investigation of the OTR tires from the PRC. *See Bridgestone*, Slip Op. 10–55 at 14.

Timken Notice

In its decision in *Timken Co. v. United States*, 893 F. 2d 337, 341 (Fed. Cir. 1990) ("*Timken*"), the United States Court of Appeals for the Federal Circuit held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended ("the Act"), the Department must publish a notice of a court decision that is not "in harmony" with a Department determination and must suspend liquidation of entries pending a "conclusive" court decision.

The Court's decision in *Bridgestone* on May 14, 2010, constitutes a final decision of that court that is not in harmony with the Department's *Final Determination*. This notice is published in fulfillment of the publication requirements of *Timken* with an effective date of May 24, 2010 (*i.e.*, 10 days following the CIT's ruling). Accordingly, the Department will direct the U.S. Customs and Border Protection ("CBP") effective May 24, 2010, to suspend liquidation of entries of subject merchandise manufactured and exported by Xugong pending the expiration of the period to appeal or pending a final decision on appeal. The Department will issue revised instructions to CBP if the Court's

decision is not appealed or if it is affirmed on appeal.

This notice is issued and published in accordance with section 516A(c)(1) of the Act.

Dated: May 26, 2010.

Paul Piquado,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–13375 Filed 6–2–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 84–21A12]

Export Trade Certificate of Review

ACTION: Notice of Application (#84–21A12) To Amend an Export Trade Certificate of Review Previously Issued to Northwest Fruit Exporters ("NFE").

SUMMARY: The Office of Competition and Economic Analysis ("OCEA") of the International Trade Administration, Department of Commerce, has received an application to amend an Export Trade Certificate of Review ("Certificate"). This notice summarizes the proposed amendment and requests comments relevant to whether the amended Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Joseph Flynn, Director, Office of Competition and Economic Analysis, International Trade Administration, (202) 482–5131 (this is not a toll-free number) or by e-mail at *oetca@ita.doc.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Certificates. A Certificate protects the holder and the members identified in the Certificate from State and Federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Export Trading Company Act of 1982 and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked as privileged or confidential business information will be deemed to be nonconfidential. An original and five (5) copies, plus two (2) copies of the nonconfidential version, should be submitted no later than 20 days after the date of this notice to: Office of Competition and Economic Analysis, International Trade Administration, U.S. Department of Commerce, Room 7021–X, Washington, DC 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the Certificate. Comments should refer to this application as "Export Trade Certificate of Review, application number 84–21A12." The original NFE Certificate (No. 84–00012) was issued on June 11, 1984 (49 FR 24581, June 14, 1984), and last amended on September 16, 2009 (74 FR 48520, September 23, 2009). A summary of the current application for an amendment follows.

Summary of the Application

Applicant: Northwest Fruit Exporters ("NFE"), 105 South 18th Street, Suite 227, Yakima, Washington 98901.

Contact: James R. Archer, Manager to NFE, Telephone: (509) 576–8004.

Application No.: 84–21A12.

Date Deemed Submitted: May 20, 2009.

Proposed Amendment: NFE seeks to amend its Certificate to:

1. Add the following companies as a new "Member" of the Certificate within the meaning of section 325.2(l) of the Regulations (15 CFR 325.2(l)): Hood River Cherry Company, Hood River, OR; Ice Lakes LLC, E. Wenatchee, WA; and JackAss Mt. Ranch, Pasco, WA.

2. Delete the following companies as Members of NFE's Certificate: Poirier Warehouse, Pateros, WA; and Witte Orchards, E. Wenatchee, WA.

Dated: May 26, 2010.

Joseph Flynn,

Director, Office of Competition and Economic Analysis.

[FR Doc. 2010–13123 Filed 6–2–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XW70

Incidental Taking of Marine Mammals; Taking of Marine Mammals Incidental to the Explosive Removal of Offshore Structures in the Gulf of Mexico

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

ACTION: Notice; issuance of a letter of authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) and implementing regulations, notification is hereby given that NMFS has issued a one-year Letters of Authorization (LOA) to take marine mammals incidental to the explosive removal of offshore oil and gas structures (EROS) in the Gulf of Mexico.

DATES: These authorizations are effective from June 1, 2010 through May 31, 2011.

ADDRESSES: The application and LOA are available for review by writing to P. Michael Payne, Chief, Permits, Conservation, and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3235 or by telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**), or online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301–713–2289.

SUPPLEMENTARY INFORMATION: Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (who has delegated the authority to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region, if certain findings are made and regulations are issued. Under the MMPA, the term "take" means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture, or kill any marine mammal.

Authorization for incidental taking, in the form of annual LOAs, may be

granted by NMFS for periods up to five years if NMFS finds, after notice and opportunity for public comment, that the taking will have a negligible impact on the species or stock(s) of marine mammals, and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). In addition, NMFS must prescribe regulations that include permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat (i.e., mitigation), and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating rounds, and areas of similar significance. The regulations also must include requirements pertaining to the monitoring and reporting of such taking. Regulations governing the taking of marine mammals incidental to EROS were published on June 19, 2008 (73 FR 34875), and remain in effect through July 19, 2013. For detailed information on this action, please refer to that **Federal Register** notice. The species that applicants may take in small numbers during EROS activities are bottlenose dolphins (*Tursiops truncatus*), Atlantic spotted dolphins (*Stenella frontalis*), pantropical spotted dolphins (*Stenella attenuata*), Clymene dolphins (*Stenella clymene*), striped dolphins (*Stenella coeruleoalba*), spinner dolphins (*Stenella longirostris*), rough-toothed dolphins (*Steno bredanensis*), Risso's dolphins (*Grampus griseus*), melon-headed whales (*Peponocephala electra*), short-finned pilot whales (*Globicephala macrorhynchus*), and sperm whales (*Physeter macrocephalus*).

Pursuant to these regulations, NMFS has issued an LOA to Ridgelake Energy, Inc. Issuance of the LOA is based on a finding made in the preamble to the final rule that the total taking by these activities (with monitoring, mitigation, and reporting measures) will result in no more than a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on subsistence uses. NMFS also finds that the applicant will meet the requirements contained in the implementing regulations and LOA, including monitoring, mitigation, and reporting requirements.

Dated: May 27, 2010

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–13315 Filed 6–2–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XW78

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 Scientific and Statistical Committee on June 21–22, 2010 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, June 21 at 10 a.m. and Tuesday, June 22, 2010 at 8:30 a.m.

ADDRESSES: *Meeting address*: The meeting will be held at the Eastland Park Hotel, 157 High Street, Portland, ME 04101; telephone: (207) 775–5411; fax: (207) 775–2872.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Monday, June 21, 2010

The Scientific and Statistical Committee (SSC) will consider rules currently used to set Acceptable Biological Catch (ABC) for all/most NEFMC-managed stocks, discuss coordination with the Council relative to the development of the control rules and review the annually compiled list of five-year Council research recommendations.

Tuesday, June 22, 2010

The SSC will review the Ecosystem-Based Fishery Management draft policy paper; review and revise the Red Crab ABC to account for estimates of discards in the fishery and develop a recommendation for an Atlantic Salmon ABC.

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 Paul J. Howard, Executive Director, at 978–465–0492, at least 5 days prior to the meeting date.

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

Dated: May 28, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–13347 Filed 6–2–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XW77

Fisheries of the South Atlantic, Gulf of Mexico, and Caribbean; Southeast Data, Assessment, and Review (SEDAR) Steering Committee Meeting

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

ACTION: Notice of SEDAR Steering Committee Meeting.

SUMMARY: The SEDAR Steering Committee will meet via conference call to discuss assessment projects for 2011. SEE **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR Steering Committee will meet on Monday, June 21, 2010 from 10 a.m. to 12 p.m., EDT.

ADDRESSES: The meeting will be held via conference call. Listening stations are available at the following locations: South Atlantic Fishery Management Council, 4055 Faber Place Drive #201, North Charleston, SC 29405; Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; and Caribbean Fishery Management Council, 268 Muñoz Rivera Ave., Suite 1108, San Juan, Puerto Rico 00918.

FOR FURTHER INFORMATION CONTACT: John Carmichael, Science and Statistics Program Manager, SAFMC, 4055 Faber Place, Suite 201, North Charleston, SC 29405; phone (843) 571–4366 or toll free (866) SAFMC–10; FAX (843) 769–4520.

SUPPLEMENTARY INFORMATION: The South Atlantic, Gulf of Mexico, and Caribbean

Fishery Management Councils; in conjunction with NOAA Fisheries, the Atlantic States Marine Fisheries Commission, and the Gulf States Marine Fisheries Commission; implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks. The SEDAR Steering Committee provides oversight of the SEDAR process, establishes assessment priorities, and provides coordination of assessment and management activities.

During this conference call the Steering Committee will discuss stocks to be assessed as benchmarks and updates for 2011.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the South Atlantic Fishery Management Council office at the address listed above at least 5 business days prior to the meeting.

Dated: May 28, 2010

Tracey L. Thompson

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

[FR Doc. 2010–13343 Filed 6–2–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XW76

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's (Council) VMS/Enforcement Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Monday, June 21, 2010 at 9:30 a.m.

ADDRESSES:

Meeting address: The meeting will be held at the Eastland Park Hotel, 157 High Street, Portland, ME 04101; Telephone:(207) 775–5411; Fax:(207) 775–1066.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978)465–0492.

SUPPLEMENTARY INFORMATION: The items of discussion in the committee's agenda are as follows:

(1) Enforcement of sectors; how to improve dockside monitoring; one landing per calendar day vs. 24 hours; discuss including two state enforcement people on the committee; marking of fixed fishing gear regulations and also discuss possibly reviewing and eliminating unnecessary or duplicative regulations.

(2) Other business

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 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 Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: May 28, 2010

Tracey L. Thompson,

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

[FR Doc. 2010–13342 Filed 6–2–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–965]

Drill Pipe from the People's Republic of China: Postponement of Preliminary Determination of Antidumping Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: June 3, 2010.

FOR FURTHER INFORMATION CONTACT: Matthew Renkey, Toni Dach, or Susan Pulongbarit AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–2312, (202) 482–1655 and (202) 482–4031, respectively.

SUPPLEMENTARY INFORMATION:

Postponement of Preliminary Determination

On January 28, 2010, the Department of Commerce ("the Department") published in the **Federal Register** the initiation of the antidumping investigation on drill *pipe from the People's Republic of China (PRC).* See Drill Pipe from the People's Republic of China: Initiation of Antidumping Duty Investigations, 75 FR 4531 (January 28, 2010) ("*Initiation Notice*").

The Initiation Notice stated that the Department would issue its preliminary determination for this investigation no later than 140 days after the date of issuance of the initiation, in accordance with section 733(b)(1)(A) of the Tariff Act of 1930, as amended ("the Act").[1]

On May 14, 2010, Petitioners, VAM Drilling USA, Inc., Texas Steel Conversion, Inc., Rotary Drilling Tools, TMK IPSCO, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, and AFL–CIO-CLC, requested a 50-day postponement of the preliminary determination pursuant to 19 CFR 351.205(b)(2) and (e). Petitioners requested a postponement of the preliminary determination in order to allow more time to collect and analyze information for the preliminary determination.

For the reasons identified by Petitioners, and because there are no compelling reasons to deny the request, the Department is postponing the deadline for the preliminary determination under section 733(c)(1)(A) of the Act by 50 days from the current deadline of June 16, 2010, to August 5, 2010. The deadline for the final determination will continue to be 75 days after the date of the preliminary determination, unless extended.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

[1] Due to the extended closure of the Government between February 5 and 11, 2010, all deadlines for active cases were tolled by one calendar week. See Memorandum From Ronald Lorentzen, DAS for Import Administration, Regarding Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm, available at http://ia.ita.doc.gov/download/administrative-deadline-tolling-memo-021210.pdf. Accordingly, the current deadline for the Department's preliminary determination was tolled to June 16, 2010.

Dated: May 24, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–13373 Filed 6–2–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–560–802)

Certain Preserved Mushrooms from Indonesia: Notice of Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: David Goldberger or Kate Johnson, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–4136 or (202) 482–4929, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 1, 2010, the Department of Commerce (the Department) published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" of the antidumping duty order on certain preserved mushrooms from Indonesia for the period of review (POR), February 1, 2009, through January 31, 2010. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 75 FR 5037 (February 1, 2010).

On March 1, 2010, in accordance with 19 CFR 351.213(b), the Department received a timely request from Monterey Mushrooms, Inc., a petitioner and a domestic interested party in the above–referenced proceeding, to conduct an administrative review of the sales of PT Eka Timur Raya (ETIRA), PT Indo Evergreen Agro Business Corp., PT Karya Kompos Bagas, and Tuwuh Agung PT. Monterey Mushrooms, Inc. was the only party to request this administrative review.

On March 30, 2010, the Department published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on certain preserved mushrooms from Indonesia with respect to these companies. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 75 FR 15679 (March 30, 2010).

On May 14, 2010, Monterey Mushrooms, Inc. timely withdrew its request for review.

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of notice of initiation of the requested review. Monterey Mushrooms, Inc. withdrew its request for review before the 90-day deadline, and no other party requested an administrative review of the antidumping duty order on certain preserved mushrooms from Indonesia. Therefore, in response to Monterey Mushrooms, Inc.'s withdrawal of its request for review, and pursuant to 19 CFR 351.213(d)(1), the Department is rescinding the administrative review of the antidumping duty order on certain preserved mushrooms from Indonesia for the period February 1, 2009, through January 31, 2010.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of this notice in the **Federal Register**.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is published in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: May 27, 2010.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–13436 Filed 6–2–10; 8:45 am]

BILLING CODE 3510–DS–S

COMMISSION OF FINE ARTS

Notice of Meeting

Established By Congress May 17, 1910.

The next meeting of the U.S. Commission of Fine Arts is scheduled for 17 June 2010, at 10 a.m. in the Commission offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street, NW., Washington DC, 20001–2728. Items of discussion may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our Web site: *http://www.cfa.gov.* Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by e-mailing *staff@cfa.gov;* or by calling 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated: May 26, 2010 in Washington DC.

Thomas Luebke,

AIA Secretary.

[FR Doc. 2010–13176 Filed 6–2–10; 8:45 am]

BILLING CODE 6330–01–M

CONSUMER PRODUCT SAFETY COMMISSION

Notice of Meeting of Chronic Hazard Advisory Panel on Phthalates and Phthalate Substitutes and Opportunity for Public Comment

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of meeting.

SUMMARY: The Consumer Product Safety Commission ("CPSC" or "Commission") announces the second meeting of the Chronic Hazard Advisory Panel (CHAP) on phthalates and phthalate substitutes. The Commission appointed this CHAP to study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles, pursuant to section 108 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) (Pub. L. 110–314). The public may submit written or oral comments on the issues to be considered by the CHAP.

DATES: The opportunity to present oral comments will be on July 26, 2010, from 10 a.m. to 5 p.m. The remainder of the meeting will be from 8:30 a.m. to 5 p.m. on July 27 and from 8:30 a.m. to 4 p.m. on July 28, 2010. Requests to present oral comments must be filed with the Office of the Secretary no later than July 1, 2010. Written comments, and a written copy of the text of the oral comments, must be received no later than July 12, 2010. Commenters should limit their presentations to approximately 15 minutes, exclusive of any periods of questioning by the members of the CHAP or the Consumer Product Safety Commission (CPSC) staff. The CHAP may further limit the time for any presentation and to impose restrictions to avoid excessive duplication of presentations.

ADDRESSES: The meeting will be in the fourth floor hearing room on July 26 and 27 and in room 410 on July 28, 2010, in the Commission's offices at 4330 East West Highway, Bethesda, Maryland. Written comments, or requests to present oral comments and the written text of such comments, should be captioned "CHAP on Phthalates" and sent by electronic mail (e-mail) to *cpsc-os@cpsc.gov,* or mailed or delivered to the Office of the Secretary, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, Maryland 20814.

Online Registration and Webcast: Members of the public who wish to attend the meeting are requested to preregister online at *http://www.cpsc.gov/cgibin/chap.aspx*. This meeting will also be available live via webcast on July 26 and July 27, and by prerecorded webcast on July 28, 2010, at *http://www.cpsc.gov/webcast*. Registration is not necessary to view the webcast.

FOR FURTHER INFORMATION CONTACT: Concerning requests and procedures for oral presentations of comments: Rockelle Hammond, Consumer Product Safety Commission, Bethesda, MD 20814; *telephone:* (301) 504–6833; e-mail *cpscos@cpsc.gov. For all other matters:* Michael Babich, Directorate for Health Sciences, Consumer Product Safety Commission, Bethesda, MD 20814; telephone (301) 504–07253; e-mail *mbabich@cpsc.gov.*

SUPPLEMENTARY INFORMATION: The Commission has previously investigated potential risks posed to children from phthalate plasticizers, especially di (2-ethylhexyl) phthalate (DEHP) and diisononyl phthalate (DINP), which were used to soften some children's teethers, rattles, and toys made from polyvinyl chloride (PVC). Phthalates can leach from such products when they are mouthed by children, causing some phthalates to be ingested. In addition, children and adults can be exposed to phthalates from many sources, including consumer products, food, cosmetics, medical devices, and the environment. Certain phthalates have been shown to cause adverse health effects, including birth defects, in laboratory animals. Section 108 of the CPSIA permanently prohibits the sale of any "children's toy or child care article" containing more than 0.1 percent of each of three specified phthalates—di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), and benzyl butyl phthalate (BBP). Section 108 of the CPSIA also prohibits on an interim basis the sale of any "children's toy that can be placed in a child's mouth" or "child care articles" containing more than 0.1 percent of each of three additional phthalates—diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), and di-n-octyl phthalate (DnOP).

Section 108 of the CPSIA requires the Commission to convene a CHAP "to study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles." The CPSIA requires the CHAP to complete an examination of the full range of phthalates that are used in products for children and to: (i) Examine all of the potential health effects (including endocrine disrupting effects) of the full range of phthalates; (ii) consider the potential health effects of each of these phthalates both in isolation and in combination with other phthalates; (iii) examine the likely levels of children's, pregnant women's, and others' exposure to phthalates, based on a reasonable estimation of normal and foreseeable use and abuse of such products; (iv) consider the cumulative effect of total exposure to phthalates, both from children's products and from other sources, such as personal care products; (v) review all relevant data, including the most recent, best-available, peer-reviewed, scientific studies of these phthalates and phthalate alternatives that employ objective data collection practices or employ other objective methods; (vi) consider the health effects of phthalates not only from ingestion but also as a result of dermal, hand-to-mouth, or other exposure; (vii) consider the level at which there is a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals and their offspring, considering the best available science, and using sufficient safety factors to account for uncertainties regarding exposure and susceptibility of children, pregnant women, and other potentially susceptible individuals; and (viii) consider possible similar health effects of phthalate alternatives used in children's toys and child care articles.

The CHAP's examination must be conducted de novo, and the statute specifies completion of its examination within 18 months of appointment of the CHAP. The CHAP must review prior work on phthalates by the Commission, but the Commission's prior work is not to be considered determinative. Within 180 days after completing its examination, the CHAP shall report to the Commission the results of the examination and shall make recommendations to the Commission regarding any phthalates (or combinations of phthalates or alternatives to phthalates) in addition to those permanently banned by the CPSIA that the CHAP determines should be declared hazardous substances.

The first meeting of the CHAP was on April 14–15, 2010. The second meeting of the CHAP will be on July 26–28, 2010, in the fourth floor hearing room at the Commission's offices in Bethesda, MD (*see* address above). The CHAP is seeking public comment on issues relating to the hazard, exposure, and risk posed by phthalates and phthalate substitutes from all sources of exposure, and especially in children's products. The CHAP is especially interested in comments and data pertaining to:

1. Information on current and anticipated future uses of phthalates and phthalate substitutes in products, including market data, production levels, and the range of uses of specific phthalates and phthalate substitutes in different product types.

2. Data on the types and levels of phthalates and phthalate substitutes found in consumer products, cosmetics, pharmaceutical drugs, medical devices, food, food supplements, food packaging, and pesticides.

3. Information on the relative importance of different sources, routes,

and pathways of exposure to phthalates in the general population, expectant mothers, and children. For example, what are the relative contributions of exposure from diet, consumer products, ambient air, and other sources, which may differ depending on the particular phthalate and the exposed population?

4. Data on consumer use patterns including the use of cosmetics and consumer products that may contain phthalates.

5. Data on children's activity patterns, including mouthing activity, exposure to household dust, dermal exposure to toys, and other potential child-specific exposure pathways.

6. Information relating to human exposure to phthalates and phthalate substitutes, including migration data, levels in environmental media (ambient and indoor air, water, soil, household dust), dermal exposure, oral exposure, and bioavailability.

7. New, unpublished, or soon-to-be published data on the types and levels of phthalates, phthalate substitutes, or their metabolites in human urine, blood, milk, or other biological media.

8. Information relating to metabolism or pharmacokinetic modeling that could be used to estimate human exposure from biomonitoring studies.

9. Toxicity data on the full range of phthalates and phthalate substitutes in commercial use, especially unpublished or soon-to-be-published studies.

10. Human data on the toxicity of phthalates, including epidemiological and clinical studies, especially unpublished or soon-to-be published studies.

11. Information on the relative sensitivity of potentially vulnerable populations, including the fetus, young children, and expectant mothers, and whether there are any other vulnerable populations that should be considered.

12. Information relating to assessing the cumulative (combined) risk from multiple phthalates, including dose response data, methodology, which health endpoint (or endpoints) is the most relevant to human risk assessment, and which phthalate substitutes or other compounds may contribute to the combined risk.

Any information submitted to CPSC in response to this request will become part of the public record. The CHAP is especially interested in unpublished studies relating to toxicity or exposure. However, the CHAP will not consider summaries of toxicological studies prepared by chemical manufacturers as substitutes for the complete studies.

There will be an opportunity for oral comments on July 26, 2010, from 10 a.m. to 5 p.m. Persons wishing to present oral comments should file a request with the Commission's Office of the Secretary no later than July 1, 2010, and submit the text of their comments not later than July 12, 2010. Commenters should limit their presentations to approximately 15 minutes, exclusive of any periods of questioning by the members of the CHAP or the CPSC staff. The CHAP may further limit the time for any presentation and to impose restrictions to avoid excessive duplication of presentations. Interested persons may also file written comments with the CHAP. Written comments must be filed with the Office of the Secretary no later than July 12, 2010. The remainder of the CHAP meeting will be from 8:30 a.m. to 5 p.m. on July 27 and from 8:30 a.m. to 4 p.m. on July 28, 2010. During this part of the meeting, the CHAP will discuss issues and the report it will write.

Dated: May 28, 2010

Alberta E. Mills,

Acting Secretary, Consumer Product Safety Commission.

[FR Doc. 2010–13389 Filed 6–2–10; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before August 2, 2010.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 28, 2010.

Sheila Carey,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Postsecondary Education

Type of Review: Revision.

Title: FIPSE Performance Reports.

Frequency: Annually.

Affected Public: Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 901.

Burden Hours: 10,426.

Abstract: This collection includes an annual and a final performance report for use with all of the following FIPSE programs: Comprehensive (84.116B), EU–U.S. (84.116J), U.S.-Brazil (84.116M), North America (84.116N), and U.S.-Russia (84.116S) Programs. Also included is an annual and a final performance report for Congressionally-Directed grants (earmarks) (84.116Z). A total of five (5) forms comprise this collection. We need to collect this data in order to evaluate and assess each grantee for continued funding and assessment of their project.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4304. When you access the information collection, click on "Download Attachments" to view.

Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–13363 Filed 6–2–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–26–000]

Kinder Morgan Border Pipeline LLC; Notice of Baseline Filing

May 27, 2010.

Take notice that on May 24, 2010, Kinder Morgan Border Pipeline LLC submitted a baseline filing of its Statement of Operating Conditions for transportation services provided under section 311 of the Natural Gas Policy Act of 1978 ("NGPA").

Any person desiring to participate in this rate proceeding must file a motion 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). 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 date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern time on Monday, June 7, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–13367 Filed 6–2–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–27–000]

Atmos Pipeline—Texas; Notice of Baseline Filing

May 27, 2010.

Take notice that on May 27, 2010, Atmos Pipeline—Texas submitted a baseline filing of its Statement of Operating Conditions for interruptible transportation services provided under section 311 of the Natural Gas Policy Act of 1978 ("NGPA").

Any person desiring to participate in this rate proceeding must file a motion 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). 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 date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern time on Monday, June 7, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–13366 Filed 6–2–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR08–17–002]

Bay Gas Storage Company, Ltd.; Notice of Compliance Filing

May 27, 2010.

Take notice that on May 21, 2010, Bay Gas Storage Company, Ltd (Bay Gas) filed to comply with the April 15, 2010, Commission Order which directed Bay Gas to file a mechanism whereby it will implement the crediting of LAUF charges to Florida Gas Transmission Co. Bay Gas requests an effective date of May 1, 2010.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at

http://www.ferc.gov. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern time on Monday, June 7, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–13365 Filed 6–2–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2594–013–MT]

Northern Lights, Inc.; Notice of Availability of Environmental Assessment

May 27, 2010.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47879), the Office of Energy Projects has reviewed the application for a new license for the existing Lake Creek Hydroelectric Project, located on Lake Creek in Lincoln County, Montana, near the City of Troy and prepared a draft environmental assessment (EA). The project does not occupy Federal lands.

The draft EA contains the staff's analysis of the potential environmental impacts of the project and concludes that licensing the project would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the draft EA is on file with the Commission and is available for public inspection. The draft EA 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. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the issuance date of this notice, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1–A, Washington, DC 20426. Please affix "Lake Creek Project No. 2594–013" to all comments. Comments may be filed electronically via Internet in lieu of paper.

The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "eFiling" link. For further information, contact Shana Murray at (202) 502–8333.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–13368 Filed 6–2–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD10–11–000]

Frequency Regulation Compensation in the Organized Wholesale Power Markets; Notice Establishing Date for Comments

May 27, 2010.

On May 26, 2010, Commission staff convened a technical conference regarding frequency regulation in the organized wholesale power markets, as previously announced.[1]

Entities wishing to submit further, written comments regarding the matters discussed at the technical conference should submit their comments in this docket on or before June 16, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–13371 Filed 6–2–10; 8:45 am]

BILLING CODE 6717–01–P

[1] *Notice of Technical Conference re Frequency Compensation in the Organized Wholesale Power Markets,* 75 FR 23,759, as supplemented by *Supplemental Notice of Technical Conference re Frequency Compensation in the Organized Wholesale Power Markets,* issued April 27, 2010.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP10–441–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Request Under Blanket Authorization

May 27, 2010.

Take notice that on May 24, 2010, Transcontinental Gas Pipe Line Company, LLC (Transco), Post Office Box 1396, Houston, Texas 77251, filed in Docket No. CP10–441–000, an application pursuant to sections 157.205, 157.208, and 157.212 of the Commission's Regulations under the Natural Gas Act (NGA) as amended, to construct and operate a new interconnection on Transco's Southwest Louisiana Lateral to allow Transco to receive natural gas and regasified liquefied natural gas (LNG) in Johnsons Bayou, Cameron Parish, Louisiana, under Transco's blanket certificate issued in Docket No. CP82–426–000,[1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Transco proposes to construct and operate a delivery interconnect off its Southwest Louisiana Lateral to allow Transco to receive natural gas and regasified LNG either from or via Natural Gas Pipeline Company of America (NGPL). Transco states that it would design, construct, own, and operate one 30-inch by 16-inch hot tap fitting with one 16-inch tap assembly, flow and pressure control facility, overpressure protection valve and controls, a 12-foot by 8-foot skid mounted instrument building, and other such other appurtenant facilities required to effect the interconnect to receive up to 200 MMcf per day of natural gas in Transco's Zone 2. Transco also states that NGPL would reimburse Transco for the estimated $1,140,000 construction cost of the proposed facilities.

Any questions concerning this application may be directed to Bela Patel, Transcontinental Gas Pipe Line Company, LLC, Post Office Box 1396, Houston, Texas 77251 or via telephone at (713) 215–2659.

This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For

[1] 20 FERC ¶ 62,420 (1982).

assistance, please contact FERC Online Support at FERC *OnlineSupport@ferc.gov* or call toll-free at (866)206–3676, or, for TTY, contact (202)502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–13370 Filed 6–2–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12632–001]

East Texas Electric Cooperative, Inc. (Cooperative); Notice Soliciting Comments and Final Recommendations, Terms and Conditions, and Prescriptions

May 27, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License—Existing Dam.

b. *Project No.:* P–12632–001.

c. *Date Filed:* March 31, 2009.

d. *Applicant:* East Texas Electric Cooperative, Inc. (Cooperative).

e. *Name of Project:* Lake Livingston Hydroelectric Project.

f. *Location:* On the Trinity River, in San Jacinto, Polk, Trinity, and Walker Counties, Texas. The project would not occupy any Federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Edd Hargett, East Texas Electric Cooperative, Inc., 2905 Westward Drive, P.O. Box 631623, Nacogdoches, TX 75963; (936) 560–9532; *eddh@gtpower.com.*

i. *FERC Contact:* Sarah Florentino at (202) 502–6863, or *sarah.florentino@ferc.gov.*

j. Deadline for filing comments and recommendations, terms and conditions, and prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *(http://www.ferc.gov/docs-filing/ferconline.asp)* under the "eFiling" link. For a simpler method of submitting text only comments, click on "Quick Comment." For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. *Project Description:* The proposed project would use the following existing facilities: (1) The Trinity River Authority's (TRA) existing 14,400-foot-long (approximate) Lake Livingston dam, which has a crest elevation of 145.0 feet mean sea level (msl) and consists of (a) A basic earth embankment section, (b) outlet works, and (c) a spillway; and (2) the 83,000-acre Lake Livingston, which has a normal water surface elevation of 131.0 feet msl and gross storage capacity of 1,750,000 acre-feet.

In addition to the existing structures, the proposed project would consist of the following new facilities: (1) An intake structure and headrace channel approximately 300 feet long; (2) three steel penstocks, about 12 feet in diameter and 750 feet in length; (3) a powerhouse containing three generating units, having a total installed capacity of 24 MW; (4) an approximate 1,200-feet-long tailrace channel; (5) an approximate 2.8-mile-long, 138-kilovolt transmission line interconnecting the project with Entergy's existing Rich substation near Goodrich; and (6) an electric switchyard and other appurtenant facilities. The project would have an estimated annual generation of 124 gigawatt-hours, which the Cooperative would sell at wholesale to its constituent electric cooperatives.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the "eLibrary" link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

All filings must: (1) Bear in all capital letters the title "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (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 submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–13369 Filed 6–2–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2009–0105; FRL–9158–7]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Voluntary Cover Sheet for TSCA Submissions; EPA ICR No. 1780.05, OMB Control No. 2070–0156

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: Voluntary Cover Sheet for TSCA Submissions; ICR No. 1780.05, OMB No. 2070–0156. The ICR, which is abstracted below, describes the nature of the information collection activity and its expected burden and costs.

DATES: Additional comments may be submitted on or before July 6, 2010.

ADDRESSES: Submit your comments, referencing docket ID Number EPA–HQ–OPPT–2009–0105 to (1) EPA online using *http://www.regulations.gov* (our preferred method), by email to *oppt.ncic@epa.gov* or by mail to: Document Control Office (DCO), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, Mail Code: 7407T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Barbara Cunningham, Director, Environmental Assistance Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, Mailcode: 7408–M, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–554–1404; e-mail address: *TSCA–Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On October 7, 2009 (74 FR 51580), EPA sought comments on this renewal ICR pursuant to 5 CFR 1320.8(d). EPA received no comments during the comment period. Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OPPT–2009–0105, which is available for online viewing at *http://www.regulations.gov*, or in person inspection at the OPPT Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Pollution Prevention and Toxics Docket is 202–566–0280.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in *http://www.regulations.gov.* The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in *http://www.regulations.gov.* For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: Voluntary Cover Sheet for TSCA Submissions.

ICR Numbers: EPA ICR No. 1780.05, OMB Control No. 2070–0156.

ICR Status: This is a request to renew an existing approved collection. This ICR is scheduled to expire on July 31, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB.

Abstract: The Toxic Substances Control Act (TSCA) requires industry to submit information and studies for existing chemical substances under sections 4, 6, and 8, and requests voluntary submission of such information under the Voluntary Children's Chemical Evaluation Program (VCCEP). EPA typically receives thousands of such submissions each year; each submission represents on average three studies. In addition, EPA can impose specific data call-ins on industry.

As a follow-up to industry experience with a 1994 TSCA data call-in, the Chemical Manufacturers Association (CMA, now known as the American Chemistry Council [ACC]), the Specialty Organics Chemical Manufacturers Association (SOCMA), and the Chemical Industry Data Exchange (CIDX), in cooperation with EPA, took an interest in pursuing electronic transfer of TSCA summary data and of full submissions to EPA. In particular, ACC developed a standardized cover sheet for voluntary use by industry as a first step to an electronic future and to begin familiarizing companies with standard requirements and concepts of electronic transfer. This form is designed for voluntary use as a cover sheet for submissions of information under TSCA sections 4, 8(d), 8(e) and VCCEP. The cover sheet facilitates submission of information by displaying certain basic data elements, permitting EPA more easily to identify, log, track, distribute, review and index submissions, and to make information publicly available more rapidly and at reduced cost, to the mutual benefit of both the respondents and EPA.

Responses to the collection of information are voluntary. Respondents may claim all or part of a notice confidential. EPA will disclose information that is covered by a claim of confidentiality only to the extent permitted by, and in accordance with, the procedures in TSCA section 14 and 40 CFR part 2.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.5 hours per response. Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install and utilize technology and systems for the purposes of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of

information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Entities potentially affected by this action are companies that manufacture, process, use, import or distribute in commerce chemical substances that are subject to reporting requirements under sections 4, 8(d) or 8(e) of TSCA, or are subject to voluntary reporting under the Voluntary Children's Chemical Evaluation Program (VCCEP).

Frequency of Collection: On occasion.

Estimated average number of responses for each respondent: 1.46.

Estimated No. of Respondents: 831.

Estimated Total Annual Burden on Respondents: 607 hours.

Estimated Total Annual Costs: $35,716.

Changes in Burden Estimates: There is a decrease of 454.5 hours (from 1,061 hours to 607 hours) in the total estimated respondent burden compared with that identified in the information collection most recently approved by OMB. This reflects a decrease in the estimated number of submissions, continuing the trend that was reported in the prior ICR renewal.

Dated: May 27, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–13385 Filed 6–2–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9158–8]

Science Advisory Board Staff Office; Notification of a Public Meeting of the SAB Lead Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public meeting of the SAB Lead Review Panel to provide a consultation on EPA's draft technical analyses that will be used to support the development of lead-based paint dust hazard standards.

DATES: There will be a public meeting held on July 6, 2010 from 9 a.m. to 5 p.m. (Eastern Time) and July 7, 2010 from 9 a.m. to 12 p.m. (Eastern Time).

ADDRESSES: The face-to-face meeting on July 6–7, 2010 will be held at the St. Regis Washington, 923 16th Street, NW., Washington, DC 20006; telephone (202) 638–2626.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to obtain information concerning the public meeting may contact Mr. Aaron Yeow, Designated Federal Officer (DFO), EPA Science Advisory Board Staff Office (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; by telephone/voice mail at (202) 343–9878 or at *yeow.aaron@epa.gov.* General information about the SAB, as well as any updates concerning the meeting announced in this notice, may be found on the EPA Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2, notice is hereby given that the SAB Lead Review Panel will hold a public face-to-face meeting to provide a consultation on EPA's draft technical analyses that will be used to support the development of lead-based paint dust hazard standards. The SAB was established pursuant to 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under FACA. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Background: Human exposure to lead may cause a variety of adverse health effects, particularly in children. EPA's Office of Pollution Prevention and Toxics (OPPT) regulates toxic substances, such as lead, through the Toxic Substances Control Act (TSCA). In 2001, EPA established standards for lead-based paint hazards, which include lead in residential dust. OPPT is developing draft technical analyses that will be used to support possible revision of existing residential lead-based paint dust hazard standards and the development of lead-based paint dust hazard standards for public and commercial buildings. In the future, EPA will also develop draft technical analyses to support the development of lead-safe work practice standards for renovations of public and commercial buildings. OPPT has requested that the SAB conduct a review of these draft technical analyses.

In response to OPPT's request, the SAB Staff Office solicited nominations of experts **[Federal Register** Notice dated February 5, 2010 (75 FR 6030–6031)] and formed a review panel for Lead. The panel will provide an initial consultation on EPA's draft technical analyses which will be used to support the development of lead-based paint dust hazard standards, followed by a peer review of these technical analyses later in the year. In the future, the panel will also review other EPA draft technical analyses that will be used to support the development of lead-safe work practice standards for renovations of public and commercial buildings. For this initial consultation, the panel is being asked to provide recommendations on the draft approach for developing the hazard standards for floors and window sills in residences and public and commercial buildings including: Selection of health endpoint(s), estimation of lead concentrations in environmental media, lead exposure assessment, conversion of dust loading to dust concentration, and blood lead modeling.

Availability of Meeting Materials: Agendas and materials in support of this meeting will be placed on the EPA Web site at *http://www.epa.gov/sab* in advance of the meeting. For technical questions and information concerning EPA's draft document, please contact Dr. Jennifer Seed at (202) 564–7634, or *seed.jennifer@epa.gov.*

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Members of the public can submit comments for a federal advisory committee to consider as it develops advice for EPA. They should send their comments directly to the Designated Federal Officer for the relevant advisory committee. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public face-to-face meeting will be limited to five minutes, with no more than a total of one hour for all speakers. Each person making an oral statement should consider providing written comments as well as their oral statement so that the points presented orally can be expanded upon in writing. Interested parties should contact Mr. Aaron Yeow, DFO, in writing (preferably via e-mail) at the contact information noted above by June 29, 2010 for the face-to-face meeting, to be placed on the list of public speakers. *Written Statements:* Written statements should be supplied to the DFO via email at the contact information noted above by June 29, 2010 for the face-to-face meeting so that

the information may be made available to the Panel members for their consideration. Written statements should be supplied in one of the following electronic formats: Adobe Acrobat PDF, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format. Submitters are requested to provide versions of signed documents, submitted with and without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Mr. Aaron Yeow at (202) 343–9878 or *yeow.aaron@epa.gov.* To request accommodation of a disability, please contact Mr. Yeow preferably at least ten days prior to each meeting to give EPA as much time as possible to process your request.

Dated: May 26, 2010,

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Staff Office.

[FR Doc. 2010–13386 Filed 6–2–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested

May 24, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 – 3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for 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 Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before July 6, 2010. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page http://reginfo.gov/public/do/PRAMain, (2) look for the section of the web page called "Currently Under Review", (3) click on the downward–pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214. For additional information or copies of the information collection(s), contact Judith B. Herman, OMD, 202–418–0214 or email judith–b.herman@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0742.

Title: Sections 52.21 through 52.33, Telephone Number Portability (47 CFR Part 52, Subpart C) and CC Docket No. 95–116.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for–profit.

Number of Respondents and Responses: 3,616 respondents; 10,001,890 responses.

Estimated Time per Response: 4 minutes – 410 hours.

Frequency of Response: One time and on occasion reporting requirements and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. section 1, 2, 3, 251 and 332 of the Communications Act of 1934, as amended.

Total Annual Burden: 672,516 hours.

Total Annual Cost: $13,424,320.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information to the Commission. If the Commission requests respondents to submit information which the respondents believe is confidential, respondents may request confidential treatment under 47 CFR 0.459 of the Commission rules.

Needs and Uses: The Commission will submit this expiring information collection (IC) as a revision to the Office of Management and Budget (OMB) to obtain the full three year clearance from them. The Commission has changed the reporting requirements and significantly increased the estimated hour and cost burdens. This increase is based on 1,626 carriers that engage in simple intermodal and wireline–to–wireline ports. We estimate that 1,626 carriers will complete an average of 6,150 ports per year with an average of 410 hours per response which results in 666,666 hours of additional burden to this IC and $13,333,320 in additional annual costs.

The Commission is revising this IC by adding standardized local service request data fields. Section 251(b)(2) of the Telecommunications Act of 1996 requires LECs to "provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." Through the Local Number Portability (LNP) process, consumers have the ability to retain their phone number when switching telecommunications service providers, enabling them to choose a provider that best suits their needs and enhancing competition. In the Porting Internal Order and Further Notice, the Commission mandated a one business day porting interval for simple wireline–to–wireline and intermodal port requests. The information collected in the standard local service request data fields is necessary to complete simple wireline–to–wireline and intermodal ports within the one business day porting interval mandated by the Commission and will be used to

comply with section 251 of the Telecommunications Act of 1996.

Federal Communications Commission.

Marlene H. Dortch,

Secretary,

Office of the Secretary,

Office of Managing Director.

[FR Doc. 2010–13321 Filed 6–2–10; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

May 27, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 – 3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, and (e) 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 Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 2, 2010. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214. For additional information, contact Judith B. Herman, OMD, 202–418–0214 or email judith–b.herman@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0799.

Title: FCC Ownership Disclosure Information for the Wireless Telecommunications Services.

Form No.: FCC Form 602.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit, not–for–profit institutions, and state, local or tribal government.

Number of Respondents and Responses: 4,115 respondents; 5,215 responses.

Estimated Time Per Response: .5 – 1.5 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 4(i), 303(g), 303(r) and 332(c)(7).

Total Annual Burden: 5,215 hours.

Total Annual Cost: $508,200.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: Respondents may request that material or information submitted to the Commission be withheld from public inspection pursuant to 47 CFR 0.459 of the Commission's rules. This general rule governs requests to withhold from public inspection information submitted to the Commission.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this comment period to obtain the full three year clearance from them. There is no change in the Commission's burden estimates. There is no change to the reporting and/or third party disclosure requirements.

The purpose of the FCC Form 602 is to obtain the identity of the filer and to elicit information required by Section 1.2112 of the Commission's rules regarding: 1) persons or entities holding a 10 percent or greater direct or indirect ownership interest or any general partners in a general partnership holding a direct or indirect ownership interest in the applicant ("Disclosable Interest Holders"; and 2) all FCC–regulated entities in which the filer or any of its Disclosable Interest Holders owns a 10 percent or greater interest.

The data collected on the FCC Form 602 includes the FCC Registration Number (FRN), which serves as a "common link" for all filings an entity has with the Commission. The Debt Collection Improvement Act of 1996 requires that entities filing with the Commission use a FRN. The FCC Form 602 was designed for, and must be filed electronically by, all licensees that hold licenses in auctionable services.

Federal Communications Commission.

Marlene H. Dortch,

Secretary,

Office of the Secretary,

Office of Managing Director.

[FR Doc. 2010–13325 Filed 6–2–10 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

May 27, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 – 3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, and (e) 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 Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 2, 2010. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214. For additional information, contact Judith B. Herman, OMD, 202–418–0214 or email judith–b.herman@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0798.

Title: FCC Application for Radio Service Authorization: Wireless Telecommunications Bureau and Public Safety Homeland Security Bureau.

Form No.: FCC Form 601.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households, business or other for–profit, not–for–profit institutions, and state, local or tribal government.

Number of Respondents and Responses: 253,120 respondents, 253,120 responses.

Estimated Time Per Response: .50 – 1.25 hours.

Frequency of Response: On occasion and every ten year reporting requirements, third party disclosure requirement and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 151, 152, 154(i), 155(c), 157, 201, 202, 208, 214, 301, 302a, 303, 307, 308, 309, 310, 311, 314, 316, 319, 324, 331, 332, 333, 336, 534 and 535.

Total Annual Burden: 221,780 hours.

Total Annual Cost: $55,410,000.

Privacy Act Impact Assessment: Yes. Records may include information about individuals or households, e.g., personally identifiable information or PII, and use(s) and disclosure of this information is governed by the requirements of a system of records notice or "SORN", FCC/WTB–1, "Wireless Services Licensing Records." There are no additional impacts under the Privacy Act.

Nature and Extent of Confidentiality: Respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission is submitting this information collection to the Office of Management and Budget (OMB) after this comment period in order to obtain the full three year clearance from them. There is no change to the Commission's estimated burden.

The Commission is revising this information collection due to an increase in the filing fees associated with the FCC Form 601. The annual cost on the respondent has increased by $4,746,000. This cost was previously estimated at $50,664,000.

The FCC Form 601 is a consolidated, multi–part application form, or "long form", that is used for general market–based licensing and site–by–site licensing for wireless telecommunications and public safety services filed through the Commission's Universal Licensing System (ULS). FCC Form 601 is composed of a main form that contains the administrative information and a series of schedules used for filing technical and other information. Respondents are encourages to submit FCC Form 601 electronically and are required to do so when submitting FCC Form 601 to apply for an authorization for which the applicant is the winning bidder in a spectrum auction.

Federal Communications Commission.

Marlene H. Dortch,

Secretary,

Office of the Secretary,

Office of Managing Director.

[FR Doc. 2010–13324 Filed 6–2–10; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comments Requested

May 26, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 – 3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, and (e) 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 Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 2, 2010. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or email to Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov and Cathy.Williams@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Cathy Williams on (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0179.

Title: Section 73.1590, Equipment Performance Measurements.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for–profit entities; Not–for–profit institutions.

Number of Respondents and Responses: 13,049 respondents and 13,049 responses.

Estimated Time per Response: 0.5 –18 hours.

Frequency of Response: Recordkeeping requirement.

Total Annual Burden: 12,335 hours.

Total Annual Cost: None.

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: No need for confidentiality required with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 73.1590(d) states the data required by paragraphs (b) and (c) of this section, together with a description of the equipment and procedure used in making the measurements, signed and dated by the qualified person(s) making the measurements, must be kept on file at the transmitter or remote control point for a period of two years, and on request must be made available during that time to duly authorized representatives of the FCC.

Federal Communications Commission.

Marlene H. Dortch,

Secretary,

Office of the Secretary,

Office of Managing Director.

[FR Doc. 2010–13322 Filed 6–2–10; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

May 27, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 – 3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, and (e) ways to further reduce the information collection burden for 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 Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 2, 2010. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214. For additional information, contact Judith B. Herman, OMD, 202–418–0214, or email judith–b.herman@fcc.gov].

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1042.

Title: Request for Technical Support – Help Request Form.

Form No.: N/A – electronic support form.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households; business or other for–profit, not–for–profit institutions, and state, local or tribal government.

Number of Respondents and Responses: 36,300 respondents, 36,300 responses.

Estimated Time Per Response: 8 minutes.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Voluntary. There is no statutory authority for this information collection.

Total Annual Burden: 4,840 hours.

Total Annual Cost: $387,200.

Privacy Act Impact Assessment: Yes.

Nature and Extent of Confidentiality: Respondents may request materials or information submitted to the Commission be withheld from pubic inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this comment period to obtain the full three year clearance from them. There is no change in the Commission's burden or cost estimates. There is no change in the reporting requirement because the Commission is requesting an extension or renewal of this information collection.

The FCC's Wireless Telecommunications Bureau (WTB) maintains Internet software used by the public to apply for licenses, participate in auctions for spectrum, and maintain license information. In this mission, WTB has a "help desk" that answers questions related to these systems as well as resetting and/or issuing user passwords for access to these systems. The form currently is available on the website <http://esupport.fcc.gov/request.html> under this OMB control number.

The form electronically categories requests to allow for more efficient skill routing internally and continuing streamlining processes within the Commission. This increases the speed of disposal of these requests.

Customers may check the status of their request using a "request number" given to the user upon submission of the request on the website. This status include then name/number of the agent assigned to the ticket, and the ticket number. No privileged or confidential information is retrievable by this form.

Records may include information about individuals or households, and the use(s) and disclosure of this information is governed by the requirements of a system of records, FCC/WTB–7, "Remedy Action Request System (RARS)". There are no additional impacts under the Privacy Act.

Federal Communications Commission.

Marlene H. Dortch,

Secretary,

Office of the Secretary,

Office of Managing Director.

[FR Doc. 2010–13323 Filed 6–2–10; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

Radio Broadcasting Services; AM or FM Proposals To Change The Community of License

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The following applicants filed AM or FM proposals to change the community of license: CEDAR COVE BROADCASTING, INC., Station KGQD, Facility ID 175363, BMPED–20100510ABP, From FRASER, CO, To SILVERTHORNE, CO; CHURCH PLANTERS OF AMERICA, Station

NEW, Facility ID 173562, BMPED–20100426ADA, From DANBURY, NC, To MADISON, NC; ENTERPRISE COPORATION OF THE DELTA, Station NEW, Facility ID 175323, BMPED–20100412ACA, From DELHI, LA, To LAKE PROVIDENCE, LA; ENTERTAINMENT MEDIA TRUST, DENNIS J. WATKINS, TRUSTEE, Station WQQW, Facility ID 90598, BP–20100510ATN, From HIGHLAND, IL, To BELLEVILLE, IL; FULLER BROADCASTING INTERNATIONAL, LLC, Station WWRX, Facility ID 58731, BPH–20100426ADS, From PAWCATUCK, CT, To LEDYARD, CT; JODESHA BROADCASTING, INC., Station KLSY, Facility ID 166011, BPH–20100406AAZ, From SOUTH BEND, WA, To COSMOPOLIS, WA; MOUNT WILSON FM BROADCASTERS, INC., Station NEW, Facility ID 183344, BNPH–20091019ABE, From RIDGECREST, CA, To JOHNANNESBURG, CA; MULTICULTURAL RADIO BROADCASTING LICENSEE, LLC, Station KAHZ, Facility ID 61814, BMJP–20100504ALA, From POMONA, CA, To YORBA LINDA, CA; NORTHEASTERN PENNSYLVANIA EDUCATIONAL TELEVISION ASSOCIATION, Station NEW, Facility ID 177089, BMPED–20100407AAB, From SYLVANIA, PA, To MAINESBURG, PA; PERCEPTION MEDIA, INC., Station WOWZ, Facility ID 8075, BP–20100510AKO, From APPOMATTOX, VA, To ROANOKE, VA; RED WOLF BROADCASTING CORPORATION, Station WBMW, Facility ID 55404, BPH–20100426ADR, From LEDYARD, CT, To PAWCATUCK, CT; ROBERT CLINT CRAWFORD D/B/A SOUTHWEST RADIO BROADCASTING, Station KKLB, Facility ID 166036, BPH–20100414AAW, From MADISONVILLE, TX, To KURTEN, TX; THE ALAMO NAVAJO SCHOOL BOARDS, INC., Station KABR, Facility ID 65389, BP–20100222ADG, From ALAMO COMMUNITY, NM, To ISLETA, NM; WESTPORT RADIO PARTNERS, LLC, Station WXMR, Facility ID 166029, BMPH–20100407ACA, From MINERVA, NY, To PLATTSBURGH WEST, NY.

DATES: Comments may be filed through August 2, 2010.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Tung Bui, 202–418–2700.

SUPPLEMENTARY INFORMATION: The full text of these applications is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street, SW., Washington, DC 20554 or electronically via the Media Bureau's Consolidated Data Base System, *http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm.* A copy of this application may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

Federal Communications Commission.

James D. Bradshaw,

Deputy Chief, Audio Division, Media Bureau.

[FR Doc. 2010–13383 Filed 6–2–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 011733–028.

Title: Common Ocean Carrier Platform Agreement.

Parties: A.P. Moller-Maersk A/S; American President Lines, Ltd., APL Co., PTE Ltd.; CMA CGM; Hamburg-Süd; Hapag-Lloyd AG; Mediterranean Shipping Company S.A.; and United Arab Shipping Company (S.A.G.) as shareholder parties, and Alianca Navegacao e Logistica Ltda.; China Shipping Container Lines Company Limited; Compania Sud Americana de Vapores, S.A.; Companhia Libra de Navegacao; COSCO Container Lines Co., Ltd.; Emirates Shipping Lines; Evergreen Line Joint Service Agreement; Gold Star Line, Ltd.; Hanjin Shipping Co., Ltd.; Hyundai Merchant Marine Co. Ltd; Kawasaki Kisen Kaisha, Ltd.; MISC Berhad; Mitsui O.S.K. Lines Ltd.; Nippon Yusen Kaisha; Safmarine Container Lines N.V.; Norasia Container Lines Limited; Tasman Orient Line C.V. and Zim Integrated Shipping as non-shareholder parties.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The amendment adds American President Lines, Ltd. and APL Co. PTE Ltd. as non-shareholder parties to the agreement.

Agreement No.: 012070–001.

Title: CSCL/ELJSA Vessel Sharing Agreement—Asia and Mexico, US East Coast Service.

Parties: China Shipping Container Lines Co., Ltd.; China Shipping Container Lines (Hong Kong) Co., Ltd.; and Evergreen Lines Joint Service Agreement.

Filing Party: Tara L. Leiter, Esq.; Blank Rome, LLP; Watergate; 600 New Hampshire Avenue, NW.; Washington, DC 20037.

Synopsis: The amendment increases the number of vessels to be deployed under the agreement and revises the amount of space allocated to each party.

Agreement No.: 012096.

Title: CSCL/ELJSA Vessel Sharing Agreement—Asia and US West Coast Service.

Parties: China Shipping Container Lines Co., Ltd.; China Shipping Container Lines (Hong Kong) Co., Ltd.; and Evergreen Lines Joint Service Agreement.

Filing Party: Tara L. Leiter, Esq.; Blank Rome, LLP; Watergate; 600 New Hampshire Avenue, NW.; Washington, DC 20037.

Synopsis: The agreement authorizes the parties to share vessel space between United States West Coast ports and ports in Asia.

Agreement No.: 012097.

Title: Mitsui O.S.K. Lines/Kawasaki Kisen Kaisha U.S. Atlantic & Gulf/South America Space Charter Agreement.

Parties: Kawasaki Kisen Kaisha, Ltd. and Mitsui O.S.K. Lines, Ltd.

Filing Parties: John P. Meade, Esq.; Vice-President; K-Line America, Inc.; 6009 Bethlehem Road; Preston, MD 21655.

Synopsis: The agreement authorizes the parties to charter space in the trades between U.S. Atlantic and Gulf Coast ports and ports in Mexico, Guatemala, Nicaragua, Honduras, Costa Rica, Panama, Colombia, Venezuela, Brazil, Argentina, Uruguay, Paraguay, Chile, and Peru.

Dated: May 28, 2010.

By Order of the Federal Maritime Commission.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2010–13409 Filed 6–2–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the

Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Alo Enterprise Corporation (OFF & NVO), 225 Chambers Street, Trenton, NJ 08609, *Officers:* Amr M. Rihan, President, (Qualifying Individual), Fida Dahrouj, Secretary *Application Type:* New OFF & NVO License;

Auto Shipping Network, Inc. (NVO), 2035 Harding Street, Hollywood, FL 33020, *Officer:* Roy Ezra, President/Secretary, (Qualifying Individual), *Application Type:* New NVO License;

European Roro Lines Corp. (NVO), Rue Heyvaert 142–144, Brussels B–1080 Belgium, *Officers:* Dany Karim, President/Secretary, (Qualifying Individual), Souhail Karim, Director, *Application Type:* New NVO License;

First Forward International Services, Inc. dba First Forward, Container Line (NVO), 5733 Arbor Vitae Street, Suite 101, Los Angeles, CA 90045, *Officers:* Dennis Liebregt, Treasurer, (Qualifying Individual), Nicholas A. Schiele, President/Secretary, *Application Type:* QI Change;

Goodnight International, Inc. (OFF & NVO), 5160 William Mills Street, Jacksonville, FL 3222, *Officers:* Angela D. Newkirk, Vice President of Logistics, (Qualifying Individual), MaryJane Mackey, President, *Application Type:* New OFF & NVO License;

Myunghe Choi (NVO), 4733 Torrance Blvd., #187, Torrance, CA 90503, *Officer:* Myunghe Choi, President, (Qualifying Individual), *Application Type:* New NVO;

Prisma Cargo Solutions LLC (NVO), 555 Eight Avenue, #1101, New York, NY 10018, *Officer:* Peimaneh Riahi, Managing Director/Secretary, (Qualifying Individual), *Application Type:* New NVO License;

Satellite Logistics Group, Inc. (OFF & NVO), 12621 Featherwood Drive, Suite 390, Houston, TX 77034, *Officers:* Kevin D. Brady, President, (Qualifying Individual), Diane S. Mohr, CFO, *Application Type:* License Transfer;

Uniworld International, Inc. (OFF), 7901 Kingspointe Parkway, Suite #24, Orlando, FL 32819, *Officers:* Tareq Shrourou, Secretary, (Qualifying Individual), M. Wael Shrourou, President, *Application Type:* QI Change;

World Express & Connection Inc. (OFF & NVO), 63 Hook Road, Bayonne, NJ 07002, *Officers:* Raya Bakhirev, President, (Qualifying Individual), Nasim Rakhamimov, Secretary, *Application Type:* New OFF & NVO License.

Dated: May 28, 2010.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2010–13417 Filed 6–2–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

[Docket No. 10–05]

American Stevedoring, Inc. v. The Port Authority of New York and New Jersey; Notice of Filing of Complaint and Assignment

May 28, 2010.

Notice is given that a complaint has been filed with the Federal Maritime Commission ("Commission") by American Stevedoring, Inc., hereinafter "Complainant," against the Port Authority of New York and New Jersey, hereinafter "Respondent." Complainant asserts that it is a corporation organized and existing pursuant to the laws of the state of New York. Complainant asserts that Respondent is a body corporate and politic created by Compact between the States of New York and New Jersey with the consent of Congress of the United States, and a marine terminal operator subject to the jurisdiction of the Commission.

Complainant asserts that Respondent violated Section 10(b)(10) and Section 10(d)(3) of the Shipping Act of 1984, 46 U.S.C. 41106(3), which prohibit a marine terminal operator from engaging in unreasonable refusal to deal or negotiate. Complainant bases this allegation on the Respondent's "refusal to negotiate the terms and conditions of a lease renewal, its haste in forcing American Stevedoring to sign the leases on one day's notice, and its ultimatum that the set of leases presented on April 23, 2008 "be signed by noon the following day, if not signed, would not be presented again to American Stevedoring, and that no leases would be presented." Complainant alleges that Respondent "exacerbated its refusal by not countersigning the set of leases for another ten months" giving competitors "at other terminals an unfair advantage." Complainant further alleges that Respondent "then interfered with American Stevedoring's existing and prospective economic relationships by issuing an RFEI and encouraging competitors to take over American Stevedoring's piers and operations, and to service its customers." Complainant asserts that as a result of Respondent's unlawful conduct, Complainant "has suffered and will suffer monetary damages in an amount yet to be determined, but exceeding $16,000,000.00 per year."

Complainant also alleges that Respondent violated Section 10(d)(4)of the Act, 46 U.S.C. app. § 41106(2), which provides that no marine terminal operator may "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person," in refusing to "negotiate the terms and conditions of the set of leases with American Stevedoring, unlike its relationships and negotiations with other marine terminal operators for lease renewal." Specifically Complainant alleges that "[t]he Port Authority's actions have given American Stevedoring's competitors at other terminals and unfair advantage in that they have been and are able to negotiate the terms and conditions of the lease agreements, including the terms of capital investments the Port Authority undertakes, such as the provision of truck toll replacement payments, on-dock rail connections, highway improvements and other transportation connecting services, whereas American Stevedoring has been frozen out of negotiations, communications, capital investments, ordinary maintenance and repairs, and has suffered other kinds of different, discriminatory treatment, not justified by transportation factors." Complainant asserts that as a result it "has suffered monetary damages and lost business opportunities in an amount yet to be determined, but exceeding several million dollars."

Complainant requests that the Commission order Respondent "(i) to cease and desist from all actions to terminate Complainant's leasehold relationships with Complainant; (ii) to recommence discussions with the Complainant in good faith over the terms and conditions of the Agreements of the Lease entered into on April 24, 2008 comparable to those entered into by the Port Authority for its other marine terminals including the recently reduced rent of Maher Terminals; (iii) to order the Port Authority to cease interfering in the economic relationships of American Stevedoring with its customer and potential

customers; (iv) to establish and put in force such other practices as the Commission determines to be lawful and reasonable governing the relationship between the Port Authority and American Stevedoring; and (v) to pay the Complainant by way of reparation for the unlawful conduct hereinabove described, in an amount yet to be determined, but exceeding $16,000,000.00 with interest and attorney's fees, or such other sum as the Commission may determine to be proper as an award of reparation; and (v) and that such other and further order or orders be made as the Commission so determines to be appropriate."

This proceeding has been assigned to the Office of Administrative Law Judges. Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61, and only after consideration has been given by the parties and the presiding officer to the use of alternative forms of dispute resolution. The hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record.

Pursuant to the further terms of 46 CFR 502.61, the initial decision of the presiding officer in this proceeding shall be issued by May 31, 2011 and the final decision of the Commission shall be issued by September 28, 2011.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2010–13390 Filed 6–2–10; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuance

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR Part 515.

License no.	Name/address	Date reissued
013787N	Trans Caribe Express Shippers, Inc., 163 Tremont Avenue, East Orange, NJ 07018	April 29, 2010.
015941NF	Cargo Plus, Inc., 8333 Wessex Drive, Pennsauken, NJ 08109	April 25, 2010.
021975F	Adora International LLC dba Adora, 16813 FM 1485, Conroe, TX 77306	April 20, 2010.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 2010–13416 Filed 6–2–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocation

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR Part 515, effective on the corresponding date shown below:

License Number: 004020N.

Name: Southern Cross Shipping, Inc.

Address: 6440 NW. 2nd Street, Miami, FL 33126.

Date Revoked: May 10, 2010.

Reason: Surrendered license voluntarily.

License Number: 017538N.

Name: Cosa Freight, Inc.

Address: 1601 W. Mission Blvd., Suite 104, Pomona, CA 91766.

Date Revoked: May 17, 2010.

Reason: Surrendered license voluntarily.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 2010–13415 Filed 6–2–10; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Privacy Act of 1974; Report of a New System of Records

AGENCY: Department of Health and Human Services (HHS).

ACTION: Notice of a New System of Records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, the U.S. Department of Health & Human Services (HHS) is proposing to establish a new system of records (SOR) titled "Early Retirement Reinsurance Program (ERRP)," System No. 09–90–0250. Under authority of Section 1102 of the Patient Protection and Affordable Care Act (the Affordable Care Act) (Pub. L. 111–148) the Early Retiree Reinsurance Program is established. The program provides reimbursement to participating employment-based plans for a portion of the cost of health benefits for early retirees and their spouses, surviving spouses and dependents. The system will collect and maintain information on individuals associated with plan sponsors who perform key tasks on behalf of the sponsor in order for the sponsor to participate in and receive reimbursement under the program. The system will also collect and maintain information on early retirees, and their spouses, *etc.,* so that sponsors' eligibility to receive reimbursement for the claims of such specific individuals can be verified. The system will also collect and maintain information related to the documentation of actual medical costs of claims for health benefits submitted to the Department, to ensure accurate reimbursement under the program.

The purpose of this system is to collect and maintain information on individuals who are early retirees (and spouses, *etc.*) such that sponsors' eligibility to receive reimbursement for the claims of such specific individuals can be verified, to collect and maintain information on individuals who are associated with plan sponsors who perform key tasks on behalf of the sponsor, so that the sponsor can participate in and get reimbursement under the program, and to collect and maintain documentation of the actual costs of medical claims, so that accurate and timely reimbursements may be made to plan sponsors who continue to offer qualifying health benefits to early retirees (and spouses, *etc.*). Information

maintained in this system will also be disclosed to: (1) Support regulatory, reimbursement, and policy functions performed by an HHS contractor, consultant or grantee; (2) assist another Federal or State agency, agency of a State government, an agency established by State law, or its fiscal agent; (3) support litigation involving the Department; (4) combat fraud and abuse in certain health benefits programs; and (5) assist efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records. We have provided background information about the modified system in the "Supplementary Information" section below. Although the Privacy Act requires only that HHS provide an opportunity for interested persons to comment on the proposed routine uses, HHS invites comments on all portions of this notice. *See* "Effective Dates" section for comment period.

DATES: *Effective Dates:* HHS filed a new system report with the Chair of the House Committee on Government Reform and Oversight, the Chair of the Senate Committee on Homeland Security & Governmental Affairs, and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on May 19, 2010. To ensure that all parties have adequate time in which to comment, the new system, including routine uses, will become effective 30 days from the publication of the notice, or 40 days from the date it was submitted to OMB and Congress, whichever is later, unless HHS receives comments that require alterations to this notice.

ADDRESSES: The public should address comments to: HHS Privacy Officer, Office of the Secretary, Office of the Assistant Secretary for Public Affairs (ASPA), Freedom of Information/ Privacy Acts Division, 330 "C" Street, SW., Washington, DC 20201. Telephone number: (202) 690–7453. Comments received will be available for review at this location, by appointment, during regular business hours, Monday through Friday from 9 a.m.–3 p.m., Eastern Time zone.

FOR FURTHER INFORMATION CONTACT: David Mlawsky, Office of Consumer Information and Insurance Oversight (OCIIO), Office of the Secretary, Department of Health and Human Services. He can be reached at (410) 786–6851, or contact via e-mail at *David.Mlawsky@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION: Rising costs have made it more difficult for employers to provide quality, affordable health insurance for workers and retirees. People in the early retiree age group often face difficulties obtaining insurance in the individual market because of age or chronic conditions that make coverage unaffordable and inaccessible. The program provides needed financial help for employer-based plans to continue to provide valuable coverage to plan participants.

Section 1102(a)(2)(B) of the Affordable Care Act defines "employment-based plan" to include a group benefits plan providing health benefits that is maintained by private employers, State or local governments, employee organizations, voluntary employees' beneficiary association, a committee or board of individuals appointed to administer such plan, or a multiemployer plan (as defined by Employee Retirement Income Security Act, or ERISA). Section 1102 does not differentiate between health benefits provided by self-funded plans or through the purchase of insurance.

The statute at section 1102(a)(2)(C) defines "early retirees" as individuals who are age 55 and older but are not eligible for coverage under Medicare, and who are not active employees of an employer maintaining, or currently contributing to, the employment-based plan or of any employer that has made substantial contributions to fund such plan. The definition of early retiree in the program's implementing regulation at 45 CFR 149.2 clarifies that spouses, surviving spouses, and dependents are also included in the definition of early retiree. This definition accommodates the language in section 1102(a)(1) of the statute, which states that reimbursement under the program is made to cover a portion of the costs of providing health coverage to early retirees and to the eligible spouses, surviving spouses, and dependents of such retirees. Reimbursement can be made under the program for the health benefit costs of eligible spouses, surviving spouses, and dependents of such retirees, even if they are under the age of 55, and/or are eligible for Medicare.

When submitting claims for reimbursement, employment-based plans (or their insurers) will submit documentation of the actual costs of the medical claims, indicating the health benefit provided, the provider or supplier, the incurred date, the individual for whom the health benefit was provided, the date and amount of payment net any known negotiated price concessions, and the employment-based plan and benefit option under which the health benefit was provided.

The Congress appropriated funding of $5 billion for the temporary program. The Secretary will reimburse plans 80 percent of the costs for health benefits for valid claims between $15,000 and $90,000 (with those amounts being indexed for plan years starting on or after October 1, 2011). Section 1102(a)(1) required the Secretary to establish this temporary program not later than 90 days after enactment of the statute, which is June 21, 2010. The Secretary has established an effective date of June 1, 2010. The program ends no later than January 1, 2014.

I. Description of the Proposed System of Records

A. Statutory and Regulatory Basis for System

Authority for the collection, maintenance, and disclosures from this system is given under provisions of § 1102 of the Affordable Care Act and its implementing regulations codified at Title 45 Code of Federal Regulations (CFR) Part 149.

B. Collection and Maintenance of Data in the System

Information in this system is maintained on early retirees and their spouses, surviving spouses, and dependents that are enrolled in employment-based plans that participate in the program. Information maintained in this system includes, but is not limited to, first name, last name, middle initial, date of birth, Social Security Number (SSN), gender, standard data for identification such as Plan Sponsor Identification Number, Application Identification Number, Benefit Option Identifier, and relationship to early retiree.

Information in this system is also maintained on individuals associated with plan sponsors who perform key tasks on behalf of the sponsor, so that the sponsor can participate in and get reimbursement under the program. Information maintained in the system regarding these individuals includes, but is not limited to, standard data for identification such as Plan Sponsor Identification Number, Application Identification Number, Benefit Option Identifier, the individual's first name, middle initial, last name, job title, date of birth, social security number, e-mail address, telephone number, fax number, employer name, and business address. When submitting claims to the Department for reimbursement, employment-based plans (or their insurers) will submit documentation of the actual costs of the medical claims, including the health benefit provided, the provider or supplier, the incurred date, the individual for whom the health benefit was provided, the date and

amount of payment net any known negotiated price concessions, and the employment-based plan and benefit option under which the health benefit was provided. Thus, such information is maintained in this system.

II. Agency Policies, Procedures, and Restrictions on Routine Uses

A. The Privacy Act permits us to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected. Any such disclosure of data is known as a "routine use." The government will only release ERRP information that can be associated with an individual as provided for under "Section III. Proposed Routine Use Disclosures of Data in the System." Both identifiable and non-identifiable data may be disclosed under a routine use.

We will only disclose the minimum personal data necessary to achieve the purpose of ERRP. HHS has the following policies and procedures concerning disclosures of information that will be maintained in the system. In general, disclosure of information from the system will be approved only for the minimum information necessary to accomplish the purpose of the disclosure and only after HHS:

1. Determines that the use or disclosure is consistent with the reason that the data is being collected, *e.g.,* to collect, maintain, and process information necessary to effectively and efficiently administer the ERRP;

2. Determines that:

a. The purpose for which the disclosure is to be made can only be accomplished if the record is provided in individually identifiable form;

b. The purpose for which the disclosure is to be made is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring; and

c. There is a strong probability that the proposed use of the data would in fact accomplish the stated purpose(s).

3. Requires the information recipient to:

a. Establish administrative, technical, and physical safeguards to prevent unauthorized use of disclosure of the record;

b. Remove or destroy at the earliest time all individually-identifiable information; and

c. Agree to not use or disclose the information for any purpose other than the stated purpose under which the information was disclosed.

4. Determines that the data are valid and reliable.

III. Proposed Routine Use Disclosures of Data in the System

A. Entities Who May Receive Disclosures Under Routine Use

These routine uses specify circumstances, in addition to those provided by statute in the Privacy Act of 1974, under which HHS may release information from the ERRP without the consent of the individual to whom such information pertains. Each proposed disclosure of information under these routine uses will be evaluated to ensure that the disclosure is legally permissible, including but not limited to ensuring that the purpose of the disclosure is compatible with the purpose for which the information was collected. We propose to establish the following routine use disclosures of information maintained in the system:

1. To support HHS contractors, consultants, or HHS grantees who have been engaged by HHS to assist in accomplishment of an HHS function relating to the purposes for this SOR and who need to have access to the records in order to assist HHS.

We contemplate disclosing information under this routine use only in situations in which HHS may enter into a contractual or similar agreement with a third party to assist in accomplishing an HHS function relating to purposes for this SOR.

HHS occasionally contracts out certain of its functions when doing so would contribute to effective and efficient operations. HHS will give a contractor, consultant, or HHS grantee the information necessary for the contractor or consultant to fulfill its duties. In these situations, safeguards are provided in the contract prohibiting the contractor, consultant, or grantee from using or disclosing the information for any purpose other than that described in the contract and requires the contractor, consultant, or grantee to return or destroy all information at the completion of the contract. Contractors are also required to provide the appropriate management, operational, and technical controls to secure the data.

2. To assist another Federal or State agency, agency of a State government, an agency established by State law, or its fiscal agent pursuant to agreements with HHS to:

a. Contribute to the accuracy of HHS"s reimbursement to sponsors under the ERRP;

b. Enable such agency to administer a Federal health benefits program, or as necessary to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds, and/or

c. Assist Federal/State Medicaid programs which may require ERRP information for purposes related to this system.

Other Federal or State agencies in their administration of a Federal health program may require ERRP information in order to support evaluations and monitoring of claims information of beneficiaries, including proper reimbursement for services provided.

3. To support the Department of Justice (DOJ), court, or adjudicatory body when:

a. The Department or any component thereof, or

b. Any employee of HHS in his or her official capacity, or

c. Any employee of HHS in his or her individual capacity where the DOJ has agreed to represent the employee, or

d. The United States Government, is a party to litigation or has an interest in such litigation, and by careful review, HHS determines that the records are both relevant and necessary to the litigation and that the use of such records by the DOJ, court or adjudicatory body is compatible with the purpose for which the agency collected the records.

Whenever HHS is involved in litigation, or occasionally when another party is involved in litigation and HHS's policies or operations could be affected by the outcome of the litigation, HHS would be able to disclose information to the DOJ, court, or adjudicatory body involved.

4. To assist an HHS contractor (including, but not limited to fiscal intermediaries and carriers) that assists in the administration of an HHS-administered health benefits program, or to a grantee of an HHS-administered grant program, when disclosure is deemed reasonably necessary by HHS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste or abuse in such program.

We contemplate disclosing information under this routine use only in situations in which HHS may enter into a contract or grant with a third party to assist in accomplishing HHS functions relating to the purpose of combating fraud, waste or abuse.

HHS occasionally contracts out certain of its functions when doing so would contribute to effective and efficient operations. HHS must be able to give a contractor or grantee whatever

information is necessary for the contractor or grantee to fulfill its duties. In these situations, safeguards are provided in the contract prohibiting the contractor or grantee from using or disclosing the information for any purpose other than that described in the contract and requiring the contractor or grantee to return or destroy all information.

5. To assist another Federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers, or that has the authority to investigate potential fraud, waste or abuse in a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by HHS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste or abuse in such programs.

Other agencies may require ERRP information for the purpose of combating fraud, waste or abuse in such Federally-funded programs.

6. To assist appropriate Federal agencies and Department contractors that have a need to know the information for the purpose of assisting the Department's efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records, and the information disclosed is relevant and unnecessary for the assistance.

Other agencies may require ERRP information for the purpose of assisting the Department's efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records.

B. Additional Circumstances Affecting Routine Use Disclosures

Our policy will be to prohibit release even of data not directly identifiable, except pursuant to one of the routine uses or if required by law, if we determine there is a possibility that an individual can be identified through implicit deduction based on small cell sizes (instances where the patient population is so small that individuals could, because of the small size, use this information to deduce the identity of the individual).

IV. Safeguards

HHS has safeguards in place for authorized users and monitors such users to ensure against unauthorized use. Personnel having access to the system have been trained in the Privacy Act and information security requirements. Employees who maintain records in this system are instructed not to release data until the intended recipient agrees to implement appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems and to prevent unauthorized access.

This system will conform to all applicable Federal laws and regulations and Federal and HHS policies and standards as they relate to information security and data privacy. These laws and regulations include but are not limited to: The Privacy Act of 1974; the Federal Information Security Management Act of 2002; the Computer Fraud and Abuse Act of 1986; the E-Government Act of 2002, and the Clinger-Cohen Act of 1996; OMB Circular A–130, Management of Federal Resources, Appendix III, Security of Federal Automated Information Resources also applies. Federal and HHS policies and standards include but are not limited to: All pertinent National Institute of Standards and Technology publications; and the HHS Information Systems Program Handbook.

V. Effects of the New System on the Rights of Individuals

HHS proposes to establish this system in accordance with the principles and requirements of the Privacy Act and will collect, use, and disseminate information only as prescribed therein. We will only disclose the minimum personal data necessary to achieve the purpose of ERRP. Disclosure of information from the system will be approved only to the extent necessary to accomplish the purpose of the disclosure. HHS has assigned a higher level of security clearance for the information maintained in this system in an effort to provide added security and protection of data in this system.

HHS will take precautionary measures to minimize the risks of unauthorized access to the records and the potential harm to individual privacy or other personal or property rights. HHS will collect only that information necessary to perform the system's functions. In addition, HHS will make disclosure from the proposed system only with consent of the subject individual, or his/her legal representative, or in accordance with an applicable exception provision of the Privacy Act.

HHS, therefore, does not anticipate an unfavorable effect on individual privacy as a result of the disclosure of information relating to individuals.

Dated: May 20, 2010.

Jay Angoff,

Director Office of Consumer Information and Insurance Oversight.

SYSTEM NUMBER: 09–90–0250

SYSTEM NAME:

"Early Retirement Reinsurance Program (ERRP)," OCIIO, OS/HHS.

SECURITY CLASSIFICATION:

Level Three Privacy Act Sensitive.

SYSTEM LOCATION:

Office of Consumer Information and Insurance Oversight, U.S. Department of Health & Human Services, 200 Independence Avenue, SW., Suite 738F, Washington, DC 20201.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Information in this system is maintained on individuals associated with plan sponsors who perform key tasks on behalf of the sponsor, so that the sponsor can participate in and get reimbursement under the program. Information in this system is also maintained on early retirees and their spouses, surviving spouses, and dependents that are enrolled in employment-based plans that participate in the program. With respect to medical claims submitted by plan sponsors for reimbursement, information in this system is maintained on early retirees and their spouses, surviving spouses, and dependents with respect to those medical claims, including the health benefit provided, the provider or supplier, the incurred date, the individual for whom the health benefit was provided, the date and amount of payment net any known negotiated price concessions, and the employment-based plan and benefit option under which the health benefit was provided.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information in this system is maintained on early retirees and their spouses, surviving spouses, and dependents that are enrolled in employment-based plans that participate in the program. Information maintained in this system includes, but is not limited to, first name, last name, middle initial, date of birth, Social Security Number (SSN), gender, standard data for identification such as Plan Sponsor Identification Number, Application Identification Number, Benefit Option Identifier, and relationship to early retiree. Information in this system is maintained on

individuals associated with plan sponsors who perform key tasks on behalf of the sponsor, so that the sponsor can participate in and get reimbursement under the program. Information maintained in the system regarding these individuals includes, but is not limited to, standard data for identification such as Plan Sponsor Identification Number, Application Identification Number, Benefit Option Identifier, the individual's first name, middle initial, last name, job title, date of birth, social security number, e-mail address, telephone number, fax number, employer name, and business address. With respect to medical claims submitted by plan sponsors for reimbursement, information in this system is maintained on early retirees and their spouses, surviving spouses, and dependents with respect to those medical claims, including the health benefit provided, the provider or supplier, the incurred date, the individual for whom the health benefit was provided, the date and amount of payment net any known negotiated price concessions, and the employment-based plan and benefit option under which the health benefit was provided.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for the collection, maintenance, and disclosures from this system is given under provisions of § 1102 of the Affordable Care Act and its implementing regulations codified at Title 45 Code of Federal Regulations (CFR) Part 149.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to collect and maintain information on individuals who are early retirees (and spouses, *etc.*), to collect and maintain information on individuals who are associated with plan sponsors who perform key tasks on behalf of the sponsor, and to collect and maintain information on medical claims submitted to the U.S. Department of Health & Human Services (HHS) for reimbursement, so that accurate and timely reimbursements may be made to plan sponsors who continue to offer qualifying health benefits to such individuals. Information maintained in this system will also be disclosed to: (1)Support regulatory, reimbursement, and policy functions performed by an HHS contractor, consultant or grantee; (2) assist another Federal or State agency, agency of a State government, an agency established by State law, or its fiscal agent; (3) support litigation involving the Department; (4) combat fraud and abuse in certain health benefits programs; and (5) assist efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OR USERS AND THE PURPOSES OF SUCH USES:

B. ENTITIES WHO MAY RECEIVE DISCLOSURES UNDER ROUTINE USE

These routine uses specify circumstances, in addition to those provided by statute in the Privacy Act of 1974, under which HHS may release information from the ERRP without the consent of the individual to whom such information pertains. Each proposed disclosure of information under these routine uses will be evaluated to ensure that the disclosure is legally permissible, including but not limited to ensuring that the purpose of the disclosure is compatible with the purpose for which the information was collected. We propose to establish or modify the following routine use disclosures of information maintained in the system:

1. To support Agency contractors, consultants, or HHS grantees who have been engaged by the Agency to assist in accomplishment of an HHS function relating to the purposes for this SOR and who need to have access to the records in order to assist HHS.

2. To assist another Federal or State agency, agency of a State government, an agency established by State law, or its fiscal agent pursuant to agreements with HHS to:

a. Contribute to the accuracy of HHS's reimbursement to sponsors under the ERRP,

b. Enable such agency to administer a Federal health benefits program, or as necessary to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds, and/or

c. Assist Federal/State Medicaid programs which may require ERRP information for purposes related to this system.

3. To the Department of Justice (DOJ), court, or adjudicatory body when:

b. The Agency or any component thereof, or

e. Any employee of the Agency in his or her official capacity, or

f. Any employee of the Agency in his or her individual capacity where the DOJ has agreed to represent the employee, or

g. The United States Government, is a party to litigation or has an interest in such litigation, and by careful review, HHS determines that the records are both relevant and necessary to the litigation and that the use of such records by the DOJ, court or adjudicatory body is compatible with the purpose for which the agency collected the records.

4. To assist an HHS contractor (including, but not limited to fiscal intermediaries and carriers) that assists in the administration of an HHS-administered health benefits program, or to a grantee of an HHS-administered grant program, when disclosure is deemed reasonably necessary by HHS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste or abuse in such program.

5. To assist another Federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers, or that has the authority to investigate potential fraud, waste or abuse in a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by HHS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste or abuse in such programs.

6. To appropriate Federal agencies and Department contractors that have a need to know the information for the purpose of assisting the Department's efforts to respond to a suspected or confirmed breach of the security or confidentiality of information disclosed is relevant and necessary for that assistance.

C. ADDITIONAL CIRCUMSTANCES AFFECTING ROUTINE USE DISCLOSURES

Our policy will be to prohibit release even of data not directly identifiable, except pursuant to one of the routine uses or if required by law, if we determine there is a possibility that an individual can be identified through implicit deduction based on small cell sizes (instances where the patient population is so small that individuals could, because of the small size, use this information to deduce the identity of the beneficiary).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

We will be storing records in hardcopy files and various electronic storage media (including DB2, Oracle, and other relational data structures).

RETRIEVABILITY:

Information is most frequently retrieved by first name, last name, middle initial, date of birth, or Social Security Number (SSN).

SAFEGUARDS:

HHS has safeguards in place for authorized users and monitors such users to ensure against unauthorized use. Personnel having access to the system have been trained in the Privacy Act and information security requirements. Employees who maintain records in this system are instructed not to release data until the intended recipient agrees to implement appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems and to prevent unauthorized access.

This system will conform to all applicable Federal laws and regulations and Federal, HHS, and HHS policies and standards as they relate to information security and data privacy. These laws and regulations include but are not limited to: The Privacy Act of 1974; the Federal Information Security Management Act of 2002; the Computer Fraud and Abuse Act of 1986; the E-Government Act of 2002, and the Clinger-Cohen Act of 1996. OMB Circular A–130, Management of Federal Resources, Appendix III, Security of Federal Automated Information Resources also applies. Federal, HHS, and HHS policies and standards include but are not limited to: all pertinent National Institute of Standards and Technology publications; and the HHS Information Systems Program Handbook. HHS will give a contractor, consultant, or HHS grantee the information necessary for the contractor or consultant to fulfill its duties. In these situations, safeguards are provided in the contract prohibiting the contractor, consultant, or grantee from using or disclosing the information for any purpose other than that described in the contract and requires the contractor, consultant, or grantee to return or destroy all information at the completion of the contract. Contractors are also required to provide the appropriate management, operational, and technical controls to secure the data.

RETENTION AND DISPOSAL:

Records are maintained with identifiers for all transactions after they are entered into the system for a period of 10 years. Records are housed in both active and archival files in accordance with HHS data and document management policies and standards. All sponsor applications, claims, and other program-related records are encompassed by the document preservation order and will be retained until notification is received from the Department of Justice.

SYSTEM MANAGER AND ADDRESS:

David Gardner, Acting Director, Early Retiree Reinsurance Division, Office of Insurance Programs, Office of Consumer Information and Insurance Oversight, U.S. Department of Health & Human Services, 200 Independence Avenue, SW., Suite 738F, Washington, DC 20201.

NOTIFICATION PROCEDURE:

For purpose of notification, the subject individual should write to the system manager who will require the system name, and the retrieval selection criteria (*e.g.,* name, SSN, *etc.*).

RECORD ACCESS PROCEDURE:

For purpose of access, use the same procedures outlined in Notification Procedures above. Requestors should also reasonably specify the record contents being sought. (These procedures are in accordance with Department regulation 45 CFR 5b.5(a)(2)).

CONTESTING RECORD PROCEDURES:

The subject individual should contact the system manager named above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department regulation 45 CFR 5b.7).

RECORD SOURCE CATEGORIES:

Record source categories include program participants, individuals on whose behalf reimbursements are being sought, and those who voluntarily submit data and personal information for the ERRP program.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 2010–13178 Filed 6–2–10; 8:45 am]

BILLING CODE 4150–65–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: "Reductions of Infection Caused by Carbapenem Resistant Enterobacteriaceae (KPC) Producing Organisms through the Application of Recently Developed CDC/HICPAC Recommendations." In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3520, AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on March 31st, 2010 and allowed 60 days for public comment. No comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments on this notice must be received by July 6, 2010.

ADDRESSES: Written comments should be submitted to: AHRQ's OMB Desk Officer by fax at (202) 395–6974 (attention: AHRQ's desk officer) or by e-mail at *OIRA_submission@omb.eop.gov* (attention: AHRQ's desk officer).

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 e-mail at *doris.lefkowitz@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

Reductions of Infections Caused by Carbapenem Resistant Enterobacteriaceae (KPC) Producing Organisms Through the Application of Recently Developed CDC/HICPAC Recommendations.

Healthcare Acquired Infections (HAIs) caused almost 100,000 deaths among the 2.1 million people who acquired infections while hospitalized in 2000, and HAI rates have risen relentlessly

since then. On March 20, 2009, the Centers for Disease Control (CDC) and the Healthcare Infections Control Practices Advisory Committee (HICPAC) developed infection control (IC) guidance for Klebsiella pneumonia carbapenemase-producing (KPC) isolates, as they have been rapidly emerging as a significant challenge in healthcare settings. The danger of these bacteria is that they are resistant to carbapenem (a class of beta-lactam antibiotics with a broad spectrum of antibacterial activity) and cannot be treated by the most commonly prescribed antibiotics. Limited treatment options mean that infections caused by carbapenem-resistant bacteria result in substantial mortality and morbidity.

The CDC and HICPAC recommendations draw on infection control strategies which have been applied to these pathogens in other settings, and other evidence-based strategies in infection control. There has been little research, however, on the implementation of control strategies to prevent the spread of these KPC infections. The goal of this project is to understand how these recommendations can best be implemented and how effective these recommendations will be in practice. This research will advance private and public efforts to improve health care quality by improving measures to control the spread of a dangerous organism. This research will also provide data for the development of an implementation toolkit that hospitals can use to prevent the spread of carbapenem resistant bacteria. The toolkit may include the following types of resources: General information about the implementation of evidence-based clinical practices, resource materials, and tools and methods that users can adopt to conduct point prevalence surveys, protocols and tools that users can adopt to specify when active KPC surveillance is needed, and resources for approaching the problem as a team-based quality-improvement effort. OMB clearance will be sought for this toolkit once it is developed.

This study is being conducted by AHRQ through its contractor, Boston University, pursuant to AHRQ's statutory authority to conduct and support research on healthcare and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of healthcare services and with respect to quality measurement and improvement. 42 U.S.C. 299a(a)(1) and (2).

Method of Collection

This project will include the following data collections from the intensive care unit (ICU) staff within each of three participating hospitals:

(1) Pre-intervention focus groups will be conducted separately with managers and staff. The purpose of these focus groups is to identify potential problems in the implementation that can be addressed through various means (*e.g.,* additional education, other changes in process). Another purpose is to understand the existing approach to quality improvement, the connection(s) between overall approach to quality improvement and to KPC infection control practices, current practices at the hospital of quality reporting and accountability, and constraints and obstacles to quality improvement as seen in their roles. Staff members identified for the focus groups will be those with the most first-hand knowledge of existing quality improvement efforts, and KPC infection control practices.

(2) Clinical staff survey. Factors identified in the pre-intervention focus groups will be used to inform the development of a self-administered survey of staff knowledge of and attitudes toward KPC surveillance and infection control procedures. Respondents will be health care workers on the units where these new guidelines have been implemented. Findings from the survey will be used to assess barriers perceived by the staff, potential differences across units, and potential differences by employee/occupational group.

(3) Post-intervention focus groups (6 months after implementation of new KPC IC guidelines) will be conducted separately with managers and staff. The purpose of these focus groups is to identify actual problems experienced in the initial implementation and possible measures to address, and to identify successful practices to include in a toolkit that hospitals can use to implement the CDC and HICPAC recommendations.

In addition to developing a toolkit, AHRQ plans to disseminate the lessons learned from this project about how hospitals can best implement the CDC guidance for KPC screening and infection control, in order to inform efforts to change practice in this area.

Estimated Annual Respondent Burden

The estimated annualized burden hours for respondents to participate in this two year research project are presented in Exhibit 1. Pre-intervention focus groups with clinical staff will be conducted with 18 staff members (an average of 9 per year for 2 years) from each of the 3 participating hospitals and will take about 1 hour. Pre-intervention focus groups with also be conducted with 2 managers (an average of I per year for 2 years) from each hospital and will take about an hour to complete.

The clinical staff survey will be administered to 20 clinical staff (an average of 10 per year for years) from each hospital and will take 15 minutes to complete.

Finally, respondents from the pre-intervention focus groups will participate in post-intervention focus groups approximately four months after the initiation of the intervention. They will not last more than an hour each. The total annualized burden hours are estimated to be 68 hours.

Exhibit 2 shows the estimated annualized cost burden associated with the respondents' time to participate in this research. The total annualized cost burden is estimated to be $3,108.

EXHIBIT 1. ESTIMATED ANNUALIZED BURDEN HOURS

Data collection	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Pre-intervention focus groups with clinical staff *	3	9	1	27
Pre-intervention focus groups with managers*	3	1	1	3
Clinical staff survey	3	10	15/60	8
Post-intervention focus groups with clinical staff *	3	9	1	27
Post-intervention focus groups with managers*	3	1	1	3

EXHIBIT 1. ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Data collection	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Total	15	n/a	n/a	68

* Individuals that cannot attend the focus groups will be interviewed one-on-one. Clinical staff includes IC leaders, QI team members and unit staff. Managers include the chief nursing officer and chief medical officer.

EXHIBIT 2. ESTIMATED ANNUALIZED COST BURDEN

Data collection	Number of respondents	Total burden hours	Average hourly wage rate	Total cost burden
Pre-intervention focus groups with clinical staff *	3	27	$36.73 *	$992
Pre-intervention focus groups with managers *	3	3	$138.38 **	$415
Clinical staff survey	3	8	$36.73 *	$294
Post-intervention focus groups with clinical staff *	3	27	$36.73 *	$992
Post-intervention focus groups with managers *	3	3	$138.38 **	$415
Total	15	68	na	$3,108

* Based upon the mean hourly wage for Registered Nurses in Nassau and Suffolk County, NY as reported by the Bureau of Labor Statistics in May 2008.

** Based on report of a private survey of HR departments conducted in November 2009 in New York, NY published by *http://www.salary.com;* 3 chief nursing officers at $101.14/hr and 3 chief medical officers at $175.61/hour.

Estimated Annual Costs to the Federal Government

Exhibit 3 shows the annualized and total cost to the federal government for this two year research project. Project development covers steps taken to revise the research plan and begin implementation. The total cost is estimated to be $500,001.

EXHIBIT 3. ANNUALIZED AND TOTAL COST TO THE FEDERAL GOVERNMENT

Cost component	Annualized cost	Total cost
Project Management	$125,526	$251,052
Project Development	$54,622	$109,244
Data Collection Activities	$41,864	$83,728
Travel	$4,000	$8,000
Overhead	$23,754	$47,507
Total	$250,001	$500,001

Request for Comments

In accordance with the above-cited Paperwork Reduction Act legislation, 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 healthcare research and healthcare 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 will become a matter of public record.

Dated: May 21, 2010.

Carolyn M. Clancy,

Director.

[FR Doc. 2010–13107 Filed 6–2–10; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Agency Recordkeeping/Reporting Requirements Under Emergency Review by the Office of Management and Budget

Title: State Personal Responsibility Education Program.

OMB No.: New Collection.

Description: An emergency request is being made to solicit comments from the public on paperwork reduction as it relates to ACYF's receipt of the following documents from applicants and awardees:

- Application for Formula Grant
- Performance Progress Reports
- Year 1 Implementation Plan
- Performance Measure Reporting

Respondents: 50 States and 9 Territories, to include, District of Columbia, Puerto Rico, Virgin Islands, Guam, American Samoa, Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands and Palau

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Application to include program narrative	59	1	40	2360
Performance Progress Reports	59	2	10	1180
Year 1 Implementation Plan	59	1	30	1770
Performance Measure Reporting	59	1	10	590

Estimated Total Annual Burden Hours: 5900.

Additional Information:

The Year 1 Implementation Plan is only required to be completed and submitted in the first year of the project period. This is a one time submission and will not occur annually.

The potential awardees could include organizations and other entities awarded in year 3 of the project period in States that did not apply for funding in the first 2 years of the project period.

A copy of this information collection, with applicable supporting documentation, may be obtained by calling the Administration for Children and Families, Reports Clearance Officer, Robert Sargis at (202) 690–7275. Interested persons are invited to submit comments regarding this request. Comments must be received within thirty days from the publication date of this Notice.

Comments about the information collection described above should be directed to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for ACF, Office of Management and Budget, Paperwork Reduction Project, 725 17th Street NW., Washington, DC 20503; FAX: (202) 395–7285; e-mail: *oira_submission@omb.eop.gov.*

Dated: May 25, 2010.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2010–13106 Filed 6–2–10; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0248]

Agency Information Collection Activities; Proposed Collection; Comment Request; Format and Content Requirements for Over-the-Counter Drug Product Labeling

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the standardized format and content requirements for the labeling of over-the-counter (OTC) drug products.

DATES: Submit either electronic or written comments on the collection of information by August 2, 2010.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3792, *Elizabeth.berbakos@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Format and Content Requirements for OTC Drug Product Labeling (OMB Control Number 0910 0340)—Reinstatement

In the **Federal Register** of March 17, 1999 (64 FR 13254), we amended our

regulations governing requirements for human drug products to establish standardized format and content requirements for the labeling of all marketed OTC drug products in part 201 (21 CFR part 201) (the 1999 labeling final rule). The regulations in part 201 require OTC drug product labeling to include uniform headings and subheadings, presented in a standardized order, with minimum standards for type size and other graphical features. Specifically, the 1999 labeling final rule added new § 201.66 to part 201. Section 201.66 sets content and format requirements for the Drug Facts portion of labels on OTC drug products.

The only burden to comply with the regulations in part 201 is a one-time burden for OTC sunscreen products and new OTC drug products introduced to the marketplace under new drug applications (NDAs) or abbreviated new drug applications (ANDAs). All OTC drug products except sunscreens and new OTC products marketed under NDAs or ANDAs are already required to be in compliance with these labeling regulations. On June 20, 2000 (65 FR 38191), we published a **Federal Register** document that required all OTC drug products marketed under the OTC monograph system except sunscreen products to comply with the regulations by May 16, 2005, or sooner (65 FR 38191 at 38193). Sunscreen products do not have to comply with the regulations until we lift the stay of the sunscreen final rule that was published in the **Federal Register** on May 21, 1999 (64 FR 27666) (the 1999 sunscreen final rule). In the **Federal Register** of December 31, 2001 (66 FR 67485), we stayed the 1999 sunscreen final rule indefinitely. In the **Federal Register** of September 3, 2004 (69 FR 53801), we delayed the § 201.66 implementation date for OTC sunscreen products indefinitely. Because the compliance date has passed for all OTC drug products except sunscreens and drug products introduced under new NDAs or ANDAs, we believe that the labeling burden associated with the 1999 labeling final rule applies only to these products. We do not anticipate receiving any requests for exemptions or deferrals under § 201.66(e) because we have only received one request in the past 8 years.

We estimate that there are 4,750 OTC sunscreen drug product stock keeping units (SKUs) that have not yet complied with the 1999 labeling final rule. All of these SKUs will need to implement the new labeling format by the implementation date included in the 1999 sunscreen final rule when it is published in the **Federal Register**. We estimate that these 4,750 SKUs are marketed by 400 manufacturers and that approximately 2 hours will be spent on each submission (see table 1 of this document). The number of hours per submission (response) is based on our estimate in the 1999 labeling final rule (64 FR 13254 at 13276). If an average of 2 hours is spent preparing, completing, and reviewing each of the estimated 4,750 sunscreen SKUs, the total number of hours dedicated to the labeling of sunscreen products would be 9,500 hours (4,750 SKUs times 2 hours/SKU) (see table 1 of this document).

Based on estimates provided by the Consumer Healthcare Products Association, we believe that approximately 500 new OTC drug product SKUs marketed under NDAs or ANDAs are introduced to the marketplace each year. We estimate that these SKUs are marketed by 300 manufacturers. We estimate that the preparation of labeling for new NDAs and ANDAs will require 5 hours to prepare, complete, and review new labeling prior to submitting the new labeling to us. Based on this estimate, the annual reporting burden for this type of labeling is approximately 2,500 hours (see table 1 of this document).

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
201.66(c) and (d)[2]	400	11.88	4,750	2	9,500
201.66(c) and (d)[3]	300	1.67	500	5	2,500
Total					12,000

[1] FDA estimates that capital costs of 22 to 25 million dollars will result from preparing labeling content and format in accordance with § 201.66. There are no operating or maintenance costs associated with this collection of information.
[2] Burden for manufacturers of sunscreen drug product.
[3] Burden for manufacturers of products marketed under new NDAs or ANDAs.

Dated: May 27, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–13279 Filed 6–2–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality; Notice of Meeting

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), announcement is made of a Health Care Policy and Research Special Emphasis Panel (SEP) meeting.

A Special Emphasis Panel is a group of experts in fields related to health care research who are invited by the Agency for Healthcare Research and Quality (AHRQ), and agree to be available, to conduct on an as needed basis, scientific reviews of applications for AHRQ support. Individual members of the Panel do not attend regularly-scheduled meetings and do not serve for fixed terms or a long period of time. Rather, they are asked to participate in particular review meetings which require their type of expertise.

Substantial segments of the upcoming SEP meeting listed below will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552b(c)(6). Grant applications for the AHRQ Limited Competition: PROSPECT STUDIES—Building New Clinical Infrastructure for CE (R01) applications are to be reviewed

and discussed at this meeting. These discussions are likely to reveal personal information concerning individuals associated with the applications. This information is exempt from mandatory disclosure under the above-cited statutes.

SEP Meeting on: AHRQ Limited Competition: PROSPECT STUDIES—Building New Clinical Infrastructure for CE (R01).

Date: June 16, 2010 (Open on June 16 from 8 a.m. to 8:15 a.m. and closed for the remainder of the meeting).

Place: Hyatt Regency Bethesda Hotel, 7400 Wisconsin Avenue, 1 Bethesda Metro Center, Bethesda, Maryland 20814.

Contact Person: Anyone wishing to obtain a roster of members, agenda or minutes of the non-confidential portions of this meeting should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, AHRQ, 540 Gaither Road, Room 2038, Rockville, Maryland 20850, Telephone (301) 427–1554.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: May 24, 2010.

Carol M. Clancy,

Director.

[FR Doc. 2010–13109 Filed 6–2–10; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality; Notice of Meeting

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), announcement is made of a Health Care Policy and Research Special Emphasis Panel (SEP) meeting.

A Special Emphasis Panel is a group of experts in fields related to health care research who are invited by the Agency for Healthcare Research and Quality (AHRQ), and agree to be available, to conduct on an as-needed basis, scientific reviews of applications for AHRQ support. Individual members of the Panel do not attend regularly-scheduled meetings and do not serve for fixed terms or a long period of time. Rather, they are asked to participate in particular review meetings which require their type of expertise.

Substantial segments of the upcoming SEP meeting listed below will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552b(c)(6). Grant applications for the OS ARRA: Optimizing Prevention and Healthcare Management for Complex Patients (R21) applications are to be reviewed and discussed at this meeting. These discussions are likely to reveal personal information concerning individuals associated with the applications. This information is exempt from mandatory disclosure under the above-cited statutes.

SEP Meeting on: OS ARRA: Optimizing Prevention and Healthcare Management for Complex Patients (R21).

Date: June 24, 2010 (Open on June 24 from 8 a.m. to 8:15 a.m. and closed for the remainder of the meeting).

Place: Hilton Rockville Executive Meeting Center, 1750 Rockville Pike, Conference Room TBD, Rockville, MD 20850.

Contact Person: Anyone wishing to obtain a roster of members, agenda or minutes of the nonconfidential portions of this meeting should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, AHRQ, 540 Gaither Road, Room 2038, Rockville, Maryland 20850, Telephone (301) 427–1554.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: May 24, 2010.

Carolyn M. Clancy,

Director.

[FR Doc. 2010–13108 Filed 6–2–10; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0004]

[FDA 225–09–0014]

Memorandum of Understanding by and Between the United States Food and Drug Administration and the International Anesthesia Research Society for the Safety of Key Inhaled and Intravenous Drugs in Pediatrics Public-Private Partnership

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between FDA and the International Anesthesia Research Society (IARS). The purpose of this MOU is to establish a framework for collaboration between FDA and IARS and to support their shared interest of promoting the safe use of anesthetics and sedatives in children.

DATES: The agreement became effective March 21, 2010.

FOR FURTHER INFORMATION CONTACT: Wendy R. Sanhai, Senior Scientific Advisor, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 4128, Silver Spring, MD 20993, 301–796–8518.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all written agreements and MOUs between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: May 26, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

BILLING CODE 4160–01–S

225-09-0014

MEMORANDUM OF UNDERSTANDING BY AND BETWEEN THE

UNITED STATES FOOD AND DRUG ADMINISTRATION (FDA)

AND THE

INTERNATIONAL ANESTHESIA RESEARCH SOCIETY (IARS)

FOR

THE SAFETY OF KEY INHALED AND INTRAVENOUS DRUGS IN PEDIATRICS

PUBLIC-PRIVATE PARTNERSHIP (SAFEKIDS PPP)

This Memorandum of Understanding (MOU) is executed by and between the United States Food and Drug Administration (FDA) and the International Anesthesia Research Society (IARS), hereafter referred to collectively as the "Parties." This MOU is deemed effective as of the date it is fully signed by both Parties (Effective Date).

WHEREAS, non-clinical studies in juvenile animal models show that exposure to some anesthetics and sedatives is associated with memory and learning deficits and other neurodegenerative changes in the central nervous system;

WHEREAS, insufficient human data exist to support or refute the possibility that similar effects could occur in children; thus, there is a critical need to address the public health issues associated with the safe use of anesthesia and sedatives in children;

WHEREAS, the FDA, under its public health mission, is interested in partnering with multiple stakeholders (e.g. professional societies, academic research institutions, patient advocacy groups, industry and other government and nonprofit organizations) to investigate the effect of anesthetics and sedatives on the developing human brain, including long-term studies in neonates and young children, and to ensure that information and outcomes generated from this research can be used to benefit public health;

WHEREAS, the IARS is a nonpolitical nonprofit voluntary membership society, organized and operated exclusively for exempt purposes as set forth in section 501(c)(3) of the Internal Revenue Code, whose mission is to encourage, stimulate, and fund ongoing anesthesia related research projects and to disseminate current, state-of-the-art, basic and clinical research data in all areas of clinical anesthesia;

WHEREAS, the FDA and the IARS seek to develop a Public-Private Partnership (PPP) to leverage the resources and expertise of the Parties and develop an overarching framework to bring together multiple stakeholders to address the major scientific and clinical gaps regarding the safe use of anesthetics and sedatives in children;

WHEREAS, the Parties have agreed to enter into this MOU to develop the SAFEKIDS (Safety of Key Inhaled and Intravenous Drugs in Pediatrics) PPP, a multi-year, multi-phased collaborative effort to make anesthesia safer for children, which will include multiple public and private partners working together in the interest of public health.

NOW, THEREFORE, in consideration of the mutual agreement of the Parties, and of the covenants and conditions hereinafter expressed, the Parties hereby agree as follows:

I. PURPOSE

The purpose of this MOU is to establish the framework for collaboration between the Parties and to support their shared interest of promoting the safe use of anesthetics and sedatives in children. The strategic goals and expected results of this collaboration are to:

1. Establish the SAFEKIDS PPP for the purpose of supporting, implementing, and managing a series of scientific projects to bridge the knowledge gaps that exist in elucidating whether certain anesthetic and sedative agents cause neurotoxicity in rodents, non-human primates, and humans.

2. Share information and data to the extent permitted by State and Federal law, and ensure that information, know-how, and best practices resulting from the scientific projects conducted under the SAFEKIDS PPP are placed in the public domain for the benefit of all stakeholders.

3. Inform clinicians, patients, and other stakeholders about any potential safety risks associated with certain anesthetic and sedative agents, through joint publications, workshops, and other educational efforts.

4. Inform future activities, including clinical trials, and the research and development of anesthetic and sedative agents for intended use in the pediatric population, to the extent permitted by available scientific data.

II. AUTHORITY

FDA is authorized to enforce the Federal Food, Drug, and Cosmetic Act (the Act) as amended (21 U.S.C. 301). In fulfilling its responsibilities under the Act, FDA among other things, directs its activities toward promoting and protecting the public health by assuring the safety, efficacy, and security of drugs. To accomplish its mission, FDA must stay abreast of the latest developments in research and also communicate with stakeholders about complex scientific and public health issues. Increased development of research, education and outreach partnerships with IARS will greatly contribute to FDA's mission.

III. RESPONSIBILITIES OF THE PARTIES

In pursuit of the goals described above, the Parties agree to work through the following process.

1. Under the framework of the SAFEKIDS PPP, the FDA and the IARS will develop an overarching infrastructure to implement and sustain additional pre-clinical and clinical research, leveraging a combination of public and private resources and expertise to bridge the scientific and public health gaps in the pediatric population.

2. The Parties will establish a public-private governance structure including a Steering Committee, an Executive Board, a Scientific Advisory Board, and technical subcommittees. These governance committees will develop strategic and operational plans, set priorities, and review, implement, oversee, and evaluate individual projects conducted under the SAFEKIDS PPP. The membership of the governance committees will be inclusive and will be comprised of representatives of the Parties and other stakeholders. The Parties will develop specific policies and procedures to carry out the work of the governance committees within the framework of the PPP.

No committee, board, or subcommittee established pursuant to this MOU will provide advice or recommendations to FDA or to any government agency.

3. To ensure integrity, scientific rigor, and consistency with the goals and objectives of the SAFEKIDS PPP, all projects proposed for implementation will undergo peer review, with final project selection to be accomplished through a consensus among qualified experts operating in a consistent and unbiased manner within the overall governance structure of the PPP.

4. Data, outcomes and best practices generated under the SAFEKIDS PPP will be placed in the public domain for the benefit of all stakeholders and patients.

IV. RESOURCES

Sources of support for projects under this MOU will be governed by State and Federal law and applicable policies and procedures. The terms for such support will be set forth in the specific and separate written agreements for each project. The MOU does not create binding, enforceable obligations against any Party. All activities undertaken pursuant to the MOU are subject to the availability of personnel, resources, and funds. This MOU does not affect or supersede any existing or future agreements or arrangements among the Parties. This MOU and all associated agreements will be subject to the applicable policies, rules, regulations, and statutes under which the FDA and IARS operate.

V. GENERAL PROVISIONS

1. Nothing in this MOU alters the statutory authorities or obligations of FDA. This MOU is intended to facilitate cooperative efforts between the Parties in the area of pediatric anesthesiology.

2. U.S. Federal law governs this MOU for all purposes, including, but not limited to, determining the validity of the MOU, the meaning of its provisions, and the rights, obligations, and remedies of the Parties.

3. Access to non-public information shall be governed by separate Confidentiality Disclosure Agreements in which the Parties will agree and certify in writing that they shall not further release, publish or disclose such information and that they shall protect such information. No proprietary data, trade secrets or patient confidential information shall be disclosed among the Parties unless permitted by the provisions of 21 U.S.C. 331(j), 21 U.S.C. 360j(c), 18 U.S.C. 1905, and other pertinent laws and regulations governing the confidentiality of such information.

4. Release of information to the media or to the general public about the SAFEKIDS PPP or the activities conducted by the Parties pursuant to the PPP and this MOU shall be subject to prior review by and agreement between the Parties.

5. It is understood that, although the Parties have mutual interests, there may be opportunities for independent collaborations and activities outside the scope of this MOU, but which are within the scope of the Parties' respective missions. As such, the Parties may, as appropriate, enter into independent negotiations and agreements with prospective partner/s without any effect on this MOU.

6. Rights to inventions or intellectual property developed will be addressed in separate written development and implementation agreements among the Parties. To the extent there is FDA participation in any projects related to development of any product, invention, or property developed, such activities will be governed by applicable Federal law.

7. Any notice or other communication required or permitted under this MOU shall be in writing and will be deemed effective on the date it is received by the receiving Party.

8. FDA participation in this MOU is governed by Federal statutes and regulations.

VI. TERM, TERMINATION AND MODIFICATIONS

1. This MOU constitutes the entire agreement between the Parties as to the matters herein. There are no representations, warranties, agreements, or understandings, expressed or implied, written or oral, between the Parties relating to the subject matter of this MOU that are not fully expressed herein.

2. This MOU may be modified only upon the mutual written consent of the Parties. Modifications must be signed by the original signatories to this MOU, or by their designees or successors. No oral statement by any person shall be interpreted as modifying or otherwise affecting the terms of this MOU.

3. This MOU, when accepted by the Parties, will remain in effect for three (3) calendar years from the Effective Date, unless modified or terminated.

4. Either Party to this MOU may terminate its participation by written notice at any time, with or without cause, and without incurring any liability or obligation. Such written notice shall be given by the terminating Party to the other Party at least 60 days prior to the date of actual termination.

VII. CONTACTS

Notices or formal communications pursuant to this MOU shall be sent in writing by personal delivery, overnight delivery, facsimile telecommunication with confirmatory receipt, or certified or registered mail, return receipt requested, to the following contact for each Party:

For FDA: Wendy R. Sanhai, Ph.D., M.B.A.
Senior Scientific Advisor
Office of the Commissioner, FDA
5600 Fishers Lane, Suite 6A-08
Rockville, MD. 20857
Fax: (301) 827-5891

With a copy to: Chekesha S. Clingman, Ph.D.
Senior Scientific Program Manager
Office of the Commissioner, FDA
5600 Fishers Lane, Suite 6A-08
Rockville, MD 20857
Fax: (301) 827-5891

For IARS: Robert N. Sladen, MD
Chair, IARS Board of Trustees
International Anesthesia Research Society
100 Pine Street, Suite 230
San Francisco, CA 94111
Fax: (415) 296-6901

With a copy to: Thomas A. Cooper
Executive Director
International Anesthesia Research Society
100 Pine Street, Suite 230
San Francisco, CA 94111
Fax: (415) 296-6901

The Parties shall notify each other of any change of address or change of named contact by written notice as specified in this paragraph VI. All notices shall be effective upon date of receipt.

Signatures begin on next page

SIGNATURES OF RESPONSIBLE PARTIES:

We, the undersigned, agree to abide by the terms and conditions of this MOU.

APPROVED AND ACCEPTED FOR THE
UNITED STATES FOOD AND DRUG ADMINISTRATION

Date 3/20/10

Janet Woodcock, M.D.
Director, Center for Drug Evaluation and Research
Food and Drug Administration

APPROVED AND ACCEPTED FOR THE
INTERNATIONAL ANESTHESIA RESEARCH SOCIETY

Date 3-21-2010

Robert N. Sladen, M.D.
Chair, IARS Board of Trustees
International Anesthesia Research Society

FDA/IAR SAFEKIDS PPP
Page 7 of 7

[FR Doc. 2010–13292 Filed 6–2–10; 8:45 am]
BILLING CODE 4160–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Office of Child Support Enforcement; Privacy Act of 1974; Computer Matching Agreement

AGENCY: Office of Child Support Enforcement (OCSE), ACF, HHS.

ACTION: Notice of a Computer Matching Program.

SUMMARY: In accordance with the Privacy Act of 1974 (5 U.S.C. 522a), as amended, OCSE is publishing notice of a computer matching program between OCSE and State agencies administering unemployment compensation (UC) programs.

DATES: The Department of Health and Human Services (HHS) invites interested parties to review, submit written data, comments, or arguments to the agency about the matching program until July 6, 2010. As required by the Privacy Act (5 U.S.C. 552a(r)), HHS on

May 26, 2010, sent a report of a Computer Matching Program to the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB). The matching program effective date is estimated to be July 13, 2010.

ADDRESSES: Interested parties may submit written comment on this notice by writing to Linda Deimeke, Director, Division of Federal Systems, Office of Automation and Program Operations, Office of Child Support Enforcement, Administration for Children and Families, 370 L'Enfant Promenade, SW., Washington, DC 20447. Comments received will be available for public inspection at this address from 9 a.m. to 5 p.m. Monday through Friday. Comments may also be submitted electronically via the Internet at: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Deimeke, Director, Division of Federal Systems, Office of Automation and Program Operations, Office of Child Support Enforcement, Administration for Children and Families, 370 L'Enfant Promenade, SW, Washington, DC 20447; telephone (202) 401–5439.

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974 (5 U.S.C. 552a), as amended, provides for certain protections for individuals applying for and receiving Federal benefits. The law governs the use of computer matching by Federal agencies when records in a system of records are matched with other Federal, State or local government records. The Privacy Act requires agencies involved in computer matching programs to:

1. Negotiate written agreements with the other agency or agencies participating in the matching programs;
2. Provide notification to applicants and beneficiaries that their records are subject to matching;
3. Verify information produced by such matching program before reducing, making a final denial of, suspending, or terminating an individual's benefits or payments;
4. Publish notice of the computer matching program in the **Federal Register**;
5. Furnish reports about the matching program to Congress and OMB; and
6. Obtain the approval of the matching agreement by the Data Integrity Board of any federal agency participating in a matching program.

This matching program meets these requirements.

Dated: May 25, 2010.

Vicki Turetsky,

Commissioner, Office of Child Support Enforcement.

Notice of Computer Matching Program

A. Participating Agencies

The participating agencies are the Office of Child Support Enforcement (OCSE), which is the "recipient agency," and State agencies administering UC programs, which are the "source agencies."

B. Purpose of the Matching Program

The purpose of the matching program is to provide new hire and quarterly wage (QW) information from OCSE's National Directory of New Hires (NDNH) to State agencies administrating UC programs for the purpose of establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, or recipients of, UC benefits. State agencies administering the UC programs may also use the NDNH information for the administration of its tax compliance function.

C. Authority for Conducting the Match

The authority for conducting the matching program is contained in section 453(j)(8) of the Social Security Act (42 U.S.C. 653(j)(8)).

D. Categories of Individuals Involved and Identification of Records Used in the Matching Program

The categories of individuals involved in the matching program are applicants and recipients of benefits under UC programs administered by State agencies. The system of records maintained by OCSE from which records will be disclosed for the purpose of this matching program is the "Location and Collection System" (LCS), No. 09–90–0074, last published in the **Federal Register** at 72 FR 51446 on September 7, 2007. The LCS includes the NDNH, which contains new hire, QW, and unemployment insurance information. Disclosures of NDNH information to the State agencies administering UC programs is a "routine use" under this system of records. Records resulting from the matching program and which are disclosed to the State agencies administering UC programs include names, Social Security numbers, and employment information.

E. Inclusive Dates of the Matching Program

The computer matching agreement will be effective and matching activity may commence the later of the following:

(1) July 13, 2010; (2) 30 days after this Notice is published in the **Federal Register**; or (3) 40 days after OCSE sends a report of the matching program to the Congressional committees of jurisdiction under 5 U.S.C. 552a(o)(2)(A) and to OMB, unless OMB disapproves the agreement within the 40-day review period or grants a waiver of 10 days of the 40-day review period. The matching agreement will remain in effect for 18 months from its effective date, unless one of the parties to the agreement advises the other by written request to terminate or modify the agreement. The agreement is subject to renewal by the HHS Data Integrity Board for 12 additional months if the matching program will be conducted without any change and each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

[FR Doc. 2010–13287 Filed 6–2–10; 8:45 am]

BILLING CODE 4184–42–P

DEPARTMENT OF HOMELAND SECURITY

National Protection and Programs Directorate

[Docket No. DHS–2010–0022]

Infrastructure Protection Data Call Survey

AGENCY: National Protection and Programs Directorate, DHS.

ACTION: 30-Day Notice and request for comments; New Information Collection Request: 1670–NEW.

SUMMARY: The Department of Homeland Security (DHS), National Protection and Programs Directorate (NPPD), Office of Infrastructure Protection (IP), Infrastructure Information Collection Division (IICD), has submitted the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). The National Protection and Programs Directorate is soliciting comments concerning New Information Collection Request, Infrastructure Protection Data Call Survey. DHS previously published this information collection request (ICR) in the **Federal Register** on December 22, 2009, at 74 FR 68070–68071, for a 60-day public comment period. DHS received no comments. The purpose of this notice is

to allow additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until July 6, 2010. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to OMB Desk Officer, Department of Homeland Security, Office of Civil Rights and Civil Liberties. Comments must be identified by "DHS–2010–0022" and may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.*
- *E-mail: oira_submission@omb.eop.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 395–5806

Instructions: All submissions received must include the words "Department of Homeland Security" and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

FOR FURTHER INFORMATION CONTACT: If additional information is required contact: Ribkha Hailu, DHS/NPPD/IP/IICD, at *iicd@dhs.gov.*

SUPPLEMENTARY INFORMATION: DHS is the lead coordinator in the national effort to identify and prioritize the country's critical infrastructure and key resources (CIKR). At DHS, this responsibility is managed by NPPD/IP. In FY2006, IP engaged in the annual development of a list of CIKR assets and systems to improve IP's CIKR prioritization efforts; this list is called the Critical Infrastructure List. The Critical Infrastructure List includes assets and systems that, if destroyed, damaged or otherwise compromised, could result in significant consequences on a regional or national scale.

The IP Data Call is administered out of IP/IICD. The IP Data Call provides opportunities for States and territories to collaborate with DHS and its Federal partners in CIKR protection. DHS, State and territorial Homeland Security Advisors (HSAs), Sector Specific Agencies (SSAs), and territories build their CIKR data using the IP Data Call application. To ensure that HSAs, SSAs and territories are able to achieve this mission, IP requests opinions and information in a survey from IP Data Call participants regarding the IP Data Call process and the Web-based application used to collect the CIKR data.

The survey data collected is for internal IICD and IP use only. IICD and IP will use the results of the IP Data Call Survey to determine levels of customer satisfaction with the IP Data Call process and application and prioritize future improvements. The results will also allow IP to appropriate funds cost-effectively based on user need and improve the process and application.

Analysis

Agency: Department of Homeland Security, National Protection and Programs Directorate.

Title: Infrastructure Protection Data Call Survey.

Form: Not Applicable.

OMB Number: 1670–NEW.

Affected Public: Federal, State, Local, Tribal.

Number of Respondents: 558.

Estimated Time Per Respondent: 15 minutes.

Total Burden Hours: 140 annual burden hours.

Total Burden Cost (operating/maintaining): $14,430.00.

Dated: May 27, 2010.

Thomas Chase Garwood, III,

Chief Information Officer, National Protection and Programs Directorate, Department of Homeland Security.

[FR Doc. 2010–13349 Filed 6–2–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2009–0136]

Collection of Information Under Review by Office of Management and Budget: OMB Control Number: 1625–0056

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) requesting an extension of its approval for the following collection of information: 1625–0056, Labeling required in 33 CFR parts 181 and 183 and 46 CFR 25.10–3. Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before July 6, 2010.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2009–0136] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT) or to OIRA. To avoid duplication, please submit your comments by only one of the following means:

(1) Electronic submission. (a) To Coast Guard docket at *http://www.regulation.gov.* (b) To OIRA by e-mail via: *oira_submission@omb.eop.gov.*

(2) Mail or Hand delivery. (a) DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Hand deliver between the hours of 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329. (b) To OIRA, 725 17th Street, NW., Washington, DC 20503, attention Desk Officer for the Coast Guard.

(3) Fax. (a) To DMF, 202–493–2251. (b) To OIRA at 202–395–5806. To ensure your comments are received in a timely manner, mark the fax, attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as

being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

A copy of the ICR is available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–611), Attn Paperwork Reduction Act Manager, U.S. Coast Guard, 2100 2nd St., SW., Stop 7101, Washington DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Contact Mr. Arthur Requina, Office of Information Management, telephone 202–475–3523 or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard invites comments on whether this ICR should be granted based on it being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of information subject to the collections; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG 2009–0136]. For your comments to OIRA to be considered, it is best if they are received on or before the July 6, 2010.

Public participation and request for comments: We encourage you to respond to this request by submitting comments and related materials. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. *Please see* the "Privacy Act" paragraph below.

Submitting comments: If you submit a comment, please include the docket number [USCG–2009–0136], indicate the specific section of the document to which each comment applies, providing a reason for each comment. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission. You may submit comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. In response to your comments, we may revise the ICR or decide not to seek an extension of approval for this collection. The Coast Guard and OIRA will consider all comments and material received during the comment period.

Viewing comments and documents: Go to *http://www.regulations.gov* to view documents mentioned in this Notice as being available in the docket. Click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2009–0136" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the DMF in room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Privacy Act statement regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (75 FR 1068, January 8, 2010) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments.

Information Collection Request

Title: Labeling required in 33 CFR Parts 181 and 183 and 46 CFR 25.10–3.

OMB Control Number: 1625–0056.

Type of Request: Extension of a currently approved collection.

Respondents: Manufacturers of boats, fuel tanks/hoses and navigation lights.

Abstract: Title 46 U.S.C. 4302(a)(3) gives the Coast Guard authority to require the display of seals, labels, plates, insignia, or other devices for certifying/evidencing compliance with safety regulations and standards of the United States Government for recreational vessels and associated equipment.

Forms: None.

Burden Estimate: The estimated burden has decreased from 395,107 to 299,141 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: May 25, 2010.

M.B. Lytle,

Captain, U.S. Coast Guard, Acting Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2010–13382 Filed 6–2–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–730, Revision of an Existing Information Collection Request; Comment Request

ACTION: 30–Day Notice of Information Collection Under Review: Form I–730, Refugee/Asylee Relative Petition. OMB Control No. 1615–0037.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on March 10, 2010 at 75 FR 11192, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until July 6, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS,

Chief, Regulatory Products Division, Clearance Office, 111 Massachusetts Avenue, NW., Washington, DC 20529–2210. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0037 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this Information Collection

(1) *Type of Information Collection:* Revision of an existing information collection.

(2) *Title of the Form/Collection:* Refugee/Asylee Relative Petition.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–730. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–730 will be used by an asylee or refugee to file on behalf of his or her spouse and/or children provided that the relationship to the refugee/asylee existed prior to their admission to the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 86,400 responses at 35 minutes (.583) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 50,371 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov/*.

We may also be contacted at: USCIS, Regulatory Products Division, 111 Massachusetts Avenue, NW., Washington, DC 20529–2210, Telephone number 202–272–8377.

Dated: May 28, 2010.

Stephen Tarragon,

Deputy Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services.

[FR Doc. 2010–13357 Filed 6–2–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376—N–47]

Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Conversion of Efficiencies Units to One Bedroom Units Multifamily Housing Package; Notice of Proposed Information Collection for Public Comment

AGENCY: Office of the Chief Information Officer.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* June 17, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within seven (14) days from the date of this Notice. Comments should refer to the proposal by name/or OMB approval number) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail: *OIRA_Submission@eop.omb.gov;* fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Leroy McKinney Jr., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Leroy.MckinneyJR@HUD.gov;* telephone (202) 402–2374. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Maurice Champagne.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the U.S. Department of Housing and Urban Development (HUD) has submitted to OMB, for emergency processing, an information collection package with respect to this information is collected from owners seeking to convert efficiency units into one bedroom units in certain types of HUD assisted and/or insured housing. The Department has developed standards and requirements via Housing Notice and attached forms to permit the conversion of efficiencies to one-bedrooms provided it can be demonstrated that the conversion is warranted by local demands and results in the long-term financial and physical repositioning of the project. This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Conversion of Efficiencies Units to One Bedroom Units Multifamily Housing Package.

Description of Information Collection: The Department has received requests from owners of assisted housing to convert efficiencies to one-bedroom units. The Department has developed policies and procedures to permit the conversion of efficiencies to one-bedroom units provided it can be demonstrated that the conversion is warranted by local market demands for affordable housing and results in the long-term financial and physical repositioning of the project. The information collected as part of the submission, will be utilized by the Department to ensure that all programmatic requirements contained in the Housing Notice and the submission requirements have been satisfied.

OMB Control Number: 2502–Pending.

Agency Form Numbers: HUD–9647, HUD–92030, HUD–92030–I, HUD–92031–IRP, HUD–92032, HUD–92033 and HUD–92040.

Members of Affected Public: Not-for-profit institutions, State, Local or Tribal Government.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of responses, and hours of response: The number of burden hours is 23,578. The number of respondents is 0.500, the number of responses is 125, the frequency of response is once per submission, and the burden hour per response is 147,375.

Status of the proposed information collection: This is a New collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: *May 27, 2010.*

Leroy McKinney Jr.,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–13344 Filed 6–2–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5384–N–05]

Notice of Proposed Information Collection: Comment Request; Record of Employee Interview

AGENCY: Office of Labor Relations, Office of Departmental Operations and Coordination, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* August 2, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Waite H. Madison, Director, Office of Labor Relations, Department of Housing and Urban Development, 451 7th Street, SW., Room 2102, Washington, DC 20410 or *Waite.H.Madison@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Jade Banks, Senior Policy Advisor, Office of Labor Relations, Department of Housing and Urban Development, 451 7th Street, SW., Room 2102, Washington, DC 20410 or *Jade.M.Banks@hud.gov,* telephone (202) 402–5475 (this is not a toll-free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Record of Employee Interview.

OMB Control Number, if applicable: 2501–0009.

Description of the need for the information and proposed use: All Federal agencies administering programs subject to Davis-Bacon wage provisions are required to enforce Federal wage and reporting activities by Department of Labor (DOL) regulations (29 CFR Part 5, Section 5.6 paragraphs (a)(2) and (a)(3), respectively.

HUD, state and local agencies administering HUD-assisted programs must enforce Federal wage and reporting requirements on covered HUD-assisted construction and maintenance work. Enforcement activities include conducting interviews with laborers and mechanics employed on HUD-assisted projects concerning their employment on covered projects. The HUD–11 and HUD–11–SP (Spanish version) are used to assist in the conduct of the interviews and to record the information provided by the respondents. The forms may be supplemented with additional pages, as needed. Responses and the provision of supplemental informaton are voluntary on the part of respondents. The HUD–11 and HUD–11–SP are available on-line through HUD's Web site. Completed HUD–11 and/or HUD–11–SP forms must be retained by the HUD and local agencies to document the sufficiency of enforcement efforts.

Agency form numbers, if applicable: Forms HUD–11 and HUD–11–SP (Spanish version).

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response

Item	Number of respondents	Amount of time required (hours)	Total time required (in hrs.)/annum
Interviews	20,000	.25	5,000
Recordkeeping	20,000	.16	3,200
Total Annual Burden	.....	.....	8,200

Status of the proposed information collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: May 27, 2010.

Waite H. Madison,

Director, Office of Labor Relations.

[FR Doc. 2010–13345 Filed 6–2–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2009–N192; 20124–1112–0000–F2]

Comal County Regional Habitat Conservation Plan, Comal County, TX

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: draft environmental impact statement, draft habitat conservation plan, and permit application; announcement of a public hearing.

SUMMARY: Comal County, Texas (Applicant), has applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit (TE–223267–0) under section 10(a)(1)(B) of the Endangered Species Act (Act) of 1973, as amended. The requested permit, which would be in effect for a period of 30 years, if granted, would authorize incidental take of the following federally listed species: Golden-cheeked warbler (*Dendroica chrysoparia*) and black-capped vireo (*Vireo atricapilla*). The proposed take would occur in Comal County, Texas, as a result of activities including, but not limited to: Public or private construction and development, utility installation and maintenance, and public infrastructure projects. Comal County has completed a draft Habitat Conservation Plan (dHCP) as part of the application package. We have issued a draft Environmental Impact Statement (dEIS) that evaluates the impacts of, and alternatives to, possible issuance of an incidental take permit (ITP).

DATES: *Comment-period end:* To ensure consideration, we must receive written comments by close of business (4:30 p.m. CDT) on or before September 1, 2010.

Public meetings: We will accept oral and written comments at a public hearing to be held on July 27, 6 p.m. to 8 p.m., Comal County Commissioners Court, 199 Main Plaza, New Braunfels, Texas 78130.

ADDRESSES: For where to review documents and submit comments, and the public meeting location, *see* Reviewing Documents and Submitting Comments in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Mr. Adam Zerrenner, Field Supervisor, U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, TX 78758 or 512–490–0057.

SUPPLEMENTARY INFORMATION: Under the National Environmental Policy Act (NEPA; 42 U.S.C. 4371 *et seq.*), this notice advises the public that we have gathered the information necessary to determine impacts and formulate alternatives for the EIS related to the potential issuance of an ITP to Comal County; and that the Applicant has developed an HCP which describes the measures the applicant has agreed to undertake to minimize and mitigate the effects of incidental take of federally listed species to the maximum extent practicable, under section 10(a)(1)(B) of the Act (16 U.S.C. 1531 *et seq.*).

Background

Our initial notice of intent to prepare an EIS and hold public scoping meetings published in the **Federal Register** on October 16, 2008 (73 FR 61433). A public scoping meeting was held on December 4, 2008, at Commissioners Court in New Braunfels, Texas. The dHCP and the conservation programs described in the plan were developed in a process involving participants and stakeholders from potentially affected or interested groups in Comal County. The groups are organized into a Citizens Advisory Committee and a Biological Advisory Team that have overseen the development of the dHCP. The Comal County Web site contains information on meetings, documents, and the status of the process.

Section 9 of the Act and its implementing regulations prohibit the "taking" of threatened and endangered species. However, under limited circumstances, we may issue permits to take listed wildlife species incidental to, and not the purpose of, otherwise lawful activities.

Proposed Action

The proposed action involves the issuance of an ITP by the Service for covered activities in Comal County, under section 10(a)(1)(B) of the Act. The activities that would be covered by the ITP are public or private construction and development, utility installation and maintenance (including, but not limited to, power and cable stations, substations, and transmission lines; water, sewer, and natural gas pipelines; and plants and other facilities), and public infrastructure projects such as school development, road construction and maintenance, and parkland. The ITP will cover Comal County, Texas. The requested term of the permit is 30 years. To meet the issuance criteria for an ITP, the Applicant has developed and will implement the dHCP, which describes the conservation measures the Applicant has agreed to undertake to minimize the potential for and mitigate the potential effects of incidental take of golden-cheeked warbler and black-capped vireo to the maximum extent practicable.

Alternatives

The alternatives to the proposed action we are considering as part of this process are:

1. No Action—A countywide HCP would not be implemented, and no ITP would be issued. This alternative would require individuals to seek authorization through section 7 consultation or individual section 10 permits to address incidental take resulting from their actions in Comal County or avoid taking actions that would result in incidental take.

2. Modified (Reduced Take and Mitigation) HCP—This alternative would only cover take of the golden-cheeked warbler, and the amount of authorized take and mitigation would be reduced for this species.

3. Preferred Alternative (Proposed Comal County RHCP)—This alternative would involve issuance of a 10(a)(1)(B) permit covering impacts to 5,238 acres of golden-cheeked warbler habitat and 1,000 acres of black-capped vireo habitat.

Reviewing Documents and Submitting Comments

Please refer to TE–223267–0 when requesting documents or submitting comments.

You may obtain copies of the dEIS and dHCP by going to the Comal County Web site at *http://www.co.comal.tx.us/comalrhcp/default.htm.* Alternatively, you may obtain compact disks with electronic copies of these documents by contacting Mr. Adam Zerrenner, Field Supervisor, by U.S. mail at U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, TX 78758; or by phone at 512/490–0057; or by fax to 512/490–0974. A limited number of printed copies of the dEIS and dHCP are also available, by request, from Mr. Zerrenner. Copies of the dEIS and dHCP are also available for public inspection and review at the following locations

(by appointment only at government offices):

• Department of the Interior, Natural Resources Library, 1849 C. St., NW., Washington, DC 20240.

• U.S. Fish and Wildlife Service, 500 Gold Avenue, SW., Room 4012, Albuquerque, NM 87102.

• U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, TX 78758.

Persons wishing to review the application may obtain a copy by contacting Mr. Adam Zerrenner, Field Supervisor, by U.S. mail at U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, TX 78758; or by phone at 512/490–0057; or by fax to 512/490–0974.

Public Meeting

We will accept oral and written comments at a public hearing to be held on July 27, 2010, 6 p.m. to 8 p.m., Comal County Commissioners Court, 199 Main Plaza, New Braunfels, Texas 78130.

Submitting Comments

Written comments may be submitted to Mr. Adam Zerrenner (*see* **FOR FURTHER INFORMATION CONTACT**). We will also accept written and oral comments at a public hearing (*see* **DATES**).

Public Availability of Comments

Written comments we receive become part of the public record associated with this action. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10(c) of the Act (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.22) and NEPA (42 U.S.C. 4371 *et seq.*) and its implementing regulations (40 CFR 1506.6).

Brian Millsap,

Acting Regional Director, Southwest Region, Albuquerque, New Mexico.

[FR Doc. 2010–13294 Filed 6–2–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORS00100 63500000 DQ0000 LXSS036H0000; HAG10–0275]

Notice of Public Meeting, Salem District Resource Advisory Committee Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Salem District Resource Advisory Committee (RAC) will meet as indicated below.

DATES: June 17, 2010, 8:30 a.m. to 4 p.m., Salem, OR; June 18, 2010, 8:30 a.m. to 4 p.m., Salem, OR.

ADDRESSES: Salem District Office, 1717 Fabry Road SE., Salem, OR 97306

FOR FURTHER INFORMATION CONTACT: Program information, meeting records, and a roster of committee members may be obtained from Richard Hatfield, BLM Salem District Designated Official, 1717 Fabry Road, Salem, OR 97306—(503) 375–5682. The meeting agenda will be posted at: *http://www.blm.gov/or/districts/salem/rac.*

Should you require reasonable accommodation, please contact the BLM Salem District—(503) 375–5682 as soon as possible.

SUPPLEMENTARY INFORMATION: The Resource Advisory Committee will consider proposed projects for Title II funding under Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. L. 110–343) that focus on maintaining or restoring water quality, land health, forest ecosystems, and infrastructure.

Aaron G. Horton,

District Manager.

[FR Doc. 2010–13293 Filed 6–2–10; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF JUSTICE

Certification of the Attorney General; Shannon County, SD

In accordance with Section 8 of the Voting Rights Act, 42 U.S.C. 1973f, I hereby certify that in my judgment the appointment of federal observers is necessary to enforce the guarantees of the Fourteenth and Fifteenth Amendments of the Constitution of the United States in Shannon County, South Dakota. This county is included within the scope of the determinations of the Attorney General and the Director of the Census made under Section 4(b) of the Voting Rights Act, 42 U.S.C. 1973b(b), and published in the **Federal Register** on January 5, 1976 (41 FR 783–84) and January 8, 1976 (41 FR 1503).

Dated: May 27, 2010.

Eric H. Holder, Jr.,

Attorney General of the United States.

[FR Doc. 2010–13285 Filed 6–2–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that on May 7, 2010, a proposed consent decree in *United States* v. *Shoshone Silver Mining Co. and Lakeview Consolidated Silver Mines, Inc.,* Civil Action No. 2:08–00495–EJL–CWD, was lodged with the United States District Court for the District of Idaho.

In this action the United States sought declaratory relief and response costs incurred by the United States under the Comprehensive Environmental Response, Compensation and Liability Act at the Idaho Lakeview Mine Site in Bonner County, Idaho. Under the proposed settlement the settling defendants have agreed to pay $50,000, as well as a share of any property sales within the next three years.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Shoshone Silver Mining Co. and Lakeview Consolidated Silver Mines, Inc.,* Civil Action No. 2:08–00495–EJL–CWD, DOJ Ref. 90–11–3–09618.

During the public comment period, the consent decree may be examined on the following Department of Justice Web site: *http://www.justice.gov/enrd/Consent_Decrees.html.* A copy of the decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone

confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of 6.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–13278 Filed 6–2–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States, State of Illinois, State of Colorado, and State of Indiana v. *AMC Entertainment Holdings, Inc.* and Kerasotes Showplace Theatres, LLC Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. Section 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America, State of Illinois, State of Colorado, and State of Indiana* v. *AMC Entertainment Holdings, Inc. and Kerasotes Showplace Theatres, LLC,* Civil Action No. 1:10–cv–00846. On May 21, 2010, the United States and co-plaintiffs filed a Complaint alleging that the proposed acquisition of most of the assets of Kerasotes Showplace Theatres, LLC by AMC Entertainment Holdings, Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. 18 by lessening competition for theatrical exhibition of first-run films in the Chicago, Denver and Indianapolis metropolitan areas. The proposed Final Judgment, filed at the same time as the Complaint, requires AMC Entertainment Holdings, Inc. to divest first-run, commercial movie theatres, along with certain tangible and intangible assets, in those three cities in order to proceed with the proposed $275 million transaction.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia, Washington, DC. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to John R. Read, Chief, Litigation III Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 4000, Washington, DC 20530 (telephone: 202–307–0468).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, U.S. Department of Justice, Antitrust Division, 450 Fifth Street, NW., Suite 4000, Washington, DC 20530, STATE OF ILLINOIS, Office of the Attorney General, State of Illinois, 100 West Randolph Street, 13th Floor, Chicago, Illinois 60601, STATE OF COLORADO, Office of the Colorado Attorney General, 1525 Sherman St., Seventh Floor, Denver, Colorado 80203, and STATE OF INDIANA, Consumer Protection Division, Office of the Indiana Attorney General, Indiana Government Center South, 302 W. Washington, 5th Floor, Indianapolis, IN 46204, *Plaintiffs,* v. *AMC ENTERTAINMENT HOLDINGS, INC.,* 920 Main Street, Kansas City, Missouri 64105 and KERASOTES SHOWPLACE THEATRES, LLC, 224 North Des Plaines, Suite 200, Chicago, Illinois 60661, *Defendants.*

Civil Action No: 1:10–cv–00846
Judge: Kennedy, Henry H.
Filed: 5/21/2010.

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, and the States of Illinois, Colorado, and Indiana, acting through their Attorneys General, bring this civil antitrust action to prevent AMC Entertainment Holdings, Inc. ("AMC") from acquiring most of the assets of Kerasotes Showplace Theatres, LLC ("Kerasotes"). If the acquisition is permitted, it would combine under common ownership the two leading, and in some cases only, mainstream movie theatres showing first-run commercial movies in certain parts of the metropolitan areas of Chicago, Denver, and Indianapolis. The transaction would substantially lessen competition and tend to create a monopoly in mainstream theatres in these markets in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

I. Jurisdiction and Venue

1. This action is filed by the United States pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to obtain equitable relief and to prevent a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. The States of Illinois, Colorado and Indiana bring this action under Section 16 of the Clayton Act, 15 U.S.C. 26, to prevent the defendants from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

2. Defendants have consented to personal jurisdiction in this District. In addition, defendant AMC, through its subsidiary, AMC Entertainment, Inc., operates theatres in this District. The licensing and exhibition of first-run, commercial films is a commercial activity that substantially affects, and is in the flow of, interstate trade and commerce. Defendants' activities in purchasing equipment, services, and supplies as well as licensing films for their theatres substantially affect interstate commerce. The Court has jurisdiction over the subject matter of this action and jurisdiction over the parties pursuant to 15 U.S.C. 22, 25, and 26, and 28 U.S.C. 1331, 1337(a), and 1345.

3. Venue in this District is proper under 15 U.S.C. 22 and 28 U.S.C. 1391(c).

II. Defendants and the Proposed Transaction

4. Defendant AMC is a Delaware corporation with its headquarters in Kansas City, Missouri. It is the holding company of AMC Entertainment, Inc. AMC owns or operates 304 theatres containing 4,574 screens in locations throughout the United States and four foreign countries. Measured by number of screens, AMC is the second-largest theatre circuit in the United States.

5. Defendant Kerasotes is a Delaware corporation with its principal place of business in Chicago, Illinois. It owns or operates 96 theatres with 973 screens in various states. Kerasotes is the sixth-largest theatre circuit in the United States.

6. On January 19, 2010, AMC and Kerasotes signed a purchase and sale agreement, under which AMC acquired Kerasotes (with the exception of three theatres that will be retained by the Kerasotes family) for approximately $275 million.

III. Background of the Movie Industry

7. Theatrical exhibition of feature length motion picture films ("movies") provides a major source of out-of-home entertainment in the United States.

8. Viewing movies in the theatre is a popular pastime. Over 1.4 billion movie tickets were sold in the United States in 2009, with total box office revenue exceeding $10.6 billion.

9. Companies that operate movie theatres are called "exhibitors." Some exhibitors own a single theatre, whereas others own a circuit of theatres within one or more regions of the United States. Established exhibitors include Regal, Carmike, and Cinemark, as well as AMC and Kerasotes.

10. Exhibitors set ticket prices for each theatre based on a number of factors, including the presence and competitive decisions of nearby comparable theatres.

IV. Relevant Markets

A. Product Market

11. Movies are a unique form of entertainment. The experience of viewing a movie in a theatre differs from live entertainment (*e.g.,* a stage production), a sporting event, or viewing a movie in the home (*e.g.,* on a DVD or via pay-per view).

12. Home viewing of movies is not a reasonable substitute for viewing movies in a theatre. When consumers watch movies in their homes, they typically lose several advantages of the theatre experience, including the size of screen, the sophistication of sound systems, the opportunity to watch in 3–D, and the social experience of viewing a movie with other patrons. Additionally, the most popular, newly released or "first-run" movies are not available for home viewing.

13. Differences in the pricing of various forms of entertainment also reflect their lack of substitutability in the eyes of consumers. Ticket prices for movies are generally different from prices for other forms of entertainment. Tickets for most forms of live entertainment are typically significantly more expensive than movie tickets. Renting a DVD for home viewing is usually significantly less expensive than viewing a movie in a theatre.

14. AMC and Kerasotes operate movie theatres that exhibit first-run, commercial movies ("mainstream theatres"). Mainstream theatres typically are multi-plex movie theatres that show a wide variety of first-run, commercial movies in order to attract all ages of moviegoers, from children to seniors. Mainstream theatres typically offer basic concessions, such as popcorn, candy and soft drinks.

15. Mainstream theatres do not compete significantly with "sub-run" theatres specializing in exhibiting movies after the four-to-five-week first run has ended, with theatres specializing in art movies or foreign language movies, or with "premiere" theatres which typically offer full-service dining, alcoholic beverages, an adults-only environment, and other luxury services and amenities not found in mainstream theatres.

16. Tickets at mainstream theatres usually cost significantly more than tickets at sub-run theatres. Movies exhibited at sub-run theatres are no longer new releases, and moviegoers generally do not regard sub-run movies as adequate substitutes for first-run movies.

17. Theatres that show art movies and foreign language movies are also not reasonable substitutes for mainstream theatres. Commercial movies typically appeal to different patrons than other types of movies, such as art movies or foreign language movies. For example, art movies tend to appeal more universally to mature audiences. Theatres that primarily exhibit art movies often contain auditoriums with fewer seats than mainstream theatres. Typically, art movies are released less widely than commercial movies.

18. Premiere theaters do not typically serve as a competitive constraint on mainstream theaters. Premiere theatres often show first-run, commercial movies, but typically have more restrictive admission policies (*e.g.,* minors must be accompanied by adults for all movies), charge higher ticket prices (sometimes as much as double the admission charged by typical first-run theatres), serve alcoholic beverages, and often offer full-service restaurants or in-service dining. Premiere theatres also differ from mainstream theatres in the luxury items and amenities they offer to their guests. For instance, in addition to expanded food and beverage offerings, premiere theatres often feature reserved seating, leather and reclining seats, wait service, and complimentary refills of popcorn and sodas. Because of these differences, premiere theatres attract an audience that is distinct from the audience for mainstream theatres.

19. The relevant product market within which to assess the competitive effects of this transaction is the exhibition of first-run, commercial movies in mainstream theatres.

B. Geographic Markets

20. Moviegoers typically are not willing to travel very far from their homes to attend a movie. As a result, geographic markets for mainstream theatres are relatively local.

Chicago, Illinois Area

21. AMC and Kerasotes account for a substantial portion of the mainstream theatre screens and ticket sales in three areas of the Chicago metropolitan area—the North Suburban Chicago area, the Upper Southwest Suburban Chicago area, and the Lower Southwest Suburban Chicago area.

22. The North Suburban Chicago area, in and around the communities of Glenview and Skokie, encompasses AMC's Northbrook Court 14, Kerasotes' Glen 10, AMC's Gardens 13, Kerasotes' Village Crossing 18, and Kerasotes' Showplace 12 (Niles) theatres. There are no other mainstream theatres in this North Suburban Chicago area.

23. The Upper Southwest Suburban Chicago area, in and around the city of Naperville, encompasses AMC's Cantera 30 and Kerasotes' Showplace 16 (Naperville) theatres. There are no other mainstream theatres in this Upper Southwest Suburban Chicago area.

24. The Lower Southwest Suburban Chicago area, in and around the village of Bolingbrook, encompasses AMC's Woodridge 18 and Kerasotes' Showplace 12 (Bolingbrook) theatres. There is only one other non-party mainstream theatre in this Lower Southwest Suburban area—a 16-screen Cinemark.

25. Moviegoers who reside in these three suburban Chicago, Illinois areas are reluctant to travel significant distances out of each of these areas to attend a movie except in unusual circumstances. The relevant geographic markets in which to assess the competitive effects of this transaction are the North Suburban Chicago, Upper Southwest Suburban Chicago, and Lower Southwest Suburban Chicago areas.

Denver, Colorado Area

26. AMC and Kerasotes account for a substantial portion of the mainstream theatre screens and ticket sales in two areas of the Denver metropolitan area.

27. The Upper Northwest Denver area, in and around the cities of Louisville and Broomfield, encompasses Kerasotes' Colony Square 12 and AMC's Flatiron Crossing 14 theatres. There are no other mainstream theatres in this Upper Northwest Denver area.

28. The Lower Northwest Denver area, in and around the cities of Westminster and Arvada, encompasses AMC's Westminster Promenade 24 and Kerasotes' Olde Town 14 theatres. There are no other mainstream theatres in this Lower Northwest Denver area.

29. Moviegoers who reside in these two Denver, Colorado areas are reluctant

to travel significant distances out of each of these areas to attend a movie except in unusual circumstances. The relevant geographic markets in which to assess the competitive effects of this transaction are the Upper Northwest Denver and Lower Northwest Denver areas.

Indianapolis, Indiana Area

30. AMC and Kerasotes account for a substantial portion of the first-run movie screens and ticket sales in two areas of the Indianapolis metropolitan area.

31. The North Indianapolis area, in and around the community of Glendale, encompasses AMC's Castleton Square 14 and Kerasotes' Glendale Town 12 theatres. There is only one other non-party mainstream theatre in this North Indianapolis area—a Regal theatre with 14 screens.

32. The South Indianapolis area, in and around the city of Greenwood, encompasses AMC's Greenwood 14 and Kerasotes' Showplace 16 and IMAX. There are no other mainstream theatres in this South Indianapolis area.

33. Moviegoers who reside in these Indianapolis, Indiana areas are reluctant to travel significant distances out of each of these areas to attend a movie except in unusual circumstances. The relevant geographic market in which to assess the competitive effects of this transaction are the North Indianapolis and the South Indianapolis areas.

C. The Relevant Markets

34. A small but significant post-acquisition increase in movie ticket prices at mainstream theatres in the relevant geographic markets would not cause a sufficient number of customers to shift to other alternatives, including to other forms of entertainment, to non-mainstream theatres, or to mainstream theatres outside the relevant geographic markets described above in sufficient numbers to make such a price increase unprofitable for the newly combined entity. Therefore, the relevant markets in which to assess the competitive effects of this transaction are the mainstream theatres in the North Suburban Chicago, Upper Southwest Suburban Chicago, Lower Southwest Suburban Chicago, Upper Northwest Denver, Lower Northwest Denver, North Indianapolis, and South Indianapolis areas.

V. Competitive Effects

35. Exhibitors compete on multiple dimensions to attract moviegoers to their theatres over the theatres of their rivals. They compete over the quality of the viewing experience. They compete to offer the most sophisticated sound and viewing systems, best picture clarity, nicest seats with best views, and cleanest floors and lobbies for moviegoers. Exhibitors also compete on price, knowing that if they charge too much (or do not offer sufficient discounted tickets for matinees, seniors, children, etc.), moviegoers might visit rival theatres.

36. In the geographic markets of the North Suburban Chicago area, the Upper Southwest Suburban Chicago area, the Lower Southwest Suburban Chicago area, the Upper Northwest Denver area, the Lower Northwest Denver area, the North Indianapolis area, and the South Indianapolis area, AMC and Kerasotes compete head-to-head for moviegoers. These geographic markets are concentrated, and in each market AMC and Kerasotes are the other's most significant competitor, given their proximity to one another and similarity in size and quality of viewing experience. Competition between AMC and Kerasotes spurs each to improve its quality and keeps prices in check.

Chicago, Illinois Area

37. In the North Suburban Chicago area, the proposed transaction would give the combined entity control of all five mainstream theatres in that area, with 83 out of 83 total screens and a 100% share of 2009 box office revenues, which totaled approximately $24.9 million. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), explained in Appendix A, the transaction would yield a post-transaction HHI of approximately 10,000, representing an increase of 4,856.

38. In the Upper Southwest Suburban Chicago area, the proposed transaction would give the newly combined entity control of the only two mainstream theatres in that area, with 46 out of 46 total screens and a 100% share of 2009 box office revenues, which totaled approximately $16.4 million. The transaction would yield a post-transaction HHI of approximately 10,000, representing an increase of 4,875.

39. In the Lower Southwest Suburban Chicago area, the proposed transaction would give the newly combined entity control of two of the three mainstream theatres in that area, with 30 out of 46 total screens and a 53.0% share of 2009 box office revenues, which totaled approximately $12.3 million. The transaction would yield a post-transaction HHI of approximately 5,017, representing an increase of 1,221.

Denver, Colorado Area

40. In the Upper Northwest Denver area, the proposed transaction would give the newly combined entity control of the only two mainstream theatres in that area, with 26 out of 26 total screens and a 100% share of 2009 box office revenues, which totaled approximately $5.3 million. The transaction would yield a post-transaction HHI of approximately 10,000, representing an increase of 4,356.

41. In the Lower Northwest Denver area, the proposed transaction would give the newly combined entity control of the only two mainstream theatres in that area, with 38 out of 38 total screens and a 100% share of 2009 box office revenues, which totaled approximately $13.3 million. The transaction would yield a post-transaction HHI of approximately 10,000, representing an increase of 3,669.

Indianapolis, Indiana Area

42. In the North Indianapolis area, the proposed transaction would give the newly combined entity control of two of the three mainstream theatres in that area, with 26 out of 40 total screens and a 76.1% share of 2009 box office revenues, which totaled approximately $9.3 million. The transaction would yield a post-transaction HHI of approximately 6,357, representing an increase of 2,689.

43. In the South Indianapolis area, the proposed transaction would give the newly combined entity control of the only two mainstream theatres in that area, with 30 out of 30 total screens and a 100% share of 2009 box office revenues, which totaled approximately $10.1 million. The transaction would yield a post-transaction HHI of approximately 10,000, representing an increase of 4,838.

44. The proposed transaction would likely lessen competition significantly in the relevant markets. Today, if AMC or Kerasotes were to increase its prices at a theatre in one of the relevant markets, and the other did not follow, the theatre that increased its prices might lose business to the other. The proposed transaction would eliminate this pricing constraint and is therefore likely to lead to higher prices for moviegoers, which could take the form of a higher adult evening ticket price or reduced discounting, *e.g.,* for matinees, children, seniors, and students.

45. The proposed transaction would also eliminate competition between AMC and Kerasotes over the quality of the viewing experience in each of the geographic markets at issue. The combined entity would have reduced

incentives to maintain, upgrade, and renovate its theatres in the relevant markets, and to improve those theatres' amenities and services, thus reducing the quality of the viewing experience for a moviegoer.

46. The presence in some of the relevant geographic markets of other non-party mainstream theatres would be insufficient to replace the competition lost due to the transaction and thus render unprofitable post-transaction increases in ticket prices or decreases in quality by the newly combined entity.

VI. Entry

47. Sufficient and timely entry that would deter or counteract the anticompetitive effects alleged above is unlikely. Exhibitors are reluctant to locate new mainstream theatres near existing theatres unless the population density, demographics, or the quality of existing theatres makes new entry viable. Those conditions do not exist in any of the relevant geographic markets.

VII. Violation Alleged

48. The plaintiffs hereby reincorporate paragraphs 1 through 47.

49. The effect of the proposed transaction would be to lessen competition substantially in the relevant geographic markets in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

50. The transaction would likely have the following effects, among others: (a) Prices for first-run, commercial movie tickets in mainstream theatres would likely increase to levels above those that would prevail absent the transaction; and (b) the quality of mainstream theatres and the mainstream theatre viewing experience in the relevant geographic areas would likely decrease below levels that would prevail absent the transaction.

VIII. Requested Relief

51. The plaintiffs request: (a) Adjudication that the proposed transaction would violate Section 7 of the Clayton Act; (b) permanent injunctive relief to prevent the consummation of the proposed transaction; (c) an award to each plaintiff of its costs in this action; and (d) such other relief as is proper.

Dated: May 21, 2010.

For Plaintiff United States of America

/s/

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Assistant Attorney General, Antitrust Division

/s/

Molly S. Boast,
Deputy Assistant Attorney General

/s/

William F. Cavanaugh, Jr.,
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/s/

Patricia A. Brink,
Deputy Director of Operations

/s/

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Dated: May 21, 2010.

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Appendix A

Definition of HHI and Calculations for Market

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,000 and 1,800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1,800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Merger Guidelines. *See Merger Guidelines* 1.51.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE OF ILLINOIS, STATE OF COLORADO and STATE OF INDIANA, *Plaintiffs,* v. AMC ENTERTAINMENT HOLDINGS, INC., and KERASOTES SHOWPLACE THEATRES, LLC, *Defendants.*

Civil Action No: 10–0846
Judge:
Filed: 5/21/2010.

Final Judgment

Whereas, Plaintiffs, United States of America, State of Illinois, State of Colorado, and State of Indiana, filed their Complaint on May 21, 2010, the Plaintiffs and Defendants, AMC Entertainment Holdings, Inc. ("AMC") and Kerasotes Showplace Theatres, LLC ("Kerasotes"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And Whereas, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the Defendants to assure that competition is not substantially lessened;

And Whereas, Plaintiffs require Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And Whereas, Defendants have represented to the Plaintiffs that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now Therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. "Acquirer" or "Acquirers" means the entity or entities to which AMC divests the Divestiture Assets.

B. "AMC" means defendant AMC Entertainment Holdings, Inc., a Delaware corporation with its principal place of business in Kansas City, Missouri, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Kerasotes" means defendant Kerasotes Showplace Theatres, LLC, a Delaware corporation with its principal place of business in Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Landlord Consent" means any contractual approval or consent that the landlord or owner of one or more of the Divestiture Assets, or of the property on which one or more of the Divestiture Assets is situated, must grant prior to the transfer of one of the Divestiture Assets to an Acquirer.

E. "Divestiture Assets" means the following theatre assets:

	Theatre	Address
1	AMC Cantera 30	28250 Diehl Road, Warrenville, IL 60555.
2	Kerasotes Showplace 12 (Bolingbrook)	1221 West Boughton Road, Bolingbrook, IL 60440.
3	Kerasotes Glen 10	1850 Tower Drive, Glenview, IL 60026.
4	AMC Gardens 13	4999 Old Orchard Shopping Center, Skokie, IL 60077,
5	Kerasotes Colony Square 12	1164 West Dillon Road, Louisville, CO 80027.
6	Kerasotes Olde Town 14	5550 Wadsworth Boulevard, Arvada, CO 80002.
7	Kerasotes Showplace 12 (Glendale 10) OR AMC Castleton Square 14.	6102 N. Rural Street, Indianapolis, IN 46220. 6020 East 82nd Street, Indianapolis, IN 46250.
8	AMC Greenwood 14	461 South Greenwood Park Drive, Greenwood, IN 46142.

The term "Divestiture Assets" includes:

1. All tangible assets that comprise the business of operating mainstream theatres that exhibit first-run, commercial movies, including, but not limited to, real property and improvements, research and development activities, all equipment, fixed assets, and fixtures, personal property, inventory, office furniture, materials, supplies, and other tangible property and all assets used in connection with the Divestiture Assets; all licenses, permits, and authorizations issued by any governmental organization relating to the Divestiture Assets; all contracts (including management contracts), teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Divestiture Assets, including supply agreements; all customer lists (including loyalty club data at the option of the Acquirer(s), copies of which may be retained by AMC at its option), contracts, accounts, and credit records; all repair and performance records and all other records relating to the Divestiture Assets;

2. All intangible assets used in the development, production, servicing, and sale of the Divestiture Assets, including, but not limited to, all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, technical information, computer software (except Defendants' proprietary software) and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, all research data concerning historic and current research and development relating to Divestiture Assets, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents, or licensees, and all research data concerning historic and current research and development efforts relating to the Divestiture Assets; provided, however, that this term does not include assets that the Defendants do not own or that AMC is not legally able to transfer.

III. Applicability

A. This Final Judgment applies to AMC and Kerasotes, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the acquirers of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. AMC is ordered and directed, within sixty (60) calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to one or more Acquirer(s) acceptable to the United States in its sole discretion (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate). The United States, in its sole discretion, may agree to one or more extensions of this time period, and shall notify the Court in such circumstances. AMC agrees to use its best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestitures ordered by this Final Judgment, AMC promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. AMC shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. AMC shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all

information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. AMC shall make available such information to the Plaintiffs at the same time that such information is made available to any other person.

C. AMC shall provide the Acquirer(s) and the United States information relating to the personnel involved in the operation of the Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer(s) to employ any Defendant employee whose primary responsibility is the operation of the Divestiture Assets.

D. AMC shall permit prospective Acquirer(s) of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. AMC shall warrant to Acquirer(s) of the Divestiture Assets that each asset will be operational on the date of sale.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestitures of the Divestiture Assets. At the option of the Acquirer(s), AMC shall enter into an agreement for products and services, such as computer support services, that are reasonably necessary for the Acquirer(s) to effectively operate the Divestiture Assets during a transition period. The terms and conditions of any contractual arrangements meant to satisfy this provision must be commercially reasonable for those products and services for which the agreement is entered and shall remain in effect for no more than three months, absent approval of the United States, in its sole discretion (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate).

G. AMC shall warrant to the Acquirer(s) that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset. Following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

H. Unless the United States (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate) otherwise consents in writing, the divestitures made pursuant to Section IV, or by trustee appointed pursuant to Section V of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate) that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing business of operating mainstream theatres that exhibit first-run, commercial movies. Divestitures of the Divestiture Assets may be made to one or more Acquirers, provided that in each instance it is demonstrated to the sole satisfaction of the United States (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate) that the Divestiture Assets will remain viable and the divestitures of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment.

(1) Shall be made to Acquirers that, in the United States' sole judgment (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate) have the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the business of mainstream theatres exhibiting first-run, commercial movies; and

(2) Shall be accomplished so as to satisfy the United States, in its sole discretion (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate) that none of the terms of any agreement between Acquirers and Defendants give the ability unreasonably to raise the Acquirers' costs, to lower the Acquirers' efficiency, or otherwise to interfere in the ability of the Acquirers to compete effectively.

V. Appointment of Trustee

A. If AMC has not divested the Divestiture Assets within the time period specified in Section IV(A), AMC shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestitures of the Divestiture Assets.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestitures to Acquirer(s) acceptable to the United States (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate) at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, VI, and VII of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of AMC any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VII.

D. The trustee shall serve at the cost and expense of AMC, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to AMC and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the

trustee's accomplishment of the divestitures.

F. After its appointment, the trustee shall file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestitures ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Landlord Consent

A. If AMC is unable to effect the divestitures required herein due to the inability to obtain the Landlord Consent for any of the Divestiture Assets, AMC shall divest alternative theatre assets that compete effectively with the theatres for which the Landlord Consent was not obtained. The United States shall, in its sole discretion (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate) determine whether such theatre assets compete effectively with the theatres for which landlord consent was not obtained.

B. Within five (5) business days following a determination that Landlord Consent cannot be obtained for the Divestiture Assets, AMC shall notify the United States and propose an alternative divestiture pursuant to Section VI(A). The United States shall have then ten (10) business days in which to determine whether such theatre assets are a suitable alternative pursuant to Section VI(A). If AMC's selection is deemed not to be a suitable alternative, the United States shall in its sole discretion select the theatre assets to be divested (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate).

C. If the trustee is responsible for effecting the divestitures, it shall notify both the United States and AMC within five (5) business days following a determination that Landlord Consent cannot be obtained for the Divestiture Assets. AMC shall thereafter have five (5) business days to propose an alternative divestiture pursuant to Section VI(A). The United States shall have then ten (10) business days in which to determine whether such theatre assets are suitable alternative pursuant to Section VI(A). If AMC's selection is deemed not to be a suitable competitive alternative, the United States shall in its sole discretion select the theatre assets to be divested (after consultation with the State of Illinois, the State of Colorado, and the State of Indiana, as appropriate).

VII. Notice of Proposed Divestitures

A. Within two (2) business days following execution of a definitive divestiture agreement, AMC or the trustee, whichever is then responsible for effecting the divestitures required herein, shall notify the United States (and, as appropriate, the State of Illinois, the State of Colorado, and the State of Indiana), of any proposed divestitures required by Sections IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestitures and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States (the State of Illinois, the State of Colorado, and the State of Indiana) of such notice, the United States may request from Defendants, the proposed Acquirer(s), any other third party, or the trustee, if applicable, additional information concerning the proposed divestitures, the proposed Acquirer(s), and any other potential Acquirer(s). Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the trustee, whichever is later, the United States shall provide written notice to Defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestitures. If the United States provides written notice that it does not object, the divestitures may be consummated, subject only to Defendants' limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VIII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

IX. Hold Separate

Until the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

X. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestitures have been completed under Sections IV or V, AMC shall deliver to the United States an affidavit as to the fact and manner of its compliance with Sections IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an

inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts AMC has taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective purchasers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by AMC, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, AMC shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. AMC shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in AMC's earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestitures have been completed.

XI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice Antitrust Division ("DOJ"), including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) Access during Defendants' office hours to inspect and copy, or at plaintiffs' option, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the plaintiffs shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XII. Notification

Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"), AMC, without providing advance notification to the DOJ, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in the business of theatres exhibiting first-run, commercial movies in Cook County, Illinois; Dupage County, Illinois; Adams County, Colorado; Boulder County, Colorado; Jefferson County, Colorado; Marion County, Indiana; and Johnson County, Indiana during a ten year period.

Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"), Kerasotes, without providing advance notification to the DOJ, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, or equity interest, in the business of theatres exhibiting first-run, commercial movies in Cook County, Illinois during a ten year period. Notwithstanding the preceding sentence, in no event shall Kerasotes be required to provide advance notification under this provision of any of the following activities: (i) engaging in a sale/leaseback, developer-financed or similar transaction, or developing internally using its own or third-party financing, in each case with respect to a newly developed theatre; or (ii) making an acquisition of not more than two percent of the outstanding voting securities of a publicly-traded company with theatres exhibiting first-run, commercial movies where such investment is made "solely for the purpose of investment" as that term is construed under 15 U.S.C. 802.9.

Such notification shall be provided to the DOJ in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only about mainstream theatres that exhibit first-run, commercial movies. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the DOJ make a written request for additional information, Defendants shall not consummate the proposed transaction or agreement until thirty (30) days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XIII. No Reacquisition

AMC may not reacquire any part of the Divestiture Assets divested under

this Final Judgment during the term of this Final Judgment.

XIV. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XVI. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16

_____

United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE OF ILLINOIS, STATE OF COLORADO, and STATE OF INDIANA, *Plaintiffs,* v. AMC ENTERTAINMENT HOLDINGS, INC., and KERASOTES SHOWPLACE THEATRES, LLC, *Defendants.*

Civil Action No.: 1:10–cv–00846
Judge Kennedy, Henry, H.
Filed: 5/21/2010.

Competitive Impact Statement

Plaintiff, United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C.16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On January 19, 2010, Defendant AMC Entertainment Holdings, Inc. ("AMC") agreed to acquire most of the assets of Defendant Kerasotes Showplace Theatres, LLC ("Kerasotes"). Plaintiffs filed a civil antitrust complaint on May 21, 2010, seeking to enjoin the proposed acquisition and to obtain equitable relief. The Complaint alleges that the acquisition, if permitted to proceed, would combine under common ownership the two leading, and in some cases, only mainstream movie theatres exhibiting first-run, commercial movies in parts of the metropolitan areas of Chicago, Denver, and Indianapolis. The likely effect of this acquisition would be to lessen competition substantially for exhibition of first-run, commercial movies in mainstream theatres in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

At the same time the Complaint was filed, the Plaintiffs also filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, AMC and Kerasotes are required to divest eight theatres located in the Chicago, Denver, and Indianapolis areas to acquirer(s) acceptable to the Plaintiffs.

Under the terms of the Hold Separate, Defendants will take certain steps to ensure that the eight theatres to be divested are operated as competitively independent, economically viable and ongoing business concerns, that they will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The Plaintiffs and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

AMC is a Delaware corporation with its headquarters in Kansas City, Missouri. It is the holding company of AMC Entertainment, Inc. AMC owns or operates 304 theatres containing 4,574 screens in locations throughout the United States and four foreign countries. Measured by number of screens, AMC is the second-largest theatre exhibitor in the United States and had revenues of approximately $2.26 billion in 2009.

Kerasotes is a Delaware corporation with its principal place of business in Chicago, Illinois. It owns or operates 96 theatres with 973 screens in various states. Kerasotes is the sixth-largest theatre exhibitor in the United States and earned revenue of approximately $327.7 million in 2009.

On January 19, 2010, AMC and Kerasotes signed a purchase and sale agreement under which AMC will acquire all the outstanding membership units of Kerasotes, with the exception of three theatres which will be retained by the Kerasotes family, for approximately $275 million.

The proposed transaction, as initially agreed to by Defendants on January 19, 2010, would lessen competition substantially as a result of AMC's acquisition of Kerasotes. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the Plaintiffs on May 21, 2010.

B. The Competitive Effects of the Transaction on the Exhibition of First-Run, Commercial Movies in Mainstream Theatres

The Complaint alleges that the exhibition of first-run, commercial movies in mainstream theatres in areas the Complaint defines as North Suburban Chicago, Upper Southwest Suburban Chicago, Lower Southwest Suburban Chicago, Upper Northwest Denver, Lower Northwest Denver, North Indianapolis, and South Indianapolis constitute lines of commerce and relevant markets for antitrust purposes.

1. The Relevant Product and Geographic Markets

The exercise of defining a relevant market helps analyze the competitive effects of a horizontal transaction. Market definition identifies an area of competition and enables the identification of market participants and the measurement of market shares and concentration. This exercise is useful to the extent it illuminates the transaction's likely competitive effects.

The Complaint alleges that the relevant product market within which to assess the competitive effects of this transaction is the exhibition of first-run, commercial movies in mainstream theatres. Mainstream theatres are movie theatres that exhibit a variety of first-run, commercial movies to attract moviegoers of all ages and offer basic concessions, such as popcorn, candy and soft drinks. According to the Complaint, the experience of viewing a film in a theatre is an inherently different experience from other forms of entertainment, such as a live show, a

sporting event, or viewing a movie in the home (*e.g.,* on a DVD player or via pay-per-view). Reflecting the significant differences between viewing a movie in a theatre and other forms of entertainment, ticket prices for movies are generally very different from prices for other forms of entertainment. Live entertainment is typically significantly more expensive than a movie ticket, whereas renting a DVD for home viewing is usually significantly cheaper than viewing a movie in a theatre.

The Complaint alleges that moviegoers generally do not regard theatres showing "sub-run" movies, art movies, or foreign language movies as adequate substitutes for mainstream theatres showing first-run movies. The Complaint also alleges that "premiere" theaters do not typically serve as competitive constraints on mainstream theaters. Although premiere theatres show first-run, commercial movies, they typically have more restrictive admission policies (*e.g.,* minors must be accompanied by adults for all movies), charge higher ticket prices, serve alcoholic beverages, and often have full-service restaurants or in-service dining.

The Complaint defines seven relevant geographic markets in the Chicago, Denver, and Indianapolis areas in which to measure the competitive effects of this transaction. Each geographic market contains a number of mainstream theatres—most of which are owned by the Defendants—at which consumers can view first-run, commercial movies. The Complaint identifies the relevant geographic markets as follows: North Suburban Chicago, Upper Southwest Suburban Chicago, Lower Southwest Suburban Chicago, Upper Northwest Denver, Lower Northwest Denver, North Indianapolis, and South Indianapolis.

Chicago, Illinois Area

According to the Complaint, the North Suburban Chicago area, in and around the communities of Glenview and Skokie, encompasses AMC's Northbrook Court 14, AMC's Gardens 13, Kerasotes' Glen 10, Kerasotes' Village Crossing 18, and Kerasotes' Showplace 12 (Niles) theatres. There are no other mainstream theatres in the North Suburban Chicago area.

The Upper Southwest Suburban Chicago area, in and around the city of Naperville, encompasses AMC's Cantera 30 and Kerasotes' Showplace Naperville 16 (Naperville) theatres. There are no other mainstream theatres in the Upper Southwest Suburban Chicago area.

The Lower Southwest Suburban Chicago area, in and around the village of Bolingbrook, encompasses AMC's Woodridge 18 and Kerasotes' Showplace 12 (Bolingbrook) theatres. There is only one non-party mainstream theatre in the Lower Southwest Suburban Chicago area—a 16-screen theatre operated by Cinemark.

Denver, Colorado Area

The Upper Northwest Denver area, in and around the cities of Louisville and Broomfield, encompasses AMC's Flatiron Crossing 14 and Kerasotes' Colony Square 12 theatres. There are no other mainstream theatres in the Upper Northwest Denver area.

The Lower Northwest Denver area, in and around the cities of Westminster and Arvada, encompasses AMC's Westminster Promenade 24 and Kerasotes' Olde Town 14 theatres. There are no other mainstream theatres in the Lower Northwest Denver area.

Indianapolis, Indiana Area

The North Indianapolis area, in and around the community of Glendale, encompasses AMC's Castleton Square 14 and Kerasotes' Glendale Town 12 theatres. There is only one other non-party mainstream theatre in the North Indianapolis area—a Regal theatre with 14 screens.

The South Indianapolis area, in and around the city of Greenwood, encompasses AMC's Greenwood 14 and Kerasotes' Showplace 16 and IMAX. There are no other mainstream theatres in the South Indianapolis area.

According to the Complaint, the relevant markets in which to assess the competitive effects of this transaction are the mainstream theatres in the above-mentioned areas: North Suburban Chicago, Upper Southwest Suburban Chicago, Lower Southwest Suburban Chicago, Upper Northwest Denver, Lower Northwest Denver, North Indianapolis, and South Indianapolis areas. A small but significant post-acquisition increase in movie ticket prices by a hypothetical monopolist of mainstream theatres in those areas would not cause a sufficient number of customers to shift to other alternatives, including to other forms of entertainment, to non-mainstream theatres, or to mainstream theatres outside the relevant geographic markets described above to make such a price increase unprofitable.

2. Competitive Effects in the Relevant Markets

The Complaint alleges that exhibitors that operate mainstream movie theatres compete on multiple dimensions. Exhibitors compete over the quality of the viewing experience. They compete to offer the most sophisticated sound and viewing systems, best picture clarity, nicest seats with the best views, and cleanest floors and lobbies for moviegoers. Such exhibitors also compete on price, knowing that if they charge too much (or do not offer sufficiently discounted tickets for matinees, seniors, children, etc.), moviegoers will choose to view movies at rival theatres.

According to the Complaint, the proposed transaction is likely to eliminate these multiple dimensions of competition between AMC and Kerasotes. In each of the relevant markets, AMC and Kerasotes are each other's most significant competitor, given their close proximity to one another and to moviegoers, and the similarity in their theatres' size and quality of viewing experience. Their competition spurs each to keep its prices in check and improve its quality. For example, Kerasotes expanded its discounts on matinees at its Bolingbrook 12 theatre, in Lower Southwest Suburban Chicago, after AMC opened its Woodridge 18 theatre nearby. Kerasotes retrofitted its Bolingbrook 12 theatre, in Lower Southwest Suburban Chicago, in response to AMC's opening its Woodridge 18 theatre nearby.

As alleged in the Complaint, each of the relevant markets would see a significant increase in market concentration under a measure called the Herfindahl-Hirschman Index ("HHI"), explained in Appendix A of the Complaint. In the area with the least change in concentration—the Lower Southwest Suburban Chicago area—the proposed transaction would give the newly combined entity control of two of the only three mainstream theatres in that area. In that market the post-transaction HHI would rise to roughly 5,017, representing an increase of 1,221 points. In other markets, the proposed acquisition would place all of the mainstream theatres under AMC's control, creating a local monopoly and yielding a post-transaction HHI of 10,000—the maximum.

In the seven relevant markets today, were AMC or Kerasotes to increase ticket prices and the other were not to follow, the exhibitor that increased price would likely suffer financially, as a substantial number of its customers would patronize the other exhibitor's theatre. After the transaction, the newly combined entity would recapture such losses, making profitable price increases that would have been unprofitable before the transaction. Likewise, the proposed transaction would eliminate competition between AMC and Kerasotes over the quality of the viewing experience at their theatres in each of the geographic markets at issue.

After the transaction, the newly combined entity would have a reduced incentive to maintain, upgrade, and renovate its theatres in the relevant markets, and to improve its theatres' amenities and services, thus reducing the quality of the viewing experience.

The Complaint alleges that the presence of the other mainstream theatres in certain of the relevant geographic markets would be insufficient to replace the competition lost due to the transaction, and thus render unprofitable post-transaction increases in ticket prices or decreases in quality by the newly combined entity.

Finally, the Complaint alleges that the entry of a mainstream theatre that would deter or counteract an increase in movie ticket prices or a decline in theatre quality is unlikely in all of the relevant markets. Exhibitors are reluctant to locate new theatres near existing theatres unless the population density and demographics makes new entry viable or the existing theatres do not have stadium seating. Those conditions do not exist in any of the relevant markets. All of these markets currently have mainstream theatres with stadium seating. Given the number of existing comparable theatres, population density and demographics in the relevant markets, demand for additional mainstream theatres in the areas at issue is not likely to support entry of a new theatre.

For all of these reasons, the Plaintiffs have concluded that the proposed transaction would lessen competition substantially in the exhibition of first-run, commercial movies in mainstream theatres in the North Suburban Chicago area, Upper Southwest Suburban Chicago area, Lower Southwest Suburban Chicago area, Upper Northwest Denver area, Lower Northwest Denver area, North Indianapolis area, and the South Indianapolis area, eliminate actual and potential competition between AMC and Kerasotes, and likely result in increased ticket prices and lower quality theatres in those markets. The proposed transaction therefore violates Section 7 of the Clayton Act.

III. Explanation of the Proposed Final Judgment

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisitions in each relevant geographic market, establishing new, independent, and economically viable competitors. The proposed Final Judgment requires AMC, within sixty (60) calendar days after the filing of the Complaint, or five (5) days after the notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as viable ongoing businesses, a total of eight theatres in the seven relevant geographic markets in the Chicago, Denver, and Indianapolis areas: Kerasotes Glen 10 and AMC Gardens 13 (North Suburban Chicago), AMC Cantera 30 (Upper Southwest Suburban Chicago), Kerasotes Showplace 12 (Bolingbrook) (Lower Southwest Suburban Chicago), Kerasotes Colony Square 12 (Upper Northwest Denver), Kerasotes Olde Town 14 (Lower Northwest Denver), Kerasotes Showplace 12 or AMC Castleton Square 12 (North Indianapolis), and AMC Greenwood 14 (South Indianapolis). The assets must be divested in such a way as to satisfy the Plaintiffs that the theatres can and will be operated by the purchaser as viable, ongoing businesses that can compete effectively in the relevant markets as mainstream theatres exhibiting first-run, commercial movies. AMC must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

Until the divestitures take place, AMC and Kerasotes must maintain the sales and marketing of the theatres, and maintain the theatres in operable condition at current capacity configurations. Until the divestitures take place, AMC and Kerasotes must not transfer or reassign to other areas within the company their employees with primary responsibility for the operation of the theatres, except for transfer bids initiated by employees pursuant to Defendants' regular, established job-posting policies.

In the event that AMC does not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that AMC will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the parties, setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestitures have not been accomplished, the trustee and the plaintiffs will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

If AMC is unable to effect the divestitures required herein due to their inability to obtain the landlords' consent, Section VI of the proposed Final Judgment requires AMC to divest alternative theatre assets that compete effectively with the theatres for which the landlord consent was not obtained. This provision will insure that any failure by AMC to obtain landlord consent does not thwart the relief obtained in the proposed Final Judgment.

The proposed Final Judgment also prohibits AMC from acquiring any other theatres in counties that correspond to the relevant geographic markets and Kerasotes from acquiring any other theatres in Cook County, Illinois, without providing at least thirty (30) days notice to the United States Department of Justice. Such acquisitions could raise competitive concerns but might be too small to be reported under the Hart-Scott-Rodino ("HSR") premerger notification statute.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of AMC's acquisition of Kerasotes.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The Plaintiffs and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the Plaintiffs have not withdrawn their consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written

comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: John R. Read, Chief, Litigation III, Antitrust Division, United States Department of Justice, 450 5th Street, NW., Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The Plaintiffs considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The Plaintiffs could have continued the litigation and sought preliminary and permanent injunctions against AMC's acquisition of Kerasotes. The Plaintiffs are satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of exhibition of first-run, commercial movies in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the Plaintiffs would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.") [1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. . *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.DC 2001). *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.DC 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.DC 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland*

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[2] *Cf. BNS,* 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft,* 56 F.3d at 1459; *see* also *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court recently confirmed in *SBC Communications,* courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11.[3]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: May 21, 2010.

Respectfully submitted,

/s/

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Nina Hale,
Bennett Matelson (DC Bar No. 454551),
Creighton J. Macy,
U.S. Department of Justice Antitrust Division 450 5th Street, NW., Suite 4000, Washington, DC 20530, Telephone: (202) 616–5943, Fax: (202) 514–7308, E-mail: *gregg.malawer@usdoj.gov,* Attorneys for Plaintiff the United States

[FR Doc. 2010–13394 Filed 6–2–10; 8:45 am]

BILLING CODE 4410–11–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Neighborworks America; Regular Board of Directors Sunshine Act Meeting

TIME AND DATE: 1 p.m., Tuesday, June 1, 2010.

PLACE: 1325 G Street, NW., Suite 800, Boardroom Washington, DC 20005.

STATUS: Open.

CONTACT PERSON FOR MORE INFORMATION: Erica Hall, Assistant Corporate Secretary (202) 220–2376; *ehall@nw.org.*

Agenda

I. Call To Order.
II. Approval of the Minutes.
III. Approval of the Minutes.
IV. Summary Report of the Audit Committee.
V. Summary Report of the Finance, Budget and Program Committee.
VI. Summary of the NHSA Special Board Committee Meeting.
VII. Summary of the NHSA Special Board of Directors Meeting.
VIII. Summary Report of the Corporate Administration Committee.
IX. Board Appointments.
X. Code of Conduct.
XI. Investment Policy.
XII. Strategic Planning Process Timeline.
XIII. Financial Report.
XIV. Corporate Scorecard.
XV. NHSA Update.
XVI. Chief Executive Officer's Quarterly Management Report.
XVII. Adjournment

Erica Hall,

Assistant Corporate Secretary.

[FR Doc. 2010–12974 Filed 6–2–10; 8:45 am]

BILLING CODE 7570–02–M

NEIGHBORHOOD REINVESTMENT CORPORATION

NHSA Special Board of Directors Meeting; Sunshine Act

TIME AND DATE: 12:30 p.m., Tuesday, May 11, 2010.

PLACE: 1325 G Street, NW., Suite 800, Boardroom, Washington, DC 20005.

STATUS: Open.

CONTACT PERSON FOR MORE INFORMATION: Erica Hall, Assistant Corporate Secretary, (202) 220–2376; *ehall@nw.org.*

AGENDA:

I. Call to Order.
II. Discussion and Recommendation For Interim Funding.
III. Adjournment.

Erica Hall,

Assistant Corporate Secretary.

[FR Doc. 2010–12975 Filed 6–2–10; 8:45 am]

BILLING CODE 7570–02–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–011; NRC–2008–0252]

Southern Nuclear Operating Company, et al; Notice of Consideration of Issuance of Amendment to Early Site Permit, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of license amendment request, opportunity to comment, and opportunity to request a hearing.

DATES: Submit comments by July 6, 2010. Requests for a hearing or leave to intervene must be filed by August 2, 2010.

FOR FURTHER INFORMATION CONTACT: Chandu Patel, Project Manager, AP1000

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D. DC 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) & 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.")

Projects Branch 1, Division of New Reactors Licensing, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–001. *Telephone:* (301) 415–3025; *fax number:* (301) 415–6350; *e-mail: Chandu.Patel@nrc.gov.*

ADDRESSES: You may submit comments by any one of the following methods. Please include Docket ID NRC–2008–0252 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *Regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You may submit comments by any one of the following methods.

Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2008–0252. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

Mail comments to: Chief, Rulemaking, Announcements and Directives Branch (RADB), Office of Administration, *Mail Stop:* TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax to RADB at (301) 492–3446.

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The application dated May 24, 2010, is available electronically in ADAMS under Docket Number 052–00011.

Federal Rulemaking Web site: Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2008–0252.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Early Site Permit (ESP) No. ESP–004, issued to Southern Nuclear Operating Company (SNC), and the co-owners of the Vogtle Electric Generating Plant (VEGP) site (Georgia Power Company, Ogtlethorpe Power Corporation, Municipal Electric Authority of Georgia, and the City of Dalton, GA) for the VEGP ESP site located in Burke County, Georgia.

The proposed amendment would change the VEGP ESP site safety analysis report (SSAR) to allow the use of engineered granular backfill (EGB) in place of Category 1 and 2 backfill over the slopes of the Unit 3 and 4 excavations at the VEGP site. In accordance with Title 10 of the *Code of Federal Regulations* (10 CFR) Section 52.39(e), changes to the ESP SSAR require prior Commission approval through an amendment to the ESP.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that performance of limited work authorization (LWA) construction activities at the VEGP ESP site in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the applicant has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The technical evaluation provided in the new SSAR section 2.5.2.9.4, "Study of Engineered Granular Backfill Placed over the Slopes of the Excavation," demonstrates that the results and conclusions in the Vogtle Electric Generating Plant (VEGP) ESP SSAR 2.5.2.9.2, "Study of the Effects of Backfill Geometry," remain valid; backfill material placed over the slopes of the excavation does not affect the VEGP site response analysis used to define the VEGP Ground Motion Response Spectra (GMRS) and Foundation Input Response Spectra (FIRS) or the VEGP SASSI [soil structure interaction] SSI seismic analyses of the Nuclear Island (NI). Reclassifying backfill over the slopes of the excavation does not invalidate the VEGP site-specific seismic analyses. The placement of EGB is outside the zone of influence. Use of EGB will have no effect on reported foundation bearing capacities, estimated total or differential settlements, or liquefaction potential. Because the hydraulic conductivity of EGB material is conservative relative to the values used in the hydrological analysis, the hydrological analysis will be unaffected. As such, the use of EGB material over the slopes of the excavation does not affect the accidental radiation release to groundwater evaluated in the SSAR. Therefore, the proposed SSAR change does not significantly increase the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The sensitivity analyses described in this amendment provide a basis for concluding that the ESP SSAR seismic analyses are not sensitive to the properties of the material over the slopes of the excavation. Also, the material over the side slopes of the excavation is outside the static zone of influence of the AP1000 power block structures, and thus cannot impact the safety performance of any safety related structure. Consequently, no new accident scenarios, failure mechanisms or limiting single failures are introduced as a result of the proposed changes. The changes have no adverse effects on any safety-related system and do not challenge the performance or integrity of any safety-related system. Therefore, all accident analyses criteria continue to be met and these changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The technical evaluation provided in the new SSAR section 2.5.2.9.4, "Study of Engineered Granular Backfill Placed over the Slopes of the Excavation," demonstrates that the results and conclusions in the VEGP ESP SSAR 2.5.2.9.2, "Study of the Effects of Backfill Geometry," remain valid, backfill material placed over the slopes of the excavation does not affect the VEGP site

response analysis used to define the VEGP GMRS and FIRS or the VEGP SASSI SSI seismic analyses of the Nuclear Island (NI). Reclassifying backfill over the slopes of the excavation does not invalidate the VEGP site-specific seismic analyses. In addition, the design function of Category 1 and 2 backfill related to bearing capacity, settlement, and liquefaction is unaffected. The evaluations and analysis results demonstrate applicable acceptance criteria are met. Therefore, the proposed changes do not involve a reduction in a margin of safety.

The NRC staff has reviewed the applicant's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Before issuing the amendment, regardless of whether a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held, if one is requested. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

II. Opportunity To Request a Hearing

Requirements for hearing requests and petitions for leave to intervene are found in 10 CFR 2.309, "Hearing requests, Petitions to Intervene, Requirements for Standing, and Contentions." Interested persons should consult 10 CFR Part 2, section 2.309, which is available at the NRC's Public Document Room (PDR), located at O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852 (or call the PDR at (800) 397–4209 or (301) 415–4737). NRC regulations are also accessible electronically from the NRC's Electronic Reading Room on the NRC Web site at *http://www.nrc.gov.*

III. Petitions for Leave To Intervene

Within 60 days of this notice, any person whose interest may be affected by this amendment and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the petitioner and specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding on the petitioner's interest.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings the NRC must make to support the granting of a license amendment in response to the application. The petition must also include a concise statement of the alleged facts or expert opinions which support the position of the petitioner and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to specific portions of the application for amendment that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application for amendment fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing. The Licensing Board will set the time and place for any prehearing conferences and evidentiary hearings, and the appropriate notices will be provided.

Non-timely petitions for leave to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the Licensing Board or a Presiding Officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

A State, county, municipality, Federally-recognized Indian Tribe, or agencies thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(d)(2). The petition should be submitted to the Commission by August 2, 2010. The petition must be filed in accordance with the filing instructions in section IV of this document, and should meet the requirements for petitions for leave to intervene set forth in this section, except that State and Federally-recognized Indian tribes do not need to address the standing requirements in 10 CFR 2.309(d)(1) if the facility is located within its boundaries. The entities listed above could also seek to participate in a hearing as a nonparty pursuant to 10 CFR 2.315(c).

Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the Licensing Board.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E–Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from June 3, 2010. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Dated at Rockville, Maryland this 27th day of May 2010.

For The Nuclear Regulatory Commission.

Jeffrey Cruz,

Chief, AP 1000 Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2010–13327 Filed 6–2–10; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon written request; Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Rule 12h–1(f); OMB Control No. 3235–0632; SEC File No. 270–570.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of

Management and Budget for extension and approval.

Rule 12h–1(f) (17 CFR 240.12h–1) provides an exemption from the registration requirements of the Securities Exchange Act of 1934 for compensatory employee stock options of issuers that are not required to file periodic reports under the Exchange Act and that have 500 or more option holders and more than $10 million in assets at its most recently ended fiscal year. The information required under filed Rule 12h–1 is not filed with the Commission. Rule 12h–(f) permits issuers to provide the required information (other than the issuer's books and records) to the option holders and holders of share received on exercise of compensatory employee stock options either by: (i) physical or electronic delivery of the information; and (ii) notice to the option holders and holders of shares received on exercise of compensatory employee stock options of the availability of the information on a password-protected Internet site. We estimate that it takes approximately 2 burden hours per response to provide the information required under Rule 12h–1 and that the information is filed by approximately 40 respondents. We estimate that 25% of the 2 hours per response (5 hours) is prepared by the company for a total annual reporting burden of 80 hours (.5 hours per response × 40 responses).

Written comments are invited on: (a) Whether this proposed collection of information is necessary for the performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden imposed by the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comment to Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312; or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: May 26, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13331 Filed 6–2–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Regulation S–AM; SEC File No. 270–548; OMB Control No. 3235–0609.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information provided for in Regulation S–AM (17 CFR part 248, subpart B), under the Fair and Accurate Credit Transactions Act of 2003 (Pub. L. 108–159, Section 214, 117 Stat. 1952 (2003)) ("FACT Act"), the Securities and Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), and the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Regulation S–AM implements the requirements of Section 214 of the FACT Act as applied to brokers, dealers, and investment companies, as well as investment advisers and transfer agents that are registered with the Commission (collectively, "Covered Persons"). As directed by Section 214 of the FACT Act, before a receiving affiliate may make marketing solicitations based on the communication of certain consumer financial information from a Covered Person, the Covered Person must provide a notice to each affected individual informing the individual of his or her right to prohibit such marketing. The regulation potentially applies to all of the approximately 21,466 Covered Persons registered with the Commission, although only approximately 12,021 of them have one or more corporate affiliates, and the regulation would require only approximately 2,147 of them to provide consumers with notice and an opt-out opportunity.

The Commission staff estimates that there are approximately 12,021 Covered Persons having one or more affiliates, and that they would require an average one-time burden of 1 hour to review affiliate marketing practices, for a total of 12,021 hours, at a total staff cost of approximately $2,524,410. The staff also estimates that approximately 2,147 Covered Persons would be required to provide notice and opt-out opportunities to consumers, and would incur an average first-year burden of 18 hours in doing so, for a total estimated first-year burden of 38,646 hours, at a total staff cost of approximately $10,279,836. With regard to continuing notice burdens, the staff estimates that each of the approximately 2,147 Covered Persons required to provide notice and opt-out opportunities to consumers would incur a burden of approximately 4 hours per year to create and deliver notices to new consumers and record any opt outs that are received on an ongoing basis, for a total of 8,588 hours, at a total staff cost of approximately $489,516 per year.

Written comments are invited on: (a) 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; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be submitted in writing to: Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312, or by e-mail to: *PRA_Mailbox@sec.gov.*

Dated: May 26, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13332 Filed 6–2–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

In the Matter of Sintec Co. Ltd.: Order of Suspension of Trading

June 1, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Sintec Co. Ltd. because it has not filed any periodic reports since the period ended December 31, 2001.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on June 1, 2010, through 11:59 p.m. EDT on June 14, 2010.

By the Commission.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13440 Filed 6–1–10; 4:15 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62168; File No. SR–NYSEAmex–2010–44]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Add Certain Violations of its Communications and Give-up Policies to its MRVP

May 25, 2010.

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 May 12, 2010, NYSE Amex LLC ("NYSE Amex" or the "Exchange") 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 NYSE Amex Disciplinary Rule 476A to add Rule 36—NYSE Amex Equities (Communications Between Exchange and Members' Offices) to Part 1A: List of Exchange Rule Violations and Fines Applicable Thereto ("Minor Rule Violation Plan").[3] The text of the proposed rule change is available on NYSE Amex's Web site at *http://www.nyse.com,* on the Commission's Web site at *http://www.sec.gov,* at NYSE Amex, 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.

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 NYSE Amex Disciplinary Rule 476A to add Rule 36—NYSE Amex Equities (Communications Between Exchange and Members' Offices) to Part 1A of its Minor Rule Violation Plan.

Background

Effective October 1, 2008, NYSE Euronext, acquired the parent company of the Exchange's predecessor, the American Stock Exchange LLC, pursuant to an Agreement and Plan of Merger (the "Merger").[4] In connection with the Merger, on December 1, 2008, the Exchange relocated all equities trading conducted on its legacy trading systems and facilities located at 86 Trinity Place, New York, New York to systems and facilities located at 11 Wall Street, New York, New York (the "Equities Relocation").[5] Similarly, on March 2, 2009, the Exchange relocated all its options trading to trading systems and facilities located at 11 Wall Street, New York, New York (the "Options Relocation").[6] As a result of the Equities and Options Relocations, the NYSE and NYSE Amex Equities Trading Floors are located within the 11 Wall Street building in a room adjacent to the NYSE Amex Options Trading Floor.

Current Rule 36—NYSE Amex Equities

Rule 36—NYSE Amex Equities governs two primary areas: (i) communications between the Floor and other locations, and (ii) the use and/or possession of portable or wireless communication or trading devices.

First, Rule 36—NYSE Amex Equities broadly prohibits members and member organizations from establishing or maintaining any telephonic or electronic communication between the Floor and any other location without Exchange approval. In addition, there are several supplementary provisions that provide more detailed prescriptions for members and member firms.

Rule 36.10—NYSE Amex Equities advises members and member organizations that the phone company will not install or disconnect any line between the Floor and any other location without Exchange approval and that such requests should be sent to the Exchange's Market Operations Division. Rule 36.60—NYSE Amex Equities further prohibits members and member organizations from listing a phone line in the name of a non-member.

Rule 36.20—NYSE Amex Equities provides that Floor brokers may maintain a phone line at their booth locations on the Floor, or use an Exchange issued and authorized portable phone, to communicate with non-members off the Floor. Only Exchange issued and authorized portable phones may be used on the Floor in accordance with the prescriptions of Rule 36.21—NYSE Amex Equities, and the use of personal phones is expressly prohibited. Rule 36.21—NYSE Amex Equities provides that Floor brokers using an Exchange issued and authorized portable phone may communicate directly from the point of sale on the Floor with someone off-Floor. In addition to processing orders, Floor brokers may also provide "market look" observations over the phone. When taking orders over the phone, Floor brokers must comply with Rule 123(e)—NYSE Amex Equities, which requires entry of the order into an electronic system, as well as any and all other record retention requirements under Rule 440—NYSE Amex Equities and SEC Rules 17a–3 and 17a–4. Exchange issued phones do not permit call-forwarding or call-waiting and may not block a caller's identification. Floor brokers may not use an Exchange authorized and provided portable phone used to trade equities while on the Exchange's Options Trading Floor.

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange's corporate affiliate, New York Stock Exchange LLC ("NYSE"), submitted a companion rule filing proposing corresponding amendments to NYSE Rule 476A. *See* SR–NYSE–2010–37.

[4] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex–2008–62) (order approving the Merger).

[5] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex–2008–63) (order approving the Equities Relocation).

[6] *See* Securities Exchange Act Release No. 59472 (February 27, 2009), 74 FR 9843 (March 6, 2009) (SR–NYSEALTR–2008–14) (order approving the Options Relocation).

Notwithstanding the prescriptions of Rule 36.20—NYSE Amex Equities, Rule 36.23—NYSE Amex Equities provides that members and employees of member organizations may use personal portable or wireless communications devices, including phones, outside the Exchange's Equities Trading Floor.[7] In addition, members and employees of member organizations may not use personal portable or wireless communication devices on the Exchange's Options Trading Floor unless they are also registered to trade options on the Exchange.

Rule 36.30—NYSE Amex Equities provides that, subject to Exchange approval, a DMM Unit may maintain a phone line at its post to communicate with its off-Floor business operations and/or its clearing firm. For trading purposes, a DMM Unit's phone line may only be used to enter hedging orders through the firm's off-Floor office or clearing firm, or through a member of an options or futures exchange as permitted under Rules 98– and 105– NYSE Amex Equities.

Under Rule 36.30—NYSE Amex Equities, a DMM Unit may also maintain a wired or wireless device that has been registered with the Exchange, such as a computer terminal or laptop, to communicate with the DMM Unit's off-Floor algorithms. A DMM Unit using such a wired or wireless device must certify that the device operates in accordance with all SEC and Exchange rules, policies, and procedures. In addition, the DMM Unit must create and maintain records of all messages generated by the wired or wireless device in compliance with Rule 440—NYSE Amex Equities and SEC Rules 17a–3 and 17a–4.

To address concerns regarding improper information sharing between the Exchange's Equities Trading Floor and the adjacent Options Trading Floor, Rule 36.70—NYSE Amex Equities prohibits members and member firm employees from (i) using or possessing any wireless trading device that may be used to view or enter orders into the Exchange's Equities trading systems while on the Options Trading Floor, and (ii) using or possessing any wireless trading device that may be used to view or enter orders into the Exchange's Options trading systems while on the Equities Trading Floor. These prohibitions apply to any and all wireless trading devices, including devices issued by the Exchange or NYSE, as well as devices that are proprietary to a member, member organization or other entity.

Finally, Rules 36.40– and 36.50–NYSE Amex Equities prescribe certain timing and handling requirements for "give-up" or "step out" transactions, whereby a member or member organization executes a customer trade on behalf of another member. While not directly related to member or member organization communications or the use and/or possession of portable or wireless communication or trading devices, these requirements are important for ensuring that members and member organizations properly document these types of transactions.

Proposed Rule Change

As noted above, the Exchange proposes to add Rule 36—NYSE Amex Equities to Part 1A of its Minor Rule Violation Plan under NYSE Amex Disciplinary Rule 476A.

Under Part 1A of the Exchange's Minor Rule Violation Plan, the Exchange may impose a fine, not to exceed $5,000, on any member, member organization, principal executive, approved person, or registered or non-registered employee of a member or member organization for a minor violation of specified Exchange rules. Such fines provide a meaningful sanction for rule violations where the facts and circumstances of the violation do not warrant the initiation of a formal disciplinary procedure under NYSE Amex Disciplinary Rule 476, but do require a regulatory response that is more significant than an admonition letter.

Currently, because Rule 36—NYSE Amex Equities is not part of the Exchange's Minor Rule Violation Plan, if a member or member firm employee were to violate the prohibitions set forth in Rule 36—NYSE Amex Equities the Exchange would be limited to issuing either an admonition letter or initiating formal proceedings under NYSE Amex Disciplinary Rule 476. This is the case whether or not the member or member firm employee violated the rule once or many times, and regardless of whether he or she made an inadvertent error or an intentional one.

The Exchange believes that the current regulatory approach for dealing with Rule 36—NYSE Amex Equities violations is too inflexible. The Exchange recognizes that members or member firm employees may violate the prescriptions of Rule 36—NYSE Amex Equities intentionally, as well as accidentally or inadvertently. When a violation is intentional, formal disciplinary measures in accordance with NYSE Amex Disciplinary Rule 476 may be warranted. However, while an admonition letter might be appropriate for an isolated accidental or inadvertent violation, in other cases an admonition letter would be inadequate even though a formal proceeding may not be warranted. The Exchange believes that the addition of Rule 36—NYSE Amex Equities to Part 1A of its Minor Rule Violation Plan under NYSE Amex Disciplinary Rule 476A will provide a more flexible and appropriate enforcement tool that preserves the Exchange's discretion to seek formal discipline under appropriate circumstances.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with, and furthers the objectives of, Section 6(b)(5) of the Act,[8] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also furthers the objectives of Section 6(b)(6) of the Act,[9] in that it provides for appropriate discipline for violations of Exchange rules and regulations.

The Exchange believes that the proposed rule change will provide the Exchange with greater regulatory flexibility to enforce the prescriptions of Rule 36—NYSE Amex Equities in a more informal manner while also preserving the Exchange's discretion to seek formal discipline for more serious transgressions as warranted.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[7] Rule 6A—NYSE Amex Equities defines "Trading Floor" as the restricted-access physical areas designated by the Exchange for the trading of equities securities, commonly known as the "Main Room" and the "Garage." The Exchange's Equities Trading Floor does not include the areas where its listed options are traded, commonly known as the "Blue Room" and the "Extended Blue Room," also known as the "NYSE Amex Options Trading Floor."

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(6).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEAmex–2010–44 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2010–44. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 a.m. and 3 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–NYSEAmex–2010–44 and should be submitted on or before June 24, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

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BILLING CODE 8010–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 200.30–3(a)(12) and 200.30–3(a)(44).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62188; File No. SR–NYSEArca–2010–23]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change To Modify the Fees for NYSE Arca Trades, To Establish the NYSE Arca BBO Service and Related Fees, and To Provide an Alternative Unit-of-Count Methodology for Those Services

May 27, 2010.

I. Introduction

On April 1, 2010, the NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify fees for NYSE Arca Trades and to establish the NYSE Arca BBO service and related fees. The proposed rule change was published for comment in the **Federal Register** on April 23, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

NYSE Arca proposes: (i) To establish NYSE Arca BBO, a service that will make available the Exchange's best bids and offers; (ii) to establish fees for NYSE Arca BBO; (iii) to modify the professional subscriber fees for NYSE Arca Trades; and (iv) to provide an alternative unit-of-count methodology to the traditional device fee for NYSE Arca Trades and NYSE Arca BBO.

a. Service

NYSE Arca BBO is a NYSE Arca-Only market data service that allows a vendor to redistribute on a real-time basis the same best-bid-and-offer information that NYSE Arca reports under the CQ Plan and the Nasdaq/UTP Plan for inclusion in the NYSE Arca BBO Information. NYSE Arca BBO Information would include the best bids and offers for all securities that are traded on the Exchange and for which NYSE Arca reports quotes under the CQ Plan or the Nasdaq/UTP Plan. NYSE Arca will make the NYSE Arca BBO available over a single datafeed, regardless of the markets on which the securities are listed.

NYSE Arca BBO would allow vendors, broker-dealers, private network providers and other entities ("NYSE Arca-Only Vendors") to make available NYSE Arca BBO Information on a real-time basis. NYSE Arca-Only Vendors may distribute the NYSE Arca BBO to both professional and nonprofessional subscribers. The Exchange would make NYSE Arca BBO Information available through NYSE Arca BBO Service no earlier than it makes that information available to the processor under the CQ Plan or the Nasdaq/UTP Plan, as applicable.

b. Fees

i. Access Fee

NYSE Arca currently charges $750 for access to the NYSE Arca Trades. The Exchange proposes to charge $750 per month for the receipt and use of NYSE Arca BBO and NYSE Acra Trades. One $750 monthly access fee entitles an NYSE Arca-Only Vendor to receive NYSE Arca BBO and NYSE Arca Trades (collectively, "NYSE Arca Market Data").

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61937 (April 16, 2010), 75 FR 21378.

The fee applies to receipt of NYSE Arca Market Data within the NYSE Arca-Only Vendor's organization or outside of it.

ii. Professional Subscriber Fee

The Exchange currently charges two professional subscriber fees for the NYSE Arca Trades Service: (i) A $5 per month per display device for the receipt and use of NYSE Arca Last Sale Information relating to Network A and Network B Eligible Securities; and (ii) $5 per month per display device for the receipt and use of NYSE Arca Last Sale Information relating to securities listed on Nasdaq. The Exchange proposes to set the professional subscriber fee for the NYSE Arca Trades at $10.00. This fee would entitle professional subscribers to receive NYSE Arca Last Sale Information relating to all securities for which last sale information is reported under the CTA Plan and the Nasdaq/UTP Plan. For the receipt and use of NYSE Arca BBO, the Exchange proposes to charge $10 per month per professional subscriber device.

For both NYSE Arca Trades and NYSE Arca BBO, the Exchange proposes to offer an alternative methodology to the traditional device fee. Instead of charging $10 per month per device, it proposes to offer NYSE Arca-Only Vendors the option of paying $10 per month per "Subscriber Entitlement." The fee entitles the end-user to receive and use NYSE Arca Market Data relating to all securities traded on NYSE Arca, regardless of the market on which a security is listed. For the purpose of calculating Subscriber Entitlements, the Exchange proposes to adopt a unit-of-count methodology that is the same as that approved by the Commission earlier this year with respect to the NYSE OpenBook® service.[4]

Under the unit-of-count methodology, the Exchange would not define the Vendor-subscriber relationship based on the manner in which a datafeed recipient or subscriber receives data (*i.e.,* through controlled displays or through data feeds). Instead, the Exchange would use billing criteria that define "Vendors," "Subscribers," "Subscriber Entitlements" and "Subscriber Entitlement Controls" as the basis for setting professional subscriber fees. The Exchange believes that this methodology more closely aligns with current data consumption and will reduce costs for the Exchange's customers.

The following basic principles underlie this proposal.

A. Vendors

• "Vendors" are market data vendors, broker-dealers, private network providers and other entities that control Subscribers' access to data through Subscriber Entitlement Controls.

B. Subscribers

• "Subscribers" are unique individual persons or devices to which a Vendor provides data. Any person or device that receives data from a Vendor is a Subscriber, whether the person or device works for or belongs to the Vendor, or works for or belongs to an entity other than the Vendor.

• Only a Vendor may control Subscriber access to data.

• Subscribers may not redistribute data in any manner.

C. Subscriber Entitlements

• A Subscriber Entitlement is a Vendor's permissioning of a Subscriber to receive access to data through an Exchange-approved Subscriber Entitlement Control.

• A Vendor may not provide data access to a Subscriber except through a unique Subscriber Entitlement.

• The Exchange will require each Vendor to provide a unique Subscriber Entitlement to each unique Subscriber.

• At prescribed intervals (normally monthly), the Exchange will require each Vendor to report each unique Subscriber Entitlement.

D. Subscriber Entitlement Controls

• A Subscriber Entitlement Control is the Vendor's process of permissioning Subscribers' access to data.

• Prior to using any Subscriber Entitlement Control or changing a previously approved Subscriber Entitlement Control, a Vendor must provide the Exchange with a demonstration and a detailed written description of the control or change and the Exchange must have approved it in writing.

• The Exchange will approve a Subscriber Entitlement Control if it allows only authorized, unique end-users or devices to access data or monitors access to data by each unique end-user or device.

• Vendors must design Subscriber Entitlement Controls to produce an audit report and make each audit report available to the Exchange upon request. The audit report must identify:

1. Each entitlement update to the Subscriber Entitlement Control;

2. The status of the Subscriber Entitlement Control; and

3. Any other changes to the Subscriber Entitlement Control over a given period.

• Only the Vendor may have access to Subscriber Entitlement Controls.

Subject to the rules described below, the Exchange will require NYSE Arca-Only Vendors to count every Subscriber Entitlement, whether it be a person or a device. This means that the NYSE Arca-Only Vendor must include in the count every person and device that has access to the data, regardless of the purposes for which the person or device uses the data. The Exchange will require NYSE Arca-Only Vendors to report and count all entitlements in accordance with the following rules.

A. The count shall be separate for the NYSE Arca Trades and NYSE Arca BBO services. This means that a device that is entitled to receive both NYSE Arca Last Sale Information and NYSE Arca BBO Information would count as a Subscriber Entitlement for the purposes of the NYSE Amex Trades service and as a separate Subscriber Entitlement for the purposes of the NYSE Amex BBO service.

B. In connection with a Vendor's external distribution of either NYSE Arca Trades or NYSE Arca BBO, the NYSE Arca-Only Vendor should count as one Subscriber Entitlement each unique Subscriber that the NYSE Arca-Only Vendor has entitled to have access to that type of market data. However, where a device is dedicated specifically to a single person, the NYSE Arca-Only Vendor should count only the person and need not count the device.

C. In connection with a NYSE Arca-Only Vendor's internal distribution of a type of NYSE Arca Market Data, the NYSE Arca-Only Vendor should count as one Subscriber Entitlement each unique person (but not devices) that the Vendor has entitled to have access to that type of market data.

D. The NYSE Arca-Only Vendor should identify and report each unique Subscriber. If a Subscriber uses the same unique Subscriber Entitlement to receive multiple services, the NYSE Arca-Only Vendor should count that as one Subscriber Entitlement. However, if a unique Subscriber uses multiple Subscriber Entitlements to gain access to one or more services (*e.g.,* a single Subscriber has multiple passwords and user identifications), the Vendor should report all of those Subscriber Entitlements.

E. The NYSE Arca-Only Vendor should report each Subscriber device serving multiple users individually as well as each person who may access the device. As an example, for a single device to which the NYSE Arca-Only

[4] *See* Securities Exchange Act Release No. 62038 (May 5, 2010), 75 FR 26825 (May 12, 2010) (SR–NYSE–2010–22) (approving on a permanent basis the alternative unit-of-count methodology).

Vendor has granted two people access, the Vendor should report three Subscriber Entitlements. Only a single, unique device that is dedicated to a single, unique person may be counted as one Subscriber Entitlement.

F. NYSE Arca-Only Vendors should report each unique person who receives access through multiple devices as one Subscriber Entitlement so long as each device is dedicated specifically to that person.

G. The NYSE Arca-Only Vendor should include in the count as one Subscriber Entitlement devices serving no users.

For example, if a Subscriber's device has no users or multiple users, the NYSE Arca-Only Vendor should count that device as one Subscriber Entitlement. If a NYSE Arca-Only Vendor entitles five individuals to use one of a Subscriber's devices, the Vendor should count five individual entitlements and one device entitlement, for a total of six Subscriber Entitlements. If a NYSE Arca-Only Vendor entitles an individual to receive a type of NYSE Arca Market Data over a Subscriber device that is dedicated to that individual, the Vendor should count that as one Subscriber Entitlement, not two.

iii. Nonprofessional Subscriber Fee

The Exchange proposes to charge each NYSE Arca-Only Vendor $5.00 per month for each nonprofessional subscriber to whom it provides NYSE Arca BBO Information. The Exchange proposes to impose the charge on the NYSE Arca-Only Vendor, rather than on the nonprofessional Subscriber.[5] In addition, the Exchange proposes to establish as an alternative to the fixed $5.00 monthly fee a fee of $.005 for each response that a NYSE Arca-Only Vendor disseminates to a nonprofessional Subscriber's inquiry for a best bid or offer under NYSE Arca BBO. The Exchange proposes to limit a NYSE Arca-Only Vendor's exposure under this alternative fee to $5.00 per month, the same amount as the proposed fixed monthly nonprofessional Subscriber flat fee. In order to take advantage of the per-query fee, a NYSE Arca-Only Vendor must document in its Exhibit A that it can: (1) Accurately measure the number of queries from each nonprofessional Subscriber and (2) report aggregate query quantities on a monthly basis.

The Exchange will impose the per-query fee only on the dissemination of best bids and offers to nonprofessional Subscribers. The per-query charge is imposed on NYSE Arca-Only Vendors, not end-users, and is payable on a monthly basis. NYSE Arca-Only Vendors may elect to disseminate NYSE Arca BBO pursuant to the per-query fee rather than the fixed monthly fee.

In establishing a nonprofessional Subscriber fee for NYSE Arca BBO, the Exchange proposes to apply the same criteria for qualification as a "nonprofessional subscriber" as the CTA and CQ Plan Participants use. Similar to the CTA and CQ Plans, classification as a nonprofessional subscriber is subject to Exchange review and requires the subscriber to attest to his or her nonprofessional subscriber status. A nonprofessional subscriber is a natural person who uses the data solely for his personal, non-business use and who is neither:

A. Registered or qualified with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any State securities agency, any securities exchange or association, or any commodities or futures contract market or association,

B. Engaged as an "investment adviser" as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that act), nor

C. Employed by a bank or other organization exemption from registration under Federal and/or State securities laws to perform functions that would require him/her to be so registered or qualified if he/she were to perform such function for an organization not so exempt.

The Exchange believes that the proposed monthly access fee, professional subscriber fee and nonprofessional subscriber fee for NYSE Arca Trades and NYSE Arca BBO enable NYSE Arca-Only Vendors and their subscribers to contribute to the Exchange's operating costs in a manner that is appropriate for the distribution of NYSE Arca Market Data in the form taken by the proposed services.

In setting the level of the proposed fees, the Exchange considered several factors, including:

(i) NYSE Arca's expectation that NYSE Arca Trades and NYSE Arca BBO are likely to be premium services, used by investors most concerned with receiving NYSE Arca Market Data on a low latency basis;

(ii) The fees that the CTA and CQ Plan Participants, the Nasdaq/UTP Plan Participants, Nasdaq, NYSE and NYSE Amex are charging for similar services (or that NYSE Arca anticipates they will soon propose to charge);

(iii) Consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of the proposed service;

(iv) The contribution of market data revenues that the Exchange believes is appropriate for entities that are most likely to take advantage of the proposed service;

(v) The contribution that revenues accruing from the proposed fee will make to meet the overall costs of the Exchange's operations;

(vi) The savings in administrative and reporting costs that the NYSE Arca Trades and NYSE Arca BBO will provide to NYSE Arca-Only Vendors (relative to counterpart services under the CTA, CQ and Nasdaq/UTP Plans); and

(vii) The fact that the proposed fees provide alternatives to existing fees under the CTA, CQ and Nasdaq/UTP Plans, alternatives that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

d. Administrative Requirements

The Exchange will require each NYSE Arca-Only Vendor to enter into a vendor agreement just as the CTA and CQ Plans require recipients of the Network A datafeeds to enter (the "Consolidated Vendor Form"). The agreement will authorize the NYSE Amex-Only Vendor to provide its NYSE Arca Market Data service to its customers or to distribute the data internally.

In addition, the Exchange will require each professional end-user that receives NYSE Arca Market Data from a vendor or broker-dealer to enter into the form of professional subscriber agreement into which the CTA and CQ Plans require end users of Network A data to enter. It will also require NYSE Amex-Only Vendors to subject nonprofessional subscribers to the same contract requirements as the CTA and CQ Plan Participants require of Network A nonprofessional subscribers.

III. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[6] In particular, it is consistent with Section

[5] The Exchange stated that it did not propose to establish a nonprofessional subscriber fee for NYSE Arca Last Sale Information because an alternative to that product is available. *See* Securities Exchange Act Release No. 61404 (January 22, 2010), 75 FR 5363 (February 2, 2010) (SR–NYSEArca–2009–108) (approving the NYSE Arca Realtime Reference Prices service).

[6] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

6(b)(4) of the Act,[7] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,[8] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,[9] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,[10] adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.[11]

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.[12] In the NYSE Arca Order, the Commission stated that "when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory."[13] It noted that the "existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."[14] If an exchange "was subject to significant competitive forces in setting the terms of a proposal," the Commission will approve a proposal unless it determines that "there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder."[15]

As noted in the NYSE Arca Order, the standards in Section 6 of the Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data. Core data is the best-priced quotations and comprehensive last-sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans.[16] In contrast, individual exchanges and other market participants distribute non-core data voluntarily.[17] The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.[18] Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to use competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6 and Rule 603.[19] Because NYSE Arca's instant proposal relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order.

The Exchange proposes to establish a service that would allow a vendor to redistribute best bids and offers for all securities that are traded on the Exchange and for which NYSE Amex reports quotes under the CQ Plan. The Exchange proposes to establish a monthly vendor fee and an alternative fee rate that uses the unit-of-count methodology. In addition, the Exchange proposes to modify the professional subscriber fees and to establish an alternative fee rate that uses the unit-of-count methodology for NYSE Arca Trades.

The proposal before the Commission relates to fees for NYSE Amex Trades and NYSE Amex BBO which are non-core, market data products. As in the Commission's NYSE Arca Order analysis, at least two broad types of significant competitive forces applied to NYSE Amex in setting the terms of this proposal: (i) NYSE Amex's compelling need to attract order flow from market participants; and (ii) the availability to market participants of alternatives to purchasing NYSE Amex Market Data.

Attracting order flow is the core competitive concern of any equity exchange, including NYSE Arca. Attracting order flow is an essential part of NYSE Arca's competitive success. If NYSE Arca cannot attract order flow to its market, it will not be able to execute transactions. If NYSE Arca cannot execute transactions on its market, it will not generate transaction revenue. If NYSE Arca cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability. Table 1 below provides a useful recent snapshot of the state of competition in the U.S. equity markets in the month of September 2009:[20]

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHARE VOLUME IN NMS STOCKS SEPTEMBER 2009

Trading venue	Share volume in NMS stocks (percent)
Registered Exchanges:	
NASDAQ	19.4
NYSE	14.7
NYSE Arca	13.2
BATS	9.5
NASDAQ OMX BX	3.3
Other Registered Exchanges	3.7
ECNs:	
5 ECNS	10.8
Dark Pools:	
32 Dark Pools (Estimated)	7.9
Broker-Dealer Internalization:	

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(8).

[10] 17 CFR 242.603(a).

[11] NYSE Arca is an exclusive processor of the NYSE Arca Trades and NYSE Arca BBO services under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes information with respect to quotations or transactions on an exclusive basis on its own behalf.

[12] Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21) ("NYSE Arca Order"). In the NYSE Arca Order, the Commission describes in great detail the competitive factors that apply to non-core market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order.

[13] *Id.* at 74771.

[14] *Id.* at 74782.

[15] *Id.* at 74781.

[16] *See* 17 CFR 242.603(b). ("Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.").

[17] *See* NYSE Arca Order at 74779.

[18] *Id.*

[19] *Id.*

[20] The Commission recently published estimated trading percentages in NMS Stocks in its Concept Release on Equity Market Structure. *See* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3597 n. 21 (January 21, 2010) (File No. S7–02–10).

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHARE VOLUME IN NMS STOCKS SEPTEMBER 2009—Continued

Trading venue	Share volume in NMS stocks (percent)
200+ Broker-Dealers (Estimated)	17.5

The market share percentages in Table 1 strongly indicate that NYSE Arca must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on NYSE Arca to act reasonably in setting its fees for NYSE Arca market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE Arca must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that seeks to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.[21]

In addition to the need to attract order flow, the availability of alternatives to NYSE Arca Market Data significantly affect the terms on which NYSE Arca can distribute this market data.[22] In setting the fees for NYSE Arca Market Data, NYSE Arca must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data.[23] Of course, the most basic source of information generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.[24] In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.[25] The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition.

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on NYSE Arca in setting the terms for distributing its NYSE Arca Market Data. The Commission believes that the availability of those alternatives, as well as NYSE Amex's compelling need to attract order flow, imposed significant competitive pressure on NYSE Amex to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because NYSE Arca was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[26] that the proposed rule change (SR–NYSEArca–2010–23) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13334 Filed 6–2–10; 8:45 am]

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[21] *See* NYSE Arca Order at 74783.

[22] *See* Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). *See also* U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. *See, e.g., FTC* v. *Whole Foods Market, Inc.,* 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC* v. *Arch Coal, Inc.,* 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. *See, e.g., Leegin Creative Leather Products* v. *PSKS, Inc.,* 127 S. Ct. 2705 (2007); *Atlanta Richfield Co.* v. *United States Petroleum Co.,* 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574 (1986); *State Oil Co.* v. *Khan,* 522 U.S. 3 (1997); *Northern Pacific Railway Co.* v. *U.S.,* 356 U.S. 1 (1958).

[23] *See* NYSE Arca Order at 74783.

[24] *Id.*

[25] *Id.*

[26] 15 U.S.C. 78s(b)(2).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62181; File No. SR–NYSE–2010–30]

Self-Regulatory Organizations; New York Stock Exchange, LLC; Order Approving Proposed Rule Change To Establish the NYSE BBO Service

May 26, 2010.

I. Introduction

On April 1, 2010, the New York Stock Exchange, LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish the NYSE BBO Service, a service that will make available the Exchange's best bids and offers and to establish fees for that service. The proposed rule change was published for comment in the **Federal Register** on April 22, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

a. Subscribers and Data Feed Recipients

The NYSE BBO Service is a NYSE-only market data service that allows a vendor to redistribute on a real-time basis the same best-bid-and-offer information that NYSE reports under the CQ Plan for inclusion in the CQ Plan's consolidated quotation information data stream ("NYSE BBO Information"). NYSE BBO Information would include the best bids and offers for all securities that are traded on the Exchange and for which NYSE reports quotes under the CQ Plan. NYSE will make the NYSE BBO Service available over a single datafeed, regardless of the markets on which the securities are listed.

The NYSE BBO Service would allow vendors, broker-dealers, private network providers and other entities ("NYSE-Only Vendors") to make NYSE BBO Information available on a real-time basis. NYSE-Only Vendors may distribute the NYSE BBO Service to both professional and nonprofessional subscribers.

The Exchange would make NYSE BBO Information available through its new NYSE BBO Service no earlier than

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61914 (April 15, 2010), 75 FR 21077.

it makes that information available to the processor under the CQ Plan.

b. Fees

i. Access Fee

For the receipt of access to the NYSE BBO datafeed, the Exchange proposes to charge $1500 per month. One $1500 monthly access fee entitles an NYSE-Only Vendor to receive both the NYSE BBO datafeed as well as the Exchange's NYSE Trades datafeed.[4] The fee applies to receipt of NYSE market data within the NYSE-Only Vendor's organization or outside of it.

ii. Professional Subscriber Fees

For the receipt and use of NYSE BBO Information, the Exchange proposes to charge $15 per month per professional subscriber device.

In addition, the Exchange proposes to offer an alternative methodology to the traditional device fee. Instead of charging $15 per month per device, it proposes to offer NYSE-Only Vendors the option of paying $15 per month per "Subscriber Entitlement." The fee entitles the end-user to receive and use NYSE BBO Information relating to all securities traded on NYSE, regardless of the market on which a security is listed. For the purpose of calculating Subscriber Entitlements, the Exchange proposes to adopt the unit-of-count methodology approved by the Commission earlier this year with respect to its NYSE OpenBook® service (the "Unit-of-Count Filing").[5]

iii. Nonprofessional Subscriber Fee

The Exchange proposes to charge each NYSE-Only Vendor $5.00 per month for each nonprofessional subscriber to whom it provides NYSE BBO Information. The Exchange proposes to impose the charge on the NYSE-Only Vendor, rather than on the nonprofessional Subscriber. In addition, the Exchange proposes, to establish as an alternative to the fixed $5.00 monthly fee, a fee of $.005 for each response that a NYSE-Only Vendor disseminates to a nonprofessional Subscriber's inquiry for a best bid or offer under the NYSE BBO service. The Exchange proposes to limit a NYSE-Only Vendor's exposure under this alternative fee to $5.00 per month, the same amount as the proposed fixed monthly nonprofessional Subscriber flat fee. In order to take advantage of the per-query fee, a NYSE-Only Vendor must document in its Exhibit A that it can: (1) Accurately measure the number of queries from each nonprofessional Subscriber and (2) report aggregate query quantities on a monthly basis.

The Exchange will impose the per-query fee only on the dissemination of best bids and offers to nonprofessional Subscribers. The per-query charge is imposed on NYSE-Only Vendors, not end-users, and is payable on a monthly basis. NYSE-Only Vendors may elect to disseminate the NYSE BBO service pursuant to the per-query fee rather than the fixed monthly fee.

In establishing a nonprofessional Subscriber fee for the NYSE BBO Service, the Exchange proposes to apply the same criteria for qualification as a "nonprofessional subscriber" as the CTA and CQ Plan Participants use. Similar to the CTA and CQ Plans, classification as a nonprofessional subscriber is subject to Exchange review and requires the subscriber to attest to his or her nonprofessional subscriber status. A "nonprofessional subscriber" is a natural person who uses the data solely for his personal, non-business use and who is neither:

A. Registered or qualified with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association,

B. Engaged as an "investment adviser" as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that act), nor

C. Employed by a bank or other organization exemption from registration under Federal and/or state securities laws to perform functions that would require him/her to be so registered or qualified if he/she were to perform such function for an organization not so exempt.

c. Justification of Fees

The Exchange believes that the proposed monthly access fee, professional subscriber fee and nonprofessional subscriber fee for the NYSE BBO Service will enable NYSE-Only Vendors and their subscribers to contribute to the Exchange's operating costs in a manner that is appropriate for the distribution of NYSE BBO Information in the form taken by the proposed services. In setting the level of the proposed fees, the Exchange considered several factors, including:

(i) NYSE's expectation that the NYSE BBO Service is likely to be a premium service, used by investors most concerned with receiving NYSE BBO Information on a low latency basis;

(ii) The fees that the CQ Plan Participants, Nasdaq, NYSE Amex and NYSE Arca are charging for similar services (or that NYSE anticipates they will soon propose to charge);

(iii) Consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of the proposed service;

(iv) The contribution of market data revenues that the Exchange believes is appropriate for entities that are most likely to take advantage of the proposed service;

(v) The contribution that revenues accruing from the proposed fee will make to meet the overall costs of the Exchange's operations;

(vi) The savings in administrative and reporting costs that the NYSE BBO Service will provide to NYSE-Only Vendors (relative to counterpart services under the CQ Plan); and

(vii) The fact that the proposed fees provide alternatives to existing fees under the CQ Plan, alternatives that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

d. Administrative Requirements

The Exchange will require each NYSE-Only Vendor to enter into a vendor agreement just as the CTA and CQ Plans require recipients of the Network A datafeeds to enter (the "Consolidated Vendor Form"). The agreement will authorize the NYSE-Only Vendor to provide NYSE BBO Information to its customers or to distribute the data internally.

In addition, the Exchange will require each professional end-user that receives NYSE BBO Information from a vendor or broker-dealer to enter into the form of professional subscriber agreement into which the CTA and CQ Plans require end users of Network A data to enter. It will also require NYSE-Only Vendors to subject nonprofessional subscribers to the same contract requirements as the CTA and CQ Plan Participants require of Network A nonprofessional subscribers.

III. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to

[4] The Commission approved the Exchange's NYSE Trades service, a NYSE-only market data service that allows a vendor to redistribute on a real-time basis the same last sale information that the Exchange reports to the Consolidated Tape Association ("CTA") for inclusion in CTA's consolidated data stream and certain other related data elements. *See* Securities Exchange Act Release No. 59606 (March 19, 2009), 74 FR 13293 (March 26, 2009) (SR–NYSE–2009–04).

[5] *See* Securities Exchange Act Release No. 62038 (May 5, 2010), 75 FR 26825 (May 12, 2010) (SR–NYSE–2010–22) (approving on a permanent basis the alternative unit-of-count methodology).

a national securities exchange.[6] In particular, it is consistent with Section 6(b)(4) of the Act,[7] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,[8] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,[9] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,[10] adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.[11]

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.[12] In the NYSE Arca Order, the Commission stated that "when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory." [13] It noted that the "existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory." [14] If an exchange "was subject to significant competitive forces in setting the terms of a proposal," the Commission will approve a proposal unless it determines that "there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder." [15]

As noted in the NYSE Arca Order, the standards in Section 6 of the Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data. Core data is the best-priced quotations and comprehensive last-sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans.[16] In contrast, individual exchanges and other market participants distribute non-core data voluntarily.[17] The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.[18] Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to use competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6 and Rule 603.[19] Because NYSE's instant proposal relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order.

The Exchange proposes to establish a service that would allow a vendor to redistribute best bids and offers for all securities that are traded on the Exchange and for which NYSE reports quotes under the CQ Plan. The Exchange proposes to establish a monthly vendor fee and an alternative fee rate that uses the unit-of-count methodology. The Exchange represents that this change would provide investors with a less expensive alternative to access bids and offer calculations than the CQ Plan's consolidated data.

The proposal before the Commission relates to fees for NYSE BBO Information which is a non-core, market data product. As in the Commission's NYSE Arca Order analysis, at least two broad types of significant competitive forces applied to NYSE in setting the terms of this proposal: (i) NYSE's compelling need to attract order flow from market participants; and (ii) the availability to market participants of alternatives to purchasing NYSE's BBO Information.

Attracting order flow is the core competitive concern of any equity exchange, including NYSE. Attracting order flow is an essential part of NYSE's competitive success. If NYSE cannot attract order flow to its market, it will not be able to execute transactions. If NYSE cannot execute transactions on its market, it will not generate transaction revenue. If NYSE cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability. Table 1 below provides a useful recent snapshot of the state of competition in the U.S. equity markets in the month of September 2009:[20]

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHAREVOLUME IN NMS STOCKS SEPTEMBER 2009

Trading Venue	Share Volume in NMS Stocks
Registered Exchanges:	
NASDAQ	19.4
NYSE	14.7
NYSE Arca	13.2
BATS	9.5
NASDAQ OMX BX	3.3

[6] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(8).

[10] 17 CFR 242.603(a).

[11] NYSE is an exclusive processor of the NYSE BBO service under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes information with respect to quotations or transactions on an exclusive basis on its own behalf.

[12] Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21) ("NYSE Arca Order"). In the NYSE Arca Order, the Commission describes in great detail the competitive factors that apply to non-core market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order.

[13] *Id.* at 74771.

[14] *Id.* at 74782.

[15] *Id.* at 74781.

[16] *See* 17 CFR 242.603(b). ("Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.")

[17] *See* NYSE Arca Order at 74779.

[18] *Id.*

[19] *Id.*

[20] The Commission recently published estimated trading percentages in NMS Stocks in its Concept Release on Equity Market Structure. *See* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3597 n. 21 (January 21, 2010) (File No. S7–02–10).

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHAREVOLUME IN NMS STOCKS SEPTEMBER 2009—Continued

Trading Venue	Share Volume in NMS Stocks
Other Registered Exchanges	3.7
ECNs:	
5 ECNS	10.8
Dark Pools:	
32 Dark Pools (Estimated)	7.9
Broker-Dealer Internatization:	
200+ Broker-Dealers (Estimated)	17.5

The market share percentages in Table 1 strongly indicate that NYSE must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on NYSE to act reasonably in setting its fees for NYSE market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that seeks to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.[21]

In addition to the need to attract order flow, the availability of alternatives to NYSE's BBO Information data significantly affect the terms on which NYSE can distribute this market data.[22] In setting the fees for its NYSE BBO Service, NYSE must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data.[23] Of course, the most basic source of information generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.[24] In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.[25] The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition.

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on the NYSE in setting the terms for distributing its NYSE BBO Information. The Commission believes that the availability of those alternatives, as well as the NYSE's compelling need to attract order flow, imposed significant competitive pressure on the NYSE to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because the NYSE was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[26] that the proposed rule change (SR–NYSE–2010–30) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13336 Filed 6–2–10; 8:45 am]

BILLING CODE 8010–01–P

[21] *See* NYSE Arca Order at 74783.

[22] *See* Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). *See also* U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. *See, e.g., FTC* v. *Whole Foods Market, Inc.,* 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC* v. *Arch Coal, Inc.,* 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. *See, e.g., Leegin Creative Leather Products* v. *PSKS, Inc.,* 127 S. Ct. 2705 (2007); *Atlanta Richfield Co.* v. *United States Petroleum Co.,* 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574 (1986); *State Oil Co.* v. *Khan,* 522 U.S. 3 (1997); *Northern Pacific Railway Co.* v. *U.S.,* 356 U.S. 1 (1958).

[23] *See* NYSE Arca Order at 74783.

[24] *Id.*

[25] *Id.*

[26] 15 U.S.C. 78s(b)(2).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62177; File No. SR–BATS–2010–013]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BATS Rule 19.5, entitled "Minimum Participation Requirement for Opening Trading of Option Series"

May 26, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 13, 2010, BATS Exchange, Inc. (the "Exchange" or "BATS") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend BATS Rule 19.5, entitled "Minimum Participation Requirement for Opening Trading of Option Series." The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing the elimination of a requirement that at least one Options Market Maker be registered for trading a particular series before it may be opened for trading on BATS Options.

An Options Market Maker is an Options Member [5] registered with the Exchange as a Market Maker.[6] Options Market Makers on BATS Options have certain obligations such as maintaining two-sided markets and participating in transactions that are "reasonably calculated to contribute to the maintenance of a fair and orderly market." [7] To register as an Options Market Maker, an Options Member must file a written application with the Exchange, which will consider an applicant's market making ability and other factors it deems appropriate in determining whether to approve an applicant's registration.[8] All Options Market Makers are designated as specialists on BATS Options for all purposes under the Act or rules thereunder.[9] The BATS Options Rules place no limit on the number of qualifying entities that may become Options Market Makers.[10] The good standing of an Options Market Maker may be suspended, terminated, or withdrawn if the conditions for approval cease to be maintained or the Options Market Maker violates any of its agreements with the Exchange or any provisions of the BATS Options Rules.[11] An Options Member that has qualified as an Options Market Maker may register to make markets in individual series of options.[12]

Currently Exchange Rule 19.5 provides in relevant part that after a particular class of options has been approved for listing on BATS Options, the Exchange will allow trading in series of options in that class only if there is at least one Options Market Maker registered for trading that particular series. The Exchange is proposing to eliminate this requirement in order to expand the number of series available to investors for trading and for hedging risks associated with securities underlying those options, as well as to enhance markets in products which are likely to receive customer order flow. The Exchange believes that eliminating the listing requirement to have an Options Market Maker in every series would permit Options Market Makers, who currently may choose to serve as Options Market Makers solely to permit an options to trade on BATS Options, to focus their expertise on the products that are more consistent with their business objectives or more likely to receive customer order flow.

Eliminating the Options Market Maker listing requirement would provide the Exchange the opportunity to trade options that may have occasional interest but that do not necessarily require a two-sided market at all times. The lack of a two-sided market would not cause customer orders to receive prices inferior to the best prices available across all exchanges. BATS Options is designed to systematically avoid trading through protected quotations on other options exchanges, and as such, orders accepted into BATS Options in options that do not have Options Market Makers will not trade at inferior prices even if there is not a two-sided market on BATS Options. As a result, incoming orders are protected from receiving inferior execution prices simply by the fact that there is robust quote competition in the exchange-listed options business with eight competing options exchanges and a multitude of competing Market Makers and liquidity providers. Additionally, the Options Order Protection and Locked/Crossed Market Plan requires plan participants to "establish, maintain and enforce written policies and procedures that are reasonably designed to prevent Trade-Throughs in that participant's market in Eligible Options Classes." [13] With the implementation of this plan, a robust network of private routing has been constructed that ensures routable customer orders can access the best prevailing prices in the market.

Moreover, the Commission recently approved the proposed rule change filing of the NASDAQ Options Market ("NOM"), which has rules that are substantially similar to the Exchange's, in which NOM eliminated the requirements for having at least one Options Market Maker registered for trading in a particular series before it may be opened for trading on NOM.[14] In its recent approval order for NOM's identical rule change the Commission cited certain findings that it made in its earlier approval of NOM, including that "the Act does not mandate a particular market model for national securities exchanges" and that "many different types of market models could satisfy the requirements of the Act".[15] The Commission stated that it does not believe that the Act requires an exchange to have Market Makers.[16] The Commission also noted that in the context of approving NOM, it had previously stated that although Options Market Makers could be an important source of liquidity on NOM, they likely would not be the only source.[17] The Exchange notes that the NOM System operates in a substantially similar manner to the Exchange's System, and is designed to match buying and selling interest of all participants on the Exchange. The Exchange is proposing simply to remove the Options Market Maker participation requirement as superfluous to the existence of a vibrant options market, nevertheless acknowledging the value Options Market Makers provide to the Exchange.

With regard to the impact on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of an expanded number of series as proposed by this filing.

The Exchange also proposes to delete paragraph (b) of Rule 19.5, which states that a class of options will be put into a non-regulatory halt if at least one series for that class is not open for trading. Originally, this provision was put in place so that the Exchange could approve underlying securities for the listing of options but delay the listing if

[5] The term "Options Member" means a firm, or organization that is registered with the Exchange pursuant to Chapter XVII of the Exchange's rules for purposes of participating in options trading on BATS Options as an "Options Order Entry Firm" or "Options Market Maker."

[6] *See* Exchange Rule 22.2.

[7] *See* Exchange Rule 22.5(a).

[8] *See* Exchange Rule 22.2(a).

[9] *See* Exchange Rule 22.2.

[10] *See* Exchange Rule 22.2(c).

[11] *See* Exchange Rule 22.4(b).

[12] *See* Exchange Rule 22.3(a).

[13] *See* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4–546) (approval order for the Protection and Locked/Crossed Plan); *see also* Securities Exchange Act Release No 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (File No. SR–BATS–2009–031) (approval order of BATS Options rules, including rules governing participation in Protection and Locked/Crossed Plan).

[14] *See* Securities Exchange Act Release No. 61735 (March 18, 2010), 75 FR 14227 (March 24, 2010) (File No. SR–NASDAQ–2010–007).

[15] *Id.* (citing Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521, 14527 (March 18, 2008) (File No. SR–NASDAQ–2007–004) ("NOM Approval Order")).

[16] As the Commission noted in its approval order for the NOM filing, in its release adopting Regulation ATS, the Commission rejected the suggestion that a guaranteed source of liquidity was a necessary component of an exchange. *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) ("Regulation ATS Release).

[17] *See* NOM Approval Order, *supra* note 15, at 14527.

the Options Market Makers on the Exchange were not yet ready to register in any series of options for that class. With the elimination of the other paragraphs in Rule 19.5 requiring an Options Market Maker, the Exchange will no longer need to delay the listings of particular series and thus will no longer need this provision.

Finally, the Exchange proposes to delete paragraph (c) of Rule 19.5, which addresses the situation where a series of options only has one Options Market Maker that then withdraws its registration. Based on the proposed change described above, this provision is no longer necessary.

2. Statutory Basis

Approval of the rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[18] In particular, the proposed change is consistent with Section 6(b)(5) of the Act,[19] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. Specifically, the Exchange believes that the proposed amendment would expand the ability of investors to trade options and hedge risks associated with securities underlying options which are not currently listed due to the lack of an Options Market Maker registration in such options series.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[20] and Rule 19b–4(f)(6) thereunder.[21]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[22] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[23] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. In making this determination, the Commission notes that BAT's proposed rule change is substantially similar to Nasdaq's recently approved rule change to eliminate its requirement that at least one options Market Maker be registered for trading a particular series before it could be opened for trading on NOM,[24] and the Commission believes that BATS' proposed rule change raises no new regulatory issues. The Commission believes that waiving the operative delay will allow BATS to immediately expand the number of series available for trading, permitting BATS to compete with NOM in the trading of these series and should foster intermarket price competition by providing an additional market and source of liquidity for options series that would otherwise have been prohibited from trading on BATS due to the lack of a Market Maker registered in that series. For these reasons, the Commission designates that the proposed rule change become operative immediately.[25]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BATS–2010–013 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2010–013. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BATS–2010–013 and

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(6). Pursuant to Rule 19b–4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[22] 17 CFR 240.19b 4(f)(6).

[23] 17 CFR 240.19b 4(f)(6)(iii).

[24] *See supra* note 14.

[25] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

should be submitted on or before June 24, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13341 Filed 6–2–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62169; File No. SR–NYSEAmex–2010–43]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Make Certain Reporting Requirements Punishable Under its MRVP

May 25, 2010.

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 May 7, 2010, NYSE Amex LLC ("NYSE Amex" or the "Exchange") 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Amex Disciplinary Rule 476A (Imposition of Fines for Minor Violation(s) of Rules) to add a new Part 1D: List of Reports Required to be Filed with the Exchange by ATP Holders and Filing Deadlines. The Exchange also proposes to add violations of NYSE Amex Rule 340.01 to Part 1C of Disciplinary Rule 476A, and to make other technical changes to the Rule. The text of the proposed rule change is available on NYSE Amex's Web site at *http://www.nyse.com,* on the Commission's Web site at *http://www.sec.gov,* at NYSE Amex, 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.

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 NYSE Amex Disciplinary Rule 476A (Imposition of Fines for Minor Violation(s) of Rules) to add a new Part 1D: List of Reports Required to be filed with the Exchange by ATP Holders and Filing Deadlines. The Exchange also proposes to add violations of NYSE Amex Rule 340.01 to Part 1C of Disciplinary Rule 476A, and to make other technical changes to the Rule.

Background

As described more fully in a related rule filing, effective October 1, 2008, NYSE Euronext acquired The Amex Membership Corporation ("AMC") pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the "Merger"). Pursuant to the Merger the Exchange's predecessor, the American Stock Exchange LLC, a subsidiary of AMC, became a subsidiary of NYSE Euronext.[3]

In connection with the Merger, on December 1, 2008, the Exchange relocated all equities trading conducted on the Exchange's legacy trading systems and facilities located at 86 Trinity Place, New York, New York, to new trading systems and facilities located at 11 Wall Street, New York, New York (known as "NYSE Amex Equities").[4] Similarly, on March 2, 2009, the Exchange relocated all options trading conducted on the Exchange's legacy trading systems and facilities to new trading systems and facilities located at 11 Wall Street (known as "NYSE Amex Options").[5]

As part of this process, the Exchange adopted NYSE Rules 475–477, including Rule 476A, subject to such changes as necessary to apply the Rules to the Exchange, as NYSE Amex Disciplinary Rules 475–477 to govern transactions and the conduct of its members and member organizations on both NYSE Amex Equities and NYSE Amex Options.[6]

Current NYSE Amex Disciplinary Rule 476A

NYSE Amex Disciplinary Rule 476A, the Exchange's Minor Rule Violation Plan ("MRVP"), governs transactions and conduct on both NYSE Amex Equities and NYSE Amex Options.

Under NYSE Amex Disciplinary Rule 476A, the Exchange may impose a summary fine on any member, member organization, allied member, approved person or registered or non-registered employee of a member or member organization for a minor violation of specified Exchange rules: Supplementary Part 1A to the Rule contains a list of NYSE Amex Equities Rules subject to summary fine; Part 1B contains a list of legacy Exchange rules; and Part 1C contains a list of NYSE Amex Options Rules. The fines permitted under the MRVP provide an appropriate sanction when, given the facts and circumstances of a particular rule violation, a response stronger than a simple admonition letter is needed but the initiation of a formal disciplinary proceeding under Disciplinary Rule 476 is unwarranted.

Violations of the listed rules are subject to the fine schedules in NYSE Amex Disciplinary Rule 476A. For violations of the rules listed in Parts 1A and 1B, individuals may be charged $500.00 for a first offense, $1,000.00 for a second offense and $2,500.00 for subsequent offenses; member firms may be charged $1,000.00 for a first offense, $2,500.00 for a second offense and $5,000.00 for subsequent offenses. Violations of the rules listed in Part 1C are subject to varying fines as specified, depending on the rule violated.

[26] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex–2008–62).

[4] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex–2008–63) (approving the adoption of the "NYSE Amex Equities" rules).

[5] *See* Securities Exchange Act Release No. 59472 (February 27, 2009), 74 FR 9843 (March 6, 2009) (SR–NYSEALTR–2008–14) (approving the adoption of the "NYSE Amex Options" rules).

[6] *See* Securities Exchange Act Release Nos. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (adopting NYSE Amex Disciplinary Rules 475–477); 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (adopting NYSE Amex Disciplinary Rule 476A).

Proposed Changes to NYSE Amex Disciplinary Rule 476A

a. Adoption of Part 1D: List of Reports Required To Be Filed With the Exchange by ATP Holders and Filing Deadlines

The Exchange proposes to add Part 1D to NYSE Amex Disciplinary Rule 476A to provide a list of financial reports required to be filed with the Exchange by NYSE Amex Options members and member organizations (also known as "ATP Holders") and corresponding filing deadlines, subject to a different fine schedule than for Parts 1A, 1B and 1C. The list of reports includes equity and net capital computations, FOCUS reports, ITSFEA forms and annual audited statements, all of which are already required to be filed under existing Exchange rules and Federal securities laws and regulations. Under proposed Part 1D, ATP Holders that fail to file any of the listed reports on the date they are due will be subject to a summary fine of $100 per day for each day such a report is not timely filed, for a period not to exceed 10 business days. Violations of the provisions of Part 1D will be subject to the procedures of the Exchange's MRVP under Disciplinary Rule 476A.

Proposed Part 1D is based, *inter alia,* on Part 3 of legacy NYSE Amex Rule 590, which similarly provided that members and member organizations that failed to timely file certain listed financial reports with the American Stock Exchange were subject to a fine of $50 per day.[7] Part 1D also draws on the Financial Industry Regulatory Authority, Inc.'s ("FINRA") By-Laws, which impose a fee of $100 per day on any member that fails to file similar reports in a timely manner, not to exceed 10 business days.[8]

The Exchange further proposes to implement proposed Part 1D on May 24, 2010, in order to give ATP Holders sufficient notice of the new fine schedule for late reporting. Because it is still listed on the Exchange's Web site, the Exchange also proposes to add language to legacy NYSE Amex Rule 590 that clarifies that its provisions apply only to transactions and/or conduct that occurred on or through the Exchange's legacy systems or facilities located at 86 Trinity Place.

b. Addition of NYSE Amex Rule 340.01 to Part 1C

The Exchange also proposes to add NYSE Amex Rule 340.01 (Disapproval of Employees) to Part 1C of Disciplinary Rule 476A and the list of NYSE Amex Options Rules subject to the Exchange's MRVP.

NYSE Amex Rule 340.01 provides that any and all employees of an ATP Holder that are to be admitted to the Trading Floor must be registered and approved by the Exchange through the submission of a Form U–4. In addition, any such employees must submit fingerprints to the Exchange or its designee for identification and appropriate processing. Rule 340.01 further provides that ATP Holders must file a Form U–5 within 10 days of the date of termination of an employee that has been admitted by the Exchange to the Trading Floor.

The Exchange believes that the current regulatory approach for dealing with these reporting requirements is too inflexible. The Exchange recognizes that ATP Holders may, for many reasons, fail to timely submit a Form U–4 or U–5 pursuant to NYSE Amex Rule 340.01. In some such circumstances, formal disciplinary proceedings in accordance with Disciplinary Rule 476 are warranted. However, in other instances such a proceeding may be unwarranted, and the Exchange believes that the addition of Rule 340.01 to the list of rule violations and fines under Part 1C of Disciplinary Rule 476A will provide a more flexible and appropriate mechanism for enforcing the reporting requirements of Rule 340.01, while preserving the Exchange's discretion to seek formal discipline when appropriate.

The Exchange further proposes related technical changes to Parts 1B and 1C in order to accommodate these proposed changes.

c. Technical Changes to Part 1A

The Exchange proposes to make technical changes to Parts 1A, 1B and 1C of NYSE Amex Disciplinary Rule 476A to clarify the effective date and the trading and conduct covered by each of these provisions.

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with, and further the objectives of, Section 6(b)(5) of the Act,[9] in that they 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 a national market system and, in general, to protect investors and the public interest. The proposed rule changes also further the objectives of Sections 6(b)(1) and 6(b)(6) of the Act,[10] in that they enforce compliance with, and provide for appropriate discipline for, violations of the Act, the rules and regulations thereunder, and Exchange rules and regulations.

In addition, because the Exchange's MRVP provides procedural rights to a member or member organization fined thereunder to contest the fine and permits disciplinary proceedings on the matter, the Exchange believes that its MRVP provides a fair procedure for disciplining members, member organizations, and persons associated therewith consistent with Sections 6(b)(7) and 6(d)(1) of the Act.[11]

The Exchange believes that the proposed rule changes will provide the Exchange with greater regulatory flexibility to enforce the reporting requirements set forth in NYSE Amex Rule 340.01 and Part 1D of NYSE Amex Disciplinary Rule 476A, consistent with the purposes of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has

[7] *See* NYSE Amex Rule 590, Part 3. Although the current NYSE Amex Disciplinary Rules govern transactions and/or conduct by Exchange members and member organizations on the trading systems and facilities located at 11 Wall Street, legacy NYSE Amex Rule 590 is still listed on the Exchange's Web site for the purposes of regulating transactions and/or conduct that occurred on or through the Exchange's legacy systems or facilities located at 86 Trinity Place prior to March 2, 2009. *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008).

[8] *See* FINRA By-Laws, Schedule A, Section 4(g).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(1) and (6).

[11] 15 U.S.C. 78f(b)(7) and (d)(1).

become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, because the proposal raises no novel issues and is consistent with prior approved rules on which it is based.[14] Therefore, the Commission designates the proposal operative upon filing.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEAmex–2010–43 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2010–43. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 a.m. and 3 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–NYSEAmex–2010–43 and should be submitted on or before June 24, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13340 Filed 6–2–10; 8:45 am]

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[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] *See e.g.,* Securities Exchange Act Release No. 44512 (July 3, 2001), 66 FR 36812 (July 13, 2001) (SR–NASD–00–39).

[15] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12) and 200.30–3(a)(44).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62167; File No. SR–NYSE–2010–37]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Add Certain Violations of Its Communications and Give-Up Policies to Its MRVP

May 25, 2010.

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 May 12, 2010, the New York Stock Exchange LLC ("NYSE" or the "Exchange") 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.

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 476A to add Rule 36 (Communications Between Exchange and Members' Offices) to its List of Exchange Rule Violations and Fines Applicable Thereto ("Minor Rule Violation Plan").[3] The text of the proposed rule change is available on NYSE's Web site at *http://www.nyse.com*, on the Commission's Web site at *http://www.sec.gov,* at NYSE, 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.

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 NYSE Rule 476A to add Rule 36 (Communications Between Exchange and Members' Offices) to its Minor Rule Violation Plan.

Background

Effective October 1, 2008, the Exchange's parent company, NYSE Euronext, acquired the parent company of NYSE Amex pursuant to an Agreement and Plan of Merger (the "Merger").[4] In connection with the

[3] The Exchange's corporate affiliate, NYSE Amex LLC ("NYSE Amex"), submitted a companion rule filing proposing corresponding amendments to NYSE Amex Disciplinary Rule 476A. *See* SR–NYSEAmex–2010–44.

[4] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3,

Merger, on December 1, 2008, NYSE Amex relocated all equities trading conducted on its legacy trading systems and facilities located at 86 Trinity Place, New York, New York to systems and facilities located at 11 Wall Street, New York, New York (the "Equities Relocation").[5] Similarly, on March 2, 2009, NYSE Amex relocated all its options trading to trading systems and facilities located at 11 Wall Street, New York, New York (the "Options Relocation").[6] As a result of the Equities and Options Relocations, the NYSE and NYSE Amex Equities Trading Floors are located within the 11 Wall Street building in a room adjacent to the NYSE Amex Options Trading Floor.

Current NYSE Rule 36

NYSE Rule 36 governs two primary areas: (i) Communications between the Floor and other locations, and (ii) the use and/or possession of portable or wireless communication or trading devices.

First, Rule 36 broadly prohibits members and member organizations from establishing or maintaining any telephonic or electronic communication between the Floor and any other location without Exchange approval. In addition, there are several supplementary provisions that provide more detailed prescriptions for members and member firms.

Rule 36.10 advises members and member organizations that the phone company will not install or disconnect any line between the Floor and any other location without Exchange approval and that such requests should be sent to the Exchange's Market Operations Division. Rule 36.60 further prohibits members and member organizations from listing a phone line in the name of a non-member.

Rule 36.20 provides that Floor brokers may maintain a phone line at their booth locations on the Floor, or use an Exchange issued and authorized portable phone, to communicate with non-members off the Floor. Only Exchange issued and authorized portable phones may be used on the Floor in accordance with the prescriptions of Rule 36.21, and the use of personal phones is expressly prohibited.[7] Rule 36.21 provides that Floor brokers using an Exchange issued and authorized portable phone may communicate directly from the point of sale on the Floor with someone off-Floor. In addition to processing orders, Floor brokers may also provide "market look" observations over the phone. When taking orders over the phone, Floor brokers must comply with Rule 123(e), which requires entry of the order into an electronic system, as well as any and all other record retention requirements under Exchange Rules and the federal securities laws. Exchange issued phones do not permit call-forwarding or call-waiting and may not block a caller's identification.

Notwithstanding the prescriptions of Rule 36.20, Rule 36.23 provides that members and employees of member organizations may use personal portable or wireless communications devices, including phones, outside the Exchange Trading Floor.[8] In addition, members and employees of member organizations may not use personal portable or wireless communication devices on the NYSE Amex Options Trading Floor unless they are also registered to trade options on NYSE Amex.

Rule 36.30 provides that, subject to Exchange approval, a DMM Unit may maintain a phone line at its post to communicate with its off-Floor business operations and/or its clearing firm. For trading purposes, a DMM Unit's phone line may only be used to enter hedging orders through the firm's off-Floor office or clearing firm, or through a member of an options or futures exchange as permitted under Rules 98 and 105.

Under Rule 36.30, a DMM Unit may also maintain a wired or wireless device that has been registered with the Exchange, such as a computer terminal or laptop, to communicate with the DMM Unit's off-Floor algorithms. A DMM Unit using such a wired or wireless device must certify that the device operates in accordance with all SEC and Exchange rules, policies, and procedures. In addition, the DMM Unit must create and maintain records of all messages generated by the wired or wireless device in compliance with NYSE Rule 440 and SEC Rules 17a–3 and 17a–4.

In addition, a DMM Unit registered in an Investment Company Unit (as defined in Section 703.16 of the Listed Company Manual) or a Trust Issued Receipt (as defined in Rule 1200) may use a telephone connection or order entry terminal at its post to enter proprietary orders in (i) the Investment Company Unit or Trust Issued Receipt in another market center, (ii) a component security of such a Unit or Receipt, or (iii) options or futures related to such Unit or Receipt, and may also use the phone to obtain market information with respect to such securities. Any such order executed on the Exchange must be entered and executed in compliance with Exchange Rule 112.20 and SEC Rule 11a2–2(T) and may only be entered for hedging purposes.[9]

To address concerns regarding improper information sharing between the Exchange's Trading Floor and the adjacent NYSE Amex Options Trading Floor, Rule 36.70 prohibits members and member firm employees from (i) using or possessing any wireless trading device that may be used to view or enter orders into the Exchange's trading systems while on the NYSE Amex Options Trading Floor, and (ii) using or possessing any wireless trading device that may be used to view or enter orders into the NYSE Amex Options trading systems while on the Exchange's Trading Floor. These prohibitions apply to any and all wireless trading devices, including devices issued by the Exchange or NYSE Amex, as well as devices that are proprietary to a member, member organization or other entity.

Finally, Rules 36.40 and 36.50 prescribe certain timing and handling requirements for "give-up" or "step out" transactions, whereby a member or member organization executes a customer trade on behalf of another member. While not directly related to member or member organization communications or the use and/or possession of portable or wireless communication or trading devices, these requirements are important for ensuring that members and member organizations properly document these types of transactions.

Proposed Rule Change

As noted above, the Exchange proposes to add NYSE Rule 36 to its

2008) (SR–NYSE–2008–60 and SR–Amex–2008–62) (order approving the Merger).

[5] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex–2008–63) (order approving the Equities Relocation).

[6] *See* Securities Exchange Act Release No. 59472 (February 27, 2009), 74 FR 9843 (March 6, 2009) (SR–NYSEALTR–2008–14) (order approving the Options Relocation).

[7] Although the Exchange does not currently trade "basket" securities, as defined in Rule 800, Rule 36 provides that Floor brokers trading such securities may establish phone lines at the basket trading location.

[8] Rule 6A defines "Trading Floor" as the restricted-access physical areas designated by the Exchange for the trading of equities securities, commonly known as the "Main Room" and the "Garage." The Exchange's Trading Floor does not include the areas where NYSE Amex-listed options are traded, commonly known as the "Blue Room" and the "Extended Blue Room," also known as the "NYSE Amex Options Trading Floor."

[9] The Exchange does not currently list or trade any Investment Company Units or Trust Issued Receipts.

Minor Rule Violation Plan under Rule 476A.

Under the Exchange's Minor Rule Violation Plan, the Exchange may impose a fine, not to exceed $5,000, on any member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization for a minor violation of specified Exchange rules. Such fines provide a meaningful sanction for rule violations where the facts and circumstances of the violation do not warrant the initiation of a formal disciplinary procedure under Rule 476, but do require a regulatory response that is more significant than an admonition letter.[10]

Currently, because Rule 36 is not part of the Exchange's Minor Rule Violation Plan, if a member or member firm employee were to violate the prohibitions set forth in Rule 36 the Exchange would be limited to issuing either an admonition letter or initiating formal proceedings under Rule 476. This is the case whether or not the member or member firm employee violated the rule once or many times, and regardless of whether he or she made an inadvertent error or an intentional one.

The Exchange believes that the current regulatory approach for dealing with Rule 36 violations is too inflexible. The Exchange recognizes that members or member firm employees may violate the prescriptions of Rule 36 intentionally, as well as accidentally or inadvertently. When a violation is intentional, formal disciplinary measures in accordance with Rule 476 may be warranted. However, while an admonition letter might be appropriate for an isolated accidental or inadvertent violation, in other cases an admonition letter would be inadequate even though a formal proceeding may not be warranted. The Exchange believes that the addition of Rule 36 to its Minor Rule Violation Plan under Rule 476A will provide a more flexible and appropriate enforcement tool that preserves the Exchange's discretion to seek formal discipline under appropriate circumstances.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with, and furthers the objectives of, Section 6(b)(5) of the Act,[11] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also furthers the objectives of Section 6(b)(6) of the Act,[12] in that it provides for appropriate discipline for violations of Exchange rules and regulations.

The Exchange believes that the proposed rule change will provide the Exchange with greater regulatory flexibility to enforce the prescriptions of NYSE Rule 36 in a more informal manner while also preserving the Exchange's discretion to seek formal discipline for more serious transgressions as warranted.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2010–37 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2010–37. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 a.m. and 3 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

[10] The Exchange's Minor Rule Violation Plan was originally adopted by the Exchange and approved by the Commission in 1985. *See* Securities Exchange Act Release No. 34–21688 (January 25, 1985), 50 FR 5025–01 (February 5, 1985) (SR–NYSE–84–27). It has been amended numerous times since its adoption.

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78f(b)(6).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

available publicly. All submissions should refer to File Number SR–NYSE–2010–37 and should be submitted on or before June 24, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13338 Filed 6–2–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62179; File No. SR–Phlx–2010–77]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Reformatting the Fee Schedule

May 26, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b–4 thereunder,[2] notice is hereby given that on May 25, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been 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 existing NASDAQ OMX PHLX, Inc. Fee Schedule ("fee schedule") solely to create a more user-friendly Fee Schedule.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, at the Commission's Public Reference Room, and on the Commission's Web site at *http://www.sec.gov.*

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 purpose of the proposed rule change is to reformat the Fee Schedule to make it more user-friendly. The newly proposed Fee Schedule includes the current fees, which remain unchanged. In the process of reformatting the Fee Schedule, additional connecting language was added where appropriate to provide clarity to the end-user. The proposal eliminates the current endnotes. The Exchange believes that by placing the language that is currently contained in endnotes into the text of the fees better displays any exceptions or exclusions referenced in those endnotes by more prominently displaying them in the text.

Table of Contents

The Exchange proposes to replace the descriptive term "Category" with a new term, "Sections", in the table of contents. This is being done solely to eliminate confusion in the use of the word "category" which is utilized in different ways by the Exchange in its fee proposals. The Exchange is also combining the Sector Index Options Fees and the U.S. Dollar-Settled Foreign Currency ("WCO") Options Fees into one section on the Fee Schedule.

Equity Options Fees

The Exchange converted the current equity options fees into a table format for ease of reference.[3] Currently, the Exchange does not separately display an options transaction charge for penny pilot program options ("Penny Pilot")[4] and Non-Penny Pilot options for customers, professionals and firms. The Exchange is proposing to display the separate categories in this revised Fee Schedule although the fees remain unchanged. The Exchange's proposal displays a similar fee for Penny Pilot and non-Penny Pilot options transactions charges for customer, professionals and firms to make clear that there is no price distinction for those market participants between Penny and non-Penny options. The Exchange is not proposing any amendments to its fees.

Additionally, the Exchange proposes to transplant endnotes (C) and (5) from the endnote section of the Fee Schedule, which the Exchange proposes to eliminate, into the Equity Options Fees section to clarify which notes apply to the displayed fees. The Exchange also proposes a similar change in the Payment for Order Flow Fees section of the Equity Option Fees with respect to endnotes (30) and (32). Additional non-substantive language has been added where appropriate to indicate what section of the Fee Schedule the transplanted endnote refers to in the Fee Schedule. For example, the words "Payment for Order Flow Fees will be" was added to the beginning of endnote (30) to clarify the context of that transplanted endnote with respect to the Payment for Order Flow Fees. The Exchange added similar language to the beginning of endnotes throughout the Fee Schedule when transplanting that text to add reference for the reader and for purposes of clarity.

Sector Index Options Fees and U.S. Dollar-Settled Foreign Currency Options Fees

The Exchange similarly converted the current fees into a table for ease of reference and combined the sector index and U.S. dollar-settled foreign currency option fees into the same section of the Fee Schedule.

Access Service, Cancellation, Membership, Regulatory and Other Fees

The Exchange reformatted this section of the Fee Schedule to reorder these fees for ease of reference. The Options Regulatory Fee was relocated after the Real-Time Risk Management Fee with no changes. Next, all permit related fees were grouped together with the endnotes weaved into this section with the clarifying language added to each endnote as described herein. The Streaming Quote Trader and Remote Streaming Quote Trader Fees were

[15] 17 CFR 200.30–3(a)(12) and 200.30–3(a)(44).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange also proposes removing all references to "per contract" after each fee in the table.

[4] The Penny Pilot was established in January 2007; and in October 2009, it was expanded and extended through December 31, 2010. *See* Securities Exchange Act Release Nos. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR–Phlx–2006–74) (approval order establishing Penny Pilot); 60873 (October 23, 2009), 74 FR 56675 (November 2, 2009) (SR–Phlx–2009–91) (expanding and extending Penny Pilot); 60966 (November 9, 2009), 74 FR 59331 (November 17, 2009) (SR–Phlx–2009–94) (adding seventy-five classes to Penny Pilot); and 61454 (February 1, 2010), 75 FR 6233 (February 8, 2010) (SR–Phlx–2010–12) (adding seventy-five options classes to the Penny Pilot). *See also* SR–Phlx–2010–65 (adding additional seventy-five option classes to the Penny Pilot). *See also* Exchange Rule 1034.

organized into tables with no changes to the text. The remainder of the fees in this section are rearranged in order to present the fees by topic. The endnotes were transplanted and words were added to indicate which fee the note references within the Fee Schedule. The Examinations Fee and FINRA fees remain the same.

Market Access Provider Subsidy, Options Floor Broker Subsidy, Routing Fees, Proprietary Data Feed Fees, NASDAQ OMX PSX

The Exchange did not amend the following sections of the Fee Schedule: Market Access Provider Subsidy, Options Floor Broker Subsidy, Routing Fees, Proprietary Data Feed Fees and NASDAQ OMX PSX. As previously stated the Exchange eliminated the endnotes section and incorporated those endnotes into the Fee Schedule instead by transplanting them into the corresponding pages of the Fee Schedule. In addition, the Exchange also proposes to amend language in endnote 55 which refers to the monthly charges for the fees for Trading Floor Personnel Registration Fee and the Fees for Certain Stock Exchange Clerks by removing the dollar amounts from that text.

These proposed changes, as previously mentioned, are non-substantive amendments and are added for the sole purpose of creating a simplified, easily readable format for displaying the various fees.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [5] in general, and furthers the objectives of Section 6(b)(4) of the Act [6] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. The Exchange believes that this proposal is both reasonable and equitable because providing the members with a more user-friendly Fee Schedule will better display the allocation of fees among Exchange members. The Exchange believes that this proposed format will provide additional transparency of Exchange fees.

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 not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [7] and paragraph (f)(3) of Rule 19b–4 [8] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2010–77 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–77. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 a.m. and 3 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 publicly available. All submissions should refer to File Number SR–Phlx–2010–77 and should be submitted on or before June 24, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13337 Filed 6–2–10; 8:45 am]

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[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(3).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62187; File No. SR–NYSEAmex–2010–35]

Self-Regulatory Organizations; NYSE Amex LLC; Order Approving Proposed Rule Change To Establish NYSE Amex Trades and NYSE Amex BBO Services and Related Fees

May 27, 2010.

I. Introduction

On April 1, 2010, the NYSE Amex LLC ("NYSE Amex" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish two NYSE Amex market data products, NYSE Amex Trades and NYSE Amex BBO and to establish market data fees for the same. The proposed rule change was published for comment in the **Federal Register** on April 22, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61936 (April 16, 2010), 75 FR 21088.

II. Description of the Proposal

a. Services

The NYSE Amex Trades service is a NYSE Amex-only market data service that allows a vendor to redistribute on a real-time basis the same last sale information that NYSE Amex reports under the CTA Plan and the Reporting Plan for Nasdaq/National Market System Securities Traded on an Exchange on an Unlisted or Listed Basis (the "Nasdaq/UTP Plan") for inclusion in those Plans' consolidated data streams and certain other related data elements ("NYSE Amex Last Sale Information"). NYSE Amex Last Sale Information would include last sale information for all securities that are traded on the Exchange and for which NYSE Amex reports quotes under the CTA Plan or the Nasdaq/UTP Plan. In addition, NYSE Amex Last Sale Information will also include a unique sequence number to each trade that allows an investor to track the context of the trade through other Exchange market data products such as NYSE Amex OpenBook®. The Exchange will make NYSE Amex Trades available over a single datafeed, regardless of the markets on which the securities are listed.

NYSE Amex BBO is a NYSE Amex-only market data service that allows a vendor to redistribute on a real-time basis the same best-bid-and-offer information that NYSE Amex reports under the CQ Plan and the Nasdaq/UTP Plan for inclusion in the NYSE Amex BBO Information. NYSE Amex BBO Information would include the best bids and offers for all securities that are traded on the Exchange and for which NYSE Amex reports quotes under the CQ Plan or the Nasdaq/UTP Plan. The Exchange will make NYSE Amex BBO available over a single datafeed, regardless of the markets on which the securities are listed.

Both NYSE Amex Trades and NYSE Amex BBO (collectively, "NYSE Amex Market Data") would allow vendors, broker-dealers, private network providers and other entities ("NYSE Amex-Only Vendors") to make NYSE Amex Last Sale Information and NYSE Amex BBO Information available on a real-time basis. NYSE Amex-Only Vendors may distribute the NYSE Amex Trade and NYSE BBO to both professional and nonprofessional subscribers.

The Exchange would make NYSE Amex Last Sale Information available through NYSE Amex Trades no earlier than it provides last sale information to the processors under the CTA Plan and Nasdaq/UTP Plan, as appropriate. The Exchange would make NYSE Amex BBO Information available through NYSE Amex BBO no earlier than it makes that information available to the processors under the CQ Plan and the Nasdaq/UTP Plan.

b. Fees

i. Access Fee

For the receipt of access to the NYSE Amex Trades and NYSE Amex BBO, the Exchange proposes to charge $750 per month. One $750 monthly access fee entitles an NYSE Amex-Only Vendor to receive NYSE Amex Trades and NYSE Amex BBO. The fee applies to receipt of NYSE Amex Market Data within the NYSE Amex-Only Vendor's organization or outside of it.

ii. Professional Subscriber Fees

For the receipt and use of NYSE Amex Trades, the Exchange proposes to charge $10 per month per professional subscriber device. Similarly, for the receipt and use of NYSE Amex BBO, the Exchange proposes to charge $10 per month per professional subscriber device.

For both NYSE Amex Trades and NYSE Amex BBO, the Exchange proposes to offer an alternative methodology to the traditional device fee. Instead of charging $10 per month per device, it proposes to offer NYSE Amex-Only Vendors the option of paying $10 per month per "Subscriber Entitlement." The fee entitles the end-user to receive and use NYSE Amex Market Data relating to all securities traded on NYSE Amex, regardless of the market on which a security is listed. For the purpose of calculating Subscriber Entitlements, the Exchange proposes to adopt a unit-of-count methodology that is the same as that approved by the Commission earlier this year with respect to its NYSE OpenBook® service.[4]

Under a unit-of-count methodology, the Exchange would not define the Vendor-subscriber relationship based on the manner in which a datafeed recipient or subscriber receives data (*i.e.,* through controlled displays or through data feeds). Instead, the Exchange uses billing criteria that defines "Vendors," "Subscribers," "Subscriber Entitlements" and "Subscriber Entitlement Controls" as the basis for setting professional subscriber fees. The Exchange believes that this methodology more closely aligns with current data consumption and will reduce costs for the Exchange's customers.

The following basic principles underlie this proposal.

A. Vendors

- "Vendors" are market data vendors, broker-dealers, private network providers and other entities that control Subscribers' access to data through Subscriber Entitlement Controls.

B. Subscribers

- "Subscribers" are unique individual persons or devices to which a Vendor provides data. Any person or device that receives data from a Vendor is a Subscriber, whether the person or device works for or belongs to the Vendor, or works for or belongs to an entity other than the Vendor.
- Only a Vendor may control Subscriber access to data.
- Subscribers may not redistribute data in any manner.

C. Subscriber Entitlements

- A Subscriber Entitlement is a Vendor's permissioning of a Subscriber to receive access to data through an Exchange-approved Subscriber Entitlement Control.
- A Vendor may not provide data access to a Subscriber except through a unique Subscriber Entitlement.
- The Exchange will require each Vendor to provide a unique Subscriber Entitlement to each unique Subscriber.
- At prescribed intervals (normally monthly), the Exchange will require each Vendor to report each unique Subscriber Entitlement.

D. Subscriber Entitlement Controls

- A Subscriber Entitlement Control is the Vendor's process of permissioning Subscribers' access to data.
- Prior to using any Subscriber Entitlement Control or changing a previously approved Subscriber Entitlement Control, a Vendor must provide the Exchange with a demonstration and a detailed written description of the control or change and the Exchange must have approved it in writing.
- The Exchange will approve a Subscriber Entitlement Control if it allows only authorized, unique end-users or devices to access data or monitors access to data by each unique end-user or device.
- Vendors must design Subscriber Entitlement Controls to produce an audit report and make each audit report available to the Exchange upon request. The audit report must identify:

1. Each entitlement update to the Subscriber Entitlement Control;

[4] *See* Securities Exchange Act Release No. 62038 (May 5, 2010), 75 FR 26825 (May 12, 2010) (SR–NYSE–2010–22) (approving on a permanent basis the alternative unit-of-count methodology).

2. The status of the Subscriber Entitlement Control; and

3. Any other changes to the Subscriber Entitlement Control over a given period.

• Only the Vendor may have access to Subscriber Entitlement Controls.

Subject to the rules described below, the Exchange will require NYSE Amex-Only Vendors to count every Subscriber Entitlement, whether it be a person or a device. This means that the NYSE Amex-Only Vendor must include in the count every person and device that has access to the data, regardless of the purposes for which the person or device uses the data. The Exchange will require NYSE Amex-Only Vendors to report and count all entitlements in accordance with the following rules.

A. The count shall be separate for the NYSE Amex Trades and NYSE Amex BBO services. This means that a device that is entitled to receive both NYSE Amex Last Sale Information and NYSE Amex BBO Information would count as a Subscriber Entitlement for the purposes of the NYSE Amex Trades service and as a separate Subscriber Entitlement for the purposes of the NYSE Amex BBO service.

B. In connection with a Vendor's external distribution of either NYSE Amex Trades or NYSE Amex BBO), the NYSE Amex-Only Vendor should count as one Subscriber Entitlement each unique Subscriber that the NYSE Amex-Only Vendor has entitled to have access to that type of market data. However, where a device is dedicated specifically to a single person, the NYSE Amex-Only Vendor should count only the person and need not count the device.

C. In connection with a NYSE Amex-Only Vendor's internal distribution of a type of NYSE Amex Market Data, the NYSE Amex-Only Vendor should count as one Subscriber Entitlement each unique person (but not devices) that the Vendor has entitled to have access to that type of market data.

D. The NYSE Amex-Only Vendor should identify and report each unique Subscriber. If a Subscriber uses the same unique Subscriber Entitlement to receive multiple services, the NYSE Amex-Only Vendor should count that as one Subscriber Entitlement. However, if a unique Subscriber uses multiple Subscriber Entitlements to gain access to one or more services (*e.g.,* a single Subscriber has multiple passwords and user identifications), the Vendor should report all of those Subscriber Entitlements.

E. The NYSE Amex-Only Vendor should report each Subscriber device serving multiple users individually as well as each person who may access the device. As an example, for a single device to which the NYSE Amex-Only Vendor has granted two people access, the Vendor should report three Subscriber Entitlements. Only a single, unique device that is dedicated to a single, unique person may be counted as one Subscriber Entitlement.

F. NYSE Amex-Only Vendors should report each unique person who receives access through multiple devices as one Subscriber Entitlement so long as each device is dedicated specifically to that person.

G. The NYSE Amex-Only Vendor should include in the count as one Subscriber Entitlement devices serving no users.

For example, if a Subscriber's device has no users or multiple users, the NYSE Amex-Only Vendor should count that device as one Subscriber Entitlement. If a NYSE Amex-Only Vendor entitles five individuals to use one of a Subscriber's devices, the Vendor should count five individual entitlements and one device entitlement, for a total of six Subscriber Entitlements. If a NYSE Amex-Only Vendor entitles an individual to receive a type of NYSE Amex Market Data over a Subscriber device that is dedicated to that individual, the Vendor should count that as one Subscriber Entitlement, not two.

iii. No Program Classification Fee

The Exchange does not propose to impose any program classification charges for the use of NYSE Amex Last Sale Information or NYSE Amex BBO information. The Exchange recognizes that each NYSE Amex-Only Vendor and Subscriber will use NYSE Amex Market Data differently and that the Exchange is one of many markets with whom Vendors and Subscribers may enter into arrangements for the receipt and use of data. In recognition of that, the Exchange's proposed unit-of-count methodology does not restrict how NYSE Amex-Only Vendors may use NYSE Amex Market Data in their display services and encourages Vendors to create and promote innovative uses of NYSE Amex Market Data. For instance, a NYSE Amex-Only Vendor may use NYSE Amex BBO information to create derived information displays, such as displays that aggregate NYSE Amex BBO information with quotation information from other markets.[5]

iv. Nonprofessional Subscriber Fee

The Exchange proposes to charge each NYSE Amex-Only Vendor $5.00 per month for each nonprofessional subscriber to whom it provides NYSE Amex BBO Information. The Exchange proposes to impose the charge on the NYSE Amex-Only Vendor, rather than on the nonprofessional Subscriber.[6] In addition, the Exchange proposes to establish as an alternative to the fixed $5.00 monthly fee a fee of $.005 for each response that a NYSE Amex-Only Vendor disseminates to a nonprofessional Subscriber's inquiry for a best bid or offer under NYSE Amex BBO. The Exchange proposes to limit a NYSE Amex-Only Vendor's exposure under this alternative fee to $5.00 per month, the same amount as the proposed fixed monthly nonprofessional Subscriber flat fee. In order to take advantage of the per-query fee, a NYSE Amex-Only Vendor must document in its Exhibit A that it can: (1) Accurately measure the number of queries from each nonprofessional Subscriber and (2) report aggregate query quantities on a monthly basis.

The Exchange will impose the per-query fee only on the dissemination of best bids and offers to nonprofessional Subscribers. The per-query charge is imposed on NYSE Amex-Only Vendors, not end-users, and is payable on a monthly basis. NYSE Amex-Only Vendors may elect to disseminate NYSE Amex BBO pursuant to the per-query fee rather than the fixed monthly fee.

In establishing a nonprofessional Subscriber fee for NYSE Amex BBO, the Exchange proposes to apply the same criteria for qualification as a "nonprofessional subscriber" as the CTA and CQ Plan Participants use. Similar to the CTA and CQ Plans, classification as a nonprofessional subscriber is subject to Exchange review and requires the subscriber to attest to his or her nonprofessional subscriber status. A nonprofessional subscriber is a natural person who uses the data solely for his personal, non-business use and who is neither:

A. Registered or qualified with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any State securities agency, any securities exchange or

[5] In the case of derived displays, the Vendor is required to: (i) Pay the Exchange's device fees; (ii) include derived displays in its reports of NYSE Amex Market Data usage; and (iii) use reasonable efforts to assure that any person viewing a display of derived data understands what the display represents and the manner in which it was derived.

[6] The Exchange stated that it did not propose to establish a nonprofessional subscriber fee for NYSE Amex Last Sale Information because an alternative to that product is available. *See* Securities Exchange Act Release No. 61403 (January 22, 2010), 75 FR 4598 (January 28, 2010) (SR–NYSEAmex–2009–85) (approving the NYSE Amex Realtime Reference Prices service).

association, or any commodities or futures contract market or association,

B. Engaged as an "investment adviser" as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that act), nor

C. Employed by a bank or other organization exemption from registration under Federal and/or State securities laws to perform functions that would require him/her to be so registered or qualified if he/she were to perform such function for an organization not so exempt.

The Exchange believes that the proposed monthly access fee, professional subscriber fee and nonprofessional subscriber fee for NYSE Amex Trades and NYSE Amex BBO enable NYSE Amex-Only Vendors and their subscribers to contribute to the Exchange's operating costs in a manner that is appropriate for the distribution of NYSE Amex Market Data in the form taken by the proposed services.

In setting the level of the proposed fees, the Exchange considered several factors, including:

(i) NYSE Amex's expectation that NYSE Amex Trades and NYSE Amex BBO are likely to be premium services, used by investors most concerned with receiving NYSE Amex Market Data on a low latency basis;

(ii) The fees that the CTA and CQ Plan Participants, the Nasdaq/UTP Plan Participants, Nasdaq, NYSE and NYSE Arca are charging for similar services (or that NYSE Amex anticipates they will soon propose to charge);

(iii) Consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of the proposed service;

(iv) The contribution of market data revenues that the Exchange believes is appropriate for entities that are most likely to take advantage of the proposed service;

(v) The contribution that revenues accruing from the proposed fee will make to meet the overall costs of the Exchange's operations;

(vi) The savings in administrative and reporting costs that the NYSE Amex Trades and NYSE Amex BBO will provide to NYSE Amex-Only Vendors (relative to counterpart services under the CTA, CQ and Nasdaq/UTP Plans); and

(vii) The fact that the proposed fees provide alternatives to existing fees under the CTA, CQ and Nasdaq/UTP Plans, alternatives that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

d. Administrative Requirements

The Exchange will require each NYSE Amex-Only Vendor to enter into a vendor agreement just as the CTA and CQ Plans require recipients of the Network A datafeeds to enter (the "Consolidated Vendor Form"). The agreement will authorize the NYSE Amex-Only Vendor to provide its NYSE Amex Market Data service to its customers or to distribute the data internally.

In addition, the Exchange will require each professional end-user that receives NYSE Amex Market Data from a vendor or broker-dealer to enter into the form of professional subscriber agreement into which the CTA and CQ Plans require end users of Network A data to enter. It will also require NYSE Amex-Only Vendors to subject nonprofessional subscribers to the same contract requirements as the CTA and CQ Plan Participants require of Network A nonprofessional subscribers.

III. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, it is consistent with Section 6(b)(4) of the Act,[8] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,[9] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,[10] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,[11] adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.[12]

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.[13] In the NYSE Arca Order, the Commission stated that "when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory."[14] It noted that the "existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."[15] If an exchange "was subject to significant competitive forces in setting the terms of a proposal," the Commission will approve a proposal unless it determines that "there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder."[16]

As noted in the NYSE Arca Order, the standards in Section 6 of the Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data. Core data is the best-priced quotations and comprehensive last-sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public

[7] 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).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(8).

[11] 17 CFR 242.603(a).

[12] NYSE Amex is an exclusive processor of NYSE Amex Trades and NYSE Amex BBO services under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes information with respect to quotations or transactions on an exclusive basis on its own behalf.

[13] Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21) ("NYSE Arca Order"). In the NYSE Arca Order, the Commission describes in great detail the competitive factors that apply to non-core market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order.

[14] *Id.* at 74771.

[15] *Id.* at 74782.

[16] *Id.* at 74781.

pursuant to joint-SRO plans.[17] In contrast, individual exchanges and other market participants distribute non-core data voluntarily.[18] The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.[19] Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to use competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6 and Rule 603.[20] Because NYSE Amex's instant proposal relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order.

The Exchange proposes to establish: (i) A service that would allow a vendor to redistribute last sale information for which NYSE Amex reports under the CTA Plan and the Nasdaq/UTP Plan; and (ii) a service that would allow a vendor to redistribute best bids and offers for all securities that are traded on the Exchange and for which NYSE Amex reports quotes under the CQ Plan. The Exchange proposes to establish a monthly vendor fee and an alternative fee rate that uses the unit-of-count methodology.

The proposal before the Commission relates to fees for NYSE Amex Trades and NYSE Amex BBO which are non-core, market data products. As in the Commission's NYSE Arca Order analysis, at least two broad types of significant competitive forces applied to NYSE Amex in setting the terms of this proposal: (i) NYSE Amex's compelling need to attract order flow from market participants; and (ii) the availability to market participants of alternatives to purchasing NYSE Amex Market Data.

Attracting order flow is the core competitive concern of any equity exchange, including NYSE Amex. Attracting order flow is an essential part of NYSE Amex's competitive success. If NYSE Amex cannot attract order flow to its market, it will not be able to execute transactions. If NYSE Amex cannot execute transactions on its market, it will not generate transaction revenue. If NYSE Amex cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability. Table 1 below provides a useful recent snapshot of the state of competition in the U.S. equity markets in the month of September 2009: [21]

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHAREVOLUME IN NMS STOCKS SEPTEMBER 2009

Trading venue	Share volume in NMS stocks (Percent)
Registered Exchanges:	
NASDAQ	19.4
NYSE	14.7
NYSE Arca	13.2
BATS	9.5
NASDAQ OMX BX	3.3
Other Registered Exchanges	3.7
ECNs ..... 5 ECNS	10.8
Dark Pools ..... 32 Dark Pools (Estimated)	7.9
Broker-Dealer ..... 200+ Broker-Dealers (Estimated)	17.5
Internalization.	

The market share percentages in Table 1 strongly indicate that NYSE Amex must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on NYSE Amex to act reasonably in setting its fees for NYSE Amex market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE Amex must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that seeks to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.[22]

In addition to the need to attract order flow, the availability of alternatives to NYSE Amex Market Data significantly affect the terms on which NYSE Amex can distribute this market data.[23] In setting the fees for NYSE Amex Market Data, NYSE Amex must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data.[24] Of course, the most basic source of information generally available at an

[17] *See* 17 CFR 242.603(b). ("Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.")

[18] *See* NYSE Arca Order at 74779.

[19] *Id.*

[20] *Id.*

[21] The Commission recently published estimated trading percentages in NMS Stocks in its Concept Release on Equity Market Structure. *See* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3597 n. 21 (January 21, 2010) (File No. S7–02–10).

[22] *See* NYSE Arca Order at 74783.

[23] *See* Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). *See also* U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. *See, e.g., FTC* v. *Whole Foods Market, Inc.,* 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC* v. *Arch Coal, Inc.,* 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. *See, e.g., Leegin Creative Leather Products* v. *PSKS, Inc.,* 127 S. Ct. 2705 (2007); *Atlanta Richfield Co.* v. *United States Petroleum Co.,* 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574 (1986); *State Oil Co.* v. *Khan,* 522 U.S. 3 (1997); *Northern Pacific Railway Co.* v. *U.S.,* 356 U.S. 1 (1958).

[24] *See* NYSE Arca Order at 74783.

exchange is the complete record of an exchange's transactions that is provided in the core data feeds.[25] In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.[26] The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition.

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on NYSE Amex in setting the terms for distributing its NYSE Amex Market Data. The Commission believes that the availability of those alternatives, as well as NYSE Amex's compelling need to attract order flow, imposed significant competitive pressure on NYSE Amex to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because NYSE Amex was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[27] that the proposed rule change (SR–NYSEAmex-2010–35) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13335 Filed 6–2–10; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF STATE

[Public Notice: 7035]

Defense Trade Advisory Group; Notice of Open Meeting

SUMMARY: The Defense Trade Advisory Group (DTAG) will meet in open session from 1:30 p.m. to 5 p.m. on Wednesday, July 07, 2010, in the East Auditorium at the U.S. Department of State, Harry S. Truman Building, Washington DC. Entry and registration will begin at 12:30 p.m. Please use the building entrance located at 21st Street, NW., Washington, DC, between C & D Streets. The membership of this advisory committee consists of private sector defense trade representatives, appointed by the Assistant Secretary of State for Political-Military Affairs, who advise the Department on policies, regulations, and technical issues affecting defense trade. The purpose of the meeting will be to discuss current defense trade issues and topics for further study. Agenda topics will be posted on the Directorate of Defense Trade Controls' Web site, at *http://www.pmddtc.state.gov* 2 weeks prior to the meeting.

Members of the public may attend this open session and will be permitted to participate in the discussion in accordance with the Chair's instructions. Members of the public may, if they wish, submit a brief statement to the committee in writing.

As access to the Department of State facilities is controlled, persons wishing to attend the meeting must notify the DTAG Alternate Designated Federal Officer (DFO) by close of business Wednesday, June 30, 2010. If notified after this date, the Department's Bureau of Diplomatic Security may not be able to complete the necessary processing required to attend the plenary session. A person requesting reasonable accommodation should notify the Alternate DFO by the same date. Each non-member observer or DTAG member that wishes to attend this plenary session should provide: His/her name; company or organizational affiliation; phone number; date of birth; and identifying data such as driver's license number, U.S. Government ID, or U.S. Military ID, to the DTAG Alternate DFO, Patricia Slygh, via e-mail at *SlyghPC@state.gov.* A RSVP list will be provided to Diplomatic Security. One of the following forms of valid photo identification will be required for admission to the Department of State building: U.S. driver's license, passport, U.S. Government ID or other valid photo ID.

FOR FURTHER INFORMATION CONTACT: Patricia Slygh, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, U.S. Department of State, Washington, DC 20522–0112; telephone (202) 663–2830; FAX (202) 261–8199; or e-mail *SlyghPC@state.gov.*

Dated: May 27, 2010.

Robert S. Kovac,

Designated Federal Officer, Defense Trade Advisory Group, Department of State.

[FR Doc. 2010–13378 Filed 6–2–10; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice 7034]

Bureau of Political-Military Affairs: Directorate of Defense Trade Controls; Notifications to the Congress of Proposed Commercial Export Licenses

SUMMARY: Notice is hereby given that the Department of State has forwarded the attached Notifications of Proposed Export Licenses to the Congress on the dates indicated on the attachments pursuant to sections 36(c) and 36(d) and in compliance with section 36(f) of the Arms Export Control Act (22 U.S.C. 2776).

DATES: *Effective Date:* As shown on each of the 14 letters.

FOR FURTHER INFORMATION CONTACT: Mr. Robert S. Kovac, Managing Director, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State (202) 663–2861.

SUPPLEMENTARY INFORMATION: Section 36(f) of the Arms Export Control Act mandates that notifications to the Congress pursuant to sections 36(c) and 36(d) must be published in the **Federal Register** when they are transmitted to Congress or as soon thereafter as practicable.

May 6, 2010 (Transmittal No. DDTC 09–141)
Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Sections 36(c) and 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a manufacturing license agreement for the manufacture of significant military equipment abroad and the export of firearms abroad in the amount of $1,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, to include technical data, and defense services to South Korea, Qatar, United Arab Emirates, United Kingdom, the Netherlands, Thailand, Chile, and Malaysia for the manufacture and sale of the Goalkeeper Gun Mount.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

[25] *Id.*

[26] *Id.*

[27] 15 U.S.C. 78s(b)(2).

[28] 17 CFR 200.30–3(a)(12).

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs

April 12, 2010 (Transmittal No. DDTC 10–005)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement to include the export of defense articles, to include technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, to include technical data, and defense services to support the Proton launch of the OS–2 Commercial Communication Satellite from the Baikonur Cosmodrome in Kazakhstan.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Matthew M. Rooney

Principal Deputy Assistant Secretary, Legislative Affairs

April 29, 2010 (Transmittal No. DDTC 10–007)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a technical assistance agreement for the export of defense articles, to include technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, to include technical data, and defense services for the modification, test, and certification of Cessna Model 208B Grand Caravans for possible use against terrorists. The United Arab Emirates (UAE) Armed Forces is the end user, and will receive the modified aircraft as they are complete.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs

May 6, 2010 (Transmittal No. DDTC 10–014)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a technical assistance agreement for the export of defense articles, to include technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to support the Global Maintenance and Supply Services (GMASS), the M777A2 Sustainment, and Mine Resistant Ambush Protected Vehicle Programs in Afghanistan for end-use by U.S. and coalition forces in support of Operation Enduring Freedom.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs

April 12, 2010 (Transmittal No. DDTC 10–017)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement for the export of defense articles, including technical data, and defense services in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the transfer of defense articles, to include technical data, and defense services to support the transfer of the ProtoStarII satellite Commercial Communication Satellite from ProtoStar Satellite Systems, Inc., Bermuda to SES Satellite Leasing Limited, Isle of Man, British Isles.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Matthew M. Rooney

Principal Deputy Assistant Secretary, Legislative Affairs

May 7, 2010 (Transmittal No. DDTC 10–021)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a manufacturing license agreement for the manufacture of significant military equipment abroad.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services for the manufacture, assembly, and test of parts and components for Turbine Engines and Auxiliary Power Units related to various military aircraft, helicopters, and tanks. All manufactured parts and components will be shipped to either Germany or the United States for final integration.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs

May 12, 2010 (Transmittal No. DDTC 10–032)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad.

The transaction contained in the attached certification involves the export of technical data and defense services for the manufacture in Japan of AN/VPS–2 RADARs and associated equipment.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma

Assistant Secretary, Legislative Affairs

May 11, 2010 (Transmittal No. DDTC 10–034)

Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a manufacturing license agreement for the manufacture of significant military equipment abroad.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and

defense services for the manufacture of military aircraft engine hot section components specifically, combustion chambers and liners. The sales territory for these components is the United States where they will be assembled into aircraft engines designated for end use by the United States Air Force.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs

May 5, 2010 (Transmittal No. DDTC 10–039)
Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the export of defense articles, to include technical data, and defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, to include technical data, and defense services to the United Kingdom to support the manufacture of X300 Transmissions, Parts, Components and Accessories to be used in military vehicles.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs

April 22, 2010 (Transmittal No. DDTC 10–040)
Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement to include the export of defense articles, including technical data, and defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to Japan for the manufacture of F–15 aircraft fuel cells for end use by the Japanese Ministry of Defense. No significant military equipment (SME) is authorized for export or for manufacturing under this authorization.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs

April 22, 2010 (Transmittal No. DDTC 10–041)
Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement to include the export of defense articles, including technical data, and defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to France for the manufacture of E–2C and E–2D aircraft empennage assemblies and spare parts for end-use by the U.S. Navy. No parts are significant military equipment.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs

May 12, 2010 (Transmittal No. DDTC 10–043)
Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Sections 36(c) and 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a manufacturing license agreement for the manufacture of significant military equipment abroad and the export of defense articles or defense services abroad in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to Israel for the manufacture of components for the TF33, J52, and F100 aircraft engines.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs

May 12, 2010 (Transmittal No. DDTC 10–046)
Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement to include the export of defense articles, including technical data, and defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to the United Kingdom in support of the sale of one C–17 Globemaster III aircraft.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Richard R. Verma
Assistant Secretary, Legislative Affairs

May 12, 2010 (Transmittal No. DDTC 10–047)
Hon. Nancy Pelosi, Speaker of the House of Representatives

Dear Madam Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed technical assistance agreement for the export of defense articles, including technical data, and defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense articles, including technical data, and defense services to the United Kingdom for repairs, improvements, modifications, and modernization efforts associated with the WAH–64 Apache helicopters in the inventory of the United Kingdom Ministry of Defence. No significant military equipment (SME) is authorized for export under this authorization.

The United States government is prepared to license the export of these items having taken into account political, military, economic, human rights, and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Richard R. Verma
Assistant Secretary, Legislative Affairs

Dated: May 24, 2010.

Robert S. Kovac,

Managing Director, Directorate of Defense Trade Controls, Department of State.

[FR Doc. 2010–13374 Filed 6–2–10; 8:45 am]

BILLING CODE 4710–25–P

SUSQUEHANNA RIVER BASIN COMMISSION

Notice of Projects Approved for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice of Approved Projects.

SUMMARY: This notice lists the projects approved by rule by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: April 1, 2010, through April 30, 2010.

ADDRESSES: Susquehanna River Basin Commission, 1721 North Front Street, Harrisburg, PA 17102–2391.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, *telephone:* (717) 238–0423, ext. 306; *fax:* (717) 238–2436; *e-mail: rcairo@srbc.net* or Stephanie L. Richardson, Secretary to the Commission, *telephone:* (717) 238–0423, ext. 304; fax: (717) 238–2436; *e-mail: srichardson@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in and 18 CFR 806.22(f) for the time period specified above:

Approvals By Rule Issued Under 18 CFR 806.22(f):

1. Chesapeake Appalachia, LLC, Pad ID: Potter, ABR–20100401, Terry Township, Bradford County, Pa.; Approval Date: April 1, 2010.

2. Chesapeake Appalachia, LLC, Pad ID: Crawford, ABR–20100402, Terry Township, Bradford County, Pa.; Approval Date: April 1, 2010.

3. Southwestern Energy Production Company, Pad ID: Reeve, ABR–20100403, Herrick Township, Bradford County, Pa.; Approval Date: April 1, 2010.

4. Novus Operating, LLC, Pad ID: Strange, ABR–20100404, Sullivan Township, Tioga County, Pa.; Approval Date: April 2, 2010.

5. Ultra Resources, Inc., Pad ID: 905 Fowler, ABR–20100405, West Branch Township, Potter County, Pa.; Approval Date: April 5, 2010.

6. East Resources, Inc., Pad ID: Halteman 611, ABR–20100406, Delmar Township, Tioga County, Pa.; Approval Date: April 6, 2010.

7. Cabot Oil & Gas Corporation, Pad ID: RoseC P1, ABR–20100407, Dimock Township, Susquehanna County, Pa.; Approval Date: April 6, 2010.

8. Chesapeake Appalachia, LLC, Pad ID: Everbreeze, ABR–20100408, Troy Township, Bradford County, Pa.; Approval Date: April 8, 2010.

9. Chesapeake Appalachia, LLC, Pad ID: Ballibay, ABR–20100409, Herrick Township, Bradford County, Pa.; Approval Date: April 8, 2010.

10. Chesapeake Appalachia, LLC, Pad ID: Balduzzi, ABR–20100410, Wyalusing Township, Bradford County, Pa.; Approval Date: April 8, 2010.

11. Chesapeake Appalachia, LLC, Pad ID: Alton, ABR–20100411, Ulster Township, Bradford County, Pa.; Approval Date: April 8, 2010.

12. Chesapeake Appalachia, LLC, Pad ID: Allford, ABR–20100412, Smithfield Township, Bradford County, Pa.; Approval Date: April 8, 2010.

13. Chesapeake Appalachia, LLC, Pad ID: Frisbee, ABR–20100413, Orwell Township, Bradford County, Pa.; Approval Date: April 8, 2010.

14. Chesapeake Appalachia, LLC, Pad ID: Blannard, ABR–20100414, Standing Stone Township, Bradford County, Pa.; Approval Date: April 8, 2010.

15. East Resources, Inc., Pad ID: Wood 512, ABR–20100415, Rutland Township, Tioga County, Pa.; Approval Date: April 9, 2010.

16. Chief Oil & Gas, LLC, Pad ID: Myers Drilling Pad #1, ABR–20100416, Penn Township, Lycoming County, Pa.; Approval Date: April 12, 2010.

17. XTO Energy Incorporated, Pad ID: Marquardt Unit 8517H, ABR–2010417, Penn Township, Lycoming County, Pa.; Approval Date: April 13, 2010.

18. Chesapeake Appalachia, LLC, Pad ID: Dunham, ABR–20100418, Albany Township, Bradford County, Pa.; Approval Date: April 13, 2010.

19. Chesapeake Appalachia, LLC, Pad ID: Yoder, ABR–20100419, West Burlington Township, Bradford County, Pa.; Approval Date: April 13, 2010.

20. Chesapeake Appalachia, LLC, Pad ID: Brackman, ABR–20100420, Leroy Township, Bradford County, Pa.; Approval Date: April 13, 2010.

21. Chesapeake Appalachia, LLC, Pad ID: Koromlan, ABR–20100421, Auburn Township, Susquehanna County, Pa.; Approval Date: April 13, 2010.

22. Chesapeake Appalachia, LLC, Pad ID: Johnson, ABR–20100422, Monroe Township, Bradford County, Pa.; Approval Date: April 13, 2010.

23. Chesapeake Appalachia, LLC, Pad ID: Henry, ABR–20100423, Albany Township, Bradford County, Pa.; Approval Date: April 13, 2010.

24. Talisman Energy USA, Inc., Pad ID: Ziegler 03 001, ABR–20100424, Columbia Township, Bradford County, Pa.; Approval Date: April 14, 2010.

25. Chief Oil & Gas, LLC, Pad ID: Oliver Drilling Pad #1, ABR–20100425, Springville Township, Susquehanna County, Pa.; Approval Date: April 14, 2010.

26. EOG Resources, Inc., Pad ID: JENKINS 1H, ABR–20100426, Springfield Township, Bradford County, Pa.; Approval Date: April 15, 2010.

27. EOG Resources, Inc., Pad ID: PHC 21V, ABR–20100427, Lawrence Township, Clearfield County, Pa.; Approval Date: April 15, 2010.

28. East Resources, Inc., Pad ID: Lange 447, ABR–20100428, Delmar Township, Tioga County, Pa.; Approval Date: April 15, 2010.

29. East Resources, Inc., Pad ID: Clark 486, ABR–20100429, Sullivan Township, Tioga County, Pa.; Approval Date: April 16, 2010.

30. Talisman Energy USA, Inc., Pad ID: Crank 03 067, ABR–20100430, Columbia Township, Bradford County, Pa.; Approval Date: April 19, 2010.

31. Cabot Oil & Gas Corporation, Pad ID: BlaisureJe P1, ABR–20100431, Dimock Township, Susquehanna County, Pa.; Approval Date: April 19, 2010.

32. Cabot Oil & Gas Corporation, Pad ID: Rayias P1, ABR–20100432, Dimock Township, Susquehanna County, Pa.; Approval Date: April 19, 2010.

33. Novus Operating, LLC, Pad ID: Golden Eagle, ABR–20100433, Covington Township, Tioga County, Pa.; Approval Date: April 21, 2010.

34. Novus Operating, LLC, Pad ID: Chicken Hawk, ABR–20100434, Sullivan Township, Tioga County, Pa.; Approval Date: April 21, 2010.

35. Chesapeake Appalachia, LLC, Pad ID: McGavin, ABR–20100435, Auburn Township, Susquehanna County, Pa.; Approval Date: April 21, 2010.

36. Chesapeake Appalachia, LLC, Pad ID: Nickolyn, ABR–20100436, Auburn Township, Susquehanna County, Pa.; Approval Date: April 21, 2010.

37. Chesapeake Appalachia, LLC, Pad ID: Rexford, ABR–20100437, Orwell Township, Bradford County, Pa.; Approval Date: April 21, 2010.

38. Chesapeake Appalachia, LLC, Pad ID: Amburke, ABR–20100438, Auburn Township, Susquehanna County, Pa.; Approval Date: April 21, 2010.

39. Seneca Resources Corporation, Pad ID: DCNR Tract 100 5H, ABR–20100439, Lewis Township, Lycoming

County, Pa.; Approval Date: April 21, 2010, including a partial waiver of 18 CFR § 806.15.

40. Ultra Resources, Inc., Pad ID: State 815, ABR–20100440, Elk Township, Tioga County, Pa.; Approval Date: April 22, 2010, including a partial waiver of 18 CFR § 806.15.

41. Chesapeake Appalachia, LLC, Pad ID: Angie, ABR–20100441, Auburn Township, Susquehanna County, Pa.; Approval Date: April 22, 2010.

42. East Resources, Inc., Pad ID: Vandergrift 290, ABR–20100442, Charleston Township, Tioga County, Pa.; Approval Date: April 23, 2010.

43. East Resources, Inc., Pad ID: Topf 416, ABR–20100443, Delmar Township, Tioga County, Pa.; Approval Date: April 23, 2010.

44. East Resources, Inc., Pad ID: Gee 832, ABR–20100444, Middlebury Township, Tioga County, Pa.; Approval Date: April 26, 2010.

45. Talisman Energy USA, Inc., Pad ID: Storch 03 035, ABR–20100445, Wells Township, Bradford County, Pa.; Approval Date: April 28, 2010.

46. Chesapeake Appalachia, LLC, Pad ID: Holtan, ABR–20100446, Auburn Township, Susquehanna County, Pa.; Approval Date: April 28, 2010.

47. Chesapeake Appalachia, LLC, Pad ID: Polomski, ABR–20100447, Wyalusing Township, Bradford County, Pa.; Approval Date: April 28, 2010.

48. Chesapeake Appalachia, LLC, Pad ID: Way, ABR–20100448, Wyalusing Township, Bradford County, Pa.; Approval Date: April 28, 2010.

49. Chesapeake Appalachia, LLC, Pad ID: Brink, ABR–20100449, Herrick Township, Bradford County, Pa.; Approval Date: April 28, 2010.

50. Chesapeake Appalachia, LLC, Pad ID: Champdale, ABR–20100450, Tuscarora Township, Bradford County, Pa.; Approval Date: April 29, 2010.

51. Chief Oil & Gas, LLC, Pad ID: Warner Drilling Pad #1, ABR–20100451, Franklin Township, Lycoming County, Pa.; Approval Date: April 29, 2010.

52. Chief Oil & Gas, LLC, Pad ID: Emig Drilling Pad #1, ABR–20100452, Cogan House Township, Lycoming County, Pa.; Approval Date: April 29, 2010.

53. Talisman Energy USA, Inc., Pad ID: Ferguson 01 023, ABR–20100453, Granville Township, Bradford County, Pa.; Approval Date: April 30, 2010.

54. Williams Production Appalachia, LLC, Pad ID: Alder Run Land LP #2H, ABR–20100454, Cooper Township, Clearfield County, Pa.; Approval Date: April 30, 2010.

55. Range Resources—Appalachia, LLC, Pad ID: Gray's Run Club Unit #2H, ABR–20100455, Jackson Township, Lycoming County, Pa.; Approval Date: April 30, 2010.

56. Range Resources—Appalachia, LLC, Pad ID: Dog Run Hunting Club Unit, ABR–20100456, Cummings Township, Lycoming County, Pa.; Approval Date: April 30, 2010.

Authority: Public Law 91–575, 84 Stat. 1509 *et seq.,* 18 CFR Parts 806, 807, and 808.

Dated: May 24, 2010.

Stephanie L. Richardson,

Secretary to the Commission.

[FR Doc. 2010–13296 Filed 6–2–10; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Executive Committee of the Aviation Rulemaking Advisory Committee; Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of the Executive Committee of the Aviation Rulemaking Advisory Committee.

DATES: The meeting will be on June 16, 2010, at 10 a.m.

ADDRESSES: The meeting will take place at the Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, 10th floor, MacCracken Room.

FOR FURTHER INFORMATION CONTACT: Gerri Robinson, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–9678; fax (202) 267–5075; e-mail *Gerri.Robinson@faa.gov.*

SUPPLEMENTARY INFORMATION: Under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), we are giving notice of a meeting of the Executive Committee of the Aviation Rulemaking Advisory Committee taking place on December 9, 2009, at the Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. The agenda includes:

1. Continuous Improvement (Committee Process)

ARAC Task—Advice and Recommendations to FAA about current ARAC process.

FAA Update on Charter Renewal

2. Status Reports

3. Remarks from other EXCOM members

Attendance is open to the interested public but limited to the space available. The FAA will arrange teleconference service for individuals wishing to join in by teleconference if we receive notice by June 7. Arrangements to participate by teleconference can be made by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Callers outside the Washington metropolitan area are responsible for paying long-distance charges.

The public must arrange by June 7 to present oral statements at the meeting. Members of the public may present written statements to the executive committee by providing 25 copies to the Executive Director, or by bringing the copies to the meeting.

If you are in need of assistance or require a reasonable accommodation for this meeting, please contact the person listed under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in Washington, DC, on May 28, 2010.

Pamela A. Hamilton-Powell,

Executive Director, Aviation Rulemaking Advisory Committee.

[FR Doc. 2010–13326 Filed 6–2–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Rescinding the Notice of Intent for an Environmental Impact Statement: Prince George's County, MD

AGENCY: Federal Highway Administration.

ACTION: Notice.

SUMMARY: This notice rescinds the Notice of Intent for preparing an Environmental Impact Statement that was issued on June 11, 2008, for a proposed roadway improvement project in Prince George's County, Maryland.

FOR FURTHER INFORMATION CONTACT: Ms. Jeanette Mar, Environmental Program Manager, FHWA, DelMar Division, 10 S. Howard Street, Suite 2450, Baltimore, MD 21201, Telephone: (410) 779–7152, e-mail address *Jeanette.Mar@dot.gov.*

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Maryland State Highway Administration (SHA), U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, Maryland Department of the Environment, and University of Maryland, is rescinding the NOI to prepare an EIS for roadway improvements which would address mobility and safety for travelers to and from the University of Maryland (UM) Campus from I–95/I–495 and points north, while providing enhanced access

to the university. The NOI is being rescinded because the project is no longer funded for study.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulation implementing Executive Order 12372 regarding intergovernmental consultation of Federal programs and activities apply to this program.)

Issued on: May 27, 2010.

Jeanette Mar,

Environmental Program Manager.

[FR Doc. 2010–13295 Filed 6–2–10; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OCC is soliciting comment concerning its information collection titled, "Community and Economic Development Entities, Community Development Projects—12 CFR part 24." The OCC also gives notice that it has submitted the collection to OMB for review.

DATES: You should submit comments by July 6, 2010.

ADDRESSES: Communications Division, Office of the Comptroller of the Currency, Mailstop 2–3, Attention: 1557–0194, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–5274 or by electronic mail to *regs.comments@occ.treas.gov.* You can inspect and photocopy the comments at the OCC, 250 E Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, please send a copy of your comments to OCC Desk Officer, 1557–0194, by mail to U.S. Office of Management and Budget, 725, 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: You can request additional information or a copy of the collection from Mary H. Gottlieb, OCC Clearance Officer, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: The OCC is proposing to extend the following information collection:

Title: Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments—12 CFR 24.

OMB Control No.: 1557–0194.

Description: This submission covers an existing regulation and revisions to the Part 24, CD–1, National Bank Community Development Investments form contained in the regulation, pursuant to which a national bank may notify the OCC, or request OCC approval, of certain community development investments.

Section 24.4(a) states that a national bank may submit a written request to the OCC to exceed the 5 percent limit for aggregate outstanding investments.

Section 24.5(a)(2) provides that an eligible bank may make an investment without prior notification to, or approval by, the OCC if the bank submits an after-the-fact notification of an investment within 10 days after it makes the investment. Section 24.5(a)(3) specifies the requirements for the after-the-fact notice, and section 24.5(a)(4) indicates that the requirements may be satisfied by filing form CD–1.[1]

Section 24.5(a)(5) provides that a national bank that is not an eligible bank, but that is at least adequately capitalized, and has a composite rating of at least 3 with improving trends under the Uniform Financial Institutions Rating System, may submit a letter to the OCC requesting authority to submit after-the-fact notices of its investments.

Section 24.5(b) provides that if a national bank or its investment does not meet the requirements for after-the-fact notification, the bank must submit an investment proposal to the OCC. Section 24.5(b)(2) specifies the requirements for the proposal, and section 24.5(a) provides that filing Form CD–1 satisfies this requirement.

The OCC requests that OMB approve its revised estimates and extend its approval of the information collection.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals; Businesses or other for-profit.

Estimated Number of Respondents: 600.

Estimated Total Annual Responses: 600.

Frequency of Response: On occasion.

Estimated Total Annual Burden: 877.5 hours.

The OCC issued a 60-Day **Federal Register** Notice on March 17, 2010. 75 FR 12813. No comments were received. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC'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 on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: May 27, 2010.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

[FR Doc. 2010–13250 Filed 6–2–10; 8:45 am]

BILLING CODE 4810–33–P

[1] National Bank Community Development (Part 24) Investments.

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–43: OTS No. H–4707]

Fox Chase Bancorp, Inc., Hatboro, PA; Approval of Conversion

Application Notice is hereby given that on May 14, 2010, the Office of Thrift Supervision approved the application of Fox Chase MHC and Fox Chase Bank, Hatboro, Pennsylvania, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (phone number: 202–906–5922 or e-mail *Public.Info@OTS.Treas.gov*) at the Public Reading Room, 1700 G Street,

NW., Washington, DC 20552, and the OTS Northeast Regional Office, Harborside Financial Center Plaza Five, Suite 1600, Jersey City, NJ 07311.

Dated: May 26, 2010.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. 2010–13208 Filed 6–2–10; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–44: OTS No. H–4704]

Oneida Financial Corp., Oneida, NY; Approval of Conversion Application

Notice is hereby given that on May 14, 2010, the Office of Thrift Supervision approved the application of Oneida Financial, MHC and Oneida Savings Bank, Oneida, New York, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (phone number: 202–906–5922 or e-mail *Public.Info@OTS.Treas.gov*) at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552, and the OTS Northeast Regional Office, Harborside Financial Center Plaza Five, Suite 1600, Jersey City, NJ 07311.

Dated: May 26, 2010.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. 2010–13209 Filed 6–2–10; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–45: OTS No. H–4715]

Peoples Federal Bancshares, Inc., Brighton, MA; Approval of Conversion Application

Notice is hereby given that on May 14, 2010, the Office of Thrift Supervision approved the application of Peoples Federal MHC and Peoples Federal Savings Bank, Brighton, Massachusetts, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (phone number: 202–906–5922 or e-mail *Public.Info@OTS.Treas.gov*) at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552, and the OTS Northeast Regional Office, Harborside Financial Center Plaza Five, Suite 1600, Jersey City, NJ 07311.

Dated: May 26, 2010.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. 2010–13213 Filed 6–2–10; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–46: OTS No. 08283]

Ideal Federal Savings Bank, Baltimore, MD; Approval of Conversion Application

Notice is hereby given that on May 24, 2010, the Office of Thrift Supervision approved the application of Ideal Federal Savings Bank, Baltimore, Maryland, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (phone number: (202) 906–5922 or e-mail: *pub1ic.info@ots.treas.gov*) at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552, and the OTS Southeast Regional Office, 1475 Peachtree Street, NE., Atlanta, Georgia 30309.

Dated: May 26, 2010.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. 2010–13216 Filed 6–2–10; 8:45 am]

BILLING CODE 6720–01–M

Federal Register

Thursday,
June 3, 2010

Part II

Environmental Protection Agency

40 CFR Parts 51, 52, 70, et al.

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, 70, and 71

[EPA–HQ–OAR–2009–0517; FRL–9152–8]

RIN 2060–AP86

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is tailoring the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and title V programs of the Clean Air Act (CAA or Act). This rulemaking is necessary because without it PSD and title V requirements would apply, as of January 2, 2011, at the 100 or 250 tons per year (tpy) levels provided under the CAA, greatly increasing the number of required permits, imposing undue costs on small sources, overwhelming the resources of permitting authorities, and severely impairing the functioning of the programs. EPA is relieving these resource burdens by phasing in the applicability of these programs to GHG sources, starting with the largest GHG emitters. This rule establishes two initial steps of the phase-in. The rule also commits the agency to take certain actions on future steps addressing smaller sources, but excludes certain smaller sources from PSD and title V permitting for GHG emissions until at least April 30, 2016.

DATES: This action is effective on August 2, 2010.

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2009–0517. 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.,* 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. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, 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.

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SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities affected by this action include sources in all sectors of the economy, including commercial and residential sources. Entities potentially affected by this action also include States, local permitting authorities, and tribal authorities. The majority of categories and entities potentially affected by this action are expected to be in the following groups:

Industry group	NAICS [a]
Agriculture, fishing, and hunting	11.
Mining	21.
Utilities (electric, natural gas, other systems)	2211, 2212, 2213.
Manufacturing (food, beverages, tobacco, textiles, leather)	311, 312, 313, 314, 315, 316.
Wood product, paper manufacturing	321, 322.
Petroleum and coal products manufacturing	32411, 32412, 32419.
Chemical manufacturing	3251, 3252, 3253, 3254, 3255, 3256, 3259.
Rubber product manufacturing	3261, 3262.
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551.
Nonmetallic mineral product manufacturing	3271, 3272, 3273, 3274, 3279.
Primary and fabricated metal manufacturing	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329.
Machinery manufacturing	3331, 3332, 3333, 3334, 3335, 3336, 3339.
Computer and electronic products manufacturing	3341, 3342, 3343, 3344, 3345, 4446.
Electrical equipment, appliance, and component manufacturing	3351, 3352, 3353, 3359.
Transportation equipment manufacturing	3361, 3362, 3363, 3364, 3365, 3366, 3366, 3369.
Furniture and related product manufacturing	3371, 3372, 3379.
Miscellaneous manufacturing	3391, 3399.
Waste management and remediation	5622, 5629.
Hospitals/Nursing and residential care facilities	6221, 6231, 6232, 6233, 6239.
Personal and laundry services	8122, 8123.
Residential/private households	8141.
Non-Residential (Commercial)	Not available. Codes only exist for private households, construction, and leasing/sales industries.

[a] North American Industry Classification System.

B. How is this preamble organized?

The information presented in this preamble is organized as follows:

Outline

C. Preamble Acronyms and Abbreviations

The following are abbreviations of terms used in this preamble.

ANPR Advance Notice of Proposed Rulemaking
APA Administrative Procedure Act
AQRVs Air Quality Related Values
BACT Best Available Control Technology
Btu British thermal units
Btu/hr British thermal units per hour
CAA or Act Clean Air Act
CAAAC Clean Air Act Advisory Committee
CAFE Corporate Average Fuel Economy
CH_4 Methane
CO Carbon Monoxide
CO_2 Carbon Dioxide
CO_2e Carbon Dioxide Equivalent
EPA U.S. Environmental Protection Agency
FDA Food and Drug Administration
FIP Federal Implementation Plan
FTEs Full-Time Equivalents
GHG Greenhouse Gas
GHz Gigahertz
GWP Global Warming Potential
HAP Hazardous Air Pollutant
HFCs Hydrofluorocarbons
ICR Information Collection Request
IPCC Intergovernmental Panel on Climate Change
LDVR Light-Duty Vehicle Rule
MACT Maximum Achievable Control Technology
MCL Maximum Contaminant Level
N_2O Nitrous Oxide
NAAQS National Ambient Air Quality Standard
NHTSA National Highway Traffic Safety Administration
NMOC Nonmethane Organic Compounds
NO_X Nitrogen Oxides
NPDES National Pollutant Discharge Elimination System
NSPS New Source Performance Standard
NSR New Source Review
NTAA National Tribal Air Association
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
PFCs Perfluorocarbons
PM Particulate Matter
PSD Prevention of Significant Deterioration
PTE Potential to Emit
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RTC Response to Comment
SBA Small Business Administration
SBAR Small Business Advocacy Review
SBREFA Small Business Regulatory Enforcement Fairness Act
SF_6 Sulfur Hexafluoride
SIP State Implementation Plan
SNPR Supplemental Notice of Proposed Rulemaking
TIP Tribal Implementation Plan
TRS Total Reduced Sulfur
TSD Technical Support Document
tpy Tons Per Year
UMRA Unfunded Mandates Reform Act
UNFCCC United Nations Framework Convention on Climate Change
VOC Volatile Organic Compound

II. Overview of the Final Rule

EPA is relieving overwhelming permitting burdens that would, in the absence of this rule, fall on permitting authorities and sources. We accomplish this by tailoring the applicability criteria that determine which GHG emission sources become subject to the PSD and title V programs [1] of the CAA. In particular, EPA is establishing with this rulemaking a phase-in approach for PSD and title V applicability, and is establishing the first two steps of the phase-in for the largest emitters of GHGs. We also commit to certain follow-up actions regarding future steps beyond the first two, discussed in more detail later. Our legal basis for this rule is our interpretation of the PSD and title V applicability provisions under the familiar *Chevron* [2] two-step framework for interpreting administrative statutes, taking account of three legal doctrines, both separately and interdependently: They are what we will call (1) The "absurd results" doctrine, which authorizes agencies to apply statutory requirements differently than a literal reading would indicate, as necessary to effectuate congressional intent and avoid absurd results, (2) the "administrative necessity" doctrine, which authorizes agencies to apply statutory requirements in a way that avoids impossible administrative burdens; and (3) the "one-step-at-a-time" doctrine, which authorizes agencies to implement statutory requirements a step at a time. This legal basis justifies each of the actions we take with this rule—*e.g.,* each of the first two steps of the phase-in approach—both (1) as part of the overall tailoring approach, and (2) independently of each other action we take with this rule. EPA also has authority for this Tailoring Rule under CAA section 301(a)(1), which authorizes the Administrator "to prescribe such regulations as are necessary to carry out his functions under [the CAA]."

For the first step of this Tailoring Rule, which will begin on January 2, 2011, PSD or title V requirements will apply to sources' GHG emissions only if the sources are subject to PSD or title V anyway due to their non-GHG pollutants. Therefore, EPA will not require sources or modifications to evaluate whether they are subject to PSD or title V requirements solely on account of their GHG emissions. Specifically, for PSD, Step 1 requires that as of January 2, 2011, the applicable requirements of PSD, most notably, the best available control technology (BACT) requirement, will apply to projects that increase net GHG emissions by at least 75,000 tpy carbon dioxide equivalent (CO_2e), but only if the project also significantly increases emissions of at least one non-GHG pollutant. For the title V program, only existing sources with, or new sources obtaining, title V permits for non-GHG pollutants will be required to address GHGs during this first step.

The second step of the Tailoring Rule, beginning on July 1, 2011, will phase in additional large sources of GHG emissions. New sources as well as existing sources not already subject to title V that emit, or have the potential to emit, at least 100,000 tpy CO_2e will become subject to the PSD and title V requirements. In addition, sources that emit or have the potential to emit at least 100,000 tpy CO_2e and that undertake a modification that increases net emissions of GHGs by at least 75,000 tpy CO_2e will also be subject to PSD requirements. For both steps, we also note that if sources or modifications exceed these CO_2e-adjusted GHG triggers, they are not covered by permitting requirements unless their GHG emissions also exceed the corresponding mass-based triggers (*i.e.,* unadjusted for CO_2e.)

EPA believes that the costs to the sources and the administrative burdens to the permitting authorities of PSD and title V permitting will be manageable at the levels in these initial two steps, and that it would be administratively infeasible to subject additional sources to PSD and title V requirements at those times. However, we also intend to issue a supplemental notice of proposed rulemaking (SNPR) in 2011, in which we will propose or solicit comment on a third step of the phase-in that would include more sources, beginning by July 1, 2013. In the same rulemaking, we may propose or solicit comment on a permanent exclusion from permitting for some category of sources, based on the doctrine of "absurd results," within the *Chevron* framework. We are establishing an enforceable commitment that we will complete this rulemaking by July 1, 2012, which will allow for 1 year's notice before Step 3 would take effect.

In addition, we commit to explore streamlining techniques that may well make the permitting programs much more efficient to administer for GHGs, and that therefore may allow their expansion to smaller sources. We expect that the initial streamlining techniques will take several years to develop and implement.

We are also including in this action a rule that no source with emissions below 50,000 tpy CO_2e, and no modification resulting in net GHG increases of less than 50,000 tpy CO_2e, will be subject to PSD or title V permitting before at least 6 years from now, April 30, 2016. This is because we are able to conclude at the present time that the administrative burdens that would accompany permitting sources below this level will be so great that even the streamlining actions that EPA may be able to develop and implement in the next several years, and even with the increases in permitting resources that we can reasonably expect the permitting authorities to acquire, it will be impossible to administer the permit programs for these sources until at least 2016.

Further, we are establishing an enforceable commitment that we will (1) Complete a study by April 30, 2015, to evaluate the status of PSD and title V permitting for GHG-emitting sources, including progress in developing streamlining techniques; and (2) complete further rulemaking based on that study by April 30, 2016, to address the permitting of smaller sources. That rulemaking may also consider additional permanent exclusions based on the "absurd results" doctrine, where applicable.

This Tailoring Rulemaking is necessary because without it, PSD and title V would apply to all stationary sources that emit or have the potential to emit more than 100 or 250 tons of GHGs per year beginning on January 2, 2011. This is the date when EPA's recently promulgated Light-Duty Vehicle Rule (LDVR) takes effect, imposing control requirements for the first time on carbon dioxide (CO_2) and other GHGs. If this January 2, 2011 date were to pass without this Tailoring Rule being in effect, PSD and title V requirements would apply at the 100/250 tpy applicability levels provided under a literal reading of the CAA as of that date. From that point forward, a source owner proposing to construct any new major source that emits at or higher than the applicability levels (and which therefore may be referred to as a "major" source) or modify any existing major source in a way that would increase GHG emissions would need to obtain a permit under the PSD program that addresses these emissions before construction or modification could begin. Similarly, title V would apply to a new or existing source exceeding the 100 tpy

[1] Unless otherwise indicated, references in this preamble to "title V," "title V requirements," the "title V program," and similar references are to the operating permit provisions in CAA sections 501–506, and not the "small business stationary source technical and environmental compliance assistance program" under CAA section 507.

[2] *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837 (1984).

applicability level in the Act, if the source did not already have a title V permit.

Under these circumstances, many small sources would be burdened by the costs of the individualized PSD control technology requirements and permit applications that the PSD provisions, absent streamlining, require. Additionally, state and local permitting authorities would be burdened by the extraordinary number of these permit applications, which are orders of magnitude greater than the current inventory of permits and would vastly exceed the current administrative resources of the permitting authorities. Permit gridlock would result with the permitting authorities able to issue only a tiny fraction of the permits requested.

These impacts—the costs to sources and administrative burdens to permitting authorities—that would result from application of the PSD and title V programs for GHG emissions at the statutory levels as of January 2, 2011, are so severe that they bring the judicial doctrines of "absurd results," "administrative necessity," and "one-step-at-a-time" into the *Chevron* two-step analytical framework for statutes administered by agencies. Under the U.S. Supreme Court's decision in *Chevron,* the agency must, at Step 1, determine whether Congress's intent as to the specific matter at issue is clear, and, if so, the agency must give effect to that intent.[3] If congressional intent is not clear, then, at Step 2, the agency has discretion to fashion an interpretation that is a reasonable construction of the statute.

To determine congressional intent, the agency must first consider the words of the statutory requirements, and if their literal meaning answers the question at hand, then, in most cases, the agency must implement those requirements by their terms. However, under the "absurd results" doctrine, the literal meaning of statutory requirements should not be considered to indicate congressional intent if that literal meaning would produce a result that is senseless or that is otherwise inconsistent with—and especially one that undermines—underlying congressional purpose. In these cases, if congressional intent for how the requirements apply to the question at hand is clear, the agency should implement the statutory requirements not in accordance with their literal meaning, but rather in a manner that most closely effectuates congressional intent. If congressional intent is not clear, then an agency may select an interpretation that is reasonable under the statute.

Under the "administrative necessity" doctrine, Congress is presumed, at *Chevron* Step 1, to intend that its statutory directives to agencies be administrable, and not to have intended to have written statutory requirements that are impossible to administer. Therefore, under this doctrine, an agency may depart from statutory requirements that, by their terms, are impossible to administer, but the agency may depart no more than necessary to render the requirements administrable. Under the "one-step-at-a-time" doctrine, Congress is presumed at *Chevron* Step 1 to have intended to allow the agency to administer the statutory requirements on a step-by-step basis, as appropriate, when the agency remains on track to implement the requirements as a whole. Each of these doctrines supports our action separately, but the three also are intertwined and support our action in a comprehensive manner.

Here, we have determined, through analysis of burden and emissions data as well as consideration of extensive public comment, that the costs to sources and administrative burdens to permitting authorities that would result from application of the PSD and title V programs for GHG emissions at the statutory levels as of January 2, 2011 should be considered "absurd results." Therefore, we conclude that under the "absurd results" doctrine, Congress could not have intended that the PSD or title V applicability provisions—in particular, the threshold levels and timing requirements—apply literally to GHG sources as of that date.

Even so, the PSD and title V provisions and their legislative history do indicate a clear congressional intent, under *Chevron* Step 1, as to *whether* the two permitting programs applied to GHG sources, and that the intent was in the affirmative, that the permitting programs do apply to GHG sources. Our previous regulatory action defining the applicability provisions made this clear, and we do not reopen this issue in this rulemaking. Moreover, even if this long-established regulatory position were not justifiable based on *Chevron* Step 1—on the grounds that in fact, congressional intent on this point is not clear—then we believe that this position, that the statutory provisions to apply PSD and title V generally to GHG sources, was justified under Chevron step 2.[4]

As to how to apply the PSD program to GHG sources, congressional intent, as expressed in the various statutory provisions and statements in the legislative history, is clear that PSD should apply at least to the largest sources initially, at least to as many more sources as possible and as promptly as possible over time—consistent with streamlining actions that we intend to consider coupled with increases in permitting authority resources—and at least to a certain point. This is the approach we take in this Tailoring Rule, and because it is consistent with congressional intent, we believe it is required under *Chevron* Step 1. Even if congressional intent were not clear as to how to apply the PSD requirements to GHG sources, we would have authority under *Chevron* Step 2 to establish a reasonable interpretation that is consistent with the PSD provisions, and we believe that the tailoring approach so qualifies.

As for title V, the statutory provisions and legislative history, which of course are different than those concerning the PSD program, do not express a clear intent as to how title V applies to GHG sources, which leads our analysis to *Chevron* Step 2, and here, again, we believe that the tailoring approach is a reasonable interpretation that is consistent with the title V provisions.

For both PSD and title V, we intend to use the tailoring approach to address smaller GHG sources over time, consistent with Congress's expectations that the programs would not impose undue costs to sources or undue administrative burdens to permitting authorities. However, we cannot say at this point how close to the statutory thresholds we will eventually reach. Because this rule establishes only the first two phases of the tailoring approach, we do not find it necessary to answer these questions in this rule, and instead we expect to resolve them through future rulemaking. We will remain mindful of the concerns that Congress expressed about including small sources in either program. We intend to consider the issue of the applicability of title V to GHG sources without applicable requirements (*i.e.,* "empty permits") in future steps of our tailoring approach. When we do so, we will further assess the potential for the approach of excluding empty permits from title V to relieve burden consistent with statutory requirements.

In addition, because Congress can be said to have intended the PSD and title

[3] *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 842–43 (1984).

[4] In this preamble and the response to comments document we fully address arguments that commenters and others have presented about congressional intent and coverage of GHGs. We do so to be fully responsive, even though we believe that this is a settled matter for which the time for judicial review has passed.

V programs to apply to GHG sources, the Tailoring Rule is also justifiable under the "administrative necessity" and "one-step-at-a-time" doctrines.

The legal analysis just described justifies each of the actions in this rule. The first two steps that we promulgate in this rule, which take effect on January 2, 2011 and July 1, 2011, constitute the most that permitting authorities can reasonably be expected to do by those times. Similarly, the 50,000 tpy floor that we promulgate through at least April 30, 2016 is reasonable because the information we have available now shows that it constitutes the most that permitting authorities can reasonably be expected to do by that date. Finally, the study and two additional rulemakings—to take effect by July 1, 2013 and April 30, 2016—to which we commit in this rule establish a track for acquiring additional information and for taking further steps to address the application of PSD and title V more closely to the literal statutory levels. We intend to apply them as closely to those levels as is consistent with congressional intent and administrative imperatives, in light of the "absurd results," "administrative necessity," and "one-step-at-a-time" doctrines, although, as noted previously, we will consider in future rulemaking how closely to the statutory thresholds we will be able to implement the PSD and title V programs as well as what to require with respect to a potentially large number of sources with empty title V permits.

In this rule, we are adopting regulatory language codifying our phase-in approach. As we will explain, many state, local and tribal area programs will likely be able to immediately implement our approach without rule or statutory changes by, for example, interpreting the term "subject to regulation" that is part of the applicability provisions for PSD and title V. We ask permitting authorities to confirm that they will follow this implementation approach for their programs, and if they cannot, then we ask them to notify us so that we can take appropriate follow-up action to narrow our federal approval of their programs before GHGs become subject to regulation for PSD and title V programs on January 2, 2011. Narrowing our approval will ensure that for federal purposes, GHG sources below the size thresholds we establish in this Tailoring Rule are not obligated to hold PSD or title V permits until the states develop and submit revised PSD and title V programs that EPA approves, either because they adopt our tailoring approach or because, if they continue to cover smaller GHG sources, the states have demonstrated that they have adequate resources to administer those programs.

The thresholds we are establishing are based on CO_2e for the aggregate sum of six greenhouse gases that constitute the pollutant that will be subject to regulation, which we refer to as GHGs.[5] These gases are: CO_2, methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). Thus, in this rule, we provide that PSD and title V applicability is based on the quantity that results when the mass emissions of each of these gases is multiplied by the Global Warming Potential (GWP) of that gas, and then summed for all six gases. However, we further provide that in order for a source's GHG emissions to trigger PSD or title V requirements, the quantity of the GHGs must equal or exceed both the applicability thresholds established in this rulemaking on a CO_2e basis and the statutory thresholds of 100 or 250 tpy on a mass basis.[6] Similarly, in order for a source to be subject to the PSD modification requirements, the source's net GHG emissions increase must exceed the applicable significance level on a CO_2e basis and must also result in a net mass increase of the constituent gases combined.

We are adopting this rule after careful consideration of numerous public comments. On October 27, 2009 (74 FR 55292), EPA proposed the GHG Tailoring Rule. EPA held two public hearings on the proposed rule, and received over 400,000 written public comments. The public comment period ended on December 28, 2009. The comments have provided detailed information that has helped EPA understand better the issues and potential impacts of this rule, and the final rule described in this preamble incorporates many of the suggestions we received. We respond to many of these comments in explaining our rationale for the final rule, which is described in section V. The final rule adopts many elements of the proposal but differs from the proposal in several important respects. We proposed to apply PSD and title V to GHG sources that emit or have the potential to emit at least 25,000 tpy CO_2e, and we proposed a PSD significance level in a range between 10,000 and 25,000 tpy CO_2e, but based on consideration of the additional information we received and our further analysis, we are finalizing the threshold levels in the amounts and on the schedule described previously. In addition, the mechanism for state, local, and tribal program implementation has been significantly changed to reflect the comments received that we needed to develop an implementation approach that states could adopt under state law more expeditiously.

The remainder of this notice describes our approach and rationale in more detail. Following this overview, section III of this preamble provides background information on the nature of GHG emissions, recent regulatory developments that affect when and how GHG emissions are subject to stationary source permitting, and the general requirements of the PSD and title V programs. Section IV describes in detail the summary of the key actions being taken in this rule, including the determination of emissions, the thresholds and timing for the phase-in, our approach to implementing the phase-in, and the additional future actions we will take. Section V provides a more detailed description of each action, explaining the policy and legal rationale and responding to comments received. Section V begins with our decisions on how to calculate the mass-based and CO_2e-based emissions used in the phase-in. Section V then turns to our legal and policy rationale for the first two steps of the phase-in, the 50,000 tpy floor, and the subsequent study and rulemakings to determine whether and how smaller sources should be subject to permitting. This section then describes key implementation issues including the approach to state adoption. After describing our plans for follow-up on title V fee programs, the section concludes by describing permit streamlining techniques; guidance on BACT for the GHG sources that are affected under the first two steps of the Tailoring Rule phase-in; requests for exemptions; and transitional issues, including grandfathering. Finally, section VI describes the expected impacts that will result from the phase-in approach (*i.e.,* the narrower application of PSD and title V requirements during the phase-in period) and sections VII and VIII address administrative requirements.

III. Background

A. What are GHGs and their sources?

Greenhouse gases trap the Earth's heat that would otherwise escape from the atmosphere into space, and form the

[5] The term "greenhouse gases" is commonly used to refer generally to gases that have heat-trapping properties. However, in this notice, unless noted otherwise, we use it to refer to specifically to the pollutant regulated in the LDVR.

[6] The relevant thresholds are 100 tpy for title V, and 250 tpy for PSD, except for 28 categories listed in EPA regulations for which the PSD threshold is 100 tpy.

greenhouse effect that helps keep the Earth warm enough for life. Greenhouse gases are naturally present in the atmosphere and are also emitted by human activities. Human activities are intensifying the naturally occurring greenhouse effect by increasing the amount of GHGs in the atmosphere, which is changing the climate in a way that endangers human health, society, and the natural environment.

Some GHGs, such as CO_2, are emitted to the atmosphere through natural processes as well as human activities. Other gases, such as fluorinated gases, are created and emitted solely through human activities. As previously noted, the well-mixed GHGs of concern directly emitted by human activities include CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6. These six GHGs will, for the purposes of this final rule, be referred to collectively as "the six well-mixed GHGs," or, simply, GHGs, and together constitute the "air pollutant" upon which the GHG thresholds in this action are based. These six gases remain in the atmosphere for decades to centuries where they become well-mixed globally in the atmosphere. When they are emitted more quickly than natural processes can remove them from the atmosphere, their concentrations increase, thus increasing the greenhouse effect. The heating effect caused by the human-induced buildup of GHGs in the atmosphere is very likely the cause of most of the observed global warming over the last 50 years. A detailed explanation of greenhouse gases, climate change and its impact on health, society, and the environment is included in EPA's technical support document (TSD) for the endangerment finding final rule (Docket ID No. EPA–HQ–OAR–2009–0472–11292).

In the United States, the combustion of fossil fuels (*e.g.,* coal, oil, gas) is the largest source of CO_2 emissions and accounts for 80 percent of the total GHG emissions. Anthropogenic CO_2 emissions released from a variety of sources, including through the use of fossil fuel combustion and cement production from geologically stored carbon (*e.g.,* coal, oil, and natural gas) that is hundreds of millions of years old, as well as anthropogenic CO_2 emissions from land-use changes such as deforestation, perturb the atmospheric concentration of CO_2 and the distribution of carbon within different reservoirs readjusts. More than half of the energy related emissions come from large stationary sources such as power plants, while about a third comes from transportation. Of the six well-mixed GHGs, four (CO_2, CH_4, N_2O, and HFCs) are emitted by motor vehicles. In the United States industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management are also important sources of GHGs.

Different GHGs have different heat-trapping capacities. The concept of GWP was developed to compare the heat-trapping capacity and atmospheric lifetime of one GHG to another. The definition of a GWP for a particular GHG is the ratio of heat trapped by one unit mass of the GHG to that of one unit mass of CO_2 over a specified time period. When quantities of the different GHGs are multiplied by their GWPs, the different GHGs can be summed and compared on a CO_2e basis. For example, CH_4 has a GWP of 21, meaning each ton of CH_4 emissions would have 21 times as much impact on global warming over a 100-year time horizon as 1 ton of CO_2 emissions. Thus, on the basis of heat-trapping capability, 1 ton of CH_4 would equal 21 tons of CO_2e. The GWPs of the non-CO_2 GHGs range from 21 (for CH_4) up to 23,900 (for SF_6). Aggregating all GHGs on a CO_2e basis at the source level allows a facility to evaluate its total GHG emissions contribution based on a single metric.

B. Endangerment Finding and the LDVR

1. Endangerment Finding

On April 2, 2007, the U.S. Supreme Court found that GHGs are air pollutants under CAA section 302(g). *Massachusetts* v. *EPA,* 549 U.S. 497 (2007). As a result, the Supreme Court found that EPA was required to determine, under CAA section 202(a), whether (1) GHGs from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or (2) the science is too uncertain to make a reasoned decision. After issuing a proposal and receiving comment, on December 7, 2009, the Administrator signed two distinct findings regarding GHGs under CAA section 202(a):

- *Endangerment Finding:* The Administrator found that the current and projected atmospheric concentrations of the mix of six long-lived and directly emitted GHGs—CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6 (referred to as "well-mixed greenhouse gases" in the endangerment finding)—are reasonably anticipated to endanger the public health and welfare of current and future generations.
- *Cause or Contribute Finding:* The Administrator found that the emissions of the single air pollutant defined as the aggregate group of six well-mixed greenhouses gases from new motor vehicles and new motor vehicle engines contributes to the GHG air pollution that threatens public health and welfare.

These findings, which were published December 15, 2009 (74 FR 66496), do not themselves impose any requirements on industry or other entities. However, they were a prerequisite to finalizing the GHG standards for light-duty vehicles, described next.

2. Light-Duty Vehicle Rule

The LDVR, 75 FR 25324 (May 7, 2010), is a joint rule between EPA and the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) that establishes a national program consisting of new standards for light-duty vehicles that will reduce GHG emissions and improve fuel economy. EPA finalized the national GHG emissions standards under the Act, and NHTSA finalized Corporate Average Fuel Economy (CAFE) standards under the Energy Policy and Conservation Act, as amended. The new standards apply to new passenger cars, light-duty trucks, and medium-duty passenger vehicles, starting with model year 2012. The EPA GHG standards are projected to result in an estimated combined average emissions level of 250 grams of CO_2 per mile for model year 2016 vehicles. The standards begin with the 2012 model year, with standards increasing in stringency through model year 2016. The standards are a fleet average for each manufacturer, based on a footprint attribute curve, meaning that the actual target for a vehicle will vary depending on the size of the vehicle. Under the footprint-based standards, each manufacturer will have a GHG standard unique to its fleet, depending on the footprints of the vehicle models produced by that manufacturer. A manufacturer will have separate footprint-based standards for cars and for trucks.

The endangerment and contribution findings described previously require EPA to issue standards under section 202(a) "applicable to emission" of the air pollutant that EPA found causes or contributes to the air pollution that endangers public health and welfare. The final emissions standards satisfy this requirement for GHGs from light-duty vehicles. Under section 202(a), the Administrator has significant discretion in how to structure the standards that apply to the emission of the air pollutant at issue here, the aggregate group of six GHGs. EPA has the discretion under section 202(a) to adopt separate standards for each gas, a single

composite standard covering various gases, or any combination of these. In the LDVR, EPA finalized separate standards for N_2O and CH_4, and a CO_2 standard that provides for credits based on reductions of HFCs, as the appropriate way to issue standards applicable to emission of the single air pollutant, the aggregate group of six GHGs. EPA did not set any standards for PFCs or SF_6, as they are not emitted by motor vehicles.

C. What are the general requirements of the PSD program?

1. Overview of the PSD Program

The PSD program is a preconstruction review and permitting program applicable to new major stationary sources and major modifications at existing major stationary sources. The PSD program applies in areas that are designated "attainment" or "unclassifiable" for a National Ambient Air Quality Standard (NAAQS). The PSD program is contained in part C of title I of the CAA. The "nonattainment new source review (NSR)" program applies in areas not in attainment of a NAAQS or in the Ozone Transport Region and is implemented under the requirements of part D of title I of the CAA. Collectively, we commonly refer to these two programs as the major NSR program. The governing EPA rules are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, Appendices S and W. There is no NAAQS for CO_2 or any of the other well-mixed GHGs, nor has EPA proposed any such NAAQS; therefore, unless and until we take further such action, we do not anticipate that the nonattainment NSR program will apply to GHGs.

The applicability of PSD to a particular source must be determined in advance of construction or modification and is pollutant-specific. The primary criterion in determining PSD applicability for a proposed source is whether the source is a "major emitting facility," based on its predicted potential emissions of regulated pollutants, within the meaning of CAA section 169(1) and either constructs or undertakes a modification. EPA has implemented these requirements in its regulations, which use somewhat different terminology for determining PSD applicability, which is whether the source is a "major stationary source" or whether the proposed project is a "major modification."

a. Major Stationary Source

Under PSD, a "major stationary source" is any source belonging to a specified list of 28 source categories which emits or has the potential to emit 100 tpy or more of any pollutant subject to regulation under the CAA, or any other source type which emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tpy. We refer to these levels as the 100/250-tpy thresholds. A new source with a potential to emit (PTE) at or above the applicable "major stationary source threshold" is subject to major source NSR. These limits originate from section 169 of the CAA, which applies PSD to any "major emitting facility" and defines the term to include any source that emits or has a PTE of 100 or 250 tpy, depending on the source category. Note that the major source definition incorporates the phrase "subject to regulation," which, as described later, will begin to include GHGs on January 2, 2011, under our interpretation of that phrase discussed in the recent Interpretive Memo notice. 75 FR 17004, April 2, 2010.

b. Major Modifications

PSD also applies to existing sources that undertake a "major modification," which occurs: (1) When there is a physical change in, or change in the method of operation of, a "major stationary source;" (2) the change results in a "significant" emission increase of a pollutant subject to regulation (equal to or above the significance level that EPA has set for the pollutant in 40 CFR 52.21(b)(23)); and (3) there is a "significant net emissions increase" of a pollutant subject to regulation that is equal to or above the significance level (defined in 40 CFR 52.21(b)(23)). Significance levels, which EPA has promulgated for criteria pollutants and certain other pollutants, represent a *de minimis* contribution to air quality problems. When EPA has not set a significance level for a regulated NSR pollutant, PSD applies to an increase of the pollutant in any amount (that is, in effect, the significance level is treated as zero).

2. General Requirements for PSD

This section provides a very brief summary of the main requirements of the PSD program. One principal requirement is that a new major source or major modification must apply BACT, which is determined on a case-by-case basis taking into account, among other factors, the cost effectiveness of the control and energy and environmental impacts. EPA has developed a "top-down" approach for BACT review, which involves a decision process that includes identification of all available control technologies, elimination of technically infeasible options, ranking of remaining options by control and cost effectiveness, and then selection of BACT. Under PSD, once a source is determined to be major for any regulated NSR pollutant, a BACT review is performed for each attainment pollutant that exceeds its PSD significance level as part of new construction or for modification projects at the source, where there is a significant increase and a significant net emissions increase of such pollutant.[7]

In addition to performing BACT, the source must analyze impacts on ambient air quality to assure that no violation of any NAAQS or PSD increments will result, and must analyze impacts on soil, vegetation, and visibility. In addition, sources or modifications that would impact Class I areas (*e.g.,* national parks) may be subject to additional requirements to protect air quality related values (AQRVs) that have been identified for such areas. Under PSD, if a source's proposed project may impact a Class I area, the Federal Land Manager is notified and is responsible for evaluating a source's projected impact on the AQRVs and recommending either approval or disapproval of the source's permit application based on anticipated impacts. There are currently no NAAQS or PSD increments established for GHGs, and therefore these PSD requirements would not apply for GHGs, even when PSD is triggered for GHGs. However, if PSD is triggered for a GHG emissions source, all regulated NSR pollutants which the new source emits in significant amounts would be subject to PSD requirements. Therefore, if a facility triggers review for regulated NSR pollutants that are non-GHG pollutants for which there are established NAAQS or increments, the air quality, additional impacts, and Class I requirements would apply to those pollutants.

The permitting authority must provide notice of its preliminary decision on a source's application for a PSD permit, and must provide an opportunity for comment by the public, industry, and other interested persons. After considering and responding to comments, the permitting authority must issue a final determination on the construction permit. Usually NSR permits are issued by state or local air

[7] We note that the PSD program has historically operated in this fashion for all pollutants—when new sources or modifications are "major," PSD applies to all pollutants that are emitted in significant quantities from the source or project. This rule does not alter that for sources or modifications that are major due to their GHG emissions.

pollution control agencies, which have their own permit programs approved by EPA in their State Implementation Plans (SIPs). In some cases, EPA has delegated its authority to issue PSD permits to the state or local agency. In other areas, EPA issues the permits under its own authority.

D. What are the general requirements of the title V operating permits program?

1. Overview of Title V

The operating permit requirements under title V are intended to improve sources' compliance with other CAA requirements. The title V program is implemented through regulations promulgated by EPA, 40 CFR part 70, for programs implemented by state and local agencies and tribes, and 40 CFR part 71, for programs generally implemented by EPA.

In summary, the title V program requires major sources (defined and interpreted by EPA to include sources that emit or have a PTE of 100 tpy of any pollutant subject to regulation) and certain other sources to apply for operating permits. Under EPA's long-standing interpretation, a pollutant, such as a GHG, is "subject to regulation" when it is subject to a CAA requirement establishing actual control of emissions. Title V generally does not add new pollution control requirements, but it does require that each permit contain all pollution control requirements or "applicable requirements" required by the CAA (*e.g.,* New Source Performance Standard (NSPS), and SIP requirements, including PSD), and it requires that certain procedural requirements be followed, especially with respect to compliance with these requirements. "Applicable requirements" for title V purposes include stationary source requirements, but do not include mobile source requirements. Other procedural requirements include providing review of permits by EPA, states, and the public, and requiring permit holders to track, report, and annually certify their compliance status with respect to their permit requirements.

2. Title V Permit Requirements

This section provides a brief summary of the requirements of the title V program that are most relevant to this action. A source generally must apply for a title V permit within 1 year of first becoming subject to permitting—for new sources, this is usually within 1 year of commencing operation. The application must include, among other things, identifying information, a description of emissions and other information necessary to determine applicability of requirements and information concerning compliance with those requirements. The permitting authority uses this information to develop the source's operating permit.

Title V permits generally contain the following elements: (1) Emissions limitations and standards to assure compliance with all applicable requirements; (2) monitoring, recordkeeping, and reporting requirements, including submittal of a semiannual monitoring report and prompt reporting of deviations from permit terms; (3) fee payment; and (4) an annual certification of certification by a responsible official. The detailed requirements are set forth at 40 CFR 70.6.

In addition to the permit content requirements, there are procedural requirements that must be followed in issuing title V permits, including (1) Application completeness determination; (2) public notice and a 30-day public comment period, including an opportunity for a public hearing, on draft permits; (3) EPA and affected state review; and (4) a statement of the legal and factual basis of the draft permit. The permitting authority must take final action (issue or deny) on the permit applications within 18 months of receipt. EPA also has 45 days from receipt of a proposed permit to object to its issuance, and citizens have 60 days after that to petition EPA to object to a permit. Permits may also need to be revised or reopened if new requirements come into effect during the permit terms or if the source makes changes that conflict with, or necessitate changes to, the current permit. Permit revisions and re-openings follow procedural requirements which vary depending on the nature of the necessary change to the permit.

E. The Interpretive Memo

On December 18, 2008, EPA issued a memorandum, "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (known as the "Johnson Memo" or the "PSD Interpretive Memo," and referred to in this preamble as the "Interpretive Memo") that set forth EPA's interpretation regarding which EPA and state actions, with respect to a previously unregulated pollutant, cause that pollutant to become "subject to regulation" under the Act. Whether a pollutant is "subject to regulation" is important for the purposes of determining whether it is covered under the federal PSD and title V permitting programs. The Interpretive Memo established that a pollutant is "subject to regulation" only if it is subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant (referred to as the "actual control interpretation"). On February 17, 2009, EPA granted a petition for reconsideration on the Interpretive Memo, and announced its intent to conduct a rulemaking to allow for public comment on the issues raised in the memorandum and on related issues. EPA also clarified that the Interpretive Memo would remain in effect pending reconsideration.

On March 29, 2010, EPA signed a notice conveying its decision to continue applying (with one limited refinement) the Interpretive Memo's interpretation of "subject to regulation" ("Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs"). *See* 75 FR 17004. EPA concluded that the "actual control interpretation" is the most appropriate interpretation to apply given the policy implications. However, we refined our interpretation in one respect: we established that PSD permitting requirements apply to a newly regulated pollutant at the time a regulatory requirement to control emissions of that pollutant "takes effect" (rather than upon promulgation or the legal effective date of the regulation containing such a requirement). In addition, based on the anticipated promulgation of the LDVR, we stated that the GHG requirements of the vehicle rule would take effect on January 2, 2011, because that is the earliest date that a 2012 model year vehicle may be introduced into commerce. In other words, the compliance obligation under the LDVR does not occur until a manufacturer may introduce into commerce vehicles that are required to comply with GHG standards, which will begin with model year 2012 and will not occur before January 2, 2011. We also reiterated EPA's interpretation that the 100 tpy major source threshold for title V is triggered only by pollutants "subject to regulation" under the Act, and we defined and applied that term for title V purposes in the same way that we did for PSD purposes. That is, we stated that a pollutant is "subject to regulation" if it is subject to a CAA requirement establishing "actual control of emissions;" that a pollutant is considered "subject to regulation" for title V purposes when such a requirement "takes effect"; and, based on the anticipated promulgation of the LDVR, that the GHG requirements of the

vehicle rule would take effect on January 2, 2011.

On April 1, 2010, we finalized the LDVR as anticipated, confirming that manufacturer certification can occur no earlier than January 2, 2011. Thus, under the terms of the final notice for the Interpretive Memo, GHGs become subject to regulation on that date, and PSD and title V program requirements will also begin to apply upon that date.

IV. Summary of Final Actions

This section describes the specific actions we are taking in this final rule. It describes the overall tailoring approach for NSR and title V applicability, the steps we are taking to put it into place, and future actions that we commit to take. The next section, V, provides the legal and policy rationale for these actions. In that section, we provide a description of our rationale and response to comments for each action, presented in the same order as we describe the actions here.

A. How do you define the GHG pollutant for PSD and title V purposes?

1. GHG Pollutant Defined as the Sum-of-Six Well-Mixed GHGs

We are identifying the air pollutant for purposes of PSD and title V applicability to be the pollutant subject to regulation, which is the air pollutant for GHGs identified in EPA's LDVR, as well as EPA's endangerment and contribution findings.[8] In the LDVR, EPA set emissions standards under section 202(a) that were "applicable to emission" of a single air pollutant defined as the aggregate sum of six GHGs. The six GHGs, which are well-mixed gases in the atmosphere, are CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6. Earlier, EPA made the contribution finding for this single air pollutant.

Furthermore, as proposed, we are using an emissions threshold that allows all six constituent gases to be evaluated using a common metric—CO_2e. Thus, to determine applicability, a source's GHG emissions are calculated on a CO_2e basis by multiplying the mass emissions of any of the six GHGs that the source emits by that gas's GWP and then summing the CO_2e for each GHG emitted by the source. This sum, expressed in terms of tpy CO_2e, is then compared to the applicable CO_2e-based permitting threshold to determine whether the source is subject to PSD and title V requirements.

In addition, because we are implementing this phase-in through the term "subject to regulation," the regulatory language is structured such that the statutory mass-based thresholds (*i.e.,* for PSD, 100/250 tpy for new construction and zero tpy for modifications at a major stationary source, and for title V, 100 tpy) continue to apply. As a result, stationary source apply and stationary sources or modifications that do not meet these thresholds are not subject to permitting requirements. While technically evaluation of the mass-based thresholds is the second step in the applicability analysis, from a practical standpoint most sources are likely to treat this as an initial screen, so that if they would not trigger PSD or title V on a mass basis, they would not proceed to evaluate emissions on a CO_2e basis. We have treated evaluation of mass-based thresholds as the initial step in our descriptions. As applicable, a source would evaluate these mass-based thresholds by summing each of the six GHGs it emits on a mass basis (*i.e.,* before applying GWP). We expect that it will be very rare for a new stationary source or modification to trigger permitting based on CO_2e and not also trigger based on mass alone.

Determining permit program applicability for the GHG "air pollutant" by using the sum-of-six GHGs is based on EPA's interpretation that the PSD and title V requirements apply to each "air pollutant" that is "subject to regulation" under another provision of the CAA. As discussed previously, the final LDVR for GHGs makes it clear that the emissions standards EPA adopted are standards applicable to emission of the single air pollutant defined as the aggregate mix of these six well-mixed GHGs. *See* LDVR, May 7, 2010, 75 FR 25398–99, section III.A.2.c, and 40 CFR 86.1818–12.[9] For reasons explained in more detail in section V, we have determined it is legally required, and preferable from a policy standpoint, for EPA to use the same definition of the air pollutant for permitting purposes as that used in the rule that establishes the control requirements for the pollutant. We also believe there are implementation advantages for applying PSD and title V in this way. Thus, this rule establishes that a stationary source will use the group of six constituent gases for permitting applicability, rather than treating each gas individually. Similarly, you will include all six constituent gases because that is how the air pollutant is defined, even though motor vehicles only emit four of the six.

2. What GWP values should be used for calculating CO_2e?

We are requiring that wherever you perform an emissions calculations involving CO_2e for the purposes of determining the applicability of PSD or title V requirements, you use the GWP values codified in the EPA's mandatory GHG reporting rule.[10] This approach will assure consistency between the values required for calculations under the reporting rule and for PSD or title V. In addition, because any changes to Table A–1 of the mandatory GHG reporting rule regulatory text must go through a rulemaking, this approach will assure that the values used for the permitting programs will reflect the latest values adopted for usage by EPA after notice and comment.

B. When will PSD and title V applicability begin for GHGs and emission sources?

Overview

In this action, we establish the first two phases of our phase-in approach, which we refer to as Steps 1 and 2. We also commit to a subsequent rulemaking in which we will propose or solicit comment on establishing a further phase-in, that is, a Step 3, that would apply PSD and title V to additional sources, effective July 1, 2013, and on which we commit to take final action, as supported by the record,[11] by no later than July 1, 2012.

We also commit to undertaking an assessment of sources' and permitting authorities' progress in implementing PSD and title V for GHG sources, and to complete this assessment by 2015. We further commit to completing another round of rulemaking addressing smaller sources by April 30, 2016. Our action in that rulemaking would address permitting requirements for smaller sources, taking into account the remaining problems concerning costs to sources and burdens to permitting authorities. Finally, we determine in this action that we will apply PSD or title V requirements to sources that emit GHGs, or that conduct modifications that result in increases in emissions of GHGs, in amounts of less than 50,000 tpy CO_2e any earlier than when we take the required further action to address smaller sources by April 30, 2016.

[8] *See* 74 FR 66496, 66499, 66536–7. December 15, 2009.

[9] 40 CFR 86.1818–12(a).

[10] Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials, 74 FR 56395.

[11] Although we commit to propose or solicit comment on lower thresholds and to take final action on that proposal by July 1, 2012, we cannot, at present, commit to promulgate lower thresholds. It will not be until the Step 3 rulemaking itself that we will gather and analyze data and receive comments that determine whether we have basis for promulgating lower thresholds.

Through this process, we will implement the phase-in approach by applying PSD and title V at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point. The level and timing of the thresholds that we promulgate in future actions will be based on our assessment of the resulting costs to sources and burdens to permitting authorities, and that, in turn, will depend on such variables as our progress in developing streamlining approaches and on permitting authorities' progress in developing permitting expertise and acquiring more resources. At this time, we cannot foresee exactly when or in what manner those developments will occur. Therefore, we cannot promulgate more components of the tailoring approach beyond what we promulgate in this action. We can say only that we may continue the phase-in process with further rulemaking after 2016. Alternatively, we may make a definitive determination in one of the future rulemaking actions that, under the "absurd results" doctrine, PSD or title V applies only to certain GHG sources, and does not apply to the remaining GHG sources, and with that rulemaking, bring this tailoring process to a close.

1. What are the Step 1 thresholds, timing, and calculation methodology?

a. PSD Permitting

Step 1 of the Tailoring Rule phase-in will begin on January 2, 2011. With respect to the PSD program, GHG sources will become subject to PSD for their GHG emissions if they undergo PSD permitting anyway, either for new construction or for modification projects, based on emissions of non-GHG pollutants, in which case they will be subject to the PSD requirements for GHG if they increase GHG emissions by 75,000 tpy CO_2e or more. Under this step, only these sources, which we refer to as "anyway" PSD sources, will become subject to PSD; no sources will become major sources for PSD purposes or be treated as undertaking modifications that trigger PSD based solely on their GHG emissions. As a result, no additional PSD permitting actions will be necessary solely due to GHG emissions. However, existing or newly-constructed sources that are determined to be major sources based on non-GHG emissions are required to conduct a BACT review for their GHG emissions (from new construction) or emissions increases (from modifications), if they are subject to PSD due to their non-GHG emissions from construction or modification actions and each of the following conditions is met:

(1) The GHG emissions (or net emissions increase) due to the new construction (or modification) project, calculated as the sum of the six well-mixed GHGs on a mass basis (no GWPs applied) exceed a value of 0 tpy; and

(2) The GHG emissions (or net emissions increase) due to the new construction (or modification) project, calculated as the sum of the six well-mixed GHGs on a CO_2e basis (GWPs applied) equal or exceed a value of 75,000 tpy CO_2e.

The purpose of the first condition is to determine whether the GHG emissions or net emissions increase has resulted in an "increase in the amount" of an air pollutant as required by the Act. Because EPA has not defined a mass-based regulatory significance level for GHGs, that level, in effect, is treated as zero. *See* 40 CFR 52.21(b)(23)(ii) and 51.166(b)(23)(ii). In practice, this means any amount of new emissions or an emission increase will exceed the mass-based limit. We are not, at this time, establishing a significance level based on mass emissions, and instead we are establishing one based on CO_2e that addresses permitting burdens. The zero mass-based amount applies, but only as an initial screen to exclude sources or changes that have no mass increase of GHGs.

b. Title V Permitting

Under Step 1, only sources required to have title V permits for non-GHG pollutants (*i.e.,* "anyway" title V sources) will be required to address GHGs as part of their title V permitting. That is, no sources will become major for title V based solely on their GHG emissions. Note further, however, that the 75,000 tpy CO_2e limit does not apply to title V, so that anyway title V sources must apply any title V requirements to their GHG emissions. Sources with title V permits must address GHG requirements when they apply for, renew, or revise their permits. These requirements will include any GHG applicable requirements (*e.g.,* GHG BACT requirements from a PSD process) and associated monitoring, record-keeping and reporting. When a permit application is otherwise required, they will also need to identify GHG emissions and other information in that application to the extent required under 40 CFR 70.5(c) and 71.5(c), including information necessary to determine applicable requirements.[12]

2. What are the Step 2 thresholds, timing, and calculation methodology?

a. PSD Permitting

Step 2 will begin July 1, 2011. Under Step 2, anyway PSD sources—that is, sources already subject to PSD based on non-GHGs and covered under Step 1 previously—will remain subject to PSD. In addition, sources with the potential to emit 100,000 tpy CO_2e or more of GHG will be considered major sources for PSD permitting purposes (provided that they also emit GHGs or some other regulated NSR pollutant above the 100/250 tpy (mass based) statutory thresholds. Additionally, any physical change or change in the method of operation at a major source (including one that is only major due to GHGs) resulting in a net GHG emissions increase of 75,000 tpy CO_2e or more will be subject to PSD review and requirements with respect to GHGs (provided that it also results in an increase of GHG emissions on a mass basis).

Specifically, for purposes of determining whether a GHG emission source, resulting from either new construction or a physical or operational change at an existing source, is considered a major source under PSD, both of the following conditions must be met:

(1) The GHG emission source, which is not major for another pollutant, emits or has the potential to emit GHG in amounts that equal or exceed the following, calculated as the sum-of-six well-mixed GHGs on a mass basis (no GWPs applied):

- 100 tpy for sources in any of the 28 major emitting facility source categories listed under PSD, or
- 250 tpy for any other stationary source.

(2) The GHG emission source emits or has the potential to emit GHGs in amounts that equal or exceed 100,000 tpy CO_2e basis.

For determining whether a modification project at a major stationary source is subject to PSD review, both of the following conditions must be met:

(1) The net GHG emissions increase resulting from the project, calculated as the sum-of-six well-mixed GHGs on a mass basis (no GWPs applied) equals or exceeds 0 tpy.

(2) The net GHG emissions increase resulting from the project, calculated as the sum-of-six well-mixed GHGs on a

[12] EPA notes, however, that many sources subject to title V under Steps 1 and 2 will also be subject to the GHG mandatory reporting rule. For these sources, the emissions description requirements in the title V regulations will generally be satisfied by referencing information provided under the reporting rule.

CO_2e basis (GWPs applied) equals or exceeds 75,000 tpy CO_2e.

The purpose of the first condition in both of these determinations is to confirm whether the GHG emissions or emissions increase have exceeded, on a mass-basis, the statutory major source thresholds (where the source is not otherwise major) and mass-based statutory significance level for GHGs, which, as noted previously, is 0 tpy. *See* 40 CFR 52.21(b)(23)(ii) and 51.166(b)(23)(ii).

As an example of how the mass-based test would apply, consider a modification project that results in a 5 tpy increase of GHG emissions on a mass basis, associated with a high-GWP GHG gas (for example, SF_6, with a GWP value of 23,900), but also results in a 100 tpy reduction in CO_2 emissions (assume no other contemporaneous increases or decreases of GHG). In this example, there would be a net decrease of GHG emissions on a mass basis (5 tpy − 100 tpy = − 95 tpy). Because there is no mass-based increase of GHG, this project does not trigger PSD, despite the fact that the net GWP-adjusted emissions increase of SF_6 in this example would equal 119,500 tpy of CO_2e and the project would thus exceed 75,000 tpy CO_2e.

b. Title V Permitting

Under Step 2, "anyway" title V sources—that is, sources already subject to title V based on non-GHGs and that are covered under Step 1 previously—will continue to be subject to title V. In addition, GHG emission sources that equal or exceed the 100,000 tpy CO_2e threshold will be required to obtain a title V permit if they do not already have one. It is important to note that the requirement to obtain a title V permit will not, by itself, result in the triggering of additional substantive requirements for control of GHG. Rather, these new title V permits will simply incorporate whatever applicable CAA requirements, if any, apply to the source being permitted. Both of the following conditions need to be met in order for title V to apply under Step 2 to a GHG emission source:

(1) An existing or newly constructed source emits or has the potential to emit GHGs in amounts that equal or exceed 100 tpy calculated as the sum of the six well-mixed GHGs on a mass basis (no GWPs applied).

(2) An existing or newly constructed source emits or has the potential to emit GHGs in amounts that equal or exceed 100,000 tpy calculated as the sum of the six well-mixed GHGs on a CO_2e basis (GWPs applied).

3. What about Step 3?

In this rule, EPA establishes an enforceable commitment to complete another rulemaking no later than July 1, 2012, in which we will propose or solicit comment on a Step 3 of the phase-in and may also consider other approaches that may result in the permanent exclusion of a category of sources from PSD or title V requirements, under the *Chevron* framework, taking account of the "absurd results" doctrine.

Consistent with our phase-in approach, it is important for us to consider whether, at some point during the implementation of Step 2, it will become possible to administer GHG permitting programs for additional sources. For example, if EPA is able to promulgate measures that streamline programs to at least some extent, if permitting authorities increase their resources, or if implementation experience and more seasoned staff results in more effective use of scarce permitting resources, then we expect that we will be able to phase in the application of PSD and title V to more sources by establishing Step 3. We do not have enough information now to establish a final Step 3, particularly because there will be significant transition occurring in the GHG permitting programs during Steps 1 and 2. However, we believe that it will be possible to develop a record on which to base Step 3 sometime soon after we begin to implement Step 2.

Therefore, we plan to propose a rule in which we solicit comment on or propose lower thresholds for PSD and title V applicability, and we establish an enforceable commitment to finalize a rule in which we address those matters by July 1, 2012. In order to provide a year for permitting authorities and sources to prepare for any additional GHG permitting action in Step 3, we will establish that Step 3 would take effect on July 1, 2013. We also commit to explore, between now and the Step 3 proposal, a wide range of streamlining options. In the proposal, we will take comment on streamlining approaches we think may be viable (except to the extent we will have already issued guidance documents concerning streamlining approaches), and we will address those options in the final rule.

In addition, as part of the Step 3 action, we may solicit comment on a permanent exclusion of certain sources from PSD, title V or both, based on an "absurd results" rationale. For example, we may make a final determination that under the "absurd results" doctrine, PSD and/or title V do not apply to a set of GHG sources that, although above the statutory thresholds for those programs, are too small and relatively inconsequential in terms of GHG contribution. Another type of such exclusion for the title V program could be for sources that would otherwise be required to obtain an "empty permit," that is, for example, one that would not contain any applicable requirements because there are none that apply to the source. If we promulgate a permanent exclusion, we may conclude that by that time, we will have brought into the PSD and title V programs the full set of sources that would be consistent with congressional intent (or, if congressional intent on that point is unclear, with a reasonable policy consistent with statutory requirements) and, under those circumstances, we would find that such a rule brings the tailoring process to a close. The application of the "absurd results" rationale for a permanent exclusion is discussed in more detail in section V.B, later in this preamble.

4. What about the proposed 6-year exclusion for smaller sources?

The tailoring proposal contemplated at least a 6-year exclusion from permitting for small sources. This proposed exclusion was based on the overwhelming numbers of permitting actions at small sources and the need for time for permitting authorities to secure resources, hire and train staff, and gain experience with GHG permitting for new types of sources and technologies. It was also based on the time needed for EPA to develop, and for states to adopt, streamlining measures to reduce the permitting burden (*e.g.,* concerning PTE, presumptive BACT, or general permits). We therefore proposed such an exclusion, and proposed that it would last 6 years—5 years to complete a required study evaluating permitting burden and assessing the effect of streamlining measures or techniques in reducing this burden, plus an additional year to complete a final rulemaking that would phase in additional sources as appropriate based on the study.

We are finalizing the 6-year exclusion, and for reasons described later, are establishing that in no event will sources below 50,000 tpy CO_2e be subject to PSD or title V permitting during the 6-year period, nor will modifications be subject to PSD unless they increase emissions by 50,000 tpy CO_2e or more. The exclusion will last until we take the action described later to address smaller sources, which is required by April 30, 2016. The exclusion provides certainty that, before this date, EPA will not act to cover

sources and modifications below these thresholds, including during the required Step 3 rulemaking that will occur in 2012. In effect, this means that Step 3 will establish a major source threshold and significance level no lower than 50,000 tpy CO_2e. This does not necessarily mean we will cover sources below this level on April 30, 2016. It simply means that the provision we are adopting would assure that EPA does not cover such sources any sooner than that.

5. When and how will EPA take further action on smaller sources?

As we proposed, we are establishing an enforceable commitment to act within 5 years to complete a study projecting the administrative burdens that remain for small sources after permitting authorities have had time to secure resources, hire and train staff, and gain experience with GHG permitting for new types of sources and technologies, and after EPA has had time to develop (and states have had time to adopt) streamlining measures to reduce the permitting burden for such sources. We will use the results of this study to serve as the basis for an additional rulemaking that would take further action to address small sources. Similar to the enforceable commitment to act on Step 3, we are making an enforceable commitment to complete this rulemaking by April 30, 2016.

We cannot predict at this time what form that final action will take. It could function as a Step 4, bringing in additional sources based on, for example, streamlining actions, increased permitting authority resources, and experienced and more efficient permitting staff; and it could further indicate that we intend to follow-up with a Step 5 to bring in more sources. Alternatively, it could also function as a final step excluding certain sources permanently based on our application of the *Chevron* framework, taking account of the "absurd results" doctrine, and subjecting the remaining sources to permitting. However, whatever final action we take would explain any necessary changes to the Step 3 thresholds and would supersede the 6-year exclusion for sources and modifications below 50,000 tpy CO_2e.

C. How do state, local and tribal area programs adopt the final GHG applicability thresholds?

We are finalizing our proposed approach to change the definition of "major stationary source" in the PSD implementing regulations, and the "major source" definition in the title V implementing regulations to tailor the application of these permitting programs to GHG emissions. We are also finalizing a significance level for GHG emissions for purposes of defining a major modification under the PSD program, and add an exclusion from PSD and title V permitting for GHG emissions, until we complete a rulemaking required by April 30, 2016, for any sources that are not already subject to PSD and title V permitting and that emit less than 50,000 tpy of CO_2e.

As explained earlier, we are adopting thresholds that phase in the applicability of GHG permitting over a specified time period. In adopting regulatory changes to implement these thresholds, we follow an approach that is substantively the same as the approach proposed, but takes a different form for purposes of revisions to our PSD and title V regulations. Specifically, in this final rule, for our regulations, in conjunction with the definitions of "major stationary source" and "major modification" (for PSD) and "major source" (for title V), we are adopting a definition of the term "subject to regulation." Moreover, we are defining this term so that GHG emissions from sources above the threshold are treated as subject to regulation, and therefore the sources that emit them are subject to PSD and title V. We are not finalizing the approach we proposed, which was to revise the numerical thresholds in the definitions so that GHG sources would have a higher threshold. Although we are defining the term "subject to regulation," we recognize that from a substantive standpoint, our tailoring approach entails interpreting the definitions of "major emitting facility," "major modification," and "major source" to phase in the applicability of PSD and title V, as applicable, to GHG sources, and it makes no difference whether we interpret those definitions through a definition of the term "subject to regulation," revising the numerical thresholds, or revising other terms in those definitions.

We are adopting definitions of the term "subject to regulation" to implement the tailoring approach because that will facilitate rapid implementation of the final rules by states. Under this approach, states may not need to undertake a regulatory or legislative action before implementing the final rule. These states would be able to establish their interpretations of the term "subject to regulation" used in existing state rules before January 2, 2011, which is the date that the LDVR and permitting requirements would take effect, and thereby exempt sources below the threshold from PSD and title V as a matter of both federal and state law. We are also codifying in this definition EPA interpretations discussed in our recent action "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs" (75 FR 17704) to provide a complete picture of the meaning of this phrase as it applies to all air pollutants.

Because we are finalizing the rule in a manner that will allow most states to rapidly implement the final rule, and because our recent action on the Interpretive Memo allowed for a longer transition time than we anticipated at proposal, we are delaying final action on our proposal to issue limited approvals for SIP-approved PSD programs and part 70 operating permit programs.[13] Instead, we are requesting that states submit information to the appropriate EPA Regional Administrator by August 2, 2010 so that we may determine whether it is still necessary to finalize any of our proposed limited approvals for any SIP-approved PSD and part 70 title V state programs. In that letter, states should explain whether they will apply the meaning of the term "subject to regulation" established by EPA in this action in implementing both their PSD and part 70 title V permitting programs, and if so, whether the state intends to do so without undertaking a regulatory or legislative process. If a state must revise its statutes or regulations to implement this rule, we ask that it provide an estimate of the time to adopt final rules in its letter to the Regional Administrator. If a state chooses not to apply the approach reflected in this rule, the letter should address whether the state has alternative authority to implement the final rule's tailoring approach or some other approach that is at least as stringent, but which also addresses the expected shortfalls in personnel and funding that would exist if the state carried out permitting at thresholds lower than those in the final rules. For any state that is unable or unwilling to apply the permitting thresholds in the final rules, and otherwise is unable to demonstrate adequate personnel and funding, or alternate authority to permit GHG emissions sources consistent with the final rules, EPA will move forward with finalizing a limited approval of the state's permitting program. By the same token, if we do not receive a letter from

[13] In the alternative, we also proposed to use our 110(k)(6) error correction authority to revise SIP-approved PSD programs.

a state in response to this request by August 2, 2010, we will be obliged to move forward with finalizing a narrowing of our approval of the existing SIP or title V program.

We also ask any state that currently lacks authority to issue PSD or title V permits to any GHG emissions sources to notify the EPA Regional Administrator by letter as to whether the state intends to undertake rulemaking to revise its rules consistent with these applicability thresholds. For any state that lacks the ability to issue PSD or title V permits for GHG emissions sources consistent with the final rule, we intend to undertake a separate action to call for revisions to these programs. We also intend to move quickly to impose a Federal Implementation Plan (FIP) for PSD through 40 CFR 52.21, and use our federal title V authority to ensure that GHG sources will be permitted consistent with the final rules. Our request for information from states is discussed further in section V.C.

D. How do you treat GHGs for purposes of title V permit fees?

We are not amending the title V regulations for fees at this time, including any of the provisions specifying the presumptive minimum fee. We are also not, at this time, calling for each state, local or tribal program to submit new fee adequacy demonstrations as a result of increased GHG permitting workload during Steps 1 and 2. However, as described in section VI.D the statutory and regulatory requirement to collect fees sufficient to cover all reasonable (direct and indirect) costs required to develop and administer title V programs still applies. Therefore, we are recommending that each program review its resource needs for GHG-emitting sources and determine if the existing fee approaches will be adequate. If those approaches will not be adequate, we suggest that state, local and tribal agencies should be proactive in raising fees to cover the direct and indirect costs of the program or develop other alternative approaches to meet the shortfall. We will closely monitor approved title V programs during implementation of the first two steps of the Tailoring Rule to ensure that the added workload from incorporating GHGs into the permit program does not result in fee shortfalls that imperil operating permit program implementation and enforcement. In developing alternative approaches, we note the value of approaches that do not require a per-ton fee for GHG and therefore do not require a GHG inventory to develop. Finally, we offer to work with permitting authorities that request our assistance with developing fee approaches.

E. Other Actions and Issues

This section describes other actions we intend to take in the future related to GHG permitting in addition to the actions that we are promulgating with this final rule. This section also responds to commenters' suggestions that we undertake certain additional actions in this rule, which we decline to do.

1. Timing for Permit Streamlining Techniques

As described at proposal, we intend to develop a series of streamlining approaches as an integral part of our phase-in approach. The approaches we described at proposal included: (1) Defining PTE for various source categories, (2) establishing emission limits for various source categories that constitute presumptive BACT, (3) establishing procedures for use of general permits and permits-by-rule, (4) establishing procedures for electronic permitting, and (5) applying lean techniques to establish more efficient permitting processes. Taken as a whole, these techniques have the potential to obviate the applicability of PSD and title V requirements for some GHG-emitting sources; promote more efficient treatment of GHG-emitting sources that will already be subject to PSD and title V; and allow the expeditious expansion of PSD and title V applicability to more GHG-emitting sources while protecting those sources and the permitting authorities from undue expenses.

As a result, we fully intend to move forward expeditiously with developing streamlining approaches. However, for reasons discussed in section V.E, we do not expect to develop and implement any of these approaches before Step 2 begins. Moreover, we generally expect that each of the first three—which are the most far-reaching—will take several years to implement because we will need to undertake notice and comment rulemaking to develop them, and then the permitting authorities will need to adopt them through the appropriate state or local processes. We commit to explore a wide range of possible approaches before the Step 3 rulemaking, and, in that rulemaking, to propose those that we think may be viable once we have had time to gather and review key supporting data, and once the states and we have key implementation experience that can inform our thinking. Because the streamlining approaches generally carry uncertainty—as demonstrated by comments we received raising legal and policy concerns, as discussed later, that we will have to address—we cannot commit with this action to adopt any streamlining actions in particular, nor to adopting them on any particular schedule. However, we intend to pursue streamlining options as expeditiously as possible, beginning immediately and proceeding throughout the phase-in period, and we encourage permitting authorities to do the same.

2. Guidance for BACT Determinations

Through this final rule we are not amending our regulations or issuing guidance on BACT for GHGs. As described in our proposal, we recognize the need to develop and issue technical and policy guidance for permitting of GHGs, and we plan to accomplish it through a separate effort that will involve stakeholder input. This effort is already underway; in addition to comments EPA received on the proposed Tailoring Rule related to GHG BACT guidance and information needs, EPA received a suite of recommendations from the Clean Air Act Advisory Committee (CAAAC) to which EPA is actively responding. This includes technical guidance and database tools that EPA anticipates issuing by June 2010, and policy guidance that will be issued by the end of 2010. Thus, this important information will be available to support permitting agencies in their BACT determinations at the time that the GHGs become a regulated NSR pollutant, once the LDVR takes effect in January 2011. EPA is confident that these measures will help support a smooth transition to permitting emissions of GHGs.

3. Requests for Higher Category-Specific Thresholds and Exemptions From Applicability

EPA has decided not to provide exemptions from applicability determinations (major source and major modification) under title V and PSD for certain GHG emission sources, emission activities, or types of emissions at this time. Commenters requested several applicability exemptions with respect to GHGs from, for example, agricultural sources, residential sources, small businesses, energy-intensive industrial processes (*e.g.,* aluminum, steel, cement, glass, and pulp and paper manufacturers), lime production, semiconductor production, poultry production, solid waste landfills, biomass combustion/biogenic emissions, fugitive emissions, and pollution control projects. For reasons explained in section V.E, we have

decided to address the need for tailoring through a uniform threshold-based approach, rather than through a collection of various specific exclusions.

4. Transitional Issues Including Requests for Grandfathering

For reasons explained in section V.E, EPA has determined that transitional issues for pending applications and permitted sources are adequately addressed by existing requirements and the amount of lead time provided before permitting requirements apply to GHGs under this rule and the March 29, 2010 final action regarding the Interpretive memo. This rule does not contain any additional exemptions or grandfathering provisions addressing the transition to PSD and title V permitting for GHGs.

We are not promulgating an exemption for PSD permit applications that are pending when Step 1 of the permitting phase-in begins for those sources that would otherwise need to obtain a PSD permit based on emissions of pollutants other than GHGs. Any PSD permits issued to such Step 1 sources on or after January 2, 2011 will need to address GHGs. This action makes no change to the position we expressed on this issue on April 2, 2010.

Final PSD permits issued before January 2, 2011 need not be reopened or amended to incorporate requirements for GHGs that take effect after the permit is issued. A source that is authorized to construct under a PSD permit but has not yet begun actual construction on January 2, 2011 may begin actual construction after that date without having to amend the previously-issued PSD permit to incorporate GHG requirements, provided the permit has not expired.

Sources that are not subject to PSD permitting requirements until Step 2 need not obtain a PSD permit addressing GHGs in order to continue any actual construction that begins before July 1, 2011, when such a source was not a major stationary source required to obtain a PSD permit. However, Step 2 sources that begin actual construction in Step 2 may do so only after obtaining a PSD permit.

The title V permitting regulations already include a robust set of provisions to address the incorporation of new applicable requirements and other transitional considerations. A title V source applying for the first time must submit its permit application within 12 months after the source becomes subject to the operating permit program or an earlier time at the discretion of the permitting authority. Where a source is required to obtain a PSD permit, the source must apply for a title V permit or permit revision within 12 months of commencing operation or on or before such earlier date as the permitting authority may establish. Where additional applicable requirements become applicable to a source after it submits its permit application, but prior to release of a draft permit, the source is obligated to supplement its application. Permitting authorities may also ask for additional information during the processing of an application. In addition, where a source that already has a title V permit becomes subject to additional applicable requirements, the permitting authority is required to reopen the permit to add those applicable requirements if the permit term has 3 or more years remaining and the applicable requirements will be in effect prior to the date the permit is due to expire.

V. What Is the Legal and Policy Rationale for the Final Actions?

In this section, we describe the legal and policy rationale for our action, including our rationale for the following: (1) Our approach to calculating GHG emissions for PSD and title V applicability purposes, (2) our approach to establishing the thresholds and timing of PSD and title V applicability to GHG emissions sources; (3) how state, local, and tribal area programs adopt the final GHG applicability thresholds; (4) treatment of GHGs for title V permit fees; (5) future activities, including streamlining actions. We present the rationale description in the following five subsections, corresponding to the basic presentation of the approach in section IV.

A. Rationale for Our Approach to Calculating GHG Emissions for PSD and Title V Applicability Purposes

1. Grouping of GHGs Into a Single Pollutant

In this section, we explain our treatment of the air pollutant at issue for purposes of PSD and title V, such that sources that emit that pollutant in the requisite quantities become subject to PSD and/or title V requirements. We explain our rationale for treating the GHG air pollutant as a combined group of six GHGs instead of six separate air pollutants defined by each individual GHG, and our rationale for including all six of the GHGs in that group. We also define the GHG metric to use for comparison to the applicability thresholds.

We proposed to identify the air pollutant as the aggregate group of the six GHGs that comprise the GHG pollutant, and to use a GHG metric for the applicability thresholds based on CO_2e. The summed CO_2e emissions would then be compared to the applicable permitting threshold to determine whether the source is subject to PSD and title V requirements. Historically, the PSD and title V regulatory provisions do not, in the first instance, define the "air pollutant" to which they apply, but rather rely for the definition of the pollutant on a cross-reference to the regulatory provision under another part of the Act that establishes the emission standards or limits for that pollutant that in turn causes the pollutant to be subject to regulation under PSD and title V permitting. As an example, the pollutant "total reduced sulfur" (TRS) is a pollutant comprised of the sum of multiple compounds that was originally defined under the NSPS, subpart BB, Standards of Performance for Kraft Pulp Mills, which then caused it to be subject to regulation under the PSD program. The actual compounds that define the pollutant TRS are identified in the NSPS. The PSD program regulations did not introduce its own independent definition of TRS, but instead relied on the definition as contained in the Kraft Pulp Mills NSPS.

However, at the time of our proposal, the endangerment and cause or contribute findings had not been completed and the LDVR for GHGs had not been finalized. Thus, there was no final agency action defining the "air pollutant" consisting of GHGs to be considered "subject to regulation." Absent a definition of "greenhouse gases" under another regulatory provision that we could cross-reference, we proposed to define "greenhouse gases" for permitting purposes as "the single air pollutant that is comprised of the group of six GHGs, as proposed in the [CAA] section 202(a) endangerment and contribution findings." 74 FR 55329, col. 1. The six well-mixed GHGs identified in the proposed contribution finding were: CO_2, CH_4, N_2O, SF_6, HFCs, and PFCs.

In the proposal, we further recognized that the LDVR for GHGs, as it was proposed, would result in reductions of only four of the gases, not all six, because only four are emitted by vehicles. However, we concluded that if the LDVR were finalized as proposed, then the air pollutant for purposes of PSD and title V applicability would be a single air pollutant that is the aggregate mix of the group of six GHGs because—

[t]hese six GHGs as a class comprise the air pollutant that is the subject of the

endangerment finding and companion contribution finding and constitute the air pollutant that is regulated by the light-duty vehicle rule through measures that address the components of that air pollutant that are emitted from the mobile sources. Thus, although the CAA section 202(a) proposal establishes controls only with respect to four GHGs, as a legal matter, the proposal covers the entire set of GHGs that as a class are the single "air pollutant" in the proposed endangerment and contribution findings.

74 FR 55329 col. 1.

We also solicited comment on whether we should identify the GHG metric in a different way, such as addressing each GHG constituent compound individually or including (whether individually or as a group) only those four GHG constituent compounds for which reductions would occur through the emission standards or limits proposed in the LDVR.

A minority of the comments on our proposal addressed this issue. Some commenters supported combining the individual GHGs as one pollutant for purposes of determining permitting applicability, and stated that it is not uncommon for EPA to recognize "collective" air pollutants comprised of many individual compounds based upon shared threats to health and welfare, including such EPA-created group pollutants as sulfur oxides, nitrogen oxides, volatile organic compounds (VOCs), and particulate matter (PM).

On the other hand, a significant number of commenters also raised concerns about grouping the individual GHGs into one metric. Some of these commenters argued that grouping GHGs is not appropriate because GHGs are not like other air pollutants that are comprised of numerous substances of concern (*e.g.,* VOCs and PM), individual GHGs do not interact or combine to create a pollutant of concern, and EPA has not established a "GHG" NAAQS that supports the definition of the pollutant as a group. Some were concerned that regulating the GHGs as a group would increase the likelihood that a source will trigger permitting requirements, adding that this is unnecessary and would conflict with the "absurd results" and "administrative necessity" doctrines because it would lead to larger numbers of sources becoming subject to permitting. Some commenters opposing grouping suggested that we should explore regulating each of the GHG pollutants on an individual mass basis rather than collectively because in their view, it is reasonable and feasible to regulate and control emissions of each of the listed pollutants, other than CO_2, at the 100/250 tpy thresholds, or less if deemed necessary, in accordance with the established mechanisms of the Act and doing so would lead to a better environmental result. Finally, some commenters argued that disaggregating the pollutants would also allow for more appropriate technology review.

After considering these comments, and taking into account other related actions that have occurred since proposal, we have determined that PSD and title V permitting program requirements will apply, as proposed, to the "single air pollutant that is comprised of the group of six GHGs." 74 FR 55329, col. 1. We believe that this approach is both compelled by the statute and reflects the preferable policy approach.

As more fully discussed elsewhere in this rulemaking, the PSD requirements apply to a "major emitting facility" that undertakes construction or "modification." CAA sections 165(a), 169 (2)(C). The term "major emitting facility" is defined as, in general, a source that emits 100 or 250 tons of "any air pollutant," CAA section 169(1), and, similarly, the term "modification" is defined as a physical or operational change that results in the increased or new emissions of "any air pollutant." CAA sections 169(2)(C), 111(a)(4). Through regulation, we have interpreted the term "any air pollutant," as found in both the terms "major emitting facility" and "modification," more narrowly to mean any "regulated NSR pollutant," and we further define this term to include any pollutant that is "subject to regulation under the Act." 40 CFR 52.21(b)(50)(iv), 52.21.(b)(2).[14]

Similarly, as discussed elsewhere, the title V requirements apply to a "major source," which is defined, in general, as any source that emits at least 100 tpy of "any air pollutant." CAA sections 502(a), 501(2)(B), 302(j). EPA has interpreted the term "any air pollutant" narrowly so that applies only with respect to air pollutants that are subject to regulation under the CAA. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, "Definition of Regulated Air Pollutant for Purposes of Title V" (Apr. 26, 1993).

Based on these provisions, the key issue for present purposes in determining whether a source is subject to PSD (because it qualifies as a major emitting facility that undertakes construction or modification) or title V is whether the pollutant or pollutants that the source emits comprise the "air pollutant" that is "subject to regulation" under the Act.

The phrase "subject to regulation under the Act," by its terms, identifies the air pollutant that is subject to PSD and title V as the same air pollutant that is identified in the regulatory action under another provision of the Act. The term is a simple cross-reference. It carries no implication that EPA, in identifying the pollutant to which PSD or title V apply, may redefine the pollutant that is regulated elsewhere in the Act. Whatever the pollutant is that is regulated elsewhere, it is that pollutant to which PSD and title V apply.

Since the time of our proposal, we have finalized both the contribution finding and the LDVR for GHGs. The final LDVR for GHGs specifies, in the rule's applicability provisions, the air pollutant subject to control as the aggregate group of the six GHGs, including CO_2, CH_4, N_2O, SF_6, HFCs, and PFCs.[15] Because it is this pollutant that is regulated under the LDVR, it is this pollutant to which PSD and title V apply. Specifically, the applicability provision in the LDVR provides a clear reference to the definition of the single pollutant comprised of the aggregate group of the six well-mixed GHGs, which makes clear PSD and title V applicability depends on the same sum-of-six GHG construct. We must follow this construct of the aggregate group of the six gases and do not have discretion to interpret the GHG "air pollutant" differently for the purposes of PSD or title V.

This construct of the pollutant as the aggregate group of the six gases is also consistent with the definition of the air pollutant in the final contribution finding for GHGs [*see* 74 FR 66496, 66499, 66536–7 (December 15, 2009)]. There, the Administrator defined the air pollutant as the "aggregate group of the same six * * * greenhouse gases," (74 FR 66536), and these well-mixed GHGs are defined to include CO_2, CH_4, N_2O, SF_6, HFCs, and PFCs.

Moreover, even if we had discretion to identify the GHGs air pollutant differently in the permitting programs than in the LDVR, we believe it is reasonable to identify the GHGs air pollutant through the sum-of-six construct for the same reasons why we adopted that definition in the contribution finding and for additional reasons noted below specific to the permit programs. The term "air

[14] By the same token, CAA section 165(a)(4) requires that a source subject to PSD impose best available control technology for "each pollutant subject to regulation under this chapter" that the source emits.

[15] The applicability provision of the LDVR is found in 40 CFR 86.1818–12(a).

pollutant" is defined under CAA section 302(g) as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air." Under this definition, EPA has broad discretion to identify an air pollutant, including, as appropriate, treating a combination of air pollutant agents as a single air pollutant. Here, we think that the six well-mixed gases are appropriately combined into a single air pollutant because, as noted in the contribution findings, they share several important attributes: Each of the six gases:

- Is directly emitted (and is not formed by secondary processes in the atmosphere);
- Is long-lived in the atmosphere after it is emitted;
- Is sufficiently long-lived that it becomes "well-mixed," which means that its concentration is essentially uniform in the atmosphere (as opposed to having significant local/regional variation); and
- Has well understood atmospheric properties (*e.g.,* radiative forcing).

See 74 FR 66516–66518.

In addition, treating the six GHGs as a single air pollutant is consistent with the actions of international scientific bodies. For example, the Intergovernmental Panel on Climate Change (IPCC) considers in various reports how the six gases drive human-induced climate change and how that affects health, society, and the environment. Similarly, the United Nations Framework Convention on Climate Change (UNFCCC) requires reporting of these six gases and the commitments under the UNFCCC and Kyoto Protocol are based on the combined emissions of these six gases. Finally, as discussed later, it is standard practice to compute the "CO_2 equivalency" of aggregate emissions using GWP.

We disagree with commenters who argued that grouping all six GHGs is not appropriate because GHGs are not like other air pollutants that are comprised of numerous substances of concern (*e.g.,* VOCs and PM). First, as noted previously, we are following the approach to a single air pollutant comprised of the aggregate of the six GHGs initially adopted in the contribution finding and followed in the LDVR. Many of these same comments have already been addressed in the contribution finding and Response to Comment (RTC) document for that action, and those responses apply equally here.

In addition to the reasons described in the endangerment and contribution findings, there are CAA permitting programmatic and policy advantages to using the sum-of-six construct for the GHG air pollutant for PSD and title V applicability purposes. We believe now, as we did at proposal, that the benefits in using the cumulative group of GHGs outweigh any implementation advantages to using an individual-GHG-based metric. The advantages to sum-of-six definition include that it may: (1) Allow significantly more flexibility to sources for designing and implementing control strategies that maximize reductions across multiple GHGs and would also likely align better with possible future regulations that allow for such flexibility; (2) more effectively support possible future offsets or trading mechanisms that involve different source categories and different compositions of GHG emissions; and (3) could better accommodate and harmonize with future regulations because it establishes one class of pollutants that includes individual components that may, in turn, become subject to specific emission standards under future regulatory efforts.

We disagree with commenters who believe that aggregating the GHGs under one GHG metric for permitting applicability purposes would lead to an excessive amount of source permitting activity. This is because the phase-in approach addresses overwhelming permitting burdens associated with permitting of GHGs. It does so by designing our applicability thresholds to allow for a manageable amount of new permitting actions based on the emissions from sources using the sum-of-six metric. If we based applicability on individual gases, (assuming, again, that we had authority to deviate from the definition of "air pollutant" as used in the LDVR), we would still need to determine what level of permitting is manageable and appropriate based on thresholds on an individual gas basis and would expect that the final rule would result in the same levels of remaining burden. Accordingly, unless the permitting program were being implemented at the statutory thresholds, the effect of a decision to aggregate or not aggregate would not reduce workload; rather, it would simply shift work from permitting facilities that trigger based on combined GHGs to those that trigger based on individual GHGs. Although we acknowledge that this may affect applicability for a particular source, we disagree with the comment that doing so would conflict with our conclusions based on the "absurd results" or "administrative necessity" doctrines. By using a consolidated and weighted measurement, we are able to direct the limited administrative resources to those new sources and modifications with the greatest impact on GHG emissions.

We also believe that the additional flexibility resulting from the sum-of-six GHG metric will provide substantially more opportunities for sources to address emission increases of GHGs than they would have had under an individual gas based metric, and, thereby, possibly reduce their permitting burden through multi-gas mitigation strategies. We disagree with the comment that isolating BACT review on sources that emit a single GHG necessarily leads to better environmental results than it would for sources that undergo a combined review for all six gases. To the contrary, given that Congress built in considerations of energy, environmental, and economic impacts into the BACT requirement, we think that allowing consideration of those factors across six gases will likely result in decisions that more appropriately account for those impacts at the source.

2. Identifying Which GHGs Are Included in the Group

As discussed previously, we proposed to include the combination of six well-mixed GHGs as the air pollutant that triggers PSD and title V applicability: CO_2, CH_4, N_2O, SF_6, HFCs, and PFCs. Some commenters supported including all six. They cite the proposed contribution findings that identify the pollutant through the sum-of-six construct, and they emphasize that EPA, in order to protect the public, has to control all the GHGs it has regulated and reduce the overall impact of the mix of six GHGs.

However, a substantial number of commenters, mainly from industry sectors who also disagree with grouping the GHGs together, contend that only the constituent gases that are actually subject to controls under the LDVR should be included in determining applicability under the Tailoring Rule. Some of these commenters believe that only the three compounds (CO_2, CH_4, N_2O) for which the LDVR contains emissions standards or caps should be considered in the GHG metric for permitting, while others would also add HFCs (which are included in a credit flexibility arrangement under the LDVR) for a total of four GHGs. These commenters argued that PSD is not triggered for all six GHGs by the LDVR because under the proposed PSD

interpretation in the Interpretive Memo, actual emission controls under the Act are required to trigger PSD obligations for a given pollutant. They also argue that including all six would conflict with EPA's rationale for the Tailoring Rule by leading to larger numbers of sources subject to permitting, thereby increasing the harm that EPA says it wants to avoid. They further assert that the EPA cannot exercise its discretion to widen the scope of PSD and title V applicability to six GHGs when it is relying on the judicial doctrines of "absurd results" and "administrative necessity" to narrow PSD and title V applicability. They explain that in their view, those doctrines apply only when EPA has taken all steps possible to narrow the scope of PSD and title V and thereby avoid the administrative problems that force it to rely on those doctrines.

There were a few comments on whether to include specific gases as part of the sum-of-six grouping. Several commenters representing sectors that have significant SF_6 usage specifically argue that SF_6 should not be included as a GHG, at least at this time, because there are no known SF_6 controls, it is not clear how PTE would be calculated from such facilities, and EPA has not addressed the economic burden that regulation of these facilities would create. A solid waste industry commenter asserts that the Tailoring Rule should confirm that CH_4 and N_2O will not be regulated under PSD or title V because these pollutants are only emitted in miniscule amounts from automobiles.

We disagree with commenters who suggest that because the LDVR actually reduces only four of the six GHGs, EPA may apply PSD and title V to only those four GHGs. It is true that the LDVR standard for the single air pollutant that is comprised of the aggregate of six GHGs consists of individual standards for only four particular constituents of the single air pollutant—which are emissions limits or caps for three GHGs (CO_2, CH_4, and N_2O) and an emission crediting option for one GHG (HFCs)—but this does not dictate that only those four compounds are subject to regulation for permitting purposes. Although the LDVR results in reductions only with respect to four specific GHGs, as a legal matter the LDVR standard covers the entire set of GHGs that as a class are the single "air pollutant" in the contribution finding. Similar to our rationale for addressing the group of six GHGs as one pollutant for PSD and title V applicability purposes, we must adhere to the definition of applicability, cited previously, in the final LDVR for GHGs and include CO_2, CH_4, N_2O, SF_6, HFCs, and PFCs. We do not have discretion to select only a subset of these gases in defining our GHG threshold metric for the permitting applicability purposes. *See* LDVR, May 7, 2010, 75 FR 25398–99, section III.A.2.c. (discussing EPA's exercise of discretion under section 202(a) in setting emissions standards applicable to emission of the single air pollutant).

For the same reasons, we disagree that this approach is inconsistent with the Agency's final action in "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program." While it is the case that only four constituent gases are reduced by the LDVR, the "air pollutant" that is controlled, and thus "subject to regulation," is the group of six, and it is this "air pollutant" to which PSD and title V apply.

We also disagree with commenters who suggested that including all six GHGs in determining permitting applicability would conflict with our "absurd results" and "administrative necessity" rationale for the phase-in periods and applicability thresholds for GHGs. Even if we did have discretion to identify the air pollutant for PSD and title V purposes as consisting of only four of the six well-mixed GHGs, we do not believe that doing so would have any meaningful impact on the administrative burdens that are at the heart of our reliance on the "absurd results" and "administrative necessity" doctrines. The number of additional permitting actions and amount of additional permitting burden resulting from including all six GHGs, rather than four, is minimal. This is because the administrative burden of GHG permitting is dominated by CO_2 and CH_4 emission sources. For example, with a major source threshold set at 100,000 tpy CO_2e, the combined population of sources that would be major for N_2O, HFCs, PFCs, and SF_6 accounts for fewer than two percent of the GHG sources that would remain covered.

For similar reasons, we disagree with commenters who specifically suggest SF_6 emissions should not be included in the applicability metric for GHGs. As we have stated earlier in this section, our selection of the GHG metric is driven by the definition of the "air pollutant" as defined in the LDVR, and in consideration of the final GHG endangerment finding. SF_6 is specifically included as one of the "well-mixed greenhouse gases" in the definition of air pollutant in the contribution finding, and is included in the definition of the air pollutant in the LDVR for which that rule is applicable. We do not believe we have the discretion to define the "air pollutant" differently for PSD and title V applicability purposes than the definition of the "air pollutant" that is regulated elsewhere. In any event, including SF_6 emissions based on the thresholds finalized in this rulemaking does not add an excessive administrative burden for permitting authorities. Based on our threshold evaluation study, we estimate that less than 40 sources of SF_6 nationwide would exceed the 100,000 tpy CO_2e threshold. Furthermore, SF_6 is a high GWP gas and, as discussed elsewhere, we have included a mass-based trigger for high GWP gases that will likely have the effect of further reducing this count.

For the same reasons, we disagree with the commenters who suggest we include black carbon and other short-lived climate forcers to the list of GHGs, as well as commenters asking for an exclusion of CH_4 and N_2O. The definition of the air pollutant, as cited in the LDVR, includes CH_4 and N_2O and does not include black carbon or other short-lived gases.

3. Use of GWP vs. Mass-Based GHG Thresholds

For the reasons discussed previously, we are determining permit program applicability based on the sum-of-six well-mixed gases that comprise the GHG air pollutant. This section discusses our use of both the CO_2e metric and mass emissions of the GHGs for applicability purposes.

Under our proposal, a source's emissions of all six GHGs would be combined into a single metric by multiplying the mass of each individual GHG (in tpy) by its GWP value, and summing these products to determine the total emissions of the GHG pollutant in tpy CO_2e. We received comments on this aspect of the proposed metric. Several commenters explicitly support the use of GWP and the CO_2e metric for GHG emissions. These commenters believe EPA has the authority to select an appropriate metric to measure GHGs in the PSD program, and policy considerations support the choice of GWP. Some of them note that GWP is a widely-used metric which employs internationally-recognized conversion factors to compare GHGs based upon their climate properties, and some add that states and local areas that have climate action plans for GHG reductions use CO_2e. Some of these commenters believe this metric will ensure a

standard measure across all permitting agencies and will lead to a more effective system for permitting authorities and create more opportunities to reduce emissions over the full class of GHGs, rather than focusing on reducing individual GHGs.

On the other hand, some commenters oppose the use of GWP and CO_2e, believing that thresholds should be based on individual mass-based emissions for each GHG. Some of these commenters felt that EPA has no discretion to ignore the metric for regulation established by Congress for PSD in section 169 of the Act. Some commenters were also concerned that the use of CO_2e will complicate the implementation of BACT because sources that trigger PSD will be required to install BACT for each regulated pollutant, not for CO_2e. As a result, a source that exceeds the threshold primarily due to its CO_2 emissions would be forced to install BACT for all other individual GHGs, regardless of how minor those other emissions may be. Finally, a commenter was concerned that use of GWP would complicate implementation because GWP values can sometimes change.

In our proposal preamble discussion of GHG metric, EPA also raised the possibility of including a limitation in the metric to address the prospect (expected to occur only rarely) that high-GWP gases could be emitted in quantities less than statutory thresholds for PSD and title V but nevertheless exceed the proposed thresholds in terms of CO_2e. Most commenters on this subject support a dual threshold under which a source would be subject to title V or PSD only if its GHG emissions exceeded both the statutory thresholds on an actual tonnage basis and the tailored thresholds on a CO_2e basis. Commenters supporting this approach felt that it would be unlawful to apply PSD when GHGs are below the statutory thresholds, or when there is not a net emissions increase. Others added that the complexity of accounting for emissions according to both mass and GWP should be manageable and is not a reason to ignore the role of mass-based emission rates in determining the applicability of PSD requirements. Additionally, one commenter observed that a dual threshold is consistent with phasing in the Tailoring Rule and is an effective way to address the current uncertainty surrounding how to measure high-GWP gases such as SF_6. In contrast, a few commenters stated they do not support a dual threshold, primarily on the grounds that there is no benefit to the added complexity.

After considering these comments, we have decided to adopt applicability thresholds in the final rule based on a CO_2e metric for the sum-of-six well-mixed gases, and also to adopt an additional mass-based threshold for the sum-of-six gases as discussed in the proposal. First, as discussed in the previous section, we have explained why the appropriate pollutant for PSD purposes is the single pollutant GHG, which is composed of the six well-mixed gases. Regarding the CO_2e metric, we continue to believe there are a number of advantages, as laid out in the proposal, to a CO_2e measure that would not be available if we used only a mass-based metric. These include: (1) A CO_2e metric, by incorporating the GWP values, best addresses the relevant environmental endpoint, which is radiative forcing of the GHGs emitted; (2) when combined with a sum-of-six gases approach, the CO_2e metric best allows for consideration of their combined effects when sources emit any one or combination of the six well-mixed GHGs; (3) a cumulative CO_2e metric is consistent with the metric used in the mandatory GHG reporting rule and other related rules and guidelines; and (4) a CO_2e metric allows more flexibility for designing and implementing control strategies that maximize reductions across multiple GHGs. We recognize the tension between the mass-based metric in the statute and the CO_2e-based metric we are adopting in this rule, but as discussed later, we will address this by also retaining the mass-based metric. Moreover, given our need to tailor our approach to covering sources of GHGs, we believe that the considerations driving our choice to also use a CO_2e-based metric are appropriate for defining the phase-in and allow for permitting resources to be directed at those sources and modifications that have the greatest impact on radiative forcing of the GHGs emitted.

We recognize the concern of commenters who stated that we cannot ignore the statutory thresholds based on the mass-based emissions of an air pollutant as described under CAA section 169(1). As we mentioned in the proposal, because both the PSD and title V statutory thresholds are expressed on a mass basis (*i.e.,* tons of a pollutant with no weighting values applied) we were concerned from a legal standpoint that the metric proposed (CO_2e) could have the effect of subjecting to PSD or title V requirements a source whose emissions fall below the statutory threshold limits on a strictly mass basis, but whose CO_2e-based emissions exceed the CO_2e thresholds we establish under the Tailoring Rule. As an example, in rare instances it is possible that a source may emit only a non-CO_2 GHG in very small amounts, on a mass basis, but one that carries a very large GWP. In this case, it is possible that the source may emit the GHG in amounts that fall below the PSD and/or title V statutory applicability threshold (100 or 250 tpy, as applicable) on a mass basis, but exceed the 100,000 CO_2e PSD and title V applicability thresholds for Step 2 finalized in this action. Under these circumstances, without a mass-based threshold, the source would trigger PSD and title V for its CO_2e emissions even though its GHG mass emissions would not, in fact, exceed the statutory triggers.

Upon review of the comments pertaining to this issue and further analysis of the legal and programmatic implications, we are adopting a two-part applicability process, for both major source applicability determinations for GHGs under PSD and title V and for determining if a net increase has occurred in PSD applicability determinations for modifications. As explained in the RTC document, we accomplish this two-step applicability approach by continuing to rely on the existing mass-based applicability provisions in the current regulations, and by including new regulatory provisions that add a definition of "subject to regulation" that in turn includes the phase-in thresholds. Similarly, for PSD modification reviews and associated netting analyses, the same two-step process must be used. Our summary in section IV.A described how we expect this provision to be implemented in practice.

We acknowledge that the possibility of changing GWP values is a downside to the use of CO_2e for the GHG metric, and we address this comment in the next section, where we discuss our plan to codify GWP values. By codifying GWP, any changes will be manageable, and, in our judgment, will not outweigh the benefits of a CO_2e-based approach. We also acknowledge that a CO_2e-based approach may appear to complicate the BACT review and implementation process. However, we disagree with the commenter's ultimate conclusion that BACT will be required for each constituent gas rather than for the regulated pollutant, which is defined as the combination of the six well-mixed GHGs. To the contrary, we believe that, in combination with the sum-of-six gases approach described above, the use of the CO_2e metric will enable the implementation of flexible approaches to design and implement mitigation and control strategies that look across all six

of the constituent gases comprising the air pollutant (*e.g.,* flexibility to account for the benefits of certain CH_4 control options, even though those options may increase CO_2). Moreover, we believe that the CO_2e metric is the best way to achieve this goal because it allows for tradeoffs among the constituent gases to be evaluated using a common currency.

4. Determining What GWP Values Are To Be Used

At proposal, we proposed to link the calculation of CO_2e for GHGs to GWP values in EPA's "Inventory of U.S. Greenhouse Gas Emissions and Sinks" (GHG Inventory). *See, e.g.,* proposed 40 CFR 51.166(b)(58). Numerous commenters expressed concerns about this proposal on various grounds, including the following:

- The EPA should follow the proper notice-and-comment procedures and the requirements of the Information Quality Act for the relevant technical underpinnings of the proposal. The EPA relies upon the GWPs of the IPCC without providing the supporting data for review, and it is inappropriate to use this as a basis for this rule without first making all the raw data available for public inspection and comment.
- The EPA cannot tie the definition of GWP to the GHG Inventory because it is a non-regulatory document that may be changed without notice-and-comment rulemaking. Before EPA uses a new GWP, that GWP must be subject to notice and comment to comply with the requirements of CAA section 307 and the Administrative Procedure Act (APA).
- An annual update of GWP would create a moving target for sources conducting applicability determinations and assessing compliance with minor NSR and PSD emission limits. The EPA needs to ensure that applicability and compliance with limits continue to be based on the GWP that existed when the determination was made or the limit was established.
- The EPA should freeze the GWP at the current values by incorporating those values into the regulation. The EPA could still revise the "NSR" GWP, but would have to revise the regulation to do so.

Commenters added that it is important to ensure that all permitting agencies are using the same calculations for the determination of CO_2e for GHGs.

We agree with commenters who suggested we should codify, either in the Tailoring Rule or through reference to codified values in another rulemaking, the GWP values to be used in permitting analyses. We agree that this approach provides certainty as to which GWP values need to be used by permitting authorities and allows sources to plan appropriately for possible changes in the GWP values. As mentioned in the comments, recommended GWP values from IPCC can change over time. While this is infrequent—the last such changes were in 2007—when it occurs, there are generally significant lag times in universal adoption of new values because of inconsistencies that could be created in national inventories and emission reporting mechanisms. In a regulatory setting, such as in the permitting programs, this could potentially create significant implementation issues, such as when a GWP change occurs while a permit action is in progress.[16] EPA also recognized similar potential implementation issues in developing its final mandatory GHG reporting rule, and codified in the regulatory text for that rule the GWP values to be used in reporting GHGs as part of that final rulemaking.

For these reasons, we have decided to follow the approach in the mandatory GHG reporting rule and require that for PSD and title V permitting requirements, wherever emissions calculations are performed, that permitting authorities and sources use GWP values that are codified in EPA rules. We will establish the GWP values for PSD and title V rules based on a cross-reference to the values that are codified in the EPA's mandatory GHG reporting rule. 74 FR 56395, Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials. Any changes to Table A–1 of the mandatory GHG reporting rule regulatory text must go through an appropriate regulatory process. In this manner, the values used for the permitting programs will reflect the latest values adopted for usage by EPA after a regulatory process and will be consistent with those values used in the EPA's mandatory GHG reporting rule. Furthermore, the lead time for adopting changes to that rule will provide a transition time to address implementation concerns raised by commenters.

5. Use of Short Tons vs. Metric Tons

We proposed that the GHG metric would be expressed in terms of English (or short) tons, rather than metric (or long) tons. A few commenters support using short tons for this purpose. Others prefer the use of metric tons, and most of them note that the mandatory GHG reporting rule is based on metric tons and believe that the Tailoring Rule should be consistent with that rule. These commenters believe that using different units in the two rules would be confusing and could result in sources that are not subject to the mandatory GHG reporting rule becoming subject to PSD. Some of the commenters add that various "cap and trade" legislative proposals also quantify GHGs in metric tons. A few other commenters recommend that EPA harmonize the applicability thresholds established under the Tailoring Rule and the mandatory GHG reporting rule without expressing a preference for short or metric tons.

We are finalizing our proposal to use short tons because short tons are the standard unit of measure for both the PSD and title V permitting programs and the basis for the threshold evaluation to support this rulemaking. Calculation inputs for PSD are typically prepared in English units (*e.g.,* pounds of fuel, British thermal units (Btu), etc.) which is the common convention for all PSD analyses and the units of the statutory thresholds under the Act.

It is true that the GHG reporting rule uses metric tons, but this does not create an inconsistency between permitting programs and the reporting rule because the two rules already use different applicability approaches. Although we originally proposed 25,000 tpy as the major source level for permitting programs, which was similar to the threshold in the reporting rule, we decided to adopt substantially higher thresholds in the final rule. Furthermore, even if the numbers were similar, the thresholds used for the reporting rule are based on actual emissions, while the PSD and title V programs thresholds are based on PTE. Therefore, we are less persuaded by arguments for consistency, and believe it is more important for ease of permit program implementation to ensure that GHG emissions calculations for PSD and title V will build on the same set of input variables used to develop short-ton based estimates for non-GHG pollutants. Thus, the use of short tons should actually facilitate the development of the GHG emission estimate. It would likely be more confusing to require a multi-pollutant PSD applicability analysis to present emissions information using different units for different pollutants, as would be the case if we required metric tons for GHG but continue to use short tons

[16] We note that our approach does not entirely avoid the possibility that a GWP change can occur while a permit is in progress although it will ensure advance notice of such a change. In the event that we plan to propose a change to GWP values, we will work with permitting authorities as necessary to provide guidance to sources on transitional issues.

for every other pollutant. Finally, we do not expect this choice to introduce additional complexity because the conversion between short tons and metric tons is a very simple calculation. Therefore, based on these considerations we are requiring that short tons be used as the basis for emission calculations used to meet PSD and title V permitting requirements.

B. Rationale for Thresholds and Timing for PSD and Title V Applicability to GHG Emissions Sources

In this subsection, we describe our legal and policy rationale for our determinations concerning PSD and title V applicability to GHG emissions sources. This subsection includes: (1) An overview of our rationale; (2) data concerning costs to sources and administrative burdens to permitting authorities; (3) a review of the *Chevron* legal framework and the "absurd results," "administrative necessity," and "one-step-at-a-time" doctrines, as well as a review of how those doctrines fit into the *Chevron* framework; (4) an overview of the relevant PSD and title V requirements and their legislative history; (5) our application of the "absurd results" doctrine for tailoring the PSD requirements; (6) our application of the "absurd results" doctrine for tailoring the title V requirements; (7) our plans to issue further rulemaking that will address the "absurd results" basis for both PSD and title V requirements; (8) our rationale for the phase-in schedule for applying PSD and title V to GHG sources; (9) our application of the "administrative necessity" basis for tailoring the PSD and title V requirements; and (10) our application of the "one-step-at-a-time" basis for tailoring the PSD and title V requirements.

1. Overview

Under the familiar *Chevron* two-step approach to construction of agency-administered statutes, the agency must first, at *Chevron* Step 1, determine whether Congress's intent in a particular provision on a specific question is clear; and if so, then the agency must follow that intent. If the intent of the provision is not clear, then the agency may, under *Chevron* Step 2, fashion a reasonable interpretation of the provision. The best indicator of congressional intent is the literal meaning of the provision and generally, according to the case law, if the literal meaning addresses the specific question, then the agency should follow the literal meaning.

However, the courts have developed three doctrines relevant here that authorize departure from a literal application of statutory provisions. The first is the "absurd results" doctrine, which authorizes such a departure if the literal application would produce a result that is inconsistent with congressional intent, and particularly if it would undermine congressional intent. The judicial doctrine of "administrative necessity" authorizes an agency to depart from statutory requirements if the agency can demonstrate that the statutory requirements, as written, are impossible to administer. The "one-step-at-a-time" doctrine authorizes an agency, under certain circumstances, to implement a statutory requirement through a phased approach. Each of the three doctrines fits into the *Chevron* framework for statutory construction because each of the three is designed to effectuate congressional intent.

To apply the statutory PSD and title V applicability thresholds literally to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program. These extraordinary increases in the scope of the permitting programs would mean that the programs would become several hundred-fold larger than what Congress appeared to contemplate. Moreover, the great majority of additional sources brought into the PSD and title V programs would be small sources that Congress did not expect would need to undergo permitting and that, at the present time, in the absence of streamlined permit procedures, would face unduly high permitting costs. Further, again at the present time, in the absence of streamlined permit procedures the administrative strains would lead to multi-year backlogs in the issuance of PSD and title V permits, which would undermine the purposes of those programs. Sources of all types—whether they emit GHGs or not—would face long delays in receiving PSD permits, which Congress intended to allow construction or expansion. Similarly, sources would face long delays in receiving title V permits, which Congress intended to promote enforceability. For both programs, the addition of enormous numbers of additional sources would provide relatively little benefit compared to the costs to sources and the burdens to permitting authorities. In the case of PSD, the large number of small sources that would be subject to control constitute a relatively small part of the environmental problem. In the case of title V, a great many of the sources that would be newly subject to permit requirements would have "empty" permits, that is, permits that do not include any applicable requirements, and that therefore serve relatively little purpose. For these reasons, the "absurd results" doctrine applies to avoid a literal application of the thresholds at this time. By the same token, the impossibility of administering the permit programs brings into play the "administrative necessity" doctrine. This doctrine also justifies not applying the PSD or title V applicability threshold provisions literally to GHG sources at this time.

The situation presented here is exactly the kind that the "absurd results," "administrative necessity," and "one-step-at-a-time" doctrines have been developed to address. Separately and interdependently, they authorize EPA and the permitting authorities to tailor the PSD and title V applicability provisions through a phased program as set forth in this rule, and to use the initial period of phase-in to develop streamlining measures, acquire expertise, and increase resources, all of which would facilitate applying PSD and title V on a broader scale without overburdening sources and permitting authorities. In this manner, the phased approach reconciles the language of the statutory provisions with the results of their application and with congressional intent.

2. Data Concerning Costs to Sources and Administrative Burdens to Permitting Authorities

This final action concerning applicability of PSD and title V to GHG-emitting sources, including the decisions on timing for the selected permitting thresholds, is based on our assessments of both the costs to the regulated sources to comply with PSD and title V permitting requirements and the administrative burdens to the permitting authorities to process PSD and title V permit actions for GHG-emitting sources. This section provides a summary of our cost and administrative burden assessments of permitting that would be required in the absence of any tailoring as well as under various tailoring options.

Our estimates of costs to the sources and administrative burdens to the permitting authorities from PSD and title V applicability for GHG emissions are based on labor and cost information from the existing Information Collection Requests (ICRs) for PSD and title V programs.[17] We apply the same basic

[17] "Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource

Continued

methodology used for the proposal, which incorporates information on numbers and types of affected sources and estimated permitting actions. We evaluate administrative burdens in terms of staffing needs, time for processing permits, and monetary costs, and we make some judgments about how those burdens would affect the permitting authorities' ability to effectively manage and administer their programs with the addition of GHG emission sources. We present the administrative burden data for applying PSD and title V requirements at the literal statutory thresholds—that is, the 100/250 tpy levels for PSD (and 0 tpy for modifications) and the 100 tpy level for title V—as well as at other thresholds, which range from 25,000 tpy CO_2e to 100,000 tpy CO_2e. We have significantly revised upwards our assessments of costs to sources and administrative burdens since proposal, and we summarize later our reasons for doing so. We also present significant comments concerning administrative burdens, and our responses to those comments.

In the next section, concerning legal and policy rationale for our actions, we discuss how these data on costs to the sources and administrative burdens to the permitting authorities informed our decisions that PSD and title V requirements should not, at present, be applied to GHG-emitting sources under the literal terms of the statutory thresholds as well as our decisions concerning what thresholds to apply for Steps 1 and 2 of the applicability phase-in approach and the applicability floor of 50,000 tpy CO_2e.

a. Costs to Sources

As we did at proposal, we have estimated costs to the sources of complying with PSD and title V starting from the data in the ICRs. We recognize that the sizes of the sources, as measured by their emissions, that would be swept into the PSD and title V programs would vary greatly, and that their permitting costs would vary as well. For example, their PSD permitting costs would depend on the amount and types of their emissions and their control requirements. Accordingly, we have determined average costs, as described later.

For PSD, at proposal, we estimated that on average, an industrial source would incur costs of $84,500 to prepare the PSD application and receive the permit, and on average, a commercial or residential source would incur costs of 20 percent that amount, or $16,900. 74 FR 55337 col. 3 to 55339 col. 3. For this action, we retain the same burden estimates for an average industrial source. This type of source would need 866 hours, which would cost $84,500, to prepare the application and the PSD permit. However, based on comments received, we have determined that a more accurate estimate for an average commercial or residential source is 70 percent of that amount of time that an industrial source would need, up from our proposal of 20 percent. Thus, an average commercial or residential source would need 606 hours, which would cost $59,000, to prepare the PSD application and receive the permit. We are increasing this time over what we proposed because we now recognize that virtually all commercial and residential sources will have no experience with the PSD permitting process, and therefore will face a significant learning curve that will entail more time to complete the application, develop control recommendations, and take the other required steps. We believe this learning period could extend from 2 to possibly 4 years or more from the date that the sources become subject to PSD requirements, depending on the type and actual number of new sources that come in for permitting. In addition, we expect that in many cases, draft PSD permits for GHGs will receive comments from various stakeholders, from citizens groups to equipment vendors, who will seek to participate in the permit process, and that all this could add to the hours that the permittee will need to invest in the process.[18] The actual costs to sources to install BACT controls, while still uncertain at this point, would likely add additional costs across a variety of sources in a sector not traditionally subject to such permitting requirements.

For title V, at proposal, we estimated that on average, an industrial source would incur costs of approximately $46,400 to prepare the title V application and receive the permit, and on average, a commercial or residential source would incur costs of 10 percent that amount, or almost $5,000. 74 FR 55338 col. 1 to 55339 col. 3. For this action, we retain the same burden estimates for an average industrial source. This type of source would need 350 hours, which would cost $46,400, to prepare the application and the title V permit. However, we have determined that a more accurate estimate for an average commercial or residential source is 50 percent of that amount of time that an industrial source would need, up from our proposal of 10 percent. Thus, an average commercial or residential source would need about 175 hours, which would cost $23,200, to prepare the title V application and receive the permit. This increase is due to the same reasons as with the PSD program just discussed. We now recognize that virtually all commercial and residential sources will have no experience with the title V permitting process and, therefore, will face a significant learning curve that will entail more time to assess, for the first time, their GHG emissions (because such sources are not covered by EPA's mandatory GHG reporting rule), complete the application, respond to permitting authority comments, meet other title V administrative requirements, and respond to interested stakeholders.[19]

b. Administrative Burdens to Permitting Authorities

(1) Estimated Permitting Authority Burden at Proposal

As at proposal, we estimated the administrative burdens to the permitting authorities at the various threshold levels for PSD or title V applicability as follows. First, for a particular threshold level, we estimated the number of GHG-emitting sources that would be subject to PSD requirements because they would undertake new construction or modification, and the number of existing sources that would be subject to title V requirements. Second, we estimated the average additional administrative burden and cost of each PSD permitting action and each title V permitting action for the GHG-emitting sources. Third, we multiplied those two estimates, and the product is the additional administrative burden at the particular threshold level. We employed the same methodology for this final rule, but, as discussed later, and described in more detail in our final burden analysis,[20] we have updated several key assumptions since the proposal as a

Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds;" Prepared by EPA Staff; March 2010.

[18] "Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds"; Prepared by EPA Staff; March 2010.

[19] "Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds"; Prepared by EPA Staff; March 2010.

[20] "Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds"; Prepared by EPA Staff; March 2010.

result of our consideration of comments received.

First, we present the administrative burdens at the statutory levels for PSD and title V applicability. At proposal, for the PSD program, we estimated the administrative burdens that would result from applying PSD at the 100/250 tpy major emitting facility threshold levels in two ways, as described in this section. We stated that at present, 280 sources are subject to PSD each year, both for new construction and modifications. This figure served as the baseline from which to calculate increases in administrative burdens due to permitting GHG-emitting sources.

The first method that we used to calculate the administrative burdens to the permitting authorities was in terms of workload hours, which we then converted to monetary costs. To make the workload calculation, we first estimated the number of GHG-emitting sources that would become subject to PSD through new construction and modification. Based on our GHG threshold data analysis, we estimated that almost 41,000 new and modified sources per year would become subject to PSD review. We first calculated the number of new sources that would become subject to PSD. To do this, we estimated growth rates for the various sectors, and then applied those growth rates to the numbers of sources in those sectors. We then calculated the number of modifications. To do this, we first assumed that each year, two percent of sources that meet or exceed the threshold levels for PSD applicability due to their conventional pollutants undertake modifications. We then calculated the number of sources that would meet or exceed the threshold levels for PSD applicability due to their GHG emissions, and applied the same assumption that two percent of them would undertake modifications. In this manner, we estimated the number of modifications of GHG-emitting sources that would become subject to PSD.

We noted that currently, 280 PSD permits are issued each year, but that applying PSD to GHG-emitting sources at the 100/250 tpy statutory threshold levels would cause an increase in permits of more than 140-fold. The reason for the extraordinary increase in PSD applicability lies simply in the fact that it takes a relatively large source to generate emissions of conventional pollutants in the amounts of 100/250 tpy or more, but many sources combust fossil fuels for heat or electricity, and the combustion process for even small quantities of fossil fuel produces quantities of CO_2 that are far in excess of the sources' quantities of conventional pollutants and that, for even small sources, equal or exceed the 100/250 tpy levels.

Based on the 140-fold increase in permits, we then estimated the per-permit burden on permitting authorities. As we stated in the proposal:

> We estimated the number of workload hours and cost a permitting authority would expend on each new source and each modification. We based these estimates on the workload hours and cost for processing permits for new sources of non-GHG emissions, which we derived from labor and cost information from the existing ICRs for PSD programs. The ICRs show that permitting authorities expend 301 hours to permit a new or modified industrial source * * *.
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> We then made assumptions for number of workload hours and costs for new sources of GHG emissions. We assumed that permitting new industrial GHG sources that emit in excess of the 250-tpy threshold would be of comparable complexity to permitting non-GHG emitting industrial sources that are subject to PSD. Thus, for these sources, we assumed that permitting authorities would expend the same number of workload hours and costs, on a per-permit basis, as they do for non-GHG emitting industrial sources. On the other hand, for commercial and residential GHG sources that emit GHGs above the 250-tpy threshold (and as a result would be subject to the requirements of the PSD permitting program at this threshold level), we assumed that the workload hours and cost for permitting these sources would be significantly less than—only 20 percent of—the hours and cost necessary to prepare and issue initial PSD permits or permit modifications for industrial GHG sources. This 20-percent estimate amounts to 60 hours of permitting authority time per residential or commercial permit.
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> Based on these assumptions, the additional annual permitting burden for permitting authorities, on a national basis, is estimated to be 3.3 million hours at a cost of $257 million to include all GHG emitters above the 250-tpy threshold.

74 FR 55301 col. 2.

Note that at the proposal, in calculating the PSD administrative burdens that would occur each year due to GHG emissions, we did not undertake separate calculations for the administrative burdens associated with permitting obligations stemming from the GHG emissions of the 280 sources already subject to PSD permitting requirements due to their conventional pollutants. In effect, we treated these 280 sources are part of the over 40,000 sources that would become subject to PSD due to their GHG emissions.

The second way that we evaluated the burden on permitting authorities was by reviewing a study conducted by state and local air permitting agencies. As we said in the preamble:

> In addition to conducting our burden analysis, we also reviewed summary information from state and local air permitting agencies regarding additional resources and burden considerations if GHG sources that emit above the 100/250-tpy thresholds were subjected to the PSD and title V programs. This information covered 43 state and local permitting agencies, representing programs from different regions of the country and various permitting program sizes (in terms of geographic and source population coverage) * * *. This information showed significant burdens projected by permitting agencies with adding sources of GHG emissions in terms of staffing, budget, and other associated resource needs. Importantly, the agencies based their analysis on the assumption that, for purposes of determining whether a source is major, its emissions would be calculated on an actual emissions ("actuals") basis, and not on a PTE basis. On an actuals basis, the agencies estimated a 10-fold increase in the number of permits.
>
> Specifically, the agencies estimated that:
>
> • Assuming, again, that number of permits was to increase by 10-fold (based on actual emissions), the resulting workload would require an average of 12 more [full-time equivalents (FTEs)] per permitting authority at an estimated cost of $1 million/year;
>
> • Without the additional FTEs, the average processing time for a permit would increase to 3 years, which is three times the current average processing time;
>
> • Permitting authorities would need 2 years on average to add the necessary staff;
>
> • Permitting authorities would also need, on average, eight additional enforcement and judicial FTEs;
>
> • Ninety percent of permitting agencies would need to train their staff in all aspects of permitting for sources of GHG emissions.
>
> • A quarter of permitting agencies were currently under a hiring freeze.

We went on to explain that this state survey significantly underestimated the administrative burdens:

> It is important to reiterate that the state and local permitting information on burden was based on the number of additional facilities subject to PSD because their emissions of GHGs exceed the 100/250-tpy thresholds at actual emissions rates, not PTE-based emissions rates. However, the PSD applicability requirements are based on PTE. By adjusting the increase in number of permits to account for GHG sources that exceed the 100/250-tpy applicability thresholds based on their PTE emissions, EPA estimated a 140-fold increase in numbers of PSD permits, much more than the 10-fold increase estimated by the states based on actual emissions.

74 FR 55301 col. 2–3.

In addition to PSD, we also estimated title V burdens at the statutory threshold. At proposal, for the title V program, we estimated the administrative burdens that would result from applying title V requirements at the 100 tpy major

source threshold level in the same two ways as for PSD, as follows. The first method was to calculate the administrative burdens in terms of workload hours, which we then converted to monetary costs. To make the workload calculation, we first estimated the number of existing GHG-emitting sources that would become subject to title V. Based on our GHG threshold data analysis, we estimated that approximately 6 million sources would become subject to title V. Compared to the 14,700 title V permits currently issued, this would be an increase in permits of more than 400-fold. We noted, in addition, that most of the 14,700 sources already subject to title V also emit GHGs and may be affected as well.

We then described the type of work that the permitting authorities would need to do for these GHG-emitting sources—the six million that would become newly subject to title V and most of the 14,700 that are already subject to title V—as follows. Note at the outset that the permitting authorities' workload is greater for sources newly subject to title V than for existing sources that seek a revised or renewed permit. As EPA noted in the preamble:

[T]he [ ] permits [for the 6 million new sources] would need to include any requirements for non-GHGs that may apply to the source, such as provisions of an applicable SIP. For any such requirements, permitting authorities would also need to develop terms addressing the various compliance assurance requirements of title V, including monitoring, deviation reporting, six-month monitoring reports, and annual compliance certifications.

Adding to the burden described above would be the burden to add GHG terms to the 14,700 existing title V permits. While, in general, existing title V permits would not immediately need to be revised or reopened to incorporate GHG (because as noted above, there are generally not applicable requirements for GHGs that apply to such sources), permitting authorities may face burdens to update existing title V permits for GHG under two possible scenarios: (1) EPA promulgates or approves any applicable requirements for GHGs that would apply to such a source, which would generally require a permit reopening or renewal application, or (2) the source makes a change that would result in an applicable requirement for GHGs to newly apply to the source, such as PSD review, which would generally require an application for a permit revision. Permitting authorities will also need to process permit renewal applications, generally on a five-year cycle, and such renewals would need to assure that the permit properly addresses GHG. Finally they would have to process title V applications for new sources (including all the PSD sources previously discussed).

74 FR 55302 cols. 2–3.

In light of those demands, we estimated the per-permit burden on permitting authorities as follows. Note, at the outset, that as with PSD, we based the workload hours on information in ICRs for industrial sources, and we then assumed that the workload for commercial and residential sources would be the indicated percentage of the workload for industrial sources:

As with PSD, we have quantified the extent of the administrative problem that would result in workload hours and cost on the basis of information concerning hours and costs for processing existing title V permits that is indicated on ICRs. However, we recognize that more than 97 percent of these new sources would be commercial and residential sources. We estimate that for permitting authorities, the average new commercial or residential permit would require 43 hours to process, which is 10 percent of the time needed for the average new industrial permit. For an average existing permit, which permitting authorities would need to process through procedures for significant revisions and permit renewals, adding GHG emissions to the permit would result in, we estimate, 9 additional hours of processing time, which is 10 percent of the amount of time currently necessary for processing existing permits. We estimate that the total nationwide additional burden for permitting authorities for title V permits from adding GHG emissions at the 100-tpy threshold would be 340 million hours, which would cost over $15 billion.

74 FR 55302 col. 3.

As with PSD, the second way that we evaluated the burden on permitting authorities at the statutory threshold was by reviewing a study conducted by state and local air permitting agencies of the burden of applying title V to existing GHG-emitting sources at the 100 tpy statutory threshold level. As we said in the preamble to the proposed rule:

[W]e also reviewed summary information from state and local permitting agencies, which showed significant burdens associated with adding GHGs in their title V programs in terms of staffing, budget, and other associated resource needs.[21] Again, note that the permitting agencies based their estimates on numbers of permits that would be required from sources subject to the 100-tpy title V applicability threshold on an actuals—not PTE—basis. Based on that level, the agencies assumed a 40-fold increase in numbers of permits, and estimated that:

- The resulting workload would require an average of 57 more FTEs per permitting agency at an estimated cost of $4.6 million/year;
- Without the additional FTEs, the average processing time for a permit would increase to almost 10 years, which is 20 times the current average permit processing time;
- Permitting authorities would need 2 years on average to add the necessary staff;
- On average, permitting authorities would need 29 additional enforcement and judicial staff;
- Eighty percent of permitting authorities would need to train their staff in all aspects of permitting for sources of GHG emission.
- A quarter of permitting agencies were currently under a hiring freeze.

As with PSD, we added that this state survey significantly underestimated the administrative burdens:

It is important to reiterate that, as with PSD, the state and local information on projected permitting burden is based on the number of additional facilities subject to title V because their emissions of GHGs exceed the 100-tpy thresholds at actual emissions rates, not the PTE-based emissions rates. However, the title V applicability requirements are based on PTE. As noted elsewhere in this preamble, the state and local agencies estimated a 40-fold increase in numbers of title V permits based on the amount of GHG sources' actual emissions. By adjusting the summary estimates provided by the state and local agencies to account for GHG sources that exceed the 100-tpy threshold based on their PTE emissions, EPA estimated that the average permitting authority would need 570 more FTEs to support its title V permitting program.

74 FR 55302 col. 3—55303 col. 1.

(2) Revisions to Proposal Estimates of Permitting Authority Burden

We received numerous comments from state and local authorities stating that EPA had underestimated the administrative burden on the permitting authorities in the proposal. State and local authorities stated that in particular, EPA underestimated the number of modifications and the amount of time it would take permitting authorities to process permits, particularly for commercial and residential sources. Based on the comments and additional analysis that we have conducted in response, we are revising in several respects our estimates of the administrative burdens for applying PSD and title V at the statutory threshold levels.

First we present revisions to our analysis regarding the burdens at the statutory levels. Before we present those changes, we want to note a revision to our methodology that affected our estimate of the number of permits currently issued under existing programs. We are revising upwards the number of sources that are already subject to PSD permitting requirements anyway for their conventional pollutants, which, as discussed previously, we refer to as "anyway" sources. This revision has implications

[21] "NACAA Summary on Permitting GHGs Under the Clean Air Act"; Memorandum from Mary Stewart Douglas, National Association of Clean Air Agencies to Juan Santiago, EPA/OAQPS, September 3, 2009.

both for (1) the number of sources that would become subject to PSD due to their GHG emissions; and also (2) the baseline number of sources already subject to PSD, which we use to compare the amount of increases in administrative burden due to permitting GHG sources. At proposal, we stated that 280 sources each year are subject to PSD due to their new construction or modifications. However, upon further analysis, we have realized that this figure is too low because it includes only sources that have emissions of one or more NAAQS pollutants at the 100/250 tpy thresholds and that are located in areas of the country that are designated attainment or unclassifiable for all of those pollutants, and thus are not designated nonattainment for any of those NAAQS pollutants. We estimate that another 520 sources have emissions of one or more NAAQS pollutants at the 100/250 tpy thresholds and are located in areas of the country that are nonattainment for at least one of those NAAQS pollutants. Some of these 520 sources may also emit one or more pollutants at the 100/250 tpy level for which their area is designated attainment or unclassifiable, and therefore may be subject to PSD for those pollutants. Accordingly, the correct number of "anyway" sources subject to PSD each year is the 280 sources that are located in areas that are attainment or unclassifiable for each pollutant that the sources emit at the 100/250 tpy level, plus at least some of the 520 sources that are located in areas that are nonattainment for at least one of the NAAQS pollutants that the sources emit at or above the 100/250 tpy threshold. In the absence of data on the number of nonattainment NSR permits that do *not* have a PSD component, and because we expect this to be a small number, we have assumed for purposes of this action, that each of the 520 sources is subject to PSD for at least one pollutant, so that we will consider all 800 sources as subject to PSD. Of this number, we estimate that 70 percent, or 560 sources will undergo a modification, while the remaining 240 permitting actions will involve new construction. Of the modifications, we assume that 80 percent, or 448, would become subject to additional requirements due to their GHG emissions because those projects have combustion-related activities that would likely emit GHGs in the requisite quantities. Our estimate of 80 percent of modification activities significantly involving combustion activities is based on a review of a random sample of PSD permits. In total we estimate that 688 sources, either upon new construction or modification, would need to add GHG requirements to their otherwise required PSD permitting action.

We should also note that in this rulemaking we are justifying our conclusions about permitting authority administrative burdens on the basis of their PSD and title V cost as calculated on both a separate basis and a combined basis. That is, we believe that the administrative burdens of the PSD program justify our tailoring approach for the PSD requirements, and the administrative burdens of the title V program justify our tailoring approach for the title V requirements, but in addition, the administrative burdens of both programs on a combined basis justify the tailoring approaches. Viewing the administrative burdens on a combined basis provides a useful perspective because most permitting authorities have a single organizational unit that is responsible for both the PSD program and the title V program, and in many cases, the same employees work on both programs. In addition, in some jurisdictions, permitting authorities issue a single, merged permit that includes both PSD and title V requirements. For these reasons, considering administrative burdens on a combined PSD and title V basis, offers a more accurate picture of the issues these agencies will face in transitioning to GHG permitting.

Turning to the revisions to our burden estimates that we made as a result of public comment, we begin by noting that many commenters believed that we significantly underestimated the administrative burdens associated with the proposed thresholds or that the administrative burden under the proposed thresholds would still overwhelm the states and result in significant permitting delays and uncertainty for sources. Many of these commenters indicate that our estimate of the number of sources that would be subject to permitting is too low, and some add that we have underestimated the per-permit effort required. (More detail on these comments is given elsewhere on the methodology used in the analysis.) Several state and local agencies provided estimates of the increased number of permits and/or staff that would be required under the thresholds we proposed that were higher than our original estimates. Specifically, commenters recommended that we increase the estimated administrative burdens for PSD permits by anywhere from 100 percent to over 2,000 percent; and that we increase the burdens for title V permits by anywhere from 29 percent to 240 percent. Many commenters indicated that EPA has not adequately accounted for "synthetic minor" sources or modification projects, stating that many such sources and projects will not be able to keep GHGs below the proposed thresholds, and those who could do so may not be able to establish enforceable synthetic minor limits. Numerous commenters also stated that the EPA has underestimated the rate of major modifications for GHGs under PSD. Some commenters assert that we underestimated the number of permits required for specific industry sectors, including the oil and gas production industry, the natural gas transmission industry, the semiconductor industry, the wood products industry, the brick industry, and landfills. Some of the state and local commenters also believe that we have overestimated their ability to hire and train sufficient staff to administer GHG permitting.

We are persuaded by the data and arguments provided by the many commenters who believe EPA underestimated the number of permitting actions and the burdens of each action, and thus the overall administrative burdens associated with permitting GHG sources. Accordingly, we have reevaluated our assessment of these administrative burdens, for both the PSD and title V programs. In conducting this reevaluation, we considered arguments made by the commenters, as well as any actual data they provided, and then we determined whether and how to modify various aspects of our detailed assessment of the burdens. Based on this consideration we have substantially revised upwards our estimate of administrative burdens, based on the analysis included in the final docket for this rulemaking.[22] The revisions affect two elements of our analysis by showing: (1) A substantial increase in the number of PSD and title V permits that will occur at a given threshold, and (2) an increase in the average burden estimate for each such permit.

Regarding the increase in our estimate of the number of projects that will occur, we estimated an increase in both PSD and title V permit actions, though the greatest changes were for PSD. At proposal, we estimated that, if PSD requirements were to apply to GHG sources at the 100/250 tpy statutory levels, 40,496 projects—consisting of 3,299 projects at industrial sources and 37,197 projects at commercial or

[22] "Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds"; Prepared by EPA Staff; March 2010.

residential sources—would need PSD permits each year. Some of these projects involve the construction of an entirely new source, but the majority of these are modifications. We now estimate that at the 100/250 tpy levels, 81,598 projects would become subject to PSD each year. These projects include 26,089 actions at industrial sources and 55,509 at commercial and residential sources. We describe our calculation of this 81,598 amount in a TSD.[23] The great majority of these 81,598 projects that would become subject to PSD are modifications. We base these estimates on the assumption that the significance levels would be 100 tpy regardless of category.

Our estimate of the number of PSD modifications is where we made our most significant upward revisions from our proposal, based on comments. Our doubling of the estimated PSD permitting actions—from 40,496 at proposal to 81,598—results from three separate adjustments we made to our estimates at proposal of the number of permit actions that would result from applying PSD to GHG sources. Two of these increased the number of major modifications, and one of these increased the number of major sources and modifications. The most significant adjustment, and one that was raised by multiple commenters, was that we undercounted the number of major modification projects at existing major sources because we did not include the existing projects that avoid major PSD review by either taking "synthetic minor" limits or by netting out for conventional pollutants, but that would not be able to avoid PSD through those mechanisms for GHGs.

We agree that the ability and procedures for sources to achieve reductions, or minimize increases, due to GHGs through adoption of enforceable limits or through netting out are not well established at this point. We believe that there will be numerous instances, particularly for combustion-related projects, where it will not be possible for sources to achieve the same level of reductions for CO_2 emissions as they do for emissions of nitrogen oxides (NO_X), for example, simply because there are not as many proven control techniques that can reduce CO_2 emissions to the same degree as NO_X. Also, more research will be necessary in the type of emission units and processes resulting in GHG emissions, and how they operate over a wide range of utilization patterns at a variety of source categories, before permitting authorities will be able to establish procedures and rules for developing minor source permit limitations. Therefore, we adjusted our count of major modification permits under PSD upward to account for this.

The second change to the number of permits concerns the general modification rate of 2 percent that we applied at proposal, based on historical experience across all pollutant types. Commenters provided information that suggest that this 2 percent figure is an underestimate for GHG sources because their emissions of CO_2 are high and accumulate quickly from various changes involving combustion units. Therefore, a greater percentage of their physical or operational changes will result in GHG emissions in excess of the significance levels that we identified at proposal. In light of these comments, we reviewed the source populations and pollutant mix within the various populations, and determined that we should revise our general modification rate to 4 percent for GHG sources. This 4 percent rate was obtained by dividing the current annual major NSR permit actions involving modifications by the 14,700 existing sources. We have revised our burden analysis accordingly. Again, the burden analysis in the docket describes our basis for these calculations in more detail.

The third adjustment to the number of permits involves our estimate of the number of sources with PTE that is greater than the various thresholds considered. This affects the number of major sources at the statutory thresholds, which we used to estimate the number of PSD and title V major sources, but also has an effect on the number of major modifications because the number of modifications depends on the size of the population of major sources. Commenters provided evidence that our estimates of capacity utilization (which, as described previously, we use for estimating potential-to-emit based on data for actual emissions) for the general manufacturing source category (referred to as "unspecified stationary combustion" in our analysis) and for the oil and gas industry were not accurate. In our proposal, our estimated range for capacity utilization for "unspecified stationary combustion" varied from 70 to 90 percent depending on manufacturing category. For the oil and gas industry, our estimate was 90 percent. We received comments indicating that these utilization rates are higher than what is normally achieved in real-world conditions, particularly for smaller manufacturing type facilities. Accordingly, in this action, we are using a 50 percent capacity utilization rate for both of these source categories, which better reflects what can be deemed reasonable operation under normal conditions for facilities in these source categories. This adjustment increased the overall number of affected facilities at various threshold levels and we have revised our burden analysis accordingly.

A few commenters asserted that we underestimated the number of residential homes, commercial buildings, and retail stores that would be subject to permitting requirements because these commenters believed the estimate in EPA's TSD was based on actual emissions from space heating equipment rather than PTE. We wish to clarify that our threshold analysis estimates for the number of residential and commercial sources (as well as all other sources) did use a PTE basis. To calculate the PTE amount for these sources, we extrapolated from the actual emissions data for the residential and commercial sources. Specifically, we assumed that a typical residential facility operates its fuel combustion sources at only 10 percent of its capacity and a typical commercial facility operates at only 15 percent of its capacity. Based on these assumptions, we multiplied residential actual emissions by a factor of 10, and commercial actual emissions by a factor of 6.6 to obtain PTE-based estimates. There is very little information available on the capacity utilization rates of fuel combustion equipment at different types of residential and commercial facilities, but we believe our methodology was reasonable for these types of sources and we did not adjust it in response to this comment. Information on the development of these estimates is provided in our Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation.

The second source of upward revisions to our administrative burden estimate is that we are increasing the estimated average cost to permitting authorities of issuing each PSD and title V permit at the statutory thresholds. At proposal, we estimated that for PSD permits, permitting authorities would expend, on average, 301 hours to permit an industrial source of GHG emissions, and 20 percent of that time, or 60 hours to permit a commercial or residential source. After estimating that amount of workload, we went on to estimate the monetary cost to permitting authorities of that workload. Similarly, for title V permits, we estimated at proposal that permitting authorities would expend 10 percent of the number of hours needed to process an industrial permit in order

[23] "Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds"; Prepared by EPA Staff; March 2010.

to process a commercial or residential permit for GHG sources.

We received comments from both permitting authorities and sources asserting that our methodology underestimated the administrative burden on grounds that (1) Our methodology fails to recognize that when a source triggers PSD for conventional pollutants, additional labor hours would be required to issue BACT for GHGs; (2) our estimate of 60 hours (versus 301 hours) to issue PSD permits to commercial and residential sources of GHGs is unrealistically low; (3) our estimate failed to account for the increase in the complexity of permits for criteria pollutants due to (i) increases in criteria pollutant emissions becoming newly subject to BACT at sources that are major only for GHGs, which will result in increased permitting and (ii) BACT controls for criteria pollutants (*e.g.,* an oxidizer for VOCs) may result in significant GHG emissions, triggering an additional BACT determination; and (4) our methodology failed to account for the significant additional PSD and title V burdens due to sources that obtain federally enforceable permit limits on GHGs in order to become "synthetic minors" and thereby avoid PSD (and possibly also title V).

Based on these comments and our own reassessment of permitting actions created by the addition of GHGs, we have revised upwards in several ways our estimate of the additional per-permit costs of applying PSD and title V to GHG sources, including the following: First we have added an estimate of the additional permitting cost for adding a GHG component to "anyway" PSD and title V permitting actions for conventional pollutants. We estimated this burden based on information in the comments together with our own judgment about how to adjust the burden numbers contained in the current supporting statements for our approved permitting ICRs. These adjustments are found in our revised burden estimate document.

Second, we have raised the per-permit burden hours for commercial and residential sources for PSD and title V. At proposal, our estimates were based on the fact that many of these permits will be technically simpler due to such factors as a lower number of emissions points, simpler processes, and less required modeling. However, commenters pointed out that, until EPA streamlines its permitting procedures, there are many permitting activities that represent a fixed cost, such as public notice, hearing, and response to comment activities. In addition, we agree, as commenters pointed out, that many of these sources will need significantly more permitting authority staff time to assist them in the permit application and preparation process because of their lack of experience with these requirements. In addition, permitting authorities will have little, if any, experience in permitting commercial and residential sources, and therefore will face a learning curve that will entail more time to take permitting action. In addition, we expect that in many cases PSD and title V permit applications for GHGs will receive comments from various stakeholders, from citizens groups to equipment vendors, who will seek to participate in the permit process, and responding and revising permits accordingly will add to the hours that the permitting authority will spend.

As a result, we raised the PSD per-permit hours for various steps in the permitting process, as described in the burden estimate document. While we continue to estimate that permitting authorities will expend, on average, 301 hours to issue a PSD permit to an industrial source, and that this would cost $23,243, we now recognize that a permitting authority would expend 70 percent of that time or 210 hours, to permit a commercial or residential source, which would cost $16,216. Similarly, for title V, while we continue to estimate that permitting authorities will expend, on average, 428 hours to issue a title V permit to an industrial source, and that this would cost $19,688, we now recognize that a permitting authority would expend 50 percent of the time, or 214 hours, to permit a commercial or residential source, which would cost $9,844.

We disagree with commenters who suggested that by basing our estimates on the numbers of newly constructing and modifying sources with high enough emissions to qualify as major emitting facilities, we failed to account for the costs of sources that seek "synthetic minor" permits to avoid PSD, and possibly title V, requirements. In fact, our methodology includes sources that might take such limits as newly-major sources for their GHG emissions; and therefore we count the full administrative burden associated with a PSD permit and a title V permit for those sources. In effect, we assume that such sources would go through PSD or title V permitting, rather than take "synthetic minor" limits. We take this approach because although we suspect that there may, in fact, be significant synthetic minor activity, we do not have data that would allow us to determine whether, and how many of, these sources will be able to adopt "synthetic minor" limits or restrict their operations to obtain minor source permitting status. Nor do we have data on the amount of the administrative burden that would fall on any particular permitting authority to establish a "synthetic minor" limit, except that we understand that the amount varies widely across states. As a result, we opted to include these sources in our analysis as sources receiving a PSD or title V permit. Therefore, to the extent that synthetic minor activity occurs, our estimate would already have included the burden for that activity. In fact, our estimate would have overestimated the burden to the extent that a permitting authority would have less administrative costs to issuing a "synthetic minor" permit, as compared to a PSD or title V permit.

(3) Revised Burden Estimates at Statutory Thresholds Based on the revisions just described, we estimate that in all, if sources that emit GHGs become subject to PSD at the 100/250 tpy levels, permitting authorities across the country would face over $1.5 billion in additional PSD permitting costs each year. This would represent an increase of 130 times the current annual burden hours under the NSR major source program for permitting authorities. The permitting authorities would need a total of almost 10,000 new FTEs to process PSD permits for GHG emissions.

In addition, we estimate that in all, if sources that emit GHGs become subject to title V at the 100 tpy level, permitting authorities across the country would incur about 1.4 billion additional work hours, which would cost $63 billion. We estimate that most of this work would be done over a 3 year period, which would amount to 458 million in additional work hours, and $21 billion in additional costs, on an annual basis over that 3-year period.

We also note that the survey of state and local permitting authorities described in the proposed rulemaking continues to shed light on the extent of the administrative burdens, including staffing, budget, and other associated resource needs, as projected by the permitting authorities. As noted previously, that survey concluded that application of the PSD requirements to GHG-emitting sources at the level of 100/250 tpy or more of actual emissions would, without additional FTEs, increase the average processing time for a PSD permit from one to 3 years. The survey further concluded that application of the title V requirements to GHG-emitting sources at the level of 100 tpy or more of actual emissions would, without additional FTEs, increase the average processing time for

a title V permit from 6 months to 10 years. As we noted at proposal, this survey assumed a ten-fold increase in the number of PSD permits and a 40-fold increase in the number of title V permits due to GHG-emitting sources, but those assumptions were severely underestimated because they were based on actual emissions. At proposal, our calculations, which were based on potential emissions, indicated a 140-fold increase in PSD permits and a more than 400-fold increase in title V permits. In this rulemaking, we recognize that even our estimates at proposal were severely underestimated. We now recognize that the number of PSD permits will be about twice what we estimated at proposal, and the average processing time for both PSD and title V permits will be two or three times greater than what we estimated at proposal. The survey of state and local permitting authorities provided other useful information as well, including the fact that it would take the permitting authorities 2 years, on average, to hire the staff necessary to handle a ten-fold increase in PSD permits and a 40-fold increase in title V permits, and that 90 percent of their staff would need additional training in all aspects of permitting for GHG sources.

(4) Revised Estimates of Administrative Burdens at Various Threshold Levels

In order to determine the appropriate PSD and title V applicability level for GHG sources, we not only estimated the burden at the statutory thresholds, as described previously, but we also estimated the number of sources, number of permitting actions, and amount of administrative burden at various applicability levels for both PSD and title V, based on the revised methodology described previously, that we used to estimate the administrative burdens of applying PSD and title V at the statutory levels. This information is summarized in Table V–1. Note that Table V–1 also includes, in the last column, the administrative burdens, described previously, associated with the 100/250 tpy thresholds.

TABLE V–1—COVERAGE AND BURDEN INFORMATION

	Current program [1]	"Anyway" source approach 75k major mod.	100k Major source 100k major mod.	100k Major source 75k major mod.	100k Major source 50k major mod.	50k Major source 50k major mod.	25k Major source 25k major mod.	100/250 Major, 100 mod.
Number of Major Sources	15,000	15,000	15,550	15,550	15,550	18,500	22,500	6,118,252.
Number of Newly Major GHG Sources.	N/A	0	550	550	550	3,500	7,500	6,105,913.
Number of PSD New Construction Actions.	240	240	242	242	242	243	250	19,889.
Number of PSD Modification Actions at Covered major sources.	448	448	468	1,363	2,257	2,354	9,645	62,284.
Permitting Authority Cost to Run PSD programs.	$12M/yr	$15M/yr	$15M/yr	$36M/yr	$57M/yr	$59M/yr	$229M/yr	$1.5B/yr.
Permitting Authority Work Hours to Run PSD programs [2].	150,795	185,195	192,055	461,450	730,544	764,781	2.97 M	19.7 M.
Permitting Authority Cost to Run Title V Programs.	$62M/yr	$63M/yr	$67M/yr	$69M/yr	$70M/yr	$88M/yr	$126M/yr	$21 B/yr.
Permitting Authority Work Hours to Run Title V Programs.	1.35 M	1.38 M	1.46 M	1.49 M	1.53 M	1.92 M	2.74 M	460 M.
Annual Total Cost to Run PSD and Title V Programs and percent increase in cost over current program.	$74M/yr	$78M/yr 5% increase (once states adopt).	$82M/yr 11% increase.	$105M/yr 42% increase.	$127M/yr 72% increase.	$147M/yr 99% increase.	$355M/yr 380% increase.	$22.5 B/yr 30,305% increase.
% GHG emissions covered [3]	0	65%	67%	67%	67%	70%	75%	78%.

Notes: (1) As explained in the preamble, "current program" figures for PSD permits also reflect NSR permits in nonattainment areas that we assume include a PSD component for at least one pollutant. (2) Number of FTEs may be calculated as work hours divided by 2,000 hours. (3) Percent of national GHG stationary source emissions emitted from sources that would be considered major for GHG emissions under each threshold scenario.

As described in the TSD, we considered several different major source/major modification threshold combinations. We chose the combinations to reflect representative, incremental steps along the possible range. Because it is time- and resource-intensive to develop estimates for a given step, we chose intervals that best reflect representative points within the range, given those time and resource constraints. Here, we discuss key observations about some of the combinations that we assessed. As the table indicates, under the current PSD and title V programs, approximately 15,000 sources qualify as major PSD sources for at least one pollutant and therefore meet the applicability thresholds. Of these, approximately 668 sources are subject to PSD requirements each year for at least one pollutant—240 because they undertake new construction, and 448 because they undertake modifications. The permitting authorities' administrative burdens for the NSR program are 153,795 work hours, and $12 million. For the title V program, the 15,000 sources are, for the most part already permitted, and therefore need revised permits as required and renewal permits on a 5-year schedule. The permitting authorities' title V administrative burdens on an annual basis are 1,349,659 work hours and $62 million.

The first threshold Table 1 describes—and which, as discussed later, we are adopting for Step 1—is the

"anyway" source approach. Under this approach, (i) PSD applies to the GHG emissions from projects that are subject to PSD anyway as new sources or major modifications due to their emissions of non-GHG pollutants and that result in an increase (or, in the case of modifications, a net increase) of at least 75,000 tpy CO_2e; and (ii) title V applies to what we will call "anyway" title V sources, that is, sources that are subject to title V anyway due to their emissions of non-GHG pollutants. Under this approach, the number of sources subject to PSD each year—including new construction and modifications—is the same as under the current program, but the permitting authorities will need to address GHG emissions as part of those permitting actions each year and, to do so, will require, each year, 34,400 additional workload hours costing an additional $3 million. For title V, we estimate that the number of title V sources that require permitting actions will, on average, be the same each year, but permitting authorities will need to address GHG requirements for some of them; as a result, permitting authorities will need, each year, 27,468 additional work hours costing $1 million in additional funding.

Another threshold described in Table V–1 is the one we are adopting under Step 2, as described later, under which (i) sources will be subject to PSD on account of their GHG emissions if they newly construct and emit at least 100,000 tpy CO_2e, or if they are existing sources that emit at least 100,000 tpy CO_2e of GHGs and make a modification that results in a net emissions increase of at least 75,000 tpy CO_2e; and (ii) existing sources will be subject to title V due to their GHG emissions if they emit 100,000 tpy CO_2e in GHG emissions. Under this approach, which we will call the 100,000/75,000 approach, we estimate that each year, compared to current levels, the permitting authorities will need to issue GHG permits to two additional sources that newly construct and to 915 additional sources that undertake modifications. Doing so will require 310,655 additional workload hours costing an additional $24 million, compared to the current program. For title V, an additional 190 sources will require new title V permits each of the first 3 years, and the permitting authorities' associated costs will be 141,322 work hours and $7 million more than the current program.

The last approach we will describe here may be called the 50,000/50,000 approach, which, as discussed later, we adopt as the floor for thresholds during the first 6 years after promulgation. Under this approach, (i) sources will be subject to PSD on account of their GHG emissions if they newly construct and emit at least 50,000 tpy CO_2e, or if they are existing sources that emit at least 50,000 tpy CO_2e of GHGs and make a modification that results in a net emissions increase of at least 50,000 tpy CO_2e; and (ii) existing sources will be subject to title V on account of their GHG emissions if they emit 50,000 tpy CO_2e in GHG emissions. Under this approach, each year, the permitting authorities will need to issue GHG permits to 3 additional sources that newly construct and 1,900 that undertake modifications above current permitting levels. Doing so will require 613,986 additional workload hours costing $47 million, compared to the current program. For title V, an additional 1,189 sources will require new title V permits each of the first 3 years and the permitting authorities' associated costs will be 568,017 work hours and $26 million more than the current program.

We present the remaining entries in the table to illustrate how the cost and burden estimates vary with increasing or decreasing thresholds relative to those selected in this rule. These variations are important in understanding how alternative thresholds would compare to the ones selected. We also include entries reflecting the baseline (current program without GHG permitting) and the burdens if we immediately implemented the full statutory thresholds on January 2, 2011, without tailoring or streamlining.

3. "Absurd Results," "Administrative Necessity," and "One-Step-at-a-Time" Legal Doctrines

a. Introduction and Summary

Having described the factual underpinnings of our action, which are the costs to sources and administrative burdens to permitting authorities, we now describe the legal underpinnings. They involve the framework for analyzing agency-administered statutes, as established by the U.S. Supreme Court in *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 842–43 (1984). In this case, *Chevron* framework must take into account the "absurd results," "administrative necessity," and "one-step-at-a-time" legal doctrines. We believe that each of these doctrines provides independent support for our action, but in addition, the three doctrines are directly intertwined and can be considered in a comprehensive and interconnected manner. Moreover, although each of the three doctrines predate the 1984 *Chevron* decision, in which the U.S. Supreme Court established the framework for construing agency-administered statutes, each fits appropriately into the *Chevron* framework.[24]

To reiterate, for convenience, the statutory provisions at issue: Congress, through the definition of "major emitting facility," applied the PSD program to include "any * * * source [that] emit[s], or ha[s] the potential to emit, one hundred [or, depending on the source category two hundred fifty] tons per year or more of any air pollutant." CAA sections 165(a), 169(1). In addition, Congress, through the definition of "modification," applied the PSD program to include "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." CAA sections 165(a), 169(2)(C), 111(a)(4). Similarly, Congress, through the definition of "major source," specified that the title V program includes "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." CAA sections 502(a), 501(2)(B), 302(j). EPA, through long-established regulatory action, in the case of PSD, and long-established guidance, in the case of title V, has interpreted these definitions narrowly so that they apply only with respect to air pollutants that are subject to regulation under the CAA.

Applying these definitions by their terms, as interpreted narrowly by EPA, to GHG sources at the present time would mean that the PSD and title V programs would apply to an extraordinarily large number of small sources, the sources would incur unduly high compliance costs, and permitting authorities would face overwhelming administrative burdens. As a result, we believe Congress did not intend for us to follow this literal reading, and instead, with this action, we chart a course for tailoring the applicability provisions of the PSD program and the title V program by phasing them in over time to the prescribed extent.

For our authority to take this action, we rely in part on the "absurd results" doctrine, because applying the PSD and title V requirements literally (as previously interpreted narrowly by

[24] Although we set out an analysis of how the three doctrines fit into the *Chevron* framework, we note that even if the doctrines are viewed independently of the *Chevron* framework, they support this action.

EPA) would not only be inconsistent with congressional intent concerning the applicability of the PSD and title V programs, but in fact would severely undermine congressional purpose for those programs. We also rely on the "administrative necessity" doctrine, which applies because construing the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would render it impossible for permitting authorities to administer the PSD provisions. The tailoring approach we promulgate in this action is consistent with both doctrines. It is also consistent with a third doctrine, the "one-step-at-a-time" doctrine, which authorizes administrative agencies under certain circumstances to address mandates through phased action.

Our discussion of the legal bases for this rule is organized as follows: In this section V.B.3, we provide an overview of the three doctrines and describe how they fit into the *Chevron* framework for statutory construction. In section V.B.4, we discuss the PSD and title V programs, including each program's relevant statutory provisions, legislative history, and regulatory history. In sections V.B.5 and V.B.6 we discuss the "absurd results" approach for PSD and title V, respectively, that we are finalizing in our action. In section V.B.7., we discuss additional rulemaking in which we may consider exempting certain categories of sources from PSD and title V under the "absurd results" doctrine. In section V.B.8, we discuss the legal and policy rationale for the phase-in schedule that we are adopting for applying PSD and title V to GHG sources. In section V.B.9 we discuss the "administrative necessity" approach for PSD and title V, respectively. In section V.B.10, we discuss the third legal basis for our action, the "one-step-at-a-time" doctrine.

b. The "Absurd Results" Doctrine

Turning first to the "absurd results" doctrine, we note at the outset that we discussed the doctrine at length in the notice of proposed rulemaking, and we incorporate by reference that discussion, although we make some refinements to that discussion in this preamble. The starting point for EPA's interpretation of the PSD and title V applicability provisions and reliance on the "absurd results" doctrine is the familiar *Chevron* two-step analysis. We discuss this analysis in greater detail later, but in brief, in interpreting a statutory provision, an agency must, under *Chevron* Step 1, determine whether Congress's intent on a particular question is clear; if so, then the agency must follow that intent. If the intent of the provision is not clear, then the agency may, under Step 2, fashion a reasonable interpretation of the provision. *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 842–43 (1984).

The courts consider the best indicator of congressional intent to be the plain meaning of the statute. However, the U.S. Supreme Court has held that the literal meaning of a statutory provision is not conclusive "in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters' * * * [in which case] the intention of the drafters, rather than the strict language, controls." *United States* v. *Ron Pair Enterprises,* 489 U.S. 235, 242 (1989). This doctrine of statutory interpretation may be termed the "absurd results" doctrine.

Although, as just noted, the U.S. Supreme Court has described the "absurd results" cases as "rare," in that case the Court seemed to be referring to the small percentage of statutory-construction cases that are decided on the basis of the doctrine. The DC Circuit, in surveying the doctrine over more than a century of jurisprudence, characterized the body of law in absolute numbers as comprising "legions of court decisions." *In re Franklyn C. Nofziger,* 925 F.2d 428, 434 (DC Cir. 1991). Indeed, there are dozens of cases, dating from within the past several years to well into the 19th century,[25] in which the U.S. Supreme Court has applied the "absurd results" doctrine to avoid the literal application of a statute, or if not so holding, has nevertheless clearly acknowledged the validity of the doctrine. Some of the more recent of these cases include: *Logan* v. *United States,* 552 U.S. 23, 36–37 (2007) ("[s]tatutory terms, we have held, may be interpreted against their literal meaning where the words 'could not conceivably have been intended to apply' to the case at hand [citation omitted]"); *Nixon* v. *Missouri Municipal League,* 541 U.S. 125, 132–33 (2004) ("any entity" includes private but not public entities); *Raygor* v. *Regents of Univ. of Minn.,* 534 U.S. 533, 542–45 (2002) ("implying a narrow interpretation of * * * 'any claim asserted' so as to exclude certain claims dismissed on Eleventh Amendment grounds"); *United States* v. *X-Citement Video, Inc.,* 513 U.S. 64, 69 (1994) (rejecting a literal interpretation of the statutory term "knowingly" on grounds that Congress could not have intended the "positively absurd" results that some applications of such an interpretation would produce, "[f]or instance, a retail druggist who returns an uninspected roll of developed film to a customer "knowingly distributes" a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct"); *Rowland* v. *Cal. Men's Colony,* 506 U.S. 194, 200 (1993) (finding that an artificial entity such as an association is not a "person" under the statute, and describing the absurdity doctrine as a "common mandate of statutory construction"); *United States* v. *Ron Pair Enterprises,* 489 U.S. 235, 242 (1989) (the plain meaning of a statutory provision is not conclusive "in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters' * * * [in which case] the intention of the drafters, rather than the strict language, controls"); *Green* v. *Bock Laundry Machine Company,* 490 U.S. 504 (1989) (provision in Federal Rule of Evidence that protects "the defendant" against potentially prejudicial evidence, but not the plaintiff, refers to only criminal, and not civil, defendants); *Public Citizen* v. *United States Dep't of Justice,* 491 U.S. 440, 453–54 (1989) (rejecting a broad, straightforward reading of the term "utilize," on grounds that a literal reading would appear to require the absurd result that all of FACA's restrictions apply if a President consults with his own political party before picking his Cabinet, and such a reading "was unmistakably *not* Congress' intention"); *Watt* v. *Alaska,* 451 U.S. 259, 266 (1981) (rejecting reliance on plain statutory language and concluding that the term "minerals" in section 401(a) of the Wildlife Refuge Revenue Sharing Act applies only to minerals on acquired refuge lands; stating "[t]he circumstances of the enactment of particular legislation may persuade a

[25] For early cases in which the U.S. Supreme Court applied the "absurd results" doctrine, *see Holy Trinity Church* v. *U.S.,* 143 U.S. 457, 516–17 (1892) ("any alien" does not include a foreign pastor; Court stated, "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers * * *. If a literal construction of the words be absurd, the Act must be construed as to avoid the absurdity"); *Chew Heong* v. *United States,* 112 U.S. 536, 555 (1884) (rejecting a literal interpretation of treaty that would have prevented the re-entry of a person into the U.S. upon the ground that he did not possess a certificate which did not exist prior to his departure, and which could not possibly have been issued); *Heyenfeldt* v. *Daney Gold Mining Co.,* 93 U.S. 634, 638 (1877) (statutory language expressly referred to past land sales and dispositions, "but evidently they were not employed in this sense, for no lands in Nevada had been sold or disposed of by any act of Congress," and the language of the statute "could not * * * apply to past sales or dispositions, and, to have any effect at all, must be held to apply to the future").

court that Congress did not intend words of common meaning to have their literal effect"); *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 23–24 (1976) (prohibition in Federal Water Pollution Control Act against discharging into navigable waters "pollutants," which are defined to include "radioactive materials," does not apply to three specific types of radioactive materials); *Jackson* v. *Lykes Bros. S.S. Co.,* 386 U.S. 731, 735 (1967) (refusing to distinguish between a longshoreman hired by "an independent stevedore company" and one hired by "the shipowner * * * to do exactly the same kind of work," despite the clear terms of the Act, and stating: "[w]e cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this Act," when the Act was "designed to provide equal justice to every longshoreman similarly situated"); *Lynch* v. *Overholser, 369 U.S. 705, 710, (1962)* (statutory construction is not confined to the "bare words of a statute"); *United States* v. *Bryan,* 339 U.S. 323, 338 (1950) ("Despite the fact that the literal language would encompass testimony elicited by the House Committee in its questioning of respondent relative to the production of the records of the association, the Court will not reach that result if it is contrary to the congressional intent and leads to absurd conclusions. And we are clearly of the opinion that the congressional purpose would be frustrated if the words, "in any criminal proceeding," were read to include a prosecution for willful default under R.S. § 102.").[26]

The DC Circuit has also handed down numerous decisions that applied the absurd results doctrine to avoid a literal interpretation or application of statutory provisions or that have acknowledged the doctrine. Some of the most recent ones include: *Arkansas Dairy Cooperative Ass'n, Inc.,* v. *U.S. Dep't of Agriculture,* 573 F.3d 815 (DC Cir. 2009) (rejecting the canon of construction that presumes that Congress is aware of existing law pertinent to the legislation that it enacts, when in this case, the presumption that Congress was aware of the Departments definition of "hearing" would lead to "the absurd result that Congress intended to impose a requirement with which the Secretary could not comply;" stating: "Courts, 'in interpreting the words of a statute, [have] some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results * * * or would thwart the obvious purpose of the statute * * *.'" (quoting *In re* Trans Alaska Pipeline Rate Cases, 436 U.S. 631, (1978)); *Buffalo Crushed Stone, Inc.* v. *Surface Transportation Board,* 194 F.3d 125, 129–30 (DC Cir. 1999) (regulation of Surface Transportation Board providing that if a notice of exemption "contains false or misleading information, the use of the exemption is void *ab initio*" does not apply to a notice containing false information when declaring the notice void *ab initio* would undermine the goals of the governing statute; a conflict between the "literal application of statutory language" and maintaining the integrity of the regulatory scheme should be resolved by construing the text in accordance with its purpose); *Mova Pharm. Corp.* v. *Shalala,* 140 F.3d 1060, 1068–69 (DC Cir. 1998) (as discussed later, describes the "absurd results" doctrine in the context of the *Chevron* framework for statutory construction; invalidates a Food and Drug Administration's (FDA) regulation designed to remedy what the FDA described as the absurd result of a literal application of the statutory provisions governing FDA approval of successive generic drug applications, on grounds that "[i]n effect, the FDA has embarked upon an adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery;" states that "[t]he rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the "unambiguously expressed intent of Congress," *Chevron,* 467 U.S. at 842, and thus to overcome the first step of the *Chevron* analysis"); *Environmental Defense Fund* v. *EPA,* 82 F.3d 451, 468–69 (DC Cir. 1996) (although Act requires that a federal action conform to the SIP that is currently in place, EPA may instead require conformity to a revised implementation plan that state commits to develop; "[t]his is one of those rare cases * * * [that] requires a more flexible, purpose-oriented interpretation if we are to avoid 'absurd or futile results.'"); *American Water Works Ass'n* v. *EPA,* 40 F.3d 1266, 1271 (DC Cir. 1994) (holding that EPA's interpretation of the term "feasible" so as to require a treatment technique instead of a maximum contaminant level (MCL) for lead is reasonable; the court stated: "Indeed, where a literal reading of a statutory term would lead to absurd results, the term simply 'has no plain meaning * * * and is the proper subject of construction by the EPA and the courts.' If the meaning of 'feasible' suggested by the NRDC is indeed its plain meaning, then this is such a case; for it could lead to a result squarely at odds with the purpose of the Safe Drinking Water Act." (quoting *Chem. Mfrs. Ass'n* v. *Natural Res. Def. Council, Inc.,* 470 U.S. 116, 126 (1985)) (citation omitted); *In re Nofziger,* 925 F.2d 428, 434–35 (DC Cir. 1991) (provision authorizing payment of attorney fees to the subject of an investigation conducted by an independent counsel of the Department of Justice only if "no indictment is brought" against such individual does not preclude payment of attorney fees when an indictment is brought but is determined to be invalid).

c. The "Administrative Necessity" Doctrine

In the proposed rulemaking, we also described in detail the "administrative necessity" doctrine, 74 FR 55311 col. 3 to 55318 col. 3, and we incorporate that discussion by reference into this notice. Under this doctrine, if a statutory provision, however clear on its face, is impossible for the agency to administer, then the agency is not required to follow the literal requirements, and instead, the agency may adjust the requirements in as refined a manner as possible to assure that the requirements are administrable, while still achieving Congress's overall intent. The DC Circuit set out the doctrine of "administrative necessity" in a line of cases that most prominently includes *Alabama Power* v. *Costle,* 636 F.2d 323 (DC Cir. 1980). The Court cited the doctrine most recently in *New York* v. *EPA,* 443 F.3d 880, 884, 888 (DC Cir. 2006).

As we stated in the proposed rulemaking, "We believe that the "administrative necessity" case law establishes a three-step process under which an administrative agency may, under the appropriate circumstances, in

[26] For other U.S. Supreme Court cases, *see Utah Junk Co.* v. *Porter,* 328 U.S. 39, 44 (1946) ("literalness may strangle meaning"); *Markham* v. *Cabell,* 326 U.S. 404, 409 (1945) ("The policy as well as the letter of the law is a guide to decision."); *United States* v. *American Trucking Associations, Inc.* 310 U.S. 534 (1940) (the term "employees" in the Federal Motor Carrier Act, is limited to employees whose activities affect safety); *C.V. Sorrels* v. *U.S.,* 287 U.S. 435, 446–49 (1932) (provisions of National Prohibition Act that criminalize possessing and selling liquor do not apply if defendant is entrapped; Court declines to apply the "letter of the statute" because doing so "in the circumstances under consideration is foreign to its purpose"); *United States* v. *Katz,* 271 U.S. 354, 362 (1926) (holding that the statutory words "no person" refer only to persons authorized under other provisions of the Act to traffic alcohol, thus rejecting a literal application of general terms descriptive of a class of persons made subject to a criminal statute); *Hawaii* v. *Mankichi,* 190 U.S. 197, 212–14 (1903) (refusing to adopt a literal application of the "Newlands resolution" which would have entitled every criminal in the State of Hawaii convicted of an offense between 1898–1900 to be set at large, as "surely such a result could not have been within the contemplation of Congress").

effect revise statutory requirements that the agency demonstrates are impossible to administer so that they are administrable." 74 FR 55315 col. 1. Specifically:

> [T]he three steps are as follows: When an agency has identified what it believes may be insurmountable burdens in administering a statutory requirement, the first step the agency must take is to evaluate how it could streamline administration as much as possible, while remaining within the confines of the statutory requirements. The second step is that the agency must determine whether it can justifiably conclude that even after whatever streamlining of administration of statutory requirements (consistent with those statutory requirements) it conducts, the remaining administrative tasks are impossible for the agency because they are beyond its resources, *e.g.,* beyond the capacities of its personnel and funding. If the agency concludes with justification that it would be impossible to administer the statutory requirements, as streamlined, then the agency may take the third step, which is to phase in or otherwise adjust the requirements so that they are administrable. However, the agency must do so in a manner that is as refined as possible so that the agency may continue to implement as fully as possible Congressional intent.

74 FR 55315 cols. 1–2.

It should also be noted that we believe the administrative burdens encountered by the state and local permitting authorities are fully relevant under the "administrative necessity" doctrine. Although the case law that discusses the doctrine focuses on federal agencies (*see* 74 FR 55312–14), under the CAA, state and local agencies are EPA's partners in implementing provisions of the CAA, and have primary responsibility for implementing the PSD program. They generally adopt EPA's PSD requirements in their SIPs, as required under CAA section 110(a)(2)(C); and they generally adopt EPA's title V requirements in their title V programs, as required under CAA section 502(d). They issue the PSD and title V permits and are responsible in the first instance for enforcing the terms of the permits. In all these respects, the law that the state and local permitting authorities administer is both federal and state law. Under certain circumstances, EPA may become responsible for permit issuance and enforcement in the first instance, but even then, EPA may, and frequently has, delegated those duties to a state, in which case, the state implements federal law directly. Thus, although the PSD and title V programs are federal requirements, for the most part, it is the states that implement those programs. For this reason, the administrative burdens that the states face in implementing the programs are relevant in determining the applicability of the "administrative necessity" doctrine.

d. "One-Step-at-a-Time" Doctrine

In addition to the "absurd results" and "administrative necessity" doctrines, another judicial doctrine supports at least part of EPA's Tailoring Rule, and that is the doctrine that agencies may implement statutory mandates one step at a time, which we will call the "one-step-at-a-time" doctrine. In the notice of proposed rulemaking, we also described this doctrine and recent case law applying it. 74 FR 55319 col. 1–3. As we noted, that the U.S. Supreme Court recently described the doctrine in *Massachusetts* v. *EPA,* 549 U.S. 497, 524 (2007), as follows: "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop;" and instead they may permissibly implement such regulatory programs over time, "refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed." We assume familiarity with our discussion in the proposal, but we expand upon it here to review the case law in greater detail and to highlight certain components of the doctrine that are particularly relevant to the Tailoring Rule. The roots of the doctrine go back at least to the DC Circuit's 1979 decision in *United States Brewers Association, Inc.* v. *EPA,* 600 F.2d 974 (DC Cir. 1979). There, the Court considered a challenge to EPA's guidelines for managing beverage containers, which EPA was required to promulgate under the Resource Conservation and Recovery Act of 1976 (RCRA). RCRA gave EPA one year to promulgate the guidelines. EPA promulgated a partial set of guidelines, started two others, and was challenged before the year was out by petitioners who objected to the initial guideline, saying it fell short of the statutory mandate. The Court upheld the initial guideline, stating: "Under these circumstances we think the question of whether the Agency has fully satisfied the mandate of the statute is not fit for judicial review at this time, when the Agency, still well within the one-year period granted by statute, is deeply involved in the process of formulating rules designed to carry out the congressional mandate. The Agency might properly take one step at a time." *States Brewers Association, Inc.* v. *EPA,* 600 F.2d at 982.

The Court addressed the doctrine at greater length in *National Association of Broadcasters* v. *FCC,* 740 F.2d 1190, 1209–14 (DC Cir. 1984). There, the Court noted that under certain statutory schemes, step-by-step agency action might not be authorized; but the Court emphasized that when it is authorized, it may offer significant benefits; and the Court went on to delineate some of the circumstances under which its use is justified. In that case, the Court held that Federal Communications Commission (FCC) acted reasonably in making a spectrum allocation decision that granted direct broadcast satellite service priority use of a gigahertz (GHz) band in 5-years time, and—although acknowledging that fixed service users that were, at that time, using that band, would have to relocate to other bands—in postponing the details of the fixed service relocation to future proceedings. The Court described in some detail "[t]he circumstances under which * * * [an] agency may defer resolution of problems raised in a rulemaking," as follows:

> The requisite judgment is in essence a pragmatic one. In an ideal world, of course, agencies would act only after comprehensive consideration of how all available alternatives comported with a well-defined policymaking objective, and in some circumstances, statutes indeed mandate that agencies proceed by only such a course * * *. But administrative action generally occurs against a shifting background in which facts, predictions, and policies are in flux and in which an agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken * * *. We have therefore recognized the reasonableness of [an agency's] decision to engage in incremental rulemaking and to defer resolution of issues raised in a rulemaking even when those issues are "related" to the main ones being considered * * *. At the same time, [an agency] cannot 'restructure [an] entire industry on a piecemeal basis' through a rule that utterly fails to consider how the likely future resolution of crucial issues will affect the rule's rationale * * *.
>
> Drawing a line between the permissible and the impermissible in this area will generally raise two questions. First the agency will likely have made some estimation, based upon evolving economic and technological conditions, as to the nature and magnitude of the problem it will have to confront when it comes to resolve the postponed issue. With regard to this aspect of the agency's decision, as long as the agency's predictions about the course of future events are plausible and flow from the factual record compiled, a reviewing court should accept the agency's estimation * * *. Second, once the nature and magnitude of the unresolved issue is determined, the relevant question is whether it was reasonable, in the context of the decisions made in the proceeding under review, for the agency to have deferred the issue to the future. With respect to that question, postponement will be most easily justified when an agency acts against a background of rapid technical and social change and when

the agency's initial decision as a practical matter is reversible should the future proceedings yield drastically unexpected results. In contrast, an incremental approach to agency decision making is least justified when small errors in predictive judgments can have catastrophic effects on the public welfare or when future proceedings are likely to be systematically defective in taking into account certain relevant interests * * *.

740 F.2d at 1210–11 (citations omitted).

In *City of Las Vegas* v. *Lujan,* 891 F.2d 927 (DC Cir. 1989), the Court suggested that one component of upholding partial agency compliance with a statutory directive is evidence that the agency was on track for full compliance. There, the Court upheld the Department of Interior's decision to list the population of desert tortoises living north and west of the Colorado River (the "Mojave" population) as endangered species, but not the nearby population living south and east of the river (the "Sonoran" population). The agency explained that the Mojave population faced certain threats that the Sonoran population did not, and the Court found nothing to fault in that reasoning. The Court added: "Since agencies have great discretion to treat a problem partially, we would not strike down the listing if it were a first step toward a complete solution, even if we thought it 'should' have covered both the Mojave and Sonoran populations." *City of Las Vegas* v. *Lujan,* 891 F.2d 927, 935 (DC Cir. 1989) (footnote omitted).

In *Grand Canyon Air Tour Coalition* v. *F.A.A.,* 154 F.3d 455 (DC Cir. 1998), the DC Circuit added another component to the "one-step-at-a-time" doctrine: While reiterating that "ordinarily, agencies have wide latitude to attack a regulatory problem in phases and that a phased attack often has substantial benefits," id. at 471, the Court went on to uphold partial agency action even when that action was long-delayed. There, the relevant statute was the Overflights Act, which required the Federal Aviation Administration (FAA) to reduce aircraft noise from sightseeing tours in Grand Canyon National Park, and established the goal of "substantial restoration of natural quiet and experience of the park." The statute required the agency to develop a plan to implement the statutory requirements within 120 days after enactment, and report to Congress within 2 years after the date of the plan as to the plan's success. In fact, the FAA did not develop, through rulemaking, a plan until ten years after enactment, and when it did, it acknowledged that the plan was only a partial one, and that it would need two more rules and another ten years to meet the statutory goal of substantial restoration. Although recognizing that the Overflights Act did not establish an explicit timetable for meeting the statutory goal, the Court stated that "[t]he language of the Overflights Act does manifest a congressional concern with expeditious agency action," and described the agency's action variously as "tardy," "undeniably slow," and "slow and faltering." Id. at 476–77. Even so, the Court upheld the FAA's action against different challenges from appellants and intervenors that (i) the agency acted unreasonably in not promulgating a complete plan to meet the statutory goal, instead of promulgating just the first step; and (ii) the agency acted unreasonably in not waiting until it had a complete plan before promulgating the first step. The Court stated: "We agree that it would be arbitrary and capricious for an agency simply to thumb its nose at Congress and say—without any explanation—that it simply does not intend to achieve a congressional goal on any timetable at all * * *," but went on to emphasize that the FAA's rule was the first of three that the agency assured would achieve the statutory goal. The Court cited *City of Las Vegas* v. *Lujan,* discussed previously, for the proposition that "a court will not strike down agency action 'if it were a first step toward a complete solution.'" *Grand Canyon Air Tour Coalition* v. *F.A.A.,* 154 F.3d 455, 477–78 (DC Cir. 1998).[27]

e. Consistency of Doctrines With *Chevron* Framework

Although the formation of the "absurd results," "administrative necessity," and "one-step-at-a-time" doctrines pre-date the *Chevron* two-step analysis for construing statutes that Congress has authorized an agency to administer, we believe that the doctrines can be considered very much a part of that analysis, and courts have continued to apply them post-*Chevron.* Under *Chevron* Step 1, an agency must determine whether "Congress has directly spoken to the precise question at issue." If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." However, if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

Chevron U.S.A. Inc. v. *NRDC,* 467 U.S. 837, 842–42 (1984).

Thus, Step 1 under *Chevron* calls for determining congressional intent for the relevant statutory directive on the specific issue presented. To determine Congress's intent, the agency must look first to the statutory terms in question, and generally interpret them according to their literal meaning, within the overall statutory context, and perhaps with reference to the legislative history. If the literal meaning of the statutory requirements is clear then, absent indications to the contrary, the agency must take it to indicate congressional intent and must implement it. Even if the literal meaning of the statutory requirements is not clear, if the agency can otherwise find indications of clear congressional intent, such as in the legislative history, then the agency must implement that congressional intent.

The DC Circuit has indicated that the "absurd results" doctrine fits into the *Chevron* Step 1 analysis in the following way: Recall that in the cases in which the courts have invoked this doctrine, the literal meaning of the statutory requirements has been clear, but has led to absurd results. This can occur when the literal meaning, when applied to the specific question, conflicts with other statutory provisions, contradicts congressional purpose as found in the legislative history—and, in particular, undermines congressional purpose—or otherwise produces results so illogical or otherwise contrary to sensible public policy as to be beyond anything Congress would reasonably have intended. *See United States* v. *Ron Pair Enterprises*, 489 U.S. 235, 242–43 (1989); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

Under these circumstances, the agency must not take the literal meaning to indicate congressional intent. As the DC Circuit has explained, "where a literal reading of a statutory term would lead to absurd results, the term 'simply has no plain meaning * * * and is the proper subject of construction by the EPA and the court.'" *American Water Works Assn* v. *EPA*, 40 F.3d 1266, 1271 (DC Cir. 1994) (quoting *Chemical Manufacturers' Association* v. *NRDC*, 470 U.S. 116, 126 (1985)). Under these circumstances, if the agency can find other indications of clear congressional intent, then the agency must implement that intent. *See United States* v. *Ron Pair Enterprises*, 489 U.S. 235, 242–43 (1989). This may mean implementing the statutory terms, albeit not in accordance with their literal meaning,

[27] For other cases, *see Arizona Public Service Co.* v. *EPA,* 562 F.3d 1116, 1125–26 (10th Cir. 2009); *General American Transp. Corp.* v. *ICC,* 872 F.2d 1048, 1058 (DC Cir. 1989); *Hazardous Waste Treatment Council* v. *EPA,* 861 F.2d 277, 287 (DC Cir. 1988); *Western Union International, Inc.* v. *FCC,* 725 Fl2d 732, 754 (DC Cir. 1984).

but in a way that achieves a result that is as close as possible to congressional intent. As the DC Circuit said in *Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060 (DC Cir. 1998):

> The rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the "unambiguously expressed intent of Congress," * * * and thus to overcome the first step of the *Chevron* analysis. But the agency does not thereby obtain a license to rewrite the statute. When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent * * *. [T]he agency might be able to show that there are multiple ways of avoiding a statutory anomaly, all equally consistent with the intentions of the statute's drafters * * *. In such a case, we would move to the second stage of the *Chevron* analysis, and ask whether the agency's choice between these options was "based on a permissible construction of the statute." Otherwise, however, our review of the agency's deviation from the statutory text will occur under the first step of the *Chevron* analysis, in which we do not defer to the agency's interpretation of the statute.

Id. at 1068 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842, 843 (1984) (citations omitted)).

The "administrative necessity" doctrine is not as well developed as the "absurd results" doctrine, so that the courts have not had occasion to explicitly describe how the doctrine fits into the *Chevron* analytical framework. However, we think that a reasonable approach, in line with the DC Circuit's approach to the "absurd results" doctrine as just described, is as follows: Recall that under the "administrative necessity" doctrine, an agency is not required to implement a statutory provision in accordance with the literal requirements when doing so would be impossible, but the agency must nevertheless implement the provision as fully as possible. Placed in the context of the *Chevron* framework, we think that that the "administrative necessity" doctrine is based on the premise that inherent in the statutory design is the presumption that Congress does not intend to impose an impossible burden on an administrative agency. *See Alabama Power* v. *Costle*, 636 F.2d 323, 357 (DC Cir. 1980) (describing the "administrative necessity" approach as one of the "limited grounds for the creation of exemptions [that] are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them").

Therefore, if the literal meaning of a statutory directive would impose on an agency an impossible administrative burden, then that literal meaning should not be considered to be indicative of congressional intent. Rather, congressional intent should be considered to achieve as much of the statutory directive as possible. As a result, the agency must adopt an approach that implements the statutory directive as fully as possible. This is consistent with the DC Circuit's holding in *Mova Pharm. Corp* that if congressional intent is clear, but the plain meaning of a statute does not express that intent, then the agency must, under *Chevron* Step 1, select an interpretation that most closely approximates congressional intent. *Mova Pharm. Corp*, 140 F.3d at 1068.[28]

The "one-step-at-a-time" doctrine fits into the *Chevron* framework in much the same manner that the "administrative necessity" doctrine does. That is, inherent in the statutory design is the presumption that Congress intended an agency, under certain circumstances, to implement the statutory requirements in a one-step-at-a-time fashion, as long as the agency stays on a path towards full implementation.

Under all of the circumstances described previously, congressional intent is clear—whether it is indicated by the plain language or otherwise—and as a result, the agency must follow that intent under *Chevron* Step 1. On the other hand, the agency may determine that congressional intent on the specific issue is not clear. In these cases, the agencies should proceed to *Chevron* Step 2 and select an interpretation or an application that is a permissible construction of the statute. This situation generally occurs when the statutory provisions are ambiguous or silent as to the specific issue, and there are no other indications of clear congressional intent. In addition, in some cases in which the literal meaning of the statutory provision, when applied to the specific question, leads to an absurd result—and, therefore, the statutory provision should be considered not to have a plain meaning—there may be no other indications of clear congressional intent. Under all these circumstances, the agency is authorized, under *Chevron* Step 2, to develop and implement a construction of the statute that the courts will uphold as long as it is reasonable.

As noted previously, the DC Circuit, has pointed out that this situation may also occur when the literal language leads to an absurd result, and, in attempting to implement congressional intent, the agency is "able to show that there are multiple ways of avoiding a statutory anomaly, all equally consistent with the intentions of the statute's drafters * * *. In such a case, we would move to the second stage of the *Chevron* analysis, and ask whether the agency's choice between these options was 'based on a permissible construction of the statute.'" *Mova Pharm. Corp,* 140 F.3d at 1068. As the U.S. Supreme Court has recently said, although in a context different than "absurd results," "In the end, the interpretation applied by EPA "governs if it is a reasonable interpretation of the statute—not necessarily the only possible * * * interpretation, nor even the interpretation deemed most reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.,* 129 S.Ct. 1498. 1505 (2009).

As a related matter, although the courts have described *Chevron* Step 2 as requiring that the agency's policy be "a permissible construction of the statute," *see Mova Pharm. Corp,* 140 F.3d at 1068 (quoting *Chevron,* 467 U.S. at 842–43), if the statutory requirements cannot be read literally because doing so would produce "absurd results," then the agency's policy need not be completely consistent with those particular requirements. The policy must still, in order to be upheld, be consistent with Congress's actions, but those actions should be considered to afford the agency broad discretion considering that both the statutory terms cannot be considered dispositive and underlying congressional intent is not clear. As the U.S. Supreme Court has recently said, although in a context different than "absurd results," In the end, the interpretation applied by the agency governs if it is a reasonable interpretation of the statute—not necessarily the only possible * * * interpretation, nor even the interpretation deemed most reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.,* 129 S.Ct. 1498. 1505 (2009).

There is another aspect of the "administrative necessity" doctrine worth noting in this context: The doctrine applies when (i) a literal application of the statutory directive to the case at hand is impossible for the agency to administer; and (ii) even so, either Congress clearly intended the statutory directive to apply to the case

[28] We recognize that we described the relationship between the *Chevron* framework and the "administrative necessity" doctrine somewhat differently in the proposal, 74 FR 55312, and that, after further analysis, we are refining our view of that relationship as described previously.

at hand or, if Congress did not clearly intend that, then the agency reasonably construes the statute to apply the statutory directive to the case at hand. In contrast, if Congress did not intend the statutory directive to apply to the case at hand, or if congressional intent is uncertain and the agency considers another approach to be reasonable, then the "administrative necessity" doctrine would not apply. As a result, the agency would not be required to implement the statutory directive to the case at hand at all, much less in a more administrable fashion.

f. Interconnectedness of the Legal Doctrines

Although we believe that each of the "absurd results," "administrative necessity," and "one-step-at-a-time" doctrines provide independent support for our action, we also believe that in this case, the three doctrines are intertwined and form a comprehensive basis for EPA's tailoring approach. As just discussed, each of the three doctrines is tied into the *Chevron* analytical framework because each is designed to give effect to underlying intent. As discussed previously, each of the three doctrines comes into play in this case because a literal reading of the PSD and title V applicability provisions results in insurmountable administrative burdens. Those insurmountable administrative burdens—along with the undue costs to sources—must be considered "absurd results" that would undermine congressional purpose for the PSD and title V programs. Under the "absurd results" doctrine, EPA is authorized not to implement the applicability provisions literally—that is, not to implement them as applying on the January 2, 2011 date that PSD and title V are triggered to all GHG sources at or above the statutory thresholds—but instead to tailor them in a manner consistent with congressional intent. That means applying the PSD and title V requirements through a phase-in approach to as many sources as possible and as quickly as possible, starting with the largest sources, as EPA does with this Tailoring Rule,[29] at least to a certain point. By the same token, the insurmountable administrative burdens bring into play the "administrative necessity" doctrine, under which EPA is, again, authorized not to implement the applicability provisions literally, but instead to apply them in a manner consistent with administrative resources. This also means phasing them in through the approach in the Tailoring Rule. Finally, the "one-step-at-a-time" doctrine, which authorizes incremental action by agencies to implement statutory requirements under certain circumstances, provides further support for the phased tailoring approach in the Tailoring Rule.

g. Application of Chevron Approach

The *Chevron* analytical approach, and the three legal doctrines at issue here, apply to this action in the following manner: To reiterate, for convenience, the statutory provisions at issue: Congress, through the definition of "major emitting facility," applied the PSD program to include (i) "any * * * stationary sources of air pollutants which emit or have the potential to emit, one hundred [or, depending on the source category, two hundred fifty] tons per year or more of any air pollutant," CAA sections 165(a), 169(1); and (ii) and such sources that undertake a physical or operational change that "increases the amount of any air pollutant emitted" by such sources, CAA sections 165(a), 169(2)(C), 111(a)(4).[30] Similarly, Congress, through the definition of "major source," specified that the title V program includes "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." CAA sections 502(a), 501(2)(B), 302(j). EPA, through long-established regulatory action, in the case of PSD, and long-established interpretation, in the case of title V, has interpreted these definitions so that they apply only with respect to air pollutants that are subject to regulation under the CAA.

For each of these applicability provisions, the approach under *Chevron* is as follows: Under *Chevron* Step 1, we must determine whether Congress expressed an intention on the specific question, which is whether the PSD or title V applicability provisions apply to GHG sources. Said differently, the specific question is whether, in the case of PSD, Congress intended that the definitions of "major emitting facility" and "modification" apply, respectively, to all GHG sources that emit at least 100 or 250 tpy or GHGs and to all physical or operational changes by major emitting facilities that "increase[ ] the amount" of GHGs; and, in the case of title V, whether the definition of "major source" applies to all GHG sources that emit at least 100 tpy GHGs.

To determine intent, we must first examine the terms of the statute in light of their literal meaning. Here, the literal reading of each provision covers GHG sources. For PSD, a GHG source that emits at least 100 or 250 tpy GHGs literally qualifies as "stationary source [ ] of air pollutants which emit[s] or ha[s] the potential to emit, one hundred [or two hundred fifty] tons per year or more of any air pollutant [subject to regulation under the CAA]." CAA section 169(1). For modifications, a physical or operational change that increases the amount of GHG emissions qualifies as a "modification" because it "increases the amount of any air pollutant emitted" by the source. Similarly, for title V, a GHG source that emits at least 100 tpy GHGs literally qualifies as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant [subject to regulation under the CAA]." CAA sections 502(a), 501(2)(B), 302(j).

Although each definition is clear that it applies to GHG sources as a general matter, applying each definition in accordance with its literal meaning to all GHG sources at the specified levels of emissions and at the present time—in advance of the development of streamlining methods and greater permitting authority expertise and resources—would create undue costs for sources and impossible administrative burdens for permitting authorities. These results are not consistent with other provisions of the PSD and title V requirements, and are inconsistent with—and, indeed, undermine—congressional purposes for the PSD and title V provisions. Accordingly, under the "absurd results" doctrine, neither the PSD definition of "major emitting facility" or "modification" nor the title V definition of "major source," should be applied literally to all GHG sources, and therefore none should be considered to have a literal meaning with respect to its application to all GHG sources.

In analyzing the provisions of each definition more closely, we believe that each has four terms, any one of which could be considered not to have its literal meaning, in this respect. Specifically, each provision includes (i) The term "any * * * source," or "a stationary source," and that term could be considered not to refer literally to all

[29] As discussed later, EPA may, in future rulemaking, make a final determination that under the "absurd results" doctrine, Congress did not intend for EPA to apply PSD to very small sources, that is, those, with emissions at or near the 100/250 tpy statutory levels.

[30] A physical or operational change is treated as a "modification" that is subject to PSD if it either "increases the amount of any air pollutant emitted" by the source or "results in the emission of any air pollutant not previously emitted." For convenience, unless otherwise indicated, when we refer to changes that "increase[ ] the amount of any air pollutant emitted," we mean both to those types of changes and changes that "result[ ] in the emission of any air pollutant not previously emitted."

of the GHG sources; (ii) either the term "two hundred fifty tons per year" or "100 tons per year," or the term "increases the amount," and those terms could be considered not to refer literally to the tonnage amount of emissions from all of the GHG sources; (iii) the term "any air pollutant," [31] and that term could be considered not to refer literally to the emissions from all of the GHG sources; and (iv) the term "subject to regulation under the CAA" (which we have interpreted "any air pollutant" to include), and that term could be considered not to refer literally to the emissions from all of the GHG sources. As long as any one of those four terms may be considered not to have its literal meaning as applied to GHG sources, then the definition as a whole—again, for PSD, the terms "major emitting facility" or "modifications," and for title V, the term "major source"—cannot be considered to apply literally to GHG sources. Because we read the terms together, as integral parts of each definition as a whole, we do not think that the choice of which of those four terms within each definition cannot be considered to apply literally to GHG sources has substantive legal effect. In other words, we believe that any one of these terms, or all of them together as part of each definition as a whole, should be considered not to apply literally in the case of GHG sources.

Having determined that each definition does not have a literal meaning with respect to the applicability of PSD or title V applies to all GHG sources, we must next inquire as to whether Congress has nevertheless expressed an intent on that question through other means. We discuss the statutory terms and legislative history of the PSD and title V provisions in more detail later, but for now it suffices to say that on the issue of whether PSD and title V apply to GHG sources, we believe that congressional intent is clear, and that is to apply PSD and title V to GHG sources generally. We believe that this intent is clear from the broad phrasing of the applicability provisions—as noted earlier, the definitions apply by their terms to GHG source generally, even though the definitions should not be applied literally to all GHG sources—the fact that the various components of the PSD and title V programs can be readily applied to GHG sources, and the fact that the two programs can readily accommodate at least some GHG sources. As a result, we believe that as a matter of *Chevron* Step 1, PSD and title V generally apply to GHG sources. Our previous regulatory action defining the applicability provisions made this clear, and we do not reopen this issue in this rulemaking. Moreover, even if this long-established regulatory position were not justifiable based on *Chevron* step 1—on the grounds that in fact, congressional intent on this point is not clear—then we believe that this position, that the statutory provisions to apply PSD and title V generally to GHG sources, was justified under Chevron step 2.[32]

On the issue of how to apply PSD to GHG sources, including the specific threshold levels and the timing, we believe that Congress could be considered to have expressed a clear intent that GHG sources be included in the PSD program at as close to the statutory thresholds as possible, and as quickly as possible, and at least to a certain point, all as consistent with the need to assure that the PSD program does not impose undue costs on sources or undue administrative burdens on the permitting authorities. Under this view, EPA would be required at *Chevron* Step 1 to adopt the Tailoring Rule because, by phasing in PSD applicability, it most closely gives effect to Congress's intent. Under these circumstances, EPA is authorized to exercise its expert judgment as to the best approach for phasing in the application of PSD to GHG sources.

Even so, we recognize that it could be concluded that on the issue of how to apply PSD to GHG sources, congressional intent is unclear. Under these circumstances, EPA has the discretion at *Chevron* Step 2 to adopt the Tailoring Rule because it is a reasonable interpretation of the statutory requirements (remaining mindful that the applicability requirements cannot be applied literally). Under the Tailoring Rule, EPA seeks to include as many GHG sources in the permitting programs at as close to the statutory thresholds as possible, and as quickly as possible, although we recognize that we ultimately may stop the phase-in process short of the statutory threshold levels.

As for title V, we believe that taken together, the various statutory requirements and statements in the legislative history do not evidence a clear congressional intent for how title V is to be applied to GHG sources. As discussed later, the relevant title V requirements and statements in legislative history differ from PSD, not least because they include provisions that concern empty permits that point in different directions. As a result, here, too, EPA has the discretion at *Chevron* Step 2 to adopt the Tailoring Rule as a reasonable interpretation of the statutory requirements. Alternatively, even if the statute does express a clear intent as to title V that, similar to PSD, title V requirements must be phased in as closely to the statutory threshold as possible and as quickly as possible, this Tailoring Rule is consistent with that intent.

It should also be noted that although EPA has concluded that applying the PSD and title V applicability provisions literally in the case of GHG sources would produce "absurd results" and therefore is not required, this conclusion has no relevance for applying other CAA requirements—such as the requirements concerning endangerment and contribution findings under CAA section 202(a)(1) or emission standards for new motor vehicles or new motor vehicle engines under CAA section 202—to GHGs or GHG sources. EPA's conclusions with respect to the PSD and title V applicability requirements are based on the specific terms of those requirements, other relevant PSD and title V provisions, and the legislative history of the PSD and title V programs.

Within the context of the *Chevron* framework, the "administrative necessity" doctrine applies as follows: Under the doctrine, Congress is presumed to intend that the PSD and title V applicability requirements be administrable. Here, those applicability requirements, if applied to GHG sources in accordance with their literal meaning, would be impossible to administer. Accordingly, under *Chevron* Step 1, it is consistent with congressional intent that EPA and the permitting authorities be authorized to implement the applicability requirements in a manner that is administrable, that is, through the tailoring approach.

As for the "one-step-at-a-time" doctrine, we believe it applies within the *Chevron* framework in conjunction with the "absurd results" and "administrative necessity" doctrines. As we discuss elsewhere, the PSD and title V applicability provisions by their terms require that sources at or above the 100/250 tpy thresholds comply with PSD and title V requirements at the time those requirements are triggered, which

[31] We do not believe that this term is ambiguous with respect to the need to cover GHG sources under either the PSD or title V program, only with respect to what sources of GHG should be covered under the circumstances presented here.

[32] In this preamble and the response to comments document we fully address arguments that commenters and others have presented about congressional intent and coverage of GHGs. We do so to be fully responsive, even though we believe that this is a settled matter for which the time for judicial review has past.

is when GHGs become subject to regulation. Therefore, if the literal meaning of the applicability provisions as applied to GHG sources were controlling—that is, if it reflected congressional intent—it would foreclose use of the one-step-at-a-time doctrine to implement a phase-in approach. However, the literal meaning is not controlling because—in light of the absurd results, including the insurmountable administrative burdens, that would result from the literal meaning—congressional intent is not to require the application of the PSD and title V requirements to all GHG sources at or above the statutory thresholds at the time that GHGs become subject to regulation. Instead, as described previously, we consider congressional intent for the applicability provisions, as applied to GHG sources, either (i) to be clear that PSD and title V should be phased in for GHG sources as quickly as possible, or (ii) to be unclear, so that EPA may reasonably choose to phase PSD and title V in for those sources in that manner. Under either view, congressional intent for PSD and title V applicability to GHG sources accommodates the "one-step-at-a-time" approach.

4. The PSD and Title V Programs

Having discussed both the factual underpinnings and, immediately above, the legal underpinnings for our tailoring approach, we now discuss the PSD and title V programs themselves, including, for each program, the key statutory provisions, their legislative history, and the relevant regulations and guidance documents through which EPA has implemented the provisions. We start with the PSD program.

a. The PSD program

(1) PSD Provisions

Several PSD provisions are relevant for present purposes because of the specific requirements that they establish and the window that they provide into congressional intent. These provisions start with the applicability provisions, found in CAA sections 165(a) and 169(1), which identify the new sources subject to PSD, and CAA section 111(a)(4), which describes the modifications of existing sources that are subject to PSD. CAA section 165(a) provides:

> No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—
>
> (1) A permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;
>
> (2) The proposed permit has been subject to a review in accordance with this section * * *, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;
>
> * * * * *
>
> (4) The proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility * * *.

The term "major emitting facility" is defined, under CAA section 169(1) to include:

> * * * stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from [28 listed] types of stationary sources. * * * Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

As for modification of existing sources, CAA section 169(1)(C) provides that the term "construction," as used in CAA section 165(a) (the PSD applicability section) "includes the modification (as defined in section 111(a)(4)) of any source or facility." Section 111(a)(4), in turn, provides:

> The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

As interpreted by EPA regulations, these provisions, taken together, provide that new stationary sources are subject to PSD if they emit at the 100/250–tpy thresholds air pollutants that are subject to EPA regulation, and that existing stationary sources that emit such air pollutants at the 100/250–tpy thresholds are subject to PSD if they undertake a physical or operational change that increases their emissions of such air pollutants by any amount.

Other provisions of particular relevance are the requirements for timely issuance of permits. The permitting authority must "grant[ ] or den[y] [any completed permit application] not later than one year after the date of filing of such completed application." CAA section 165(c).

In addition, the PSD provisions articulate "the purposes of [the PSD program]," which are to balance environmental protection and growth. CAA section 160. One of the purposes, in subsection (1), is specifically "to protect public health and welfare," and another, in subsection (3), is "to insure that economic growth will occur in a manner consistent with the preservations of existing clean air resources."

The PSD provisions also include detailed procedures for implementation. Most relevant for sources of GHG are the provisions that the proposed permit for each source must be the subject of a public hearing with opportunity for interested persons to comment, CAA section 165(a)(2), and each source must be subject to BACT, as determined by the permitting authority on a source-by-source basis, CAA section 165(a)(4), 169(3).

(2) PSD Legislative History

The legislative history of the PSD provisions, enacted in the 1977 CAA Amendments, makes clear that Congress was largely focused on sources of criteria pollutants: primarily sulfur dioxide, PM, NO_X, and carbon monoxide (CO). This focus is evident in the basic purpose of the PSD program, which is to safeguard maintenance of the NAAQS. *See* S 95–127 (95th Cong., 1st Sess.), at 27.

Congress designed the PSD provisions to impose significant regulatory requirements, on a source-by-source basis, to identify and implement BACT and, for criteria pollutant, to also undertake certain studies. Congress was well aware that because these requirements are individualized to the source, they are expensive. Accordingly, Congress designed the applicability provisions (i) to apply these requirements to industrial sources of a certain type and a certain size—sources within 28 specified source categories and that emit at least 100 tpy—as well as all other sources that emit at least 250 tpy, and, by the same token, (ii) to exempt other sources from these requirements.[33]

Although Congress required that CAA requirements generally apply to "major emitting facilities," defined as any source that emits or has the potential to emit 100 tpy of any pollutant, Congress applied PSD to only sources at 100 tpy or higher in 28 specified industrial source categories, and at 250 tpy or

[33] Coverage of modifications by the PSD program was addressed by a technical amendment which added a cross reference in section 169 to section 111. The legislative history of this provision is scant and there is no suggestion that Congress would have contemplated sweeping in large number of changes from smaller sources through the addition of this provision.

more in all other source categories. This distinction was deliberate: According to Sen. McClure, Congress selected the 28 source categories after reviewing an EPA study describing 190 industrial source categories. 122 *Cong. Rec.* 24521 (July 29, 1976) (statement by Sen. McClure).

Congress also relied on an EPA memorandum that identified the range of industrial categories that EPA regulated under its regulations that constituted the precursor to the statutory PSD program,[34] and listed both the estimated number of new sources constructing each year and the amount of pollution emitted by the "typical plant" in the category. The memorandum was prepared by B.J. Steigerwald, Director of the Office of Air Quality Planning and Standards and Roger Strelow, EPA's Assistant Administrator for Air and Waste Management ("Steigerwald-Strelow memorandum"). The Steigerwald-Strelow memorandum makes clear that the 100 tpy cut-off for the 28 listed sources categories, and the 250 tpy cut-off for all other sources, was meaningful; that is, there were a large number of sources below those cut-offs that Congress explicitly contemplated would not be included in the PSD program. *Id.* at 24548–50.

Consistent with this, the legislative history on the Senate side also specifically identified certain source categories that Senators believed should not be covered by PSD. The Senate bill language limited PSD to sources of 100 tpy or more in 28 listed source categories, and to any other categories that the Administrator might add. Sen. Muskie stated that the Senate bill excluded "houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources." 123 *Cong. Rec.* 18021 (June 8, 1977) (statement of Sen. Muskie). Sen. McLure's list of excluded source categories were "[a] small gasoline jobber, or a heating plant at a community college, [which] could have the potential to emit 100 tons of pollution annually." 122 Cong. Rec. 24548–49 (July 29, 1976) (statement of Sen. McClure). The Senate Committee Report included a comparable list, and in describing it, concisely articulated the cost-conscious basis for the line-drawing: "[the PSD] procedure * * * must include an effective review-and-permit process. Such a process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college, each of which may have the potential to emit 100 tons of pollution annually." S. Rpt. 95–127 at 96–97.

The enacted legislation differs from the Senate bill by replacing the authorization to EPA to include by regulation source categories in addition to the listed 28 source categories with an inclusion of all other sources if they exceed 250 tpy, and with an authorization for the states to exempt hospitals and educational institutions. But Congress's overall intention remains clear, as the DC Circuit described in *Alabama Power:* "Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air * * *. [With respect to] the heating plant operating in a large high school or in a small community college * * * [w]e have no reason to believe that Congress intended to define such obviously minor sources as 'major' for the purposes of the PSD provision."[35] 636 F.2d at 353–54.

A particularly important indication of congressional intent to limit the PSD program it was designing to larger sources comes in considering the emissions profile of the small-sized boilers. Congress focused closely on identifying which sources with emissions in excess of 100 tpy should not be subject to PSD even though they are subject to CAA requirements generally. But Congress viewed a large set of sources as emitting below 100 tpy and therefore not included in the PSD program. Chief among these sources, in terms of absolute numbers of sources, were small boilers. The Steigerwald-Strelow memorandum identified two categories of these boilers, differentiated by size. The first ranges in size from 10 to 250 x 10^6 Btu per hour (Btu/hr), and has a "typical plant" size of 10^7 Btu/hr, with "BACT emissions from typical plant" of 53 tpy, and a total of 1,446 sources in the category. The second category ranges in size from 0.3 to 10 x 10^6 Btu/hr, and has a "typical plant" size of 1.3 x 10^6 Btu/hr, with "BACT emissions from typical plant" of 2 tpy, and a total of 11,215 sources in the category. The memorandum discusses these two categories in the context of explaining which source categories exceed a size of 100 tpy—and therefore would be subject to PSD if a 100 tpy threshold were set—by stating, "Fortunately, most truly small boilers and typical space heating operations would not be covered." 122 *Cong. Rec.* 24549 (July 29, 1976).

The legislative history also provides a window into the scope of the program that Congress anticipated and related administrability concerns. According to the Steigerwald-Strelow memorandum, the number of new sources each year whose "BACT emissions from typical plant" exceed 100 for the 28 listed source categories and 250 for all other source categories is less than 100 per year. Although the Steigerwald-Strelow memorandum does not attempt to estimate the number of modifications, it appears that based on this information, Congress had reason to expect the total size of the PSD program to be measured in the hundreds or perhaps thousands of permits each year. A program of this size would be manageable by EPA and the permitting authorities.

(3) PSD Regulatory History: Regulations Concerning the Definition of "Major Stationary Source"

For present purposes, the regulatory history of the PSD program is most noteworthy because it shows that since the inception of the program following the 1977 CAA Amendments, EPA has interpreted the statutory PSD applicability provisions to apply more narrowly—to any air pollutant *subject to regulation*—than their literal meaning ("any air pollutant"). EPA's initial rulemaking implementing the PSD program, which was proposed and finalized in 1977–1978, made explicit that the entire PSD program applied to only pollutants regulated under the Act. 43 FR 26380, 26403, 26406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)). In 1979–1980, EPA revised the PSD program to conform to *Alabama Power* v. *Costle,* 636 F.2d 323 (DC Cir. 1980). 44 FR 51924 (September 5, 1979) (proposed rule); 45 FR 52676 (August 7, 1980) (final rule). In this rulemaking, EPA did not disturb the pre-existing provisions that limited the applicability of the PSD program to

[34] Beginning in 1974, EPA implemented a program that required sources of certain NAAQS pollutants seeking to construct in attainment or unclassifiable areas to implement emission controls for the purpose of preventing deterioration in the ambient air quality in those areas. This program was the precursor to the PSD program Congress enacted in 1977.

[35] Note that although Congress specifically authorized the states to exempt "nonprofit health or education institutions" from the definition of "major emitting facility," this statement by the DC Circuit should be taken as the Court's view that Congress did not design PSD to cover sources of the small size described.

regulated air pollutants.[36] In 1996 EPA proposed, and in 2002 finalized, a set of amendments to the PSD provisions that included revisions to conform with the 1990 CAA Amendments, which, in relevant part, exempted hazardous air pollutants (HAPs) from PSD, under CAA section 112(b)(6). *See* 61 FR 38250 (July 23, 1996), 67 FR 80186 (December 31, 2002). In the preamble to the final rule, EPA noted that based on a request from a commenter, EPA was amending the regulations to "clarify which pollutants are covered under the PSD program." EPA accomplished this by promulgating a definition for "regulated NSR pollutant," which listed categories of pollutants regulated under the Act, and by substituting that defined term for the phrase "pollutants regulated under the Act" that was previously used in various parts of the PSD regulations. 67 FR 80240. The definition of "regulated NSR pollutant" includes several categories of pollutants (including, in general, NAAQS pollutants and precursors, pollutants regulated under CAA section 111 NSPS, Class I or II substances regulated under CAA title VI) and a catch-all category, "[a]ny pollutant that otherwise is subject to regulation under the Act." *E.g.,* 40 CFR 52.21(b)(50). As in the previous rulemakings, EPA did not address the difference between the definition of "major emitting facility" and its regulatory approach or indicate that it had received comments on this issue. While the definition of "major modification" in the PSD regulations has changed over time with respect to how emission increases are calculated, the regulatory history with respect to pollutant coverage parallels that of major emitting facility.

We recount this regulatory history as background information. We are not reconsidering or reopening these regulations to the extent they interpret the definition of "major emitting facility" and "modification" narrowly to be limited to pollutants subject to regulation under the Act.

[36] As noted elsewhere in this notice, in *Alabama Power,* the DC Circuit noted that the definition of "major emitting facility" under CAA section 169(1) could apply to air pollutants not regulated under other provisions of the Act, and discussed the contrast of this broad definition to the narrower application of the BACT provisions. 636 F.2d at 352–53 & n. 60. In its rulemaking notices responding to *Alabama Power,* EPA discussed at length certain issues, such as the applicability of NSR to pollutants emitted below the "major" thresholds, that are based on the reference in "major emitting facility" to "any air pollutant." However, throughout its discussion, EPA interpreted that reference as "any regulated air pollutant," again without specifically acknowledging the difference or without acknowledging the above-noted statements in *Alabama Power. See* 45 FR 52710–52711. EPA did not indicate that it had received comments on this issue.

b. Title V Program

Having reviewed the key statutory provisions, their legislative history, and the relevant administrative interpretations for the PSD program, we now do the same for the title V program.

(1) Title V Provisions

The key title V provisions for present purposes start with the applicability provisions, which are found in CAA sections 502(a), 501(2)(B), and 302(j). These provisions provide that it is unlawful for any person to operate a "major source" without a title V permit, section 502(a), and define a "major source" to include "any major stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." CAA sections 501(2)(B) and 302(j). As noted elsewhere, these provisions, taken together and as interpreted by EPA, provide that stationary sources are subject to title V if they emit at the 100-tpy threshold air pollutants that are subject to EPA regulation.

In addition, although title V does not have a set of provisions describing its purpose, it is clear from its provisions and its legislative history, discussed later, that its key goal is to gather into one permitting mechanism the CAA requirements applicable to a source and impose conditions necessary to assure compliance with such requirements, and thereby promote the enforceability of CAA requirements applicable to the covered sources. Section 503(b)(1) requires that the source's permit application contain a compliance plan describing how the source will "comply with all applicable requirements" of the CAA, and section 504(a) requires that "[e]ach permit issued under [title V] shall include * * * such * * * conditions as are necessary to assure compliance with applicable requirements of [the Act]." *See* H.R. Rep. No. 101–490, at 351 (1990) ("It should be emphasized that the operating permit to be issued under this title is intended by the Administration to be the single document or source of all of the requirements under the Act applicable to the source.").

Importantly, title V is replete with provisions designed to make the permitting process as efficient and smooth-running as possible, including the expeditious processing of permit applications and the timely issuance of permits. Section 503(c) requires that "the permitting authority shall approve or disapprove a completed application * * * and shall issue or deny the permit, within 18 months after the date of receipt thereof * * *." Section 502(b)(6) requires the permitting authority to develop "adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice * * * and for expeditious review of permit actions, including * * * judicial review in State court of the final permit action by [specified persons]." Section 502(b)(7) includes a "hammer" provision designed to reinforce timely permit issuance, which is that the permitting authority's program must include:

> To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in [CAA] section 503 * * *) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

Section 502(b)(8) requires the permit program to include "[a]uthority and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public [certain permit-related documents]". Section 502(b)(9) requires a permit revision to incorporate requirements promulgated after issuance of the permit, but only if the permit is for a major source and has a term of 3 or more years remaining. In addition, the revision must occur "as expeditiously as practicable." Section 502(b)(10) requires the permit program to include operational flexibility provisions that "allow changes within a permitted facility * * * without requiring a permit revision, if the changes are not modifications * * * and * * * do not exceed the emissions allowable under the permit * * *."

In addition, title V includes a comprehensive and finely detailed implementation schedule that mandates timely issuance of permits while building in EPA and affected state review, public participation, and timely compliance by the source with reporting requirements. Following the date that sources become subject to title V, they have 1 year to submit their permit applications. CAA section 503(c). As noted previously, the permitting authority then has 18 months to issue or deny the permit. CAA section 503(c). Permitting authorities must provide an opportunity for public comment and a hearing. CAA section 502(b)(6). If the permitting authority proposes to issue

the permit, the permitting authority must submit the permit to EPA, and notify affected states, for review. CAA section 505(a)(1). EPA then has 45 days to review the permit and, if EPA deems it appropriate, to object to the permit. CAA section 505(b)(1). If EPA does object, then the permitting authority must, within 90 days, revise it to meet the objections, or else EPA becomes required to issue or deny the permit. CAA section 505(c). If EPA does not object, then, within 60 days of the close of the 45-day review period, any person may petition EPA to object, and EPA must grant or deny the petition within 60 days. CAA section 505(b)(2). If a permit is issued, it must include a permit compliance plan, under which the permittee must "submit progress reports to the permitting authority no less frequently than every 6 months," and must "periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and [ ] promptly report any deviations from permit requirements to the permitting authority." CAA section 503(b).

(2) Title V Legislative History

The legislative history of title V, enacted by Congress in the 1990 CAA Amendments, indicates the scope of the program that Congress expected: Congress expected the program to cover some tens of thousands of sources, which would approximate the scope of the permit program under the Clean Water Act. The Senate Committee on Environment and Public Works stated:

> EPA estimates that the new permit requirements will cover about 8,200 major sources that emit 100 tons per year or more of criteria pollutants (which are regulated under SIPs). In addition, many smaller sources are (or, as EPA promulgates additional regulations, will be) covered by new source performance standards under section 111 of the Act, hazardous air pollutant standards under section 112 of the Act, and nonattainment provisions of this legislation. By comparison, under the Clean Water Act, some 70,000 sources receive permits, including more than 16,000 major sources. Although many air pollution sources have more emission points than water pollution sources, the additional workload in managing the air pollution permit system is estimated to be roughly comparable to the burden that States and EPA have successfully managed under the Clean Water Act.

S. Rep. 101–228, at 353 (1990).[37] Sen. Mitchell, the Senate Majority Leader, stated that he expected "over 10,000 permits [to] * * * be issued under this program." 136 Cong. Rec. S3239–03 (March 27, 1990). Others in Congress had similar estimates. *See, e.g.,* 136 Cong. Rec. S3166 ("thousands and thousands of permit applications * * * will be required to be submitted") (statement of Sen. Nickles).

Furthermore, the legislative history indicates that Congress did not contemplate that large numbers of very small sources would be subject to title V's requirements.[38] This becomes clear by reviewing the legislative history of a companion piece of legislation to the operating permits provisions that Congress enacted into CAA section 507, which is the "Small business stationary source technical and environmental compliance assistance program." CAA section 507. Under this provision, sources that, among other things, "are not major stationary source[s]" and that emit less than 50 tpy of any regulated pollutant, as well as less than 75 tpy or all regulated pollutants, are eligible for assistance under CAA section 507. CAA section 507(c)(1). The House Committee Report described this provision—including what types of sources it expected this provision to benefit—as follows:

> New section [507] is a small source/small business provision added by the Committee. It seeks to help small businesses to comply with the problems that are likely to occur under the Act as amended by this bill. For purposes of this section, small businesses or small emitters are defined as sources that are emitting 100 tons or less per year and that have a number of employees that would qualify them for assistance from the Small Business Administration (SBA). As we look to the future of environmental protection under the Act, we take special steps here to ensure that it is possible for these small businesses to comply with minimum hassle and in recognition of the problems that are unique to them. Such small businesses include printers, furniture makers, dry cleaners, and millions of other small businesses in this country.

House Committee Report, H.R. 101–590, at 354. In this manner, the House Committee Report made clear that it expected "millions of * * * small businesses"—including "printers, furniture makers, dry cleaners" and many others—to benefit from the CAA section 507 small source/small business program, but Congress did not expect them to become subject to the operating permit requirements of title V because their emissions fell below 100 tpy, which is, in general, the threshold for title V applicability as a "major source."

The legislative history of title V confirms that Congress viewed a principal purpose of title V as providing a vehicle to compile the requirements applicable to the source. As the report of the House Committee on Energy and Commerce ("House Committee Report") stated, "It should be emphasized that the operating permit to be issued under this title is intended by the Administration to be the single document or source of all of the requirements under the Act applicable to the source." H.R. Rep. No. 101–490, at 351 (1990). Combined with the source's reporting requirements, this compilation of applicable requirements would facilitate public awareness of a source's obligations and compliance and would facilitate compliance and enforcement.

On the Senate side, Sen. Chafee, one of the floor managers of the bill, made a similar point:

> The permits will serve the very useful function of gathering and reciting in one place—the permit document itself—all of the duties imposed by the Clean Air Act upon the source that holds the permit. This would clearly be an improvement over the present system, where both the source and EPA must search through numerous provisions of state implementation plans and regulations to assemble a complete list of requirements that apply to any particular plant * * *.
>
> Once these permits are in place, plant managers will be better able to understand and to follow the requirements of the Clean Air Act. At the same time, EPA will be better able to monitor how well each plant is complying with those requirements. This is a highly sensible approach for all concerned.

136 Cong. Rec. S213 (January 24, 1990) (statement of Sen. Chafee). Sen. Lieberman made a similar statement. 136 Cong. Rec. 3172–73 (March 26, 1990) (statement of Sen. Lieberman). Thus, a central purpose of the title V permit program is to compile all the requirements applicable to the source into a single place, the permit. Implicit in this purpose is that the sources subject to title V will have applicable requirements to be compiled. As Sen. Chafee directly stated, "[T]he vast majority of these permit applications will * * *, in all likelihood, only codify the existing requirements of the applicable State implementation plan."

[37] The House Committee on Energy and Commerce acknowledged that it was "uncertain about the magnitude of permit applications likely to be submitted under the bill initially and thereafter in each State or to EPA," H. Rep. 101–490 p. 346.

[38] Title V can apply to certain small businesses in some circumstances. Under CAA sections 502(a) and 501(2)(A), title V applies to major sources of HAPs, which includes sources that may emit as little as 10 tpy of a single HAP, and which may include some dry cleaners and other small businesses. In addition, under CAA section 502(a), title V applies to area sources subject to standards under CAA sections 111 or 112 (or required to have a PSD or nonattainment NSR permit), unless the Administrator exempts those sources from title V because compliance would be impracticable, infeasible, or unnecessarily burdensome.

136 Cong. Rec. S2720 (March 20, 1990) (statement of Sen. Chafee).

More broadly, the legislative history also indicates congressional concern about the costs of permitting for small businesses, and a determination to minimize those costs to the extent possible. This concern is reflected in several provisions of title V. For example, section 502(a) authorizes EPA to exempt all or part of a source category—except for any major source from the title V permit program if EPA "finds that compliance with [title V] requirements is impracticable, infeasible, or unnecessarily burdensome on such categories." Similarly, the permit fee provisions include a presumptive minimum fee amount, but authorize an exemption from that presumptive amount upon a showing that a lesser amount will meet overall fee requirements, CAA section 502(b)(3)(B)(iv). One of the drafters of this provision, Rep. Wyden, explained that its purpose was to preserve the flexibility of states to impose lower fees of small businesses:

> I note that the provision on fees allows reductions for small sources where appropriate. The state has some flexibility, under the general permit fee provisions, to adjust fee levels for any source so long as the average fee charged meets the statutory minimum.

136 Cong. Rec. H12884 (Oct. 26, 1990) (statement of Rep. Wyden). *See, e.g.,* 136 Cong. Rec. H2559 (May 21, 1990) (statement of Rep. Wyden) (discussing need to "help small businesses through the air permit labyrinth").

The legislative history also indicates that Congress was deeply concerned both about the need not to burden sources generally with undue costs and to assure the administrability of the title V program, and as a result, was determined to make the program as smooth-running as possible. These goals are reflected in many of the title V requirements, as discussed previously. *See, e.g.,* CAA section 502(b)(6) (requiring "adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice * * * and for expeditious review of permit actions); CAA section 502(b)(7) (includes a "hammer" provision designed to reinforce timely permit issuance); CAA section 502(b)(9)–(10) (limiting circumstances under which permit revision is required; requiring revision to occur "as expeditiously as practicable;" including operational flexibility provisions).

The legislative history confirms that these provisions were designed to reduce costs to sources and promote administrability. The "Chafee-Baucus Statement of Senate Managers" for the bill explained the purpose of the CAA section 502(b)(6) requirement for "[a]dequate, streamlined, and reasonable procedures for expeditious[ ]" permit actions as follows:

> [M]uch concern has been expressed that this new permitting process will unduly delay the proper functioning of many sources, and we intend to mitigate any delay by directing that the process be expeditious.
>
> In addition to this general directive for expeditious processing, we mandate in new section 503 that permitting authorities approve or reject permit applications within certain specified time periods following filing. In this fashion, we have taken explicit steps to protect against undue delays.

136 Cong. Rec. S16941 (statement of Sen. Chafee). The same statement explained that the permit revision procedures of CAA section 502(b)(9) reflect a—

> careful effort to ensure that the permit program works effectively and efficiently. Succinctly, this provision accommodates two competing concerns. On the one hand, it is important to ensure that permit requirements remain up-to-date as the provisions of the Clean Air Act are developed and new requirements are imposed. On the other hand, it also is important to be sure that we do not reduce the permit program to a shambles by requiring sources to engage in a continuous process of revising their permits as these new requirements are imposed.

136 Cong. Rec. 16942 (Oct. 27, 1990) (Chafee-Baucus statement of Senate Managers) (statement of Sen. Chafee).

In addition, these concerns were at the bottom of the following statement by Sen. Chafee, in which he described how the bill's drafters had revised it in response to a concern by industry that an earlier version of the bill would have put undue costs on industry:

> We have also heard concerns from industry that S. 1630 would burden sources unduly by requiring them to submit—along with their permit applications—plans explaining how they intend to comply with all requirements of the Clean Air Act that apply to them.
>
> But, Mr. President, we emphatically do not intend to burden industry with preparation and submission of unnecessary compliance plans. The substitute clarifies that any compliance plans would address only those matters by which the sources would comply with new requirements imposed by this act as it is finally signed into law. These plans would not need to address compliance with any existing Clean Air Act requirements, unless the source is in violation of those requirements.

136 Cong. Rec. S2107 (March 5, 1990) (statement of Sen. Chafee).

As another indication of congressional concern over administrability, Congress recognized that at the beginning of the program, large numbers of permit applications might overwhelm the permitting authorities. To protect against this, Congress included in CAA section 503(c) a phase-in schedule for permitting authorities to act on the initial set of permit applications. Under 503(c), permitting authorities were not required to act on the initial set of permit applications within 18 months after it received the application, but rather could act on one-third of them on an annual basis over a 3-year period. Sen. Chafee, in describing an early version of this provision—which would have allowed permitting authorities to phase in the submission of permit applications—explained that its purpose was "to avoid a logjam of permit applications[,] * * * ensure that [regulatory] gridlock can be avoided, and [ensure] that the permitting process will work with a minimum of disruption and delay." 136 Cong. Rec., S2106 (March 5, 1990) (statement of Sen. Chafee).

(3) Title V Regulatory History

As with PSD, for present purposes, the regulatory history of the title V program is most noteworthy because it shows that beginning shortly after the inception of the program following the 1990 CAA Amendments, EPA has interpreted the statutory title V applicability provisions to apply more narrowly—to any air pollutant *subject to regulation*—than their literal meaning ("any air pollutant"). As discussed previously, title V applies to any "major source," defined, as relevant here, under CAA sections 501(2)(B) and 302(j), as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant * * *." EPA's regulations mirror the CAA definitional provisions. 40 CFR 70.2.

However, since 1993, EPA has interpreted the applicability provisions more narrowly. At that time, which was shortly after title V was enacted, EPA issued a guidance document making clear that it interprets this requirement to apply to sources of pollutants "subject to regulation" under the Act. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, "Definition of Regulated Air Pollutant for Purposes of Title V" (Apr. 26, 1993) (Wegman Memorandum). The interpretation in this memorandum was based on: (1) EPA's reading of the definitional chain for "major source" under title V, including the definition of "air pollutant" under section 302(g) and

the definition of "major source" under 302(j); (2) the view that Congress did not intend to require a variety of sources to obtain title V permits if they are not otherwise regulated under the Act (*see* also CAA section 504(a), providing that title V permits are to include and assure compliance with applicable requirements under the Act); and (3) consistency with the approach under the PSD program.

While the specific narrow interpretation in the Wegman Memorandum of the definition of "air pollutant" in CAA section 302(g) is in question in light of the holding in *Massachusetts* v. *EPA,* 549 U.S. 497, 533 (2007) (finding this definition to be "capacious"), we believe that the overall rationale for our interpretation of the applicability of title V remains sound. EPA continues to maintain its interpretation, consistent with CAA sections 302(j), 501, 502 and 504(a), that the provisions governing title V applicability for "a major stationary source" can only be triggered by emissions of pollutants subject to regulation. This interpretation is based primarily on the purpose of title V to collect all regulatory requirements applicable to a source and to assure compliance with such requirements, *see, e.g.,* CAA section 504(a), and on the desire to promote consistency with the approach under the PSD program.

In the Tailoring Rule notice of proposed rulemaking, EPA acknowledged the Wegman Memorandum and affirmed the memorandum's continued viability, stating that "EPA continues to maintain this interpretation." 74 FR 55300, col. 3, fn. 8; *see also* 75 FR 17022–23 (Interpretive Memo reconsideration).

As with PSD, we recount this regulatory history as background information, and we are not reconsidering or re-opening this interpretation of the definition of "major source" narrowly to be limited to pollutants subject to regulation under the Act.

5. Application of the "Absurd Results" Doctrine for the PSD Program

Having reviewed the factual background, legal doctrines, and the key components of the PSD and title V programs, we now turn towards interpreting the PSD and title V requirements in accordance with the *Chevron* framework, accounting for the applicable legal doctrines. We begin with the "absurd results" doctrine, and apply it first to the PSD requirements.

In this action, we finalize, with some refinements, the "absurd results" basis we proposed. Specifically, we are revising our regulations to limit PSD applicability to GHG emitting sources by revising the regulatory term, "regulated NSR pollutant," and although our revised regulations do not accord with a literal reading of the statutory provisions for PSD applicability, which are incorporated into the definition of "major emitting facility" and "major modification," we have concluded that based on the "absurd results" doctrine, a literal adherence to the terms of these definitions is not required. Even so, we believe Congress did intend that PSD apply to GHG sources as a general matter. Further, we may apply PSD to GHG sources in a phased-in manner, as we do through the tailoring approach, because either congressional intent is clear on that issue and the tailoring approach best reflects it, or congressional intent is unclear and the tailoring approach is a reasonable interpretation of the statute.

a. Congressional Purpose for the PSD Program

To reiterate, for convenience, CAA section 169(1) defines a "major emitting facility" to include "any * * * source[] [that] emit[s], or ha[s] the potential to emit, [depending on the source category], one hundred [or two hundred fifty] tons per year or more or more of any air pollutant." CAA section 169(1); and a "modification" as any physical or operational change in "a stationary source which increases the amount of any air pollutant emitted by such source," CAA section 169(2)(C), 111(a)(4). We also reiterate that, as discussed above, beginning with our initial rulemaking in 1977–1978 to implement the PSD program, we have interpreted these definitions more narrowly by reading into them the limitation that a source is subject to PSD only if the air pollutants in question are "subject to regulation under the Act." 40 CFR 51.166(b)(49)(iv). EPA is not re-opening this interpretation in this regulation in this action.

Under the current interpretation of the PSD applicability provision, EPA's recent promulgation of the LDVR will trigger the applicability of PSD for GHG sources at the 100/250 tpy threshold levels as of January 2, 2011. This is because PSD applicability hinges on the definition of "major emitting facility," which, under EPA's long-standing narrowing interpretation, but absent further tailoring, applies PSD to sources of any air pollutant subject that is subject to regulation under another provision of the CAA. EPA's promulgation of the LDVR means that GHGs will become subject to regulation on the date that the rule takes effect, which will be January 2, 2011.

But absent tailoring, the January 2, 2011 trigger date for GHG PSD applicability will subject an extraordinarily large number of sources, more than 81,000, to PSD each year, an increase of almost 300-fold. And the great majority of these new sources will be small commercial or residential sources. We believe that for many reasons, this result is contrary to congressional intent for the PSD program, and in fact would severely undermine what Congress sought to accomplish with the program. As a result, under our *Chevron* analysis, accounting for the "absurd results" doctrine, the statutory definition for "major emitting facility" (as interpreted narrowly to include "subject to regulation") should not be read to apply to all GHG sources at or above the 100/250 tpy threshold as of the January 2, 2011 date. Rather, the definitions of "major emitting facility" and "modification" should be tailored so that they apply to GHG sources on a phased-in basis, with the largest sources first, as we describe in this rule.

As explained previously, *Chevron* Step 1 calls for a determination of congressional intent, and the courts consider the best indicator of congressional intent to be the plain meaning of the statute. However, the U.S. Supreme Court has held that the literal meaning of a statutory provision is not conclusive "in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters' * * * [in which case] the intention of the drafters, rather than the strict language, controls." *United States* v. *Ron Pair Enterprises,* 489 U.S. 235, 242 (1989). To determine whether "the intentions of the * * * drafters" differ from the result produced from "literal application" of the statutory provisions in question, the courts may examine the overall context of the statutory provisions, including whether there are related statutory provisions that either conflict or are consistent with that interpretation; and the legislative history to see if it exposes what the legislature meant by the terms in question. In addition, the courts may examine whether a literal application of the provisions produces a result that the courts characterize variously as absurd, futile, strange, or indeterminate, and therefore so illogical or otherwise contrary to sensible public policy as to be beyond anything Congress would reasonably have intended. In such cases, the literal language cannot be said to reflect the intention of the drafters, and

therefore does not control. *See United States* v. *Ron Pair Enterprises,* 489 U.S. 235, 242–43 (1989); *Griffin* v. *Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982).

Here, applying the definitions of "major emitting facility" and "modification" literally (as EPA has interpreted them more narrowly) at the present time—in the absence of streamlining measures or additional permitting authority resources, and without tailoring—would be contrary to congressional purpose for the PSD provisions, as found in the statutory provisions and legislative history, especially in light of the impact from applying those definitions literally. Congress established the PSD program in large measure because it was concerned that around the country, industrial development, which was confronting barriers to locating in nonattainment areas (that is, areas that do not meet the NAAQS), would attempt to locate in clean air areas (that is, attainment areas or unclassifiable areas), but that as a consequence, the clean air areas would see their air quality deteriorate to the point where they, too, would no longer meet the NAAQS. The end result would be the spread of environmental and health problems to those formerly clean air areas, as well as more barriers to further industrial development. With these concerns in mind, Congress designed the PSD program to require newly constructing or modifying sources in areas with air quality that meets the NAAQS (or that is unclassifiable) to analyze their emissions of NAAQS pollutants and to implement controls as needed to assure that those emissions do not significantly deteriorate air quality. Many of the PSD requirements, and much of the discussion in the legislative history, reflect these aspects of the PSD program. *E.g.,* CAA sections 162, 163, 164, 165(a)(3), 165(d)(2), 165(e), 166; *see generally* H. Rep. 95–294, 95th Cong., 1st Sess. (1977) 103–78.

Congress also designed the PSD program to impose controls on non-NAAQS pollutants, through the requirement under CAA section 165(a)(4) that the source be "subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." For example, when Congress enacted the PSD provisions in 1977, sources emitting HAPs were required to implement BACT for those pollutants, although in the 1990 CAA Amendments, Congress redesigned CAA section 112, which includes the requirements for HAPs, and excluded HAPs from PSD. CAA section 112(b)(6).

Congress was keenly aware that the PSD program needed to serve two purposes: Protect the environment and promote economic growth. Congress explicitly identified these two goals in the "purposes" section of the PSD provision, CAA section 160, and various PSD requirements clearly reflect them. For example, to protect economic growth, the PSD program expedites the permit process to include a 1-year limitation on the time that the permitting authority has act on permit applications. To protect the environment, in addition to including many provisions that focus on NAAQS pollutants, the PSD program requires that the preconstruction permit impose emission limits that reflect BACT for each pollutant subject to regulation under another CAA provision. CAA section 165(a)(4). This BACT provision also makes clear, by its terms, that although Congress designed the PSD program largely with NAAQS pollutants in mind, Congress also intended that sources subject to PSD control the emissions of their other pollutants as well. The DC Circuit has recognized the twin goals of environmental protection and economic development that underlie PSD, and has upheld EPA interpretations of the PSD program that reflect a balancing of those goals. *See, e.g., New York* v. *EPA,* 413 F.3d 3, 27 (DC Cir.), *rehearing en banc den.* 431 F.3d 801 (2005).

Congress was also keenly aware that the PSD analyses and controls that it was mandating had to be implemented on a source-by-source basis, and that this process would be expensive for sources. As a result, Congress intended to limit the PSD program to large industrial sources because it was those sources that were the primary cause of the pollution problems in question and because those sources would have the resources to comply with the PSD requirements. Congress's mechanism for limiting PSD was the 100/250 tpy threshold limitations. Focused as it was primarily on NAAQS pollutants, Congress considered sources that emit NAAQS pollutants in those quantities generally to be the large industrial sources to which it intended PSD to be limited.

That Congress paid careful attention to the types and sizes of sources that would be subject to the PSD program and designed the thresholds deliberately to limit the program's scope is evident from the legislative history. Several Senate floor statements and the Committee Report made clear that PSD should not apply to small sources. As discussed later, Congress scrutinized information that EPA provided as to types and sizes of sources, found largely in the Steigerwald-Strelow memorandum. Sen. Muskie stated that the Senate bill excluded "houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources." *123 Cong. Rec.* 18021 (June 8, 1977) (statement of Sen. Muskie). Sen. McClure stated that PSD should be limited to "industrial plants of significant impact," and should exclude "[a] small gasoline jobber, or a heating plant at a community college, [which] could have the potential to emit 100 tons of pollution annually." 122 Cong. Rec. 24548–49 (July 29, 1976) (statement of Sen. McClure). The Senate Committee Report mirrored Sen. McClure's statement, and concisely articulated the cost-related basis for the line-drawing: "[The PSD] procedure * * * must include an effective review-and-permit process. Such a process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college, each of which may have the potential to emit 100 tons of pollution annually." S. Rpt. 95–127 at 96–97.

The DC Circuit had occasion, in *Alabama Power,* to acknowledge this legislative history. "Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air." *Alabama Power,* 636 F.2d at 353. The Court added, "Though the costs of compliance with [the PSD] requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds specified in section 169(1).". *Id.* at 354.

It is not too much to say that applying PSD requirements literally to GHG sources at the present time—in the absence of streamlining or increasing permitting authority resources and without tailoring the definition of "major emitting facility" or "modification"—would result in a program that would have been unrecognizable to the Congress that designed PSD. Congress intended that PSD be limited to a relatively small number of large industrial sources.

Without phasing in PSD and title V applicability to GHG sources so as to allow the development of streamlining methods and increases in permitting authority resources, the PSD program would expand by January 2, 2011, from the current 280 sources per year to almost 82,000 sources, virtually all of which would be smaller than the sources currently in the PSD program and most of which would be small commercial and residential sources. Until EPA could develop streamlining methods, all of the sources that would become newly subject to PSD—whether they be larger or smaller sources, whether industrial or commercial/residential sources—would have to undergo source-specific BACT determinations for their GHG emissions, as well as their emissions of conventional pollutants in amounts in excess of the significance levels. We estimate that the commercial and residential sources—the great majority of which are small business—would each incur, on average, almost $60,000 in PSD permitting expenses. This result would be contrary to Congress's careful efforts to confine PSD to large industrial sources that could afford these costs.

A closer look at the legislative history confirms the view that Congress did not expect PSD to apply to large numbers of small sources, including commercial and residential sources, and instead expected the 100/250 tpy thresholds to limit PSD's applicability to larger sources. As noted previously, Congress relied on an EPA memorandum—the Steigerwald-Strelow memorandum—that identified the range of industrial categories that EPA regulated under its program that constituted the precursor to the statutory PSD program, and listed both the estimated number of new sources constructing each year and the amount of pollution emitted by the "typical plant" in the category. The Steigerwald-Strelow memorandum makes clear that the 100 tpy cut-off for the 28 listed sources categories, and the 250 tpy cut-off for all other sources, would exclude from PSD a large number of sources. 122 *Cong. Rec.* 24548–50 (July 29, 1976). However, virtually all, if not all, of the sources in half the 28 source categories emit CO_2 in quantities that equal or exceed the 100 tpy threshold, and almost all of the sources in the remaining categories emit CO_2 in quantities that equal or exceed the 100 tpy threshold. Therefore, applying the "major emitting facility" definition to GHG sources, in the absence of streamlining methods and without tailoring, would, as a practical matter, vitiate much of the purpose of the 100 tpy cut-off for industrial sources.[39]

Most telling, in this regard, is the small-sized boilers, which the Steigerwald-Strelow memorandum describes, in terms of size, pollutants emitted, and numbers of sources, as follows: The memorandum identified two categories of these boilers, differentiated by size. The first ranges in size from 10 to 250 x 10^6 Btu/hr, and has a "typical plant" size of 10^7 Btu/hr, with "BACT emissions from typical plant" of 53 tpy, and a total of 1,446 sources in that category. The second category ranges in size from 0.3 to 10 x 10^6 Btu/hr, and has a "typical plant" size of 1.3 x 10^6 Btu/hr, with "BACT emissions from typical plant" of 2 tpy, and a total of 11,215 sources in the category. That memorandum makes clear that EPA did not believe that sources in these two categories—and especially the smallest one—would be subject to PSD under a 100 tpy threshold, by stating, "Fortunately, most truly small boilers and typical space heating operations would not be covered." 122 *Cong. Rec.* 24549 (July 29, 1976). However, these data and conclusions were all based on emissions of NAAQS pollutants, the amounts of which placed these boilers well below the PSD threshold limitations. In general, most boilers of these small sizes are fired with natural gas, and a natural gas boiler greater than 0.5 x 10^6 Btu/hr emits at least 250 tpy CO_2. Therefore, if the CO_2 emissions of these small boilers are considered—as would occur by applying the definition of "major emitting facility" to GHG sources without tailoring—then most of them would in fact be subject to PSD. Again, this result would directly contravene Congress's intention to limit PSD to "industrial plants of significant impact." 122 *Cong. Rec.* 24548–49 (statement of Sen. McClure).

Perhaps the most compelling reason why applying the PSD program to GHG sources without tailoring, and before the development of streamlining methods, would be inconsistent with congressional intent, is that the resulting program would prove unadministrable. Although the legislative history of the PSD program does not reveal much explicit congressional focus on administrability issues, the Steigerwald-Strelow Memorandum, which identifies the source categories and numbers of sources that were before Congress as it considered PSD, suggests that the program that Congress fashioned could be expected to cover at most a few thousand sources each year. This appears to be approximately the size of the program that EPA administered before the 1977 CAA Amendments, so that it seems reasonable to assume that Congress expected the PSD program it enacted to be within EPA's and the states' administrative capacities.

Moreover, the *Alabama Power* court stressed the importance of administrability concerns: Most importantly, the Court held that EPA, in interpreting the "modification" provisions that apply PSD to physical or operational changes by major emitting facilities that "increase the amount of any air pollutant emitted," CAA section 111(a)(4), may "exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity," and went on to state that in establishing the exemption thresholds, "[t]he Agency should look at the degree of administrative burden posed by enforcement at various *de minimis* threshold levels." 636 F.2d at 400,405. In addition, the Court based its holding that potential-to-emit for purposes of the applicability thresholds should be defined as emissions at full capacity with implementation of control equipment, in part on its view that with this definition, the number of sources subject to PSD would be manageable:

> Though the costs of compliance with section 165 requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds specified in section 169(1). The numbers of sources that meet these criteria, as we delineate them, are reasonably in line with EPA's administrative capability.

Alabama Power, 636 F.2d at 354. However, applying PSD to GHG sources before streamlining and without tailoring would increase the size of the PSD program at least an order of magnitude beyond what Congress seems

[39] Specifically, of the 28 source categories under CAA section 169(1), information available to EPA indicates that all of the sources in the following categories emit at least 100 tpy of CO_2 annually: fossil-fuel fired steam electric plants of more than 250 million Btu per hour heat input, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, municipal incinerators capable of charging more than 50 tons of refuse per day, nitric acid plants, petroleum refineries, lime plants, primary lead smelters, fossil-fuel boilers of more than 250 Btus per hour heat input. In addition, all but a few kraft pulp mills and glass fiber processing plants emit at least 100 tpy CO_2 annually. Our information is incomplete with respect to the remaining source categories, but with the possible exception of petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, we suspect that virtually all sources emit at least 100 tpy CO_2 annually. *See* "Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation"; Office of Air Quality Planning and Standards; March 29, 2010.

to have expected, which would have been far beyond the "administrative capability" that *Alabama Power* described EPA as having.

Beyond this disconnect with congressional expectations, what is most important is that the extraordinarily large number of permit applications would overwhelm permitting authorities and slow their ability to process permit applications to a crawl. Our best estimate at present is that permitting authorities would need to process almost 82,000 permit applications per year, compared to, at most, 800 in the current PSD program. The total additional workload, in work hours, for PSD permits would be more than 19.5 million more work hours, compared to 150,795 work hours for the current PSD program, and the total additional costs would be over $1.5 billion, compared with $12 million for the current PSD program.

At proposal, we noted that the states had estimated that the influx of permit applications that would result from applying the 250 tpy threshold at actual emissions would, without additional resources, result in permitting delays of 3 years. In fact, as we noted at proposal, a literal reading of the PSD requirements would require their application at the 250 tpy PTE level, which would result in ten times more permit applications than were assumed when the states made the 3-year estimate. Further, our current estimates of the numbers of sources that would be subject to PSD requirements are about twice what we estimated at proposal, as described elsewhere. Moreover, our estimate of the number of hours that permitting authorities would need to process a permit application from a source in the commercial or residential sector—which is, by far, the largest single sector—is three and one-half times as long as we estimated at proposal. And under a literal reading of the PSD applicability provisions as applied to GHG sources, the permitting authorities would be required to implement a program of this size beginning on January 2, 2011, less than 9 months from now. We received many comments from states and industry raising concerns about the cost to sources and administrative burdens of PSD permitting if the statutory threshold were to apply for GHG emissions. One commenter estimated a cost of over $5 billion and the dedication of over 17,000 FTEs to this effort.

We consider it difficult to overstate the impact that applying PSD requirements literally to GHG sources as of January 2, 2011—before streamlining or increasing permitting resources and without tailoring—would have on permitting authorities and on the PSD program, and we are concerned that this impact could adversely affect national economic development. The number of PSD permits that would be required from such an approach is far beyond what the PSD program has seen to date. It is clear throughout the country, PSD permit issuance would be unable to keep up with the flood of incoming applications, resulting in delays, at the outset, that would be at least a decade or longer, and that would only grow worse over time as each year, the number of new permit applications would exceed permitting authority resources for that year. Because PSD is a preconstruction program, during this time, tens of thousands of sources each year would be prevented from constructing or modifying. In fact, it is reasonable to assume that many of those sources will be forced to abandon altogether plans to construct or modify. As a result, a literal application of the PSD applicability provisions to GHG sources would slow construction nationwide for years, with all of the adverse effects that this would have on economic development.

The remedies for this scenario would be for permitting authorities to increase their PSD funding by over 100-fold, from $12 million to over $1.5 billion, or the development by EPA and the permitting authorities of streamlining techniques. But it is not possible for permitting authorities to increase their funding to those levels in the foreseeable future, partly because of the sheer magnitude of those levels and partly because of the financial challenges that states currently face. And, for the reasons discussed later, although streamlining offers genuine promise to improve the manageability of the PSD workload, streamlining cannot do so in the very near term and, in any event, the extent to which it can do so has not yet come into focus.

So clear are at least the broad outlines of this picture that EPA did not receive any substantive comments arguing that permitting authorities could in fact administer the PSD program with the applicability requirements applied literally to GHG sources beginning in the very near future.[40] Every permitting authority that addressed this issue in their comments on the proposed Tailoring Rule stated unequivocally that it could not administer the PSD program at the statutory levels. To cite a few examples (each of which considered both the PSD and title V programs together): NACAA, which represents air pollution control agencies in 53 states and territories, stated it "* * * agrees with the EPA that immediately attempting to implement the PSD and title V programs using the statutory thresholds meets the test for invoking the administrative necessity and absurd results doctrines." Similarly, the California Air Resources Board stated that it "* * * concurs with the United States, EPA that if more appropriate applicability thresholds [as opposed to the statutory thresholds] are not set for GHG it will not be administratively possible to implement these [the PSD and tile V] permitting programs." All other state and local permitting agencies that commented on the proposed tailoring provided similar comments that they would not have the adequate staff capacity or resources to be able to successfully administer their permitting programs with the addition of GHG emission sources at the statutory thresholds for PSD and title V.

It is the many-year delays in permit issuance and the consequent chilling of economic development that provide perhaps the clearest indication that applying the PSD applicability provisions to GHG sources without tailoring produces absurd results. These effects would undermine one of Congress's central purposes in establishing the PSD program, which was to promote development in clean air areas by large industrial sources (as long as they included environmental safeguards). As discussed previously, this goal is manifest in the structure of the PSD provisions, and Congress even went so far as to make this goal explicit in the purposes section of the PSD provisions.

Moreover, at the present time, there is relatively little environmental benefit in subjecting large numbers of small GHG sources to the expensive, source-by-source PSD permitting requirements. They represent a relatively small share of the GHG inventory and the control options available to them, at present, are limited. As a result, approaches other than source-by-source permitting presently offer more promise for generating emissions reductions in an efficient manner. These approaches, which may be developed through both federal and state efforts, include requirements, incentives, and educational outreach to promote efficiency improvements to boilers and furnaces and energy efficient operations, including, for example, weatherization programs.

For all these reasons, interpreting the definition of "major emitting facility"

[40] EPA did receive a smaller number of comments that asserted in conclusory fashion that permitting authorities could administer the 100/250 tpy levels.

and "modification" literally—that is, as EPA has interpreted them more narrowly, but without tailoring and before the program requirements can be streamlined or permitting authority resources can be increased—would produce results that are not consonant with, and, in fact, would severely undermine, Congress's purpose for the PSD program. These results may fairly be characterized as the type of absurd results that support our view that the literal terms of the PSD applicability provisions do not indicate congressional intent for how those provisions should applied to GHG sources.

b. Congressional Intent for the Applicability Provisions

(1) Congressional Intent for Whether and How PSD Applies to GHG Sources

Several of the PSD provisions and statements in the legislative history are particularly important in determining whether and how the PSD program should apply to GHG sources, as discussed elsewhere:

(1) The applicability provisions, under CAA section 165(a) and 169(1). These provisions are written broadly, and although, as we explain above, they cannot be read literally to apply to GHG sources at or above the 100/250 tpy, they nevertheless can be read to indicate that directionally, Congress intended that PSD be applied inclusively.

(2) The various PSD provisions that identify the pollutants subject to PSD. *Compare, e.g.,* CAA sections 162, 163, 164, 165(a)(3), 165(d)(2), 165(e), and 166 (NAAQS pollutants) with CAA sections 165(a)(3)(C), 165(a)(4) (other pollutants). These provisions indicate that a major purpose of the PSD program is to control NAAQS pollutants, but that the program also covers non-NAAQS pollutants.

(3) The requirement that permitting authorities act on PSD applications within 1 year. CAA section 165(c). This provision indicates that Congress anticipated the PSD program would be of a size that would allow permitting authorities to meet this deadline.

(4) The purpose provision. CAA section 160. This provision makes clear that PSD is designed both to protect public health and welfare and to promote economic growth.

(5) In addition, we consider important the legislative history indicating the Congress intended PSD to apply to large industrial sources because they were the primary source of the air pollution problems and they have the resources to manage the demands of the PSD permitting process; and that, by the same token, Congress expected that small sources would not be subject to PSD. The legislative history does not specifically mention GHG sources.

Looking at these provisions and the legislative history together, we think Congress can be said to have intended that the PSD program apply to GHG sources as a general matter. The most important indication of congressional intent in this regard is the applicability provisions, which provide, in part, that PSD applies to (i) "any * * * source[that] emit[s], or ha[s] the potential to emit [the specified quantity] of any air pollutant," CAA section 169(1); and (ii) to any such source that undertakes a physical or operational change that "increases the amount of any air pollutant emitted." CAA section 169(2)(C), 111(a)(4). These terms are quite broad, and should be read to include GHG sources and GHGs. *See Massachusetts* v. *EPA,* 549 U.S. 497, 533 (2007) ("Because greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles."). Moreover, including GHG sources—under certain circumstances—is consistent with the PSD provisions that refer to other pollutants, establish the time-frame for acting on PSD applications, and establish the overall purpose of the program. In addition, including GHG sources—again, under certain circumstances—is consistent with the legislative history that PSD be limited to sources that cause a meaningful part of the air pollution problem and have the resources to manage the PSD requirements. No PSD provision explicitly imposes any limitation of PSD to large industrial sources, and Congress's reasoning for focusing on large industrial sources—which was that these sources are best suited to handle the resource -intensive analyses required by the PSD program—could extend to GHG sources under certain circumstances (that is, large sources first, and smaller sources after streamlining methods are developed). Similarly, as discussed previously, it is reasonable to read into Congress's intent that the PSD program be limited to a size that permitting authorities would be able to administer, but it is consistent with that reading to recognize that the permitting authorities could take certain steps—including adoption of streamlining measures and ramping up resources—that would allow them to handle a higher volume of permitting. Finally, we find nothing in the PSD provisions or legislative history that would indicate congressional intent to exclude GHG sources. Accordingly, we believe that Congress must be said to have intended an affirmative response for whether PSD applies to sources of GHGs as a general matter. Our previous regulatory action defining the PSD applicability provisions made this clear, and we do not reopen this issue in this rulemaking. Moreover, even if this long-established regulatory position were not justifiable based on *Chevron* Step 1—on the grounds that in fact, congressional intent on this point is not clear—then we believe that this position, that the statutory provisions to apply PSD to GHG sources in general, was justified under *Chevron* Step 2.

As to how PSD applies to GHG sources, although, for reasons discussed previously, the 100/250 tpy threshold provision, which establishes the scope of PSD applicability, should not be read as applying literally to GHG sources—and as a result, the applicability provision as a whole cannot be said to have a plain meaning as to the scope of coverage of GHG sources—we believe that the applicability provisions and legislative history nevertheless indicate a congressional intent for how PSD should apply to GHG sources. That is to apply PSD to as many sources as possible as quickly as possible, at least to a certain point. We believe that this intent can be inferred from the inclusiveness of the applicability provision, combined with the legislative history that focuses on Congress's desire to include in the PSD program sources that have the resources to comply with the requirements and, as the Court in *Alabama Power* recognized, Congress's concern about administrability. That is, at first, PSD may apply to the largest GHG sources because they may be expected to have the resources to comply with PSD's requirements and permitting authorities may be expected to accommodate those sources; and over time, with streamlining and increases in permitting authority resources, PSD may apply to more GHG sources. As discussed later, the tailoring approach is consistent with congressional intent in this regard.

We recognize the tension between the applicability provisions, which are inclusive, and the statements in the legislative history that express Congress's expectation that PSD be limited to large industrial sources. At least to a point, the applicability provisions and these statements can be reconciled by recognizing that the reason why Congress expected that PSD would be limited to large industrial sources was that Congress recognized that PSD applied on a source-by-source basis, that this would be costly to

sources, and that only the large industrial sources could afford those costs. Taking certain actions—including streamlining PSD requirements—can render PSD more affordable and thereby allow its application to smaller sources in a more cost-effective manner. In this way, PSD's inclusive applicability provisions can be reconciled with the narrower scope Congress expected, and this is part of the reason why we characterize congressional intent as being consistent with phasing in the applicability of PSD to GHG sources through the tailoring approach.[41]

On the other hand, if Congress cannot be said to have expressed an intent as to the manner and scope of PSD applicability to GHG sources, then, under *Chevron* Step 2, EPA may apply a reasonable interpretation of the applicability provisions to determine the scope of coverage of GHG sources that is consistent with the statutory requirements. The Tailoring Rule is a reasonable interpretation under *Chevron* Step 2. It is consistent with (1) The applicability provisions, recognizing that as we have seen, those provisions cannot be applied literally under these circumstances,[42] (2) the provisions described above concerning which pollutants the PSD provisions cover and the timetable for permitting authority action on PSD applications; (3) the purpose provisions of PSD, and the accompanying legislative history, because it protects public health and welfare without inhibiting economic development; and (4) the legislative history indicating Congress intended that PSD be limited to sources that cause a meaningful part of the problem and can manage its requirements, because it will expand PSD's applicability only after streamlining methods and greater permitting authority resources will allow for such an expansion in an orderly manner.

(2) Criteria for Establishing Phase-in Schedule

The specific phase-in schedule under the tailoring approach will depend on several things. The first is our progress in developing streamlining methods that will render the permitting authority workload more manageable by taking some sources off the table (through regulations or guidance interpreting PTE), and by allowing for more efficient permit processing (through general permits and presumptive BACT). At the same time, streamlining techniques will lower permitting costs to sources or even eliminate some sources' obligations to obtain permits altogether. The second is the time that permitting authorities need to ramp up their resources in an orderly and efficient manner to manage the additional workload. The third is information we have as to the sources' abilities to meet the requirements of the PSD program and the permitting authorities' ability to process permits in a timely fashion. That information will be based on the real-world experience the permitting authorities will accumulate as they proceed to process permit application for the larger GHG sources.

Thus, under our present approach, we will develop streamlining techniques, we expect the permitting authorities to ramp up resources in response to the additional demands placed upon them in the first two steps, and we will gather real-world information about the GHG permitting process; and based on all that, we will address expanding the PSD program in a step-by-step fashion to include more sources over time. We intend to follow this process to establish both the PSD applicability thresholds and, as we describe next, the significance levels.

(3) Criteria for Establishing Significance Levels[43]

The criteria for establishing the significance levels are the same as for establishing the "major emitting facility" thresholds. As noted previously, under the applicable CAA sections, any physical or operational change at a stationary source that "increases the amount of any air pollutant emitted by such source" or that results in the emission of a new pollutant is treated as a "modification" that is subject to PSD requirements. Although the CAA, by its terms, treats as an "increase" any amount of emissions that is greater than zero, the DC Circuit held in *Alabama Power* v. *Costle* that EPA may establish a threshold—called the significance level—on *de minimis* grounds for the amount of any particular pollutant that may be increased. 636 F.2d at 400.

Of particular importance, the Court in *Alabama Power* indicated that EPA may rely on administrative considerations to establish significance levels. *Id.* To reiterate, the Court held that "EPA does have discretion, in administering the statute's 'modification' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity." 636 F.2d at 400. The Court added a more detailed exposition of its views in a subsequent part of its opinion, where it discussed the BACT provision, under CAA section 165(a)(4), and the Court made clear that those views applied as well to the "modification" provision. There, the Court invalidated an EPA regulation that established a 100- and 250-tpy exemption from the BACT requirement. Both the BACT provision and the modification provision apply by their terms to all emissions from a source, but the Court stated that each provision must be read to incorporate an exemption based on *de minimis* or administrative considerations, and explained:

> We understand that the application of BACT requirements to the emission of all pollutants from a new facility, no matter how miniscule some may be, could impose severe administrative burdens on EPA, as well as severe economic burdens on the construction of new facilities. But the proper way to resolve this difficulty is to define a *de minimis* standard rationally designed to alleviate severe administrative burdens, not to extend the statutory 100 or 250-ton threshold to a context where Congress clearly did not apply it. Just as for the applicability of PSD to modifications, the *de minimis* exemption must be designed with the specific administrative burdens and specific regulatory context in mind. This the Agency has failed to do. We do not hold that 100 tons per year necessarily exceeds a permissible *de minimis* level; only that the Agency must follow a rational approach to determine what level of emission is a *de minimis* amount.
>
> A rational approach would consider the administrative burden with respect to each statutory context: what level of emission is *de minimis* for modification, what level *de minimis* for application of BACT. Concerning

[41] Reconciling the applicability provisions with the statements in the legislative history in this manner is also consistent with the U.S. Supreme Court's view that the Clean Air Act has inherent flexibility, as it stated in *Massachusetts* v. *EPA,* 549 U.S. 497, 532 (2007):

> While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence. *See Pennsylvania Dept. of Corrections* v. *Yeskey, 524 U. S. 206,* 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth" (internal quotation marks omitted)).

[42] For the reasons discussed above, we believe that Step 2 of the *Chevron* framework, which authorizes the exercise of agency discretion as long as the agency remains consistent with a reasonable construction of the statute, does not require a literal construction of the statute in a case such as this one, in which the "absurd results" doctrine applies so that the statutory requirements cannot be read literally.

[43] It should be noted that strictly speaking, we do not, in our drafting of the regulatory revisions that are part of this rulemaking, establish a significance level for GHG emissions based on CO_2e. Rather, we establish an applicability criteria for determining whether GHGs are subject to regulation with respect to the particular source. We explain our approach in more detail in the Response to Comments document. Throughout this preamble, we refer to this action, for convenience, as a significance level.

the application of BACT, a rational approach would consider whether the *de minimis* threshold should vary depending on the specific pollutant and the danger posed by increases in its emission. The Agency should look at the degree of administrative burden posed by enforcement at various *de minimis* threshold levels. It is relevant that our decision requires the Agency, in its evaluation of emissions of facilities, to take into account the facility's air pollution controls. It may also be relevant, though it is certainly not controlling, that Congress made a judgment in the Act that new facilities emitting less than 100 or 250 tons per year are not sizeable enough to warrant PSD review.

Id. at 405. As just quoted, the Court acknowledged the 100 and 250 tpy thresholds for a major emitting facility, and did not indicate whether the modification exemption level could exceed those statutory levels, but nevertheless, the Court made clear that EPA may "consider the administrative burden" associated with modifications to establish an exemption level for modifications.

EPA has established significance levels for various pollutants, generally relying on a *de minimis* basis. *See, e.g.,* 45 FR 52676, 52705–52710 (August 7, 1980). In these actions, EPA generally established the level based on the triviality of the amount of emissions excluded. To this point, we have not attempted to determine *de minimis*—that is, trivial—levels for GHGs. Instead, in this rulemaking, EPA is establishing a phase-in schedule for significance levels based on the *Chevron* framework, accounting for the "absurd results," "administrative necessity," and "one-step-at-a-time" doctrines. It is not necessary to establish a permanent *de minimis* level in this rulemaking. For one thing, the Court in *Alabama Power* explicitly authorized an administrative basis for significance levels. Moreover, were EPA to establish a *de minimis* level, that amount could be below—perhaps even well below—the "major emitting facility" thresholds established in this rulemaking on grounds of "administrative necessity" and the other doctrines. Accordingly, at present, if we were to establish a permanent significance level on a *de minimis* basis, that level could result in too many small sources being required to submit permit applications while the phase-in is occurring. This would give rise to the same problems concerning undue costs to the sources and administrative burdens for the permitting authorities for which we are fashioning a remedy. Accordingly, the significance levels we establish with this action are the lowest levels that sources and permitting authorities can reasonably be expected to implement at the present time in light of the costs to the sources and the administrative burdens to the permitting authorities.

c. Other Possible Approaches to Reconciling a Literal Reading of PSD Applicability Provisions and Congressional Intent

Commenters have suggested another approach to reconciling the inconsistency between the definition of "major emitting facility" and congressional intent. They urge that the "major emitting facility" definition should be applied so that only sources that emit NAAQS pollutants, for which the area is designated attainment or unclassifiable, in the requisite quantities would be subject to PSD, and sources would not be subject to PSD based solely on their emissions of non-NAAQS pollutants or a NAAQS pollutant for which an area has been designated nonattainment. Some commenters argue that this approach is mandated by several of the PSD provisions, read together or at least that the relevant statutory provisions are ambiguous and that this approach is a reasonable reading of them. Under this approach, we would not need to phase in the application of PSD by lowering the applicability threshold for GHG emitters.

Specifically, many commenters have questioned whether EPA has the authority to regulate GHGs under the PSD provisions. Although the specific lines of reasoning vary somewhat from one commenter to another, in general, they based their arguments largely on CAA sections 161 and 165(a). Under CAA section 161:

> In accordance with the policy of section 101(b)(1), each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 107 as attainment or unclassifiable.

Commenters point out that section 107 applies only to NAAQS pollutants and directs that areas be designated as attainment, nonattainment, or unclassifiable on a pollutant-by-pollutant basis. Under CAA section 165(a), a "major emitting facility" cannot be constructed "in any area to which this part applies" unless it meets certain requirements. According to some commenters, these provisions, read together, limit PSD's applications to only NAAQS pollutants that are emitted from sources in areas that are designated attainment or unclassifiable for those pollutants. Other comments make a similar point, except to state that PSD applies more broadly to pollutants with a local, ambient impact.

Some commenters go on to take the position that NAAQS pollutants for which the area is designated attainment or unclassifiable are the only pollutants that can be regulated under any provision of the PSD requirements; while others take the position that once PSD is triggered for a source on the basis of its NAAQS pollutants, then other, non-NAAQS, pollutants may be regulated under certain PSD provisions, in particular, the BACT provision under CAA section 165(a)(4). These commenters agree, however, that emissions of GHGs, by themselves, cannot trigger PSD applicability. Finally, some commenters state that even if the PSD provisions cannot be read by their terms to preclude GHGs from triggering PSD, then they can be read to authorize EPA to determine that GHG emissions do not trigger PSD.

We recognize, as we have said elsewhere, that a major purpose of the PSD provisions is to regulate emissions of NAAQS pollutants in an area that is designated attainment or unclassifiable for those pollutants. However, we do not read CAA sections 161 and the "in any area to which this part applies" clause in 165(a), in the context of the PSD applicability provisions, as limiting PSD applicability to those pollutants. The key PSD applicability provisions are found in sections 165(a) and 169(1). Section 165(a) states, "No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless [certain requirements are met]." A "major emitting facility" is defined, under CAA section 169(1), as "any * * * stationary source[s] which emit[s], or ha[s] the potential to emit, one hundred [or, depending on the source category, two hundred fifty] tons per year or more of any air pollutant." As discussed elsewhere, EPA has long interpreted the term "any air pollutant" to refer to "any air pollutant subject to regulation under the CAA," and for present purposes, will continue to read the "subject to regulation" phrase into that term.

Although section 165(a) makes clear that the PSD requirements apply only to sources located in areas designated attainment or unclassifiable, it does not, by its terms, state that the PSD requirements apply only to pollutants for which the area is designated attainment or unclassifiable. Rather, section 165(a) explicitly states that the PSD requirements apply more broadly to any pollutant that is subject to regulation. Moreover, another

requirement in CAA section 165(a) also applies to air pollutants broadly. Under CAA section 165(a)(3), one of the requirements for securing a preconstruction permit is to demonstrate that the source's emissions "will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area [to which the PSD requirements apply], (B) [NAAQS] in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter." As just quoted, subparagraph (C), by its terms clearly applies to non-NAAQS pollutants. This is because it refers to (1) "any other applicable emission standard," which distinguishes it from subparagraph (B) and therefore from NAAQS pollutants; and (2) "any * * * standard of performance under this chapter," which refers to standards of performance under section 111, several of which are for non-NAAQS pollutants. *See, e.g.,* 40 CFR 60.33c(a) "municipal solid waste landfill emissions." By the same token, CAA section 110(j) specifically contemplates that a source required to hold a permit under title I of the Act, which includes a PSD permit, demonstrate that the source complies with "standards of performance," which may include requirements for pollutants other than NAAQS.

In addition, CAA section 163(a)(4) includes as a PSD requirement that "the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." Section 163(a)(4)'s broad reference to "each pollutant subject to regulation under this chapter" clearly indicates that it applies to non-NAAQS pollutants, as long as they are regulated under other provisions of the Act.[44] The DC Circuit, in *Alabama Power* v. *Costle,* 636 F.2d 323, 361 n.90 (DC Cir. 1980) indicated that, under the law applicable at the time the Court handed down the decision in 1980, PSD applies to HAPs.[45]

In addition, PSD requirements are part of SIPs, and although SIPs generally are limited to provisions that implement the NAAQS, and therefore generally are limited to controlling NAAQS pollutants (or non-NAAQS pollutants that affect ambient air quality), *see generally* CAA section 110, Congress explicitly required SIPs to include requirements to protect visibility, under CAA section 169A–B. *See* CAA sections 110(a)(2)(D)(i)(II), 169A(b)(2)(A). Congress took much the same approach with the PSD program, which was to require that PSD requirements be included in the SIPs, but to explicitly require that PSD apply to non-NAAQS pollutants.

These provisions—sections 165(a)(3), 165(a)(4), and 110(j)—all indicate by their terms that PSD requirements apply to non-NAAQS pollutants. As such, they lend credence to our view that Congress intended the PSD applicability provisions to include GHG sources. At the very least, they demonstrate that Congress certainly knew how to specifically describe certain air pollutants—*e.g.,* "air pollution in excess of * * * any other applicable emission standard or standard of performance under this chapter," CAA section 165(a)(3)(C)—which indicates that its decision not to specifically describe air pollutants in the applicability provisions suggests an intent to cover air pollutants broadly.

To return to sections 161 and the "in any area to which this part applies" phrase in 165(a), which commenters rely on as the cornerstone of their argument, commenters in effect take the position that Congress intended the geographic references in these provisions—that is, the references to areas designated as attainment or unclassifiable—to limit the scope of the permitting provisions. We think it unpersuasive that Congress would have taken such an indirect, and silently implied, route to limit the scope of the permitting provisions. As noted previously, the permitting provisions apply broadly by their terms. Had Congress intended to limit PSD permitting in the manner urged by commenters, it certainly could have done so directly, such as by limiting PSD permitting to "any pollutant for which an area is designated attainment or unclassifiable." Indeed, Congress did so in other PSD provisions, discussed previously. Similarly, in other sections of the CAA, Congress also directly limited the scope of pollutant applicability by specifying which pollutants are or are not subject to the provision. *See, e.g.,* section 111(d) (performance standards for existing sources apply only to pollutants other than NAAQS or HAPs), section 112(a)(1) (applying air toxics requirements in section 112 to sources that emit above the specified tonnage thresholds of "hazardous air pollutants").

In addition, although section 161 requires that SIPs contain emission limitations and other measures as necessary to prevent significant deterioration in areas designated as attainment or unclassifiable, it does not by its terms limit SIPs to only those measures.

Most broadly, we read the PSD provisions and their legislative history to evidence Congress's intent that PSD apply throughout the country to large sources that undertake new construction or modifications, and that Congress's overall purpose was to assure that, as the industrial stock of the nation turned over, it would become cleaner for all air pollutants emitted. Greenhouse gas sources, as a general matter, fit readily into this overall vision. At the time that Congress enacted the PSD provisions in 1977, every area of the nation was designated attainment or unclassifiable for at least one air pollutant, and that has remained the case to the present time. Accordingly, at all times, PSD has applied in every area of the country. The PSD requirements clearly cover all air pollutants emitted by the source, and provide a process for reviewing those emissions and determining BACT for them under CAA section 165(a)(4). It is true that at the time Congress adopted the PSD provisions, it was primarily concerned about the NAAQS pollutants—or, as some commenters assert, pollutants with local, ambient impact—because those pollutants represented a major component of the air pollution problems it was aware of and was addressing. But its overall purpose was broad enough to cover additional pollutants; the process it enacted for establishing BACT was broad enough to encompass additional pollutants; and the applicability provisions it established were phrased broadly enough to encompass additional pollutants, *see* section 169(1). As a result, we believe that the PSD applicability provisions, which, again, refer to, as we have interpreted them, "any air pollutant [subject to regulation under the CAA]," should be seen as "capacious" and therefore encompass GHG sources, in much the same manner as the U.S. Supreme Court viewed the definition of "air pollutant" to be "capacious" and therefore encompass GHGs. *Massachusetts* v. *EPA,* 549 U.S. 497, 533 (2007).

In addition, it should not be overlooked that we have applied PSD to

[44] We find no support for the proposition raised by some commenters that this provision is limited to "NAAQS" pollutants. To the contrary, "under this chapter" unambiguously signals an intent to cover any pollutant regulated under the Act. Had Congress intended a narrower focus, they would have specified "any NAAQS pollutant" or any pollutant subject to regulation under this Part (PSD).

[45] In the 1990 CAA Amendments, Congress added section 112(b)(6), which provides that PSD "shall not apply to pollutants listed under this section," that is, HAPs.

non-NAAQS pollutants since the inception of the program over 30 years ago. For example, prior to the 1990 CAA Amendments, PSD applied to HAPs regulated under CAA section 112; and over the years, EPA has established significance levels for fluorides, sulfuric acid mist, hydrogen sulfide, TRS, reduced sulfur compounds, municipal waste combustor organics, municipal waste combustor metals, municipal waste combustor acid gases, and municipal solid waste landfill emissions, *see* 40 CFR 51.166(b)(23)(i); and EPA has proposed a significance level for ozone depleting substances. *See* 61 FR 38307 (July 23, 1996). Of course, the basis for all these actions is PSD's applicability to these non-NAAQS air pollutants. We are not aware that EPA's actions in establishing significance levels for these pollutants gave rise to challenges on grounds that the PSD provisions do not apply to them. As the U.S. Supreme Court recently stated in upholding an EPA approach in another context: "While not conclusive, it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion * * * that the agency has been proceeding in essentially this fashion for over 30 years." *Entergy Corp.* v. *Riverkeeper,* Inc., 129 S.Ct. 1498, 1509 (2009) (citations omitted).

Finally, we note that excluding GHG sources from PSD applicability would create inequitable results. Consider the hypothetical case of two sources that construct in the same area, each of which emits the same amount of GHGs, and that amount is large enough to trigger PSD applicability. Assume that the first one, but not the second, also emits NAAQS pollutants amounts large enough to trigger PSD applicability. If GHG sources are excluded from PSD applicability, then the first of those sources, but not the second, would be subject to PSD requirements for its GHG emissions. Similarly, consider the hypothetical case of two sources that emit identical amounts of the same NAAQS pollutant and identical amounts of GHGs, all amounts of which are large enough to trigger PSD applicability requirements. Assume that the first source constructs in an area that is an attainment or unclassifiable area for the NAAQS pollutant that it emits, and that the second source constructs in an area that is not an attainment or unclassifiable area for that NAAQS pollutant. Here again, if GHG sources are excluded from PSD applicability, then the first of those sources, but not the second, would be subject to PSD requirements for its GHG emissions. These results are inequitable and would create an uneven playing field and for this reason, too, support our view that the PSD applicability provisions apply to GHG sources.

Accordingly, we reject the argument that section 165 must be, or may reasonably be, limited in scope to pollutants for which an area has been designated as attainment or unclassifiable. Rather, the PSD applicability provision—the definition of "major emitting facility" in CAA section 169(1)—applies by its terms (as we have interpreted them narrowly through regulation) to sources emitting any air pollutant subject to regulation, and is not limited to any NAAQS air pollutant. Our research has not disclosed any explicit statements in the legislative history that Congress intended to limit PSD applicability to sources of NAAQS pollutants.

6. Application of the "Absurd Results" Doctrine for the Title V Program

Having discussed the application of the *Chevron* framework, taking account of the "absurd results" doctrine, for the PSD applicability requirements, we now turn towards applying the same approach to the title V applicability requirements. Because of the parallels between the PSD and title V applicability provisions, much of the discussion later parallels the previous discussion of PSD. As with PSD, we finalize, with some refinements, the "absurd results" basis we proposed. Specifically, we are revising our regulations to limit title V applicability to GHG emitting sources by revising the regulatory term, "major source," and although our revised regulations do not accord with a literal reading of the statutory provisions for title V applicability, which are incorporated into the statutory definition of "major source," we have concluded that based on the "absurd results" doctrine, a literal adherence to the terms of this definition is not required. Rather, we may apply title V to GHG sources in a phased-in manner, as we do through the tailoring approach, because although congressional intent is clear that title V applies to GHG sources in general, congressional intent is unclear on the question of how title V applies, and the tailoring approach is a reasonable interpretation of the statute.

To reiterate, for convenience, the title V applicability provisions provide that after the effective date of a title V program, it is unlawful for any person to operate a "major source" without a title V permit (CAA section 502(a), and define a "major source" to include "any major stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." CAA sections 501(2)(B) and 302(j).

Under the current interpretation of the title V applicability provisions, EPA's recent promulgation of the LDVR will trigger the applicability of title V for GHG sources at the 100 tpy threshold levels as of January 2, 2011. This is because title V applicability hinges on the definition of "major source," which, under EPA's long-standing narrowing interpretation, but absent further tailoring, applies title V to sources of any air pollutant that is subject to regulation under another provision of the CAA. EPA's promulgation of the LDVR means that GHGs will become subject to regulation on the date that the rule takes effect, which will be January 2, 2011.

But absent tailoring, the January 2, 2011 trigger date for GHG PSD applicability will see an extraordinarily large number of sources—some 6.1 million—become subject to title V, an increase of over 400-fold over the 14,700 sources that currently are subject to title V. The great majority of these will be small commercial or residential sources.

We believe that for many reasons, this result is contrary to congressional intent for the title V program, and in fact would severely undermine what Congress sought to accomplish with the program. As a result, under *Chevron,* accounting for the "absurd results" doctrine, the statutory definition for "major source" (as EPA has already narrowed it to refer to any air pollutant "subject to regulation") should not be read to apply to all GHG sources at or above the 100 tpy threshold as of the January 2, 2011 date. Rather, the definition of "major source" should be tailored so that it applies to GHG sources on a phased-in basis, with the largest sources first, as we describe in this rule.

a. Congressional Intent for the Title V Program

As we said, previously, in a similar circumstance involving the PSD program, applying title V requirements to GHG sources without tailoring the definition of "major source"—and, as discussed later, without streamlining the title V requirements or allowing for time for permitting authorities to ramp up resources—would result in a program unrecognizable to the Congress that enacted title V, and one that would be flatly unadministrable. Without tailoring, the PSD program would expand from the current 14,700 sources to some 6.1 million, with the great

majority of the sources being small commercial and residential sources that not only have never been permitted before, but that in many cases have no applicable requirements under the CAA to include in the permit. In the next several sections, we will describe some of the specific ways that this literal application of title V would not only differ from, but would undermine, congressional intent. But the big picture is readily drawn: The influx of millions of permit applications would do nothing less than overwhelm the program Congress finely crafted for thousands of sources, with its multi-step deadlines measured in days and months, its multiple mandates for expeditious permit processing, its nuanced limitations on the need for permit revisions, its efforts to save smaller sources permit fees. Regulatory gridlock, precisely what Congress strove to avoid, would result.

Most visibly, interpreting the applicability provisions literally to include GHG sources at the 100 tpy level immediately would revise the program from what Congress envisioned in three major ways, the legislative history of each of which was discussed previously:

- It would immediately expand the program to cover several-hundred-fold more sources than Congress anticipated.
- It would immediately expand the program to cover very small sources that Congress expected would not be included in the program.
- It would immediately expand the program so that a large number of sources have empty permits, that is, permits without applicable requirement, and undermine the implementation of the program for sources with applicable requirements.

Revising the program in this way through a literal interpretation of the applicability provisions—without tailoring the applicability requirements and without streamlining the program requirements—is clearly inconsistent with Congress's conception of the program's scope, and these inconsistencies are foundational. Most importantly, the program that would result would be unduly costly to sources and impossible for permitting authorities to implement, and therefore would frustrate the purposes that Congress intended to achieve with the program that it did design.

As discussed previously, Congress was fully aware that with the title V program, it was subjecting sources and permitting authorities to additional costs and administrative burdens, and it was fully aware of concerns that absent careful design, the program could become a formula for regulatory gridlock. Determined to make the program workable, Congress crafted the provisions to be efficient and workable.

However, if title V were to apply to GHG sources at the 100 tpy level, until EPA could develop streamlining methods, all of these sources newly subject to title V would need to apply for permits. We estimate that the commercial and residential sources would incur, on average, expenses of $23,175, while an industrial source would incur expenses of $46,350, to prepare a permit application and receive a permit. The great majority of these sources would be small commercial and residential sources of the type that Congress did not expect would be included in title V. For example, as discussed above, the legislative history of title V, including both the permit program under CAA sections 501–506 and the "small business stationary source technical and environmental compliance assistance program" under CAA section 507, indicated that Congress did not expect that "printers, furniture makers, dry cleaners, and millions of other small businesses" would become subject to title V. House Committee Report, H.R. 101–590, at 354. These sources generally do not have the potential to emit conventional pollutants at or above the 100 tpy threshold.[46] However, many do have the potential to emit GHGs above that threshold. Many printers and furniture makers use a variety of combustion equipment that has the potential to emit at least 100 tpy CO_2, and many commercial dry cleaners have gas-fired driers that have the potential to emit at least 100 tpy of CO_2. All told, there are in fact "millions of * * * small businesses" that would become subject to title V—of the 6.1 million sources that would become subject to title V, the great majority are small businesses—if the title V applicability provisions are applied literally to GHG sources.

Moreover, the overall cost to all 6.1 million sources—before the development of streamlining methods—would be a staggering $49 billion per year over a 3 year period. Imposing burdens of this magnitude on these sources—individually and in total—would of course be contrary to Congress's efforts to minimize the expenses of title V, especially to small sources. The magnitude of the costs is, in a sense, heightened because a great many of these sources will not have applicable requirements to include in their permits; therefore, much of the costs will produce relatively little benefit.

Yet, the most important reason why applying the title V program to GHG sources without tailoring, and before the development of streamlining methods, would be inconsistent with congressional intent, is that the resulting program would prove unadministrable. Adding some 6.1 million permit applications to the 14,700 that permitting authorities now handle would completely overwhelm permitting authorities, and for all practical purposes, bring the title V permitting process to a standstill.

The costs to permitting authorities of this multi-million-source program would again be staggering. On average, and without streamlining, a permitting authority would expend 214 hours, which would cost $9,844, to issue a permit to a commercial or residential source; and 428 hours, which would cost $19,688, to issue a permit to an industrial source. In all, permitting authorities would face over $21 billion in additional permitting costs each year due to GHGs, compared to the current program cost of $62 million each year.

Beyond this disconnect with congressional expectations as to scope of the program, the extraordinarily large number of permit applications would overwhelm permitting authorities and slow their ability to process permit applications to a crawl. As described at proposal, the survey of permitting authorities conducted by NACAA found that a literal application of the title V applicability provisions to all GHG sources would result in permitting delays of some 10 years. However, as we further noted at proposal, this estimate was based on the assumption that the applicability threshold would be 100 tpy based on actual emissions; in fact, the applicability threshold would be 100 tpy based on PTE, which would sweep in many more sources. Moreover, as stated elsewhere, we currently estimate the amount of per-permit work hours for permitting authorities in processing title V permit applications to be several times higher than what we estimated at proposal. As with PSD, such a program would be beyond anything within our experience, and it is difficult to give a meaningful estimate

[46] As noted previously, the fact that some small sources are subject to title V because they are "major sources" of HAPs or certain area sources and therefore are covered under CAA sections 502(a) and 501(2)(A) does not alter the conclusion from the legislative history that Congress did not expect large numbers of small sources to become subject to title V. The fact that Congress authorized the Administrator to exempt area sources from the title V program where compliance with title V would be "impracticable, infeasible, or unnecessarily burdensome" reinforces the conclusion that Congress did not intend the program to be "impracticable, infeasible or unnecessarily burdensome" for small sources.

for how long the permitting process would take for each permit on average. But it is clear that the period would be many years longer than even the 10 years estimated by NACAA.

In addition, applying title V to all GHG sources without tailoring would be in tension with a specific CAA requirement, that of CAA section 503(c), which imposes a time limit of 18 months from the date of receipt of the completed permit application for the permitting authority to issue or deny the permit. It would be impossible for permitting authorities to meet this statutory requirement if their workload increases from some 14,700 permits to 6.1 million, and without streamlining. Instead, as just noted, permit applications would face multi-year delays in obtaining their permits.

Moreover, these delays would undermine the overall statutory design that promotes the smooth-running of the permitting process, and the underlying purpose of the title V program itself. As noted elsewhere, Congress intended through title V to facilitate sources' compliance with their CAA obligations by establishing an operating permit program that requires the source to combine all of its CAA requirements, and explain how it will assure compliance with such requirements. Congress established a comprehensive process to implement the operating permit program. Through this process, following the date that sources become subject to title V, they have 1 year to submit their permit applications. CAA section 503(c). As noted, the permitting authority then has 18 months to issue or deny the permit. CAA section 503(c). Permitting authorities must provide an opportunity for public comment and a hearing. CAA section 502(b)(6). If the permitting authority proposes to issue the permit, the permitting authority must submit the permit to EPA for review, and notify affected states. CAA section 505(a)(1). EPA then has 45 days to review the permit and, if EPA deems it appropriate, to object to the permit. CAA section 503(b)(1). If EPA does object, then the permitting authority must, within 90 days, revise it to meet the objections, or else EPA becomes required to issue or deny the permit. CAA section 503(c). If EPA does not object, then, within 60 days of the close of the 45-day review period, any person may petition EPA to object, and EPA must grant or deny the petition within 60 days. CAA section 505(b)(2). This set of applicant, permitting authority, and EPA actions and deadlines establishes the process for the prompt and efficient issuance of operating permits for the appropriate universe of sources.

But at least for an initial period, until resources could be ramped up and streamlining methods could be developed, the extraordinary numbers of these permit applicants would sweep aside this carefully constructed program, and instead, backlog the permit authorities. This initial period would last for many years. As discussed elsewhere, it would take several years to develop and apply streamlining measures—in particular, general permits—and during that time, the permit backlog would grow so large that it would take many more years for permitting authorities to catch up by raising the requisite funds and hiring and training the necessary employees.

What's more, only a fraction of these millions of sources newly covered by title V will be subject to any CAA requirements due to their GHG emissions, and we suspect that a larger number will not be subject to any CAA requirements at all. As a result, for most of these sources, although they would need to apply for and receive a permit, there would be no applicable requirements to include in the permit and thus the exercise would not improve compliance.

The picture that emerges from a literal application of title V's requirements to all GHG sources—at the 100 tpy level, beginning on January 2, 2011—shows multi-year delays in issuance of all permits, for both the sources that have applicable requirements and that Congress clearly intended the program to cover, and for the millions of sources that may not be subject to any applicable requirements. In short, this literal interpretation would apply title V to millions of sources that Congress did not expect be covered, and the ensuing administrative burdens—at least initially—would impede the issuance of permits to the thousands or perhaps tens of thousands of sources that Congress did expect be covered. This is the type of "absurd results" from a literal application of statutory provisions that the courts have held should be avoided. And even beyond all that, the sheer magnitude of the numbers involved—millions of permits requiring thousands of FTEs at a cost to the permitting authorities of billions of dollars, all this beginning immediately at the time that GHGs become subject to regulation—makes clear that this result of a literal application of the title V provisions to GHG sources cannot be what Congress intended.

b. EPA's Reconciliation of Applicability Provisions With Congressional Intent

For the reasons just described, we should not consider the literal meaning of the applicability provisions to be determinative of congressional intent as to the applicability of title V to all GHG sources; rather, we should examine other provisions of the statute and the legislative history to determine congressional intent on that question. If congressional intent is clear, we must adopt and implement an applicability approach that is as close as possible to congressional intent; and if congressional intent is not clear, then we must select an interpretation that is reasonable and consistent with the statutory requirements. This section explains EPA's view of congressional intent for the applicability of the title V program to GHG sources and the principles and approach EPA is using for tailoring. In addition, we also respond to other approaches that were suggested by commenters.

To determine congressional intent, we consider the statutory provisions and legislative history, and this analysis is similar to that for PSD. The most important title V provisions and legislative history for this purpose are the following:

(1) The applicability provisions themselves, which, as we have interpreted them, apply title V to all sources that emit at least 100 tpy of any air pollutant subject to regulation. CAA sections 502(a), 501(2)(B), 302(j). Although we do not believe these provisions should be applied literally to GHG sources, their broad phrasing indicates, directionally, a congressional intent towards inclusiveness of sources in title V, including GHG sources.

(2) The provisions for general permits, CAA section 504(d); and title V fees, CAA section 502(b)(3)(A). These provisions give title V an important measure of flexibility as to its scope. The explicit authorization of general permits means that title V may be applied to more sources and more efficiently, thereby saving costs to both source and permitting authority. The requirements for permit fees provide a mechanism for permitting authorities to, over time, develop their programs to cover more sources. In this sense, these provisions could be construed to indicate congressional intent to apply title V inclusively, to the extent that permitting authorities can accommodate additional sources through general permits and permit fees.

(3) The detailed procedural requirements—including time periods, such as the 18-month time period for action on permit applications—for title V permit processing. CAA sections 503, 505. Although these requirements are consistent with applying title V to GHG sources—in the sense that at least in

theory, there is nothing intrinsic to GHG sources that would mean that permitting authorities could not comply with these requirements—these requirements cast doubt on whether Congress can be said to have intended that title V cover the many small GHG sources (at least immediately) in light of the risk that including all those sources in title V would strain the process.

(4) The provisions and legislative history concerning applicable requirements, which indicate that a purpose of title V is to include sources' applicable requirements in their permits. CAA sections 503(b)(2), 504(a). These provisions, and the accompanying legislative history, discussed previously, suggest an intent to include within title V GHG sources that have applicable requirements, but may also suggest that Congress would not have intended to include in title V the large numbers of GHG sources that have "empty permits," at least where their inclusion would undermine implementation of the program for sources with applicable requirements.

(5) The small-business-assistance provisions of section 507 and the legislative history of title V—both the permitting program and the small-business-assistance program—concerning the scope of the permitting program and small businesses. These indicate that Congress intended title V to cover some tens of thousands of sources, and did not intend that title V apply to small businesses. These provisions and legislative history suggest that Congress did not intend for title V to apply to include large numbers of small GHG sources.

Finally, the legislative history of title V does not explicitly mention GHG sources, which could suggest that Congress did not have occasion to focus on whether and how title V would apply to GHG sources.

With all this, we believe that Congress had a clear intent on the question of whether title V generally applies to GHG sources, and that was that it does. As with PSD, the most important indication of congressional intent in this regard is the applicability provisions, which provide, in part, that title V applies to "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, [the requisite quantity] of any air pollutant." CAA sections 502(a), 501(2)(B), 302(j). This term is quite broad, and should be read to include GHG sources. *See Massachusetts* v. *EPA,* 549 U.S. 497, 533 (2007) ("Because greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles."). Moreover, including GHG sources—under certain circumstances—is consistent with the various statutory provisions and statements in the legislative history described previously.

In the alternative, if it is concluded that Congress did not express a clear intent on that question, then, under *Chevron S*tep 2, EPA exercises its discretion to conclude that title V applies to GHG sources as a general matter. This is a reasonable policy because applying the title V program to at least the larger GHG sources will assure promote accountability and enforceability for those sources, which is a key goal of the title V program, and will not impose obligations that are beyond the resources of those sources or insurmountable burdens on the permitting authorities. This policy is a reasonable interpretation of the statutory provisions for the same reasons just discussed.

As to the question of how title V applies to GHG sources, we believe that Congress cannot be said to have expressed a clear intent. A central aspect of how title V is to apply to GHG sources concerns "empty permits," and on this aspect, some of the above-described provisions and statements in the legislative history point in different directions. This is particularly true of, on the one hand the title V applicability provisions, which apply by their terms inclusively and, on the other hand, the requirement that sources include applicable CAA requirements in their permits, and the statements in the legislative history indicating that Congress intended title V to cover sources subject to other CAA requirements.

Because Congress cannot be said to have expressed an intent as to the manner and scope of title V applicability to GHG sources, then, under *Chevron* Step 2, EPA may apply a reasonable interpretation of the applicability provision to determine the scope of coverage of GHG sources that is consistent with the statutory requirements. The Tailoring Rule qualifies as such an interpretation. The Tailoring Rule in effect reads the applicability provisions not to apply title V to GHG sources at or above the 100 tpy level, but instead to apply title V to as many of the GHG sources at or above that level as possible and as quickly as possible, starting with the largest sources first, that is consistent with both the permitting authorities' ability to administer the program and with a sensible imposition of costs to sources. This tailoring approach is consistent with the inclusive direction of the applicability provision, the flexibility in title V's scope that is inherent in the provisions authorizing general permits and requiring permit fees, the detailed process requirements, and the legislative history that focuses on Congress's concern about costs to sources and administrability. With the tailoring approach, over time, more sources may be included in title V, consistent with those provisions and legislative history. This reconciles the inclusiveness of the applicability provisions with Congress's expectations of a more limited scope for the title V program.[47] However, as part of the tailoring approach, we recognize that we may at some point determine that it is appropriate to exclude certain sources, such as the smallest of the GHG sources. In addition, we intend to address the issue of sources with "empty permits" in a later rulemaking, as discussed previously.

The specific phase-in schedule will depend on the following: We will gather information about the permitting authorities' ability to process permits, and we will develop streamlining techniques. Based on that information, we will address expanding the title V program in a step-by-step fashion to include more sources over time. Each step will be based on our assessment of the permitting authorities' and sources' ability to comply with their respective obligations under the title V program.

We recognize that the availability of permit fees to support title V permit actions creates a potentially important source of resources, and that this has implications for the permitting authorities' ability to implement the title V program for sources of GHGs. At least in theory, permitting authorities could assess and collect sufficient fees to support hiring and training sufficient personnel so that they could expand their programs to match the expansion in the number of sources covered by the program.

Even so, title V fees cannot be considered a panacea that will resolve all resource problems that permitting authorities will have, for several reasons. Permitting authorities will likely be constrained as to the rate in which they can increase fees in light of

[47] As with PSD, this way of reconciling the PSD applicability provisions with Congress's expectations for a narrower PSD program is consistent with the U.S. Supreme Court's view that the CAA should be read to include "regulatory flexibility, [without which] changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts* v. *EPA,* 549 U.S. 532.

the costs to sources. As indicated elsewhere, at least at the outset of the program before streamlining techniques have been developed, a literal application of the title V applicability provisions to GHG sources would, on average, cost each industrial source $46,400 and each commercial or residential source $23,200 to complete the permit application and take other associated actions; and it would cost each permitting authority, on average, $19,688 to process the industrial source permit and $9,844 to process the commercial or residential source permit. Particularly in light of the high costs to sources of applying for a permit, it is not likely that permitting authorities would be able to pass on to the sources in the form of fees, the entirety of the permitting authorities' own high costs for processing those permits, at least not right away. Even to the extent it would be possible to raise permit fees, permitting authorities would have to undergo a process to assess, impose, and collect those fees, and then hire and train personnel. The survey from the state and local agencies described previously forecast a 2-year period for hiring and training, without counting time for the fee process. For these reasons, we do not believe that the authorization for fees will allow the permitting authorities either to accelerate Steps 1 or 2 of the tailoring schedule or to permit a larger number of sources at those steps. Step 1 will take effect on January 2, 2011, Step 2 will take effect on July 1, 2011, and the process for determining and collecting fees, and then hiring and training personnel will take at least several years after July 1, 2011.

Moreover, we do not believe that the authorization for fees means that permitting authorities can reasonably be expected to permit title V sources at levels below 50,000 tpy CO_2e before 2016. The next level below 50,000 tpy CO_2e for which we have data is 25,000 tpy CO_2e, and the costs to permitting authorities to run their programs at that level ($126 million) is more than double their current costs ($62 million). We do not consider it reasonable to expect permitting authorities to more than double their program within the first 6 years of title V applicability to GHG sources. That it is not reasonable to expect that is made even clearer when the permitting authorities' burdens in implementing their PSD programs are considered. The ability of permitting authorities to impose fees may have more important implications for subsequent steps, and as we address those subsequent steps in future rulemakings, we will consider the fees. EPA's approach to fees in this rulemaking is discussed elsewhere.

c. Other Possible Approaches to Reconciling Literal Reading of Title V Applicability Provisions and Congressional Intent

Having described how the *Chevron* framework, accounting for the "absurd results" doctrine, applies to title V requirements in this case and why it supports this Tailoring Rule—under which we expect to apply title V to more sources, in a step-by-step fashion, over time—we turn to the last part of our discussion of this doctrine. Here, we address another possible approach suggested by comments, which is that EPA should apply the title V program only to sources that are subject to applicable requirements, so that sources should not be required to hold "empty permits" (*e.g.,* permits issued to a source that is not subject to any applicable requirement for any pollutant). To the extent that commenters argue that the statute requires EPA to adopt a "no-empty-permits" theory, we disagree. We believe that although various provisions of title V indicate that one of title V's purposes is to gather a source's applicable requirements into a single permitting mechanism, *see* CAA sections 503(b)(1), 504(a), we do not read those provisions as expressly limiting, as a matter of *Chevron* Step 1, title V to sources with applicable requirements. The applicability provisions, by their terms, include sources based on amount of emissions, and do not include any explicit limits to applicability based on whether the sources has applicable requirements. As described previously, we believe that Congress, although clearly expressing an intent that title V apply to GHG sources generally, did not express a clear intent as to how title V applies to GHG sources. The tension between these two sets of provisions, which we identified in the proposal and commenters further discussed, provides further support for that conclusion. Accordingly, we have discretion under *Chevron* Step 2 to determine a reasonable approach, consistent with the statutory requirements, concerning the application of title V to GHG sources with empty permits.

We note that to date, we have issued permits to sources without applicable requirements, albeit on rare occasions. We have little reason to believe that the "empty-permits" issue will arise in Steps 1 and 2 of our tailoring approach because we believe there will be no "empty permits" in Step 1 or Step 2 or, if there are, that they will be very few in number. As stated elsewhere, we believe that the tailoring approach we adopt in this rulemaking for Steps 1 and 2 is a reasonable approach that is consistent with statutory requirements.

We need to gather more information concerning the potential number and utility of "empty permits" for GHG sources, in light of the fact that the need for requirements in title V permits will vary based on the requirements of each SIP, and the fact that some SIPs contain broadly applicable requirements. As stated elsewhere, we intend to consider the issue of the applicability of title V to GHG sources with "empty permits" in Step 3 of our tailoring approach. When we do so, we will further assess the potential for the approach of excluding empty permits from title V to relieve burden consistent with statutory requirements.

7. Additional Rulemaking for the PSD and Title V Programs

The previous sections 5 and 6 discussed our application of the *Chevron* framework, accounting for the "absurd results" doctrine, to the PSD and title V applicability requirements, respectively. As another point in this regard, which is relevant for both PSD and title V purposes, we also commit to subsequent rulemakings in which we may further address the "absurd results" doctrine.

Specifically, we will propose or solicit comment on establishing a further phase-in, that is, a Step 3, that would apply PSD and title V to additional sources, effective July 1, 2013, and on which we commit to take final action, as supported by the record, by no later than July 1, 2012. We further commit to completing another round of rulemaking addressing smaller sources by April 30, 2016. Our action in that rulemaking would take into account the severity of the remaining problems associated with permitting authority burden and source costs.

While committing to future action, we do not decide in this rule when the phase-in process will ultimately end, or at what threshold level, because all that depends on uncertain variables such as our progress in developing streamlining approaches and on permitting authorities' progress in developing permitting expertise and acquiring more resources. We may continue the phase-in process with further rulemaking(s) after 2016. Alternatively, we may make a final determination through future rulemaking that, under the "absurd results" doctrine, PSD and/or title V do not apply to GHG sources that, while small and relatively inconsequential in terms of GHG contribution, are above

the statutory tonnage thresholds for these programs, and thereby end the phase-in process. In addition, we may consider whether to limit title V applicability to GHG sources in order to minimize the number of GHG sources with "empty" permits.

8. Rationale for the Phase-In Schedule for Applying PSD and Title V to GHG Sources

Having discussed in sections V.B.5, V.B.6, and V.B.7 the reasons for tailoring the PSD and title V programs, we now describe our rationale for selecting the specific phase-in schedule in this rule for applying PSD and title V to GHG-emitting sources. To reiterate for convenience, under Step 1 of this schedule, which begins on January 2, 2011, (1) PSD applies to the GHG emissions of "anyway" PSD sources, that is, sources that are subject to PSD anyway due to their emissions of conventional pollutants and that undertake a modification that results in an increase of at least 75,000 tpy CO_2e; and (2) title V applies to "anyway" title V sources, that is, sources that are subject to title V anyway due to their emissions of conventional pollutants. Under Step 2, which begins on July 1, 2011, (1) sources will be subject to PSD on account of their GHG emissions if they newly construct and emit at least 100,000 tpy CO_2e, or if they are existing sources that emit at least 100,000 tpy CO_2e of GHGs and make a modification that results in the emission of at least 75,000 tpy CO_2e; and (2) existing and new sources will be subject to title V on account of their GHG emissions if they emit 100,000 tpy CO_2e in GHG emissions. In addition, EPA intends to begin another round of rulemaking—Step 3—in 2011 and commits to complete it by July 1, 2012. In that rulemaking, we will propose or solicit comment on a further phase-in of GHG sources for PSD and title V applicability, and we may propose or solicit comment on another application of the "absurd results" doctrine that excludes categories of sources from PSD or title V. However, under this rule, in no event will EPA apply PSD or title V to sources below the 50,000 tpy CO_2e levels in Step 3, or any other step we might promulgate prior to April 2016. In addition, EPA commits to conduct a study, to be concluded by April 30, 2015, evaluating the status of PSD and title V applicability to GHG sources, and, based on the study, complete a rulemaking by April 30, 2016 that addresses another round of a phase-in.

a. Rationale for Step 1

In Step 1 of our tailoring approach, which begins on January 2, 2011, PSD and title V requirements will apply to only those sources that are subject to PSD or title V requirements anyway due to their conventional pollutants ("anyway" sources) and that, in the case of PSD, make modifications that result in an increase in GHG emissions of at least 75,000 tpy CO_2e. No sources would become major for PSD or title V under this step based on their GHG emissions alone. This section describes our proposal, comments on the proposal and our response to those comments, and our rationale for Step 1.

(1) Proposal

In our proposal, we proposed (1) the application of PSD and title V requirements to sources that emit at least 25,000 tpy CO_2e, (2) a PSD significance level of between 10,000 and 25,000 tpy CO_2e, and (3) a commitment to undertake a study to be followed by further rulemaking after 6 years. In addition, we solicited comment on the alternative of limiting PSD and title V applicability to "anyway" sources for at least the first 6 years. Under this approach, PSD and title V applicability would be determined based on non-GHG pollutants, and without regard to GHGs, but those sources subject to PSD would also be subject to BACT requirements for GHGs if their GHG emissions exceeded the significance level established in the final rule, and those sources subject to title V would be required to include any applicable requirements for GHGs in their permits.

(2) Comments

Many commenters supported this "anyway"-source approach, and offered a variety of reasons: According to the commenters, (1) This approach is a better reading of Congress's intent in the Act and is consistent with *Alabama Power* v. *Costle,* 636 F.2d 323 (DC Cir. 1980); (2) this approach would reduce the permitting workload on sources currently considered minor and focus PSD and title V requirements on large sources of non-GHG pollutants, as intended by Congress; (3) it is appropriate to base PSD and title V applicability on non-GHG emissions until data on GHG emissions are available from the mandatory GHG reporting rule; (4) in the initial phase, this approach would be more straightforward to administer, would provide a more predictable permitting workload, and would prevent a flood of newly regulated sources from overburdening state agencies; (5) this approach would provide permitting agencies time to develop experience handling GHG sources and requirements under the PSD and title V programs; (6) this approach would provide EPA and the permitting agencies the time needed to develop streamlining techniques; (7) this approach is consistent with the "absurd results" and "administrative necessity" doctrines because the scope of the permitting programs would remain consistent with both congressional intent and current administrative practice, but EPA and state agencies would still be allowed to begin regulating GHG emissions from existing PSD and title V sources; and (8) sources already required to obtain PSD permits are best equipped to work through BACT issues with permitting authorities.

Commenters added that if BACT is applied for GHGs due to permit actions involving non-GHG pollutants, EPA would need to set a significance threshold for the application of BACT, without which BACT could apply to very small (*e.g.,* 1 ton) GHG increases associated with projects that otherwise triggered PSD for increases of non-GHG.

(3) Determination as to Step 1, PSD and Title V Applicability and PSD Significance Level

After considering the administrative burdens from increased permitting actions and the need for permitting authorities to have sufficient time to develop necessary expertise and staffing resources to address that burden, we have decided in this final action to establish the "anyway" source approach as Step 1. Beginning on January 2, 2011, sources subject to PSD requirements for their conventional pollutants anyway will be required to apply BACT to their GHG emissions if they construct or modify and in so doing, emit at least 75,000 tpy CO_2e in GHGs. Similarly, sources subject to title V requirements anyway due to their conventional pollutants will be required to meet certain requirements for their GHGs, as described elsewhere. These requirements at Step 1 for PSD and title V will not expire. On July 1, 2011, a further phase-in of PSD and title V applicability—Step 2—will kick in.

At Step 1, by definition, all of the covered sources are already subject to PSD and title V permitting requirements, and will simply be adding a GHG component to what would be an otherwise occurring permitting action for conventional pollutants. These sources include fossil fuel-fired power plants, petroleum refineries, cement plants, iron and steel plants, pulp and paper plants, petroleum refineries, large

landfills, and other large industrial sources. These sources will need to perform some additional analysis that is unique to GHG emission units, particularly related to the BACT review and selection process, but they will likely be able to utilize information developed as part of other permitting requirements for conventional pollutants, such as equipment fuel usage and operational parameters. Also, because these facilities are familiar with the case-by-case permitting processes, including all the steps from the application to the final review process, they will not confront a high PSD or title V learning curve.

The "anyway" source approach has particular appeal during the first step of the phase-in approach because it begins to apply key PSD and title V program requirements as soon as January 2, 2011 to large sources of emissions, but because it applies only to sources that are already subject to PSD for other pollutants, it can be implemented efficiently and with an administrative burden that is manageable in the next 8 months. We expect that under this approach, the sources and permitting authorities will still face substantial additional work to address the GHG emissions. In addition to the activities discussed elsewhere, there will be significant and complex policy questions about how BACT will be implemented for GHGs that must be resolved. These issues will include how to determine BACT for GHGs, how to do netting, and other similar issues. Even with EPA guidance, many case-specific policy issues will arise and will have to be resolved by the permitting authority in the context of a specific permit application. Nevertheless, with the "anyway" source approach, this work will be manageable because the associated permitting burden will be limited to adding a GHG component to each existing permit action for which it will be required, and will avoid the significantly greater burdens associated with large numbers of new permit actions that would be required for sources and modifications that would be subject to PSD for the first time. Instead, this "anyway" source approach allows permitting authorities sufficient time to develop necessary expertise and staffing resources to address GHG BACT.

We agree with commenters that the establishment of a significance level—which, in effect, is a BACT threshold—is appropriate, and we have decided to establish this level at 75,000 tpy CO_2e because, for reasons discussed later, that is the level that will apply during Step 2. At this level, the administrative burdens, described later, will be manageable. Importantly, we believe a consistent significance level between Steps 1 and 2, as opposed to a lower significance level in Step 1, will provide for a smoother transition and avoid the problems that would arise if PSD applied to modifications during Step 1 that PSD would not apply to in Step 2. Otherwise, we would create a perverse incentive for companies to delay such projects until Step 2 to avoid BACT.

We estimate that Step 1 will result in a 23 percent increase in permitting authority work hours and a $3 million increase—which amounts to a 25 percent increase from the current program cost of $12 million—in their annual costs for running PSD programs. This is primarily due to the GHG BACT review requirements. For title V programs, we estimate a 2 percent increase in permitting authority work hours and a $1 million increase in the title V annual program costs for permitting authorities under Step 1 as compared to the current program cost of $62 million. These work hours and costs will be needed primarily to review GHG emissions information, add any GHG-related requirements to title V revisions and renewal actions that would otherwise be occurring, respond to comments and petitions from the public, as well as develop fee requirements and make fee determinations associated with issuing new or revised title V permits that add GHG-related information. For both the PSD and title V programs on a combined basis, the additional costs for Step 1 will be $4 million, which amounts to a 5 percent increase in the current combined program cost of $74 million.

In addition to these workload and monetary costs, permitting authorities will confront additional burdens before and during Step 1, which we have not attempted to quantify. One of the most significant of these is training staff in the PSD-related areas of GHG emissions calculations and BACT evaluations. In addition, permitting staff will need to build staff expertise and capacity for addressing GHG requirements in preparation for Step 2, which will begin only 6 months after Step 1; and in communicating and providing outreach to sources addressing GHG emissions for the first time. Based on comments we received on the proposal from permitting authorities, we believe these additional training and outreach requirements—for both the PSD and title V programs—will add significantly to the permitting authorities' burden during the initial 6-month period under Step 1.

We believe that these administrative burdens are substantial but manageable. Following this action, permitting authorities will have only 8 months to prepare for Step 1, when they will need to increase their resources by 5 percent for both the PSD and title V programs combined, and be able to implement BACT requirements for GHG sources. During Step 1, they will need to prepare for Step 2, when, as discussed later, they will need to process over 900 additional PSD permits each year and begin to process over 1,100 additional title V permit actions.

We have decided to limit Step 1 to the "anyway" source approach, and not apply PSD or title V to sources based on their GHG emissions, for several reasons. First, we believe that the administrative burdens described previously are the most that the permitting authorities can reasonably be expected to manage before and during Step 1. Tighter PSD and title V applicability requirements would mean greater administrative burdens.

Second, we believe that the costs of GHG permitting to the sources, as described previously, are substantial and as a result, necessitate that we wait for the permitting authorities to develop the PSD and title V programs for GHG sources during the first 6 months of 2011 before subjecting sources to PSD and title V requirements on account of their GHG emissions. By July 1, 2011, when Step 2 takes effect, the PSD and title V programs will be better developed. For example, the permitting authorities will have more experience making BACT determinations. In addition, by that time, sources will have had more time to prepare for the permitting processes. In addition, as suggested by one commenter, the additional time will allow sources and permitting authorities to address the current uncertainty surrounding how to measure high-GWP gases.

Third, we estimate that "anyway" sources account for approximately 65 percent of total national stationary source GHG emissions. As a result, limiting Step 1 to these sources will still capture a large portion of the GHG inventory.

A large number of commenters urged us to leave this "anyway" source approach in place until such time as we complete an assessment and conduct further rulemaking, which we proposed would be 6 years from now. We are not taking this action; rather, for the reasons discussed next, we believe it is reasonable to use GHG thresholds to begin to phase in PSD and title V applicability to additional sources in Step 2.

b. Rationale for Step 2

(1) Proposal

We proposed to establish the applicability level for PSD and title V to GHG sources at 25,000 tpy CO_2e, and we proposed a PSD significance level in the range of 10,000 to 25,000 tpy CO_2e. Our burden estimates at proposal led us to conclude that at those threshold levels, for the PSD program, "approximately 400 additional new or modified facilities would be subject to PSD review in a given year. These include approximately 130 new facilities and approximately 270 modifications * * *." 74 FR 55331, col. 1. We estimated that processing these numbers of additional permits, along with doing the additional work associated with GHG emissions from sources subject to PSD anyway due to their conventional emissions, would increase permitting authority burdens by "approximately 112,000 staff hours at an additional cost of approximately $8 million. This workload amount represents an increase of about 1.3 times, or 32 percent, in the current burden for permitting authorities on a nationwide basis." *Id.* col. 3. We concluded that "this additional burden is manageable," but that "any threshold lower than 25,000 tpy CO_2e, would create undue administrative burdens." *Id.*

For the title V program, we estimated that at a 25,000-tpy CO_2e permitting threshold, "about 13,600 existing facilities" would become subject to title V, and that to manage the additional workload associated with permitting those sources and with the other permit revisions and modifications that would result from the 25,000 tpy CO_2e threshold, permitting authorities would require an additional 492 FTEs, which would be an estimated 50 percent increase over current title V staffing levels. 74 FR 55335, cols. 1–2.

(2) Comments

We received a significant number of comments from both permitting authorities and industry representatives that our proposed GHG threshold of 25,000 tpy CO_2e for major source applicability was too low and would result in an unmanageable amount of permitting actions in the near term. Many offered evidence that we severely underestimated both the number of permitting actions and the per-permit administrative burden, for both PSD and title V programs.

Commenters also asserted that the proposed 25,000 tpy threshold is too low because it will subject small sources (including many small businesses) to PSD and title V, which is not in keeping with Congress's intent to limit PSD and title V to large sources when Congress set the 100/250 tpy thresholds for the permitting programs. EPA, in collaboration with the SBA, conducted an outreach meeting designed to exchange information with small entities that may be interested in these regulations. The EPA took this small business outreach effort into account when finalizing this rule. Many commenters from this outreach effort said that there were many more small businesses that would become subject to PSD and title V due to the proposed permitting thresholds than EPA estimated at proposal.

Many commenters recommended specific major source thresholds for PSD and title V, including levels of 25,000 (as proposed), 40,000, 50,000, 100,000, 150,000, 250,000, and 1,000,000 tpy CO_2e. A majority of the commenters—including both industry and state agency commenters—recommended major source thresholds of 100,000 tpy CO_2e. However, several state agency commenters recommended thresholds of 50,000 tpy CO_2e. Other commenters recommended sector-specific thresholds. For example, solid waste industry commenters suggested thresholds of 820,000 tpy CO_2e for PSD [which they calculate to be equivalent to the existing PSD threshold for "municipal solid waste landfill emissions," *i.e.,* 250 tpy nonmethane organic compounds (NMOC)] and 320,000 tpy CO_2e for title V (calculated to be equivalent to the existing major source applicability threshold of 100 tpy NMOC). Other commenters urged EPA to set the GHG thresholds at levels that correspond to emissions of conventional pollutants at the 100/250 tpy level.

Many of the commenters that recommended increasing the thresholds cited EPA's estimates that a particular threshold would significantly reduce the number of sources subject to the rule while causing only a slight reduction in the percentage of GHGs captured. Several of these commenters noted that Table VIII–2 in the proposal preamble indicates that shifting the major source threshold for PSD from 25,000 to 100,000 tpy CO_2e would reduce the number of major sources from 13,661 to 4,850 while reducing the coverage of U.S. stationary source GHG emissions by only about 4 percent. Other commenters referred to the regulatory impact analysis (RIA) for the mandatory GHG reporting rule to conclude that raising the threshold from 25,000 to 100,000 tpy CO_2e would exclude thousands of entities that, on a combined basis, emit only one percent of the nation's GHG emissions. *See* the RTC document for this final rulemaking for more detailed description of comments received on our proposed burden assessment.

Many commenters also recommended specific PSD GHG significance thresholds, including levels of 10,000 (as proposed), 15,000 (within the proposed range), 25,000 (also as proposed), 40,000, 50,000, and 100,000, and 150,000 tpy CO_2e, as well as suggesting sector-specific thresholds. These recommendations were based on the view that we had underestimated the number of modifications and that the burden of permitting at the proposed levels would therefore be much worse than we projected. A number of the commenters argued that the significance threshold should be no less than the major source threshold, at whatever level that is set. The largest number of commenters recommended a PSD significance threshold of 100,000 tpy CO_2e, although significant numbers also support 25,000 and 50,000 tpy CO_2e.

(3) Rationale for Step 2

Based on these comments, we reassessed our original burden estimates from our proposal. This reassessment is discussed at the beginning of this section. We decided that, once this adjustment is taken into account, the burdens at the proposed 25,000 threshold and the proposed 10,000–25,000 significance levels would be unmanageable. We therefore evaluated higher thresholds ranging from a 25,000 tpy CO_2e major source applicability level for PSD and title V to a 50,000, 75,000, or 100,000 tpy CO_2e level, with associated PSD GHG significance levels of equal or lesser magnitude; and we selected the 100,000/75,000 tpy CO_2e level. Central to our decision to promulgate higher thresholds than what we proposed is our recognition, based on comments and further analysis, that applying PSD to GHG sources at the statutory or any other threshold level or significance level that we have considered would result in (1) a greater number of sources, and significantly greater number of modifications than we first estimated becoming subject to those programs; and (2) a greater per-permit cost than we first estimated to the permitting authority of processing those permit actions. We discussed our revised estimates and reasoning at the beginning of this section.

We now estimate that the 25,000/25,000 tpy level would result in 250 additional PSD permit actions for new construction (either for GHG-only sources or additions to otherwise occurring permits) and an additional 9,200 PSD permits for modifications

each year (compared to our estimate at proposal of 130 for new construction and 270 for modifications). This level of permitting would require an additional 2,815,927 work hours, or 1,400 FTEs (compared to our estimate at proposal of 112,000 additional work hours, or 57 FTEs); and would cost an additional $217 million each year (compared to our estimate at proposal of an additional $8 million). *See* 74 FR 55331 (proposal). This $217 million amount represents approximately a 1,800 percent increase over current permitting authority annual cost of $12 million for the major NSR programs.

For title V, under our final burden analysis at a 25,000 tpy CO_2e threshold, we estimate a $64 million annual increase in program costs to permitting authorities to add GHG emission sources, which reflects a greater than 100 percent increase over current program costs of $62 million. We estimate that this increased burden would result in the need for almost 700 new FTEs nationwide at permitting authorities (compared to our estimate at proposal of 492 additional FTEs, or about a 50 percent increase in existing program size). This increase in burden is due to an estimated annual increase of 2,500 new title V permits, over 9,500 permit revisions, and over 2,600 permit renewal actions due to GHG emission sources. These additional title V actions compare to current annual program actions of approximately 50 new title V permits, 1,394 significant revisions, and 3,267 permit renewals.

Based on this information, we have decided not to finalize our proposal to apply a 25,000 tpy CO_2e applicability threshold to GHG sources at the time that PSD and title V take effect. At that level, too many sources—many more than we thought at proposal—would be subject to high permitting costs. In addition, permitting at that level and at that time would not be administratively feasible. The resulting increase in the number of PSD and title V permitting actions and workload would create insurmountable resource demands for permitting agencies in the near term, which would jeopardize the functioning of these permitting programs. We are mindful that not only would the permitting programs have to bear the costs that our estimates are able to monetize, but they would also incur burdens associated with hiring and training staff to make and implement GHG BACT determinations, GHG emissions evaluations, and other evaluations required under the PSD program for a wide variety of formerly unpermitted sources, including significant numbers and types of small manufacturing and commercial or residential establishments. They would also incur burdens associated with reviewing applications, citizen comment and petitions, and the need to communicate and provide outreach to new categories of sources, including, again, significant numbers and types of small manufacturing and commercial or residential sources. Thus, the increased administrative burdens at the 25,000/25,000 tpy CO_2e levels are so great that we have concluded that they would not be consistent with the goals of avoiding absurd results that contravene congressional intent, including avoiding a permitting burden that would overwhelm the capacity of permitting authorities to effectively implement their programs.

Based on our revised burden analysis, in this final action, we have decided to establish a multi-step, phase-in approach that contains a significantly higher initial threshold level. We have determined that a 100,000 tpy CO_2e major source threshold level for PSD and title V purposes, and a 75,000 tpy CO_2e significance level, produce a level of permitting activity that would certainly be an increase over current workload, but that would be administratively feasible by July 1, 2011. As a result, we have decided to finalize these thresholds as Step 2.

In reaching this conclusion, we needed to consider both the sources' abilities to manage the permitting process and the permitting authorities' capacity to address newly-major sources as expeditiously as possible. As to the former, sources subject to Step 2 will, for the most part, continue to include the "anyway" sources subject to Step 1. In addition, we estimate that Step 2 will include about 500 additional sources that are not already subject to permitting. Most of them will become subject to PSD and title V because of fuel burning. In order to meet the 100,000/75,000 threshold, they will have to burn a significant quantity of fuel, and that means they will be a significant size. In general, these sources include municipal or commercial landfills that are large, but not large enough to be covered by the NSPS, pulp and paper facilities, electronics manufacturing plants, chemical production plants, and beverage producers. Although these sources have not been subject to PSD permitting before, some of them have already been subject to minor source permitting, and so will have some familiarity with the permitting process. In addition, in general, these sources are in source categories that have larger sources that are already subject to PSD and title V. As a result, they are in industries that have experience in the permitting process. Because of their relatively large size and access to knowledge about the permitting processes, we believe these sources will be able to manage the permitting requirements.

As to the permitting authorities' capacity to handle the Step 2 workload, we note first that our Step 1 approach does not cover newly-major sources. As a result, the Step 2 threshold and timing has to be established in a way that takes into account permitting authority challenges in addressing many sources and categories that would be subject to major source permitting for the first time.

We considered the various PSD and title V threshold applicability and significance level options in our final burden analysis, summarized in Table VI–1, including levels at 50,000 CO_2e and 100,000 CO_2e. As Table VI–1 indicates, we estimate that a 100,000 tpy CO_2e major source applicability threshold would result in approximately 550 sources becoming newly classified as major sources for PSD based on their GHG emissions, while a 50,000 tpy CO_2e threshold would result in 3,500 newly classified major sources.

We then considered the impact on both PSD and title V programs of different PSD significance level options for GHGs. The choice of a PSD significance level has a direct impact on title V burdens because PSD permit requirements resulting from modification activities will result in required title V permit revisions. We developed PSD and title V burden estimates based on significance levels of 50,000 tpy, 75,000 tpy and 100,000 tpy CO_2e, combined with a major source applicability level of 100,000 tpy CO_2e.

At a 50,000 tpy CO_2e significance level, we estimated an annual increase of approximately 1,800 PSD permitting actions and almost 2,000 additional title V permitting actions, as compared to Step 1. At a 75,000 tpy CO_2e significance level, we estimated an annual increase of approximately 900 PSD permitting actions and just over 1,000 additional title V permitting actions as compared to Step 1. At a 100,000 tpy CO_2e significance level we estimated an annual increase of approximately 25 PSD permitting actions and 210 additional title V permitting actions as compared to Step 1. For title V, under these different scenarios, the major source applicability level of 100,000 tpy CO_2e results in approximately 200 new permits annually, but, as noted, the choice of significance levels affects the number of required permit revisions.

Based on this information, we have decided to set our final Step 2 thresholds at 100,000 tpy CO_2e for major source applicability under PSD and title V and at a 75,000 tpy CO_2e significance level for PSD. Overall, we estimate that the almost 900 additional PSD permitting actions (virtually all of which would be modifications) per year at these levels will result in an approximately $21 million increase (from Step 1) in states' annual costs for running PSD programs. In addition, we estimate that the 1,000 additional title V permit actions will cause the total title V burden for permitting authorities to increase by $6 million annually from Step 1. This total increase in permit program burdens of $27 million represents a 34 percent increase over the $78 million in total cost of PSD and title V programs at Step 1. We consider this a substantial increase particularly because Step 2's start date of July 1, 2011, is only 6 months after Step 1's start date of January 2, 2011. What's more, Step 1 will entail a substantial increase in permitting authority obligations, so that adding the costs of Step 1 and Step 2 together—$31 million—means that permitting authorities will be required to increase their permitting resources by approximately 42 percent between now and Step 2. In addition to the administrative burdens we have been able to monetize, we must be mindful that permitting authorities will incur other burdens, including the significant support and outreach activities by permitting staff for the many newly permitted sources. We believe that any lower thresholds in this timeframe, whether in the PSD and title V applicability levels or in the significance level, would give rise to administrative burdens that are not manageable by the permitting authorities.

Although the burdens at the 100,000 tpy CO_2e/75,000 tpy CO_2e levels are steep, we consider them manageable. Step 2 permitting for GHGs will mostly involve source categories in which some sources have traditionally been subject to permitting, which should render applying even the new GHG requirements more manageable. These source categories include fossil fuel-fired power plants, petroleum refineries, cement plants, iron and steel plants, and petroleum refineries, in addition to other large industrial type source categories. A full description of the type of sources that we expect will have GHG emissions that exceed the 100,000 tpy CO_2e threshold is provided in the "Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation" located in the public docket for this rulemaking. In addition, because Step 2 does not begin until July 1, 2011, permitting authorities have about 14 months to prepare for it.

In addition, we believe that the sources that will become subject to PSD and title V requirements at the 100,000/75,000 tpy CO_2e levels will be able to accommodate the additional costs of permitting. For the most part, these sources will be of a comparable size and activity level as those sources that are already subject to those requirements.

Because the administrative burdens at the 100,000/75,000 tpy CO_2e level are as heavy as the permitting authorities can reasonably be expected to carry, adopting these threshold levels is consistent with our legal basis under the "absurd results" doctrine. Under this basis, we are reconciling the statutory levels with congressional intent by requiring that the PSD and title V requirements be applied to GHG sources at levels as close as possible to the statutory thresholds, and as quickly as possible, in light of costs to sources and administrative burdens.

Because the administrative burdens at the 100,000/75,000 tpy CO_2e level are manageable, we do not believe that higher threshold levels are justifiable for Step 2. Specifically, at the 100,000/100,000 level—which would entail a 100,000 tpy CO_2e significance level, rather than a 75,000 tpy CO_2e level—permitting sources would need to handle only 20 additional modifications beyond current levels, and thus would not incur substantial additional costs. By the same token, we disagree with commenters who suggested that we needed to set permanent GHG permitting thresholds for major sources at a rate equivalent to the amount of GHGs that would be emitted by conventional pollutants at the 100 and 250 tpy level in order to meet the legal bases of the "absurd results" and "administrative necessity" doctrines. These levels would likely be well above 300,000 tpy CO_2e, depending on fuel types and assumptions regarding the relative emissions of GHGs compared to the conventional pollutants. Our data show that none of the levels above 100,000/75,000 tpy CO_2e would result in significant increases in administrative burdens. As a result, establishing these levels would not apply PSD or title V requirements to GHG sources as quickly as possible, and thus would not be consistent with our approach in the Tailoring Rule.

We estimate that facilities meeting the Step 2 major source applicability thresholds account for approximately 67 percent of total national stationary source GHG emissions. Many commenters felt that this should be an important basis for our selection of a threshold, stating that there is no significant loss in GHG emissions coverage of source categories at the 100,000 tpy CO_2e threshold, and in some cases arguing that as a result, we should set the level even higher. We agree that it is important that the coverage in Step 2 represents 86 percent of the coverage at full implementation of the statutory 100/250 thresholds.

c. Rationale for EPA's Plan Beyond Step 2

EPA commits that after Step 2, EPA will begin another rulemaking in 2011 and complete it by July 1, 2012, and in that rulemaking take comment on a further phase-in of GHG sources for PSD and title V applicability (Step 3). However, under this rule, in no event will EPA apply PSD or title V to sources below the 50,000 tpy CO_2e levels prior to 2016. In addition, EPA commits to conduct a study, to be concluded by April 30, 2015, evaluating the status of PSD and title V applicability to GHG sources, and, based on the study, complete a rulemaking by April 30, 2016, that addresses another round of a phase-in.

(1) Proposal

In our proposal, we noted that following implementation of the first phase of PSD and title V applicability to GHG sources, generally at the 25,000 tpy CO_2e threshold, additional action would be required over time to assure full compliance with the statute. We did not establish more steps in the schedule, but we did commit to conduct a study, to be completed by 5 years after promulgation, evaluating the status of PSD and title V applicability to GHG sources, and, based on the study, complete a rulemaking by 6 years after promulgation that addressed an additional step of the phase-in.

(2) Comments

A number of commenters supported the proposal's overall approach to phase in the permitting of GHGs, mainly because this approach will allow permitting of the largest sources of GHGs immediately while collecting more information about smaller sources and more fully considering streamlining options for subsequent phases. Many of these commenters made clear that they do not support implementation of the statutory 100/250 tpy thresholds, even through a phase-in approach. On the other hand, one commenter asserted that EPA has failed to demonstrate that

it needs 6 years to study and implement NSR and title V for sources emitting less than 25,000 tpy. The commenter contends that EPA has not analyzed, among other things, what combined effect the full implementation of its streamlining proposals in the 15 months before the due-date for title V permit applications would be to reduce the cost, complexity, and number of title V permit applications that would have to be submitted.

(3) Rationale for Further Steps

We agree with commenters who support a phased-in approach to the Tailoring Rule. Our final action reflects a multi-step process that we believe will facilitate a manageable expansion of PSD and title V applicability, as appropriate, to GHG-emitting sources. In our final action, we have established the initial two steps of a multi-step phase-in of lower threshold applicability with a commitment to take further regulatory activity to consider adopting lower thresholds. We believe this process will provide substantial opportunity for permitting authorities and sources to establish enough experience and information, and to provide significant real-world feedback to EPA, so as to better inform decisions on future phase-in steps.

With this overall phase-in approach in mind, in this final rule, EPA includes an enforceable commitment to undertake a notice-and-comment rulemaking that would begin with an SNPR that we expect to be issued in 2011 and that we commit will be finalized in 2012. The notice will propose or solicit comment on further reductions in the applicability levels. This rulemaking will take effect by July 1, 2013, and therefore, in effect, constitute Step 3. In this action, we are committing to a rulemaking for Step 3, but are not promulgating Step 3, because it is important to allow EPA and the permitting authorities to gain experience permitting sources under Steps 1 and 2, and to allow time to develop streamlining methods, before attempting to determine what would be the next phase-in levels for PSD and title V applicability. While committing to future action, we do not decide in this rule when the phase-in process will ultimately end, or at what threshold level, because all that depends on uncertain variables such as our progress in developing streamlining approaches and on permitting authorities' progress in developing permitting expertise and acquiring more resources. We may continue the phase-in process with further rulemaking(s) after 2016. Alternatively, we may make a final determination through future rulemaking that, under a *Chevron* analysis, accounting for the "absurd results" doctrine, PSD and/or title V do not apply to GHG sources that, while small and relatively inconsequential in terms of GHG contribution, are above the statutory tonnage thresholds for these programs, and thereby end the phase-in process.

In addition, in this action, we are determining that in no event—whether through Step 3 or a subsequent step—will we apply PSD or title V to sources at the 50,000/50,000 tpy CO_2e level or lower prior to May 1, 2016. We have several reasons for making this determination at this time. Most importantly, our examination of the expected burdens to the permitting authorities of applying PSD and title V to GHG sources convinces us that extending the permitting programs to sources at or below the 50,000/50,000 tpy CO_2e level within 6 years of promulgation would result in prohibitively heavy burdens. This threshold option would result in close to 2,000 additional annual PSD permitting actions per year over the current program and more than 1,000 over Step 2, including both new construction and modifications. For title V, we estimated an increase of over 1,000 new title V permits (all newly permitted sources because of GHG emissions) over 2,000 permit revisions per year over the current program, and about 980 new title V permits and 900 permit revisions more than the Step 2 amounts.

These increases, which could occur between 2013 and 2016 under our approach depending on the outcome of the Step 3 rulemaking, represent very substantial additions to the permitting program. In terms of cost, we estimate that these additional actions would result in a $73 million per year increase in joint PSD and title V program costs over the current programs—which is almost a doubling of costs—and $42 million annual cost increase over Step 2 for the current programs. We believe that it would take permitting authorities some time to adjust to this workload. This is particularly true because at the 50,000/50,000 tpy CO_2e level, smaller sources—including ones not previously subject to permitting requirements—will become subject to PSD and title V. It will take some time for both the permitting authorities and the sources to absorb these new obligations.

Importantly, the next lower cut-off—below 50,000 tpy CO_2e for the major threshold level—is the 25,000/25,000 tpy CO_2e level. For the reasons discussed previously, this level is clearly not manageable within the first 6 years after this action. This applicability level would bring in over 7,000 sources that would be newly subject to title V permitting and result in close to 10,000 new PSD permitting actions. This would result in a 380 percent increase over current program costs for PSD and title V to run these programs. Based on comments we received from state and local permitting agencies on our proposed Tailoring Rule, these levels of permitting activities would far exceed the administrative capabilities of the permitting agencies for at least the near future. Thus, the 6-year exclusion is necessary to provide these agencies and their permittees certainty that this will not occur.

We recognize that at present, we do not have data that would allow us to compile administrative burden estimates for specific levels between the 50,000/50,000 and 25,000/25,000 tpy CO_2e levels we assessed. However, it is clear that the burdens begin to rise sharply below the 50,000/50,000 tpy CO_2e level. To reiterate, the combined PSD and title V administrative burdens at the 50,000/50,000 tpy CO_2e level cost almost twice as much as the current programs, but the burdens at the 25,000/25,000 tpy CO_2e level cost almost four times as much as the current programs. As a result, we conclude that dropping the level below 50,000/50,000 tpy CO_2e too soon would quickly expose the permitting authorities to unacceptably high burdens.

As a further reason for concluding that we will not reduce thresholds beyond 50,000/50,000 tpy CO_2e during the first 6 years, we recognize that the PSD permitting process in particular carries important ramifications for the permitting authorities and the affected sources. If we have underestimated the permitting burden or the ability of states to respond to their additional workload, then permitting backlogs will result, and PSD permit issuance will be delayed, and sources seeking a PSD permit will not be able to construct or modify. If this were to happen on a large enough scale, it could have potentially serious consequences for the national economy.

Moreover, we need to be mindful that the best information we currently have as to permitting authority burdens represents a national average, as described previously. Our information at the individual state and local level, where permitting occurs, is not as robust. Accordingly, we recognize that a particular state may encounter permitting costs that are higher than average, and this may result in permitting backlogs in that state, with

the consequence that sources in that state will face long delays in constructing or modifying. Similarly, even if a particular state's costs are in line with the national average, that state may not be able to find the additional resources to cover those costs as readily as other states. For this reason, too, sources in that state could face long delays in constructing or modifying.

Beyond the administrative burdens to permitting authorities, we recognize that the costs of PSD and title V permitting to sources may be high, and we are not inclined to allow their imposition at this time on sources smaller than the 50,000/50,000 tpy CO_2e threshold. At that level, the permitting programs will apply to a significant number of newly permitted sources, including a variety of small manufacturing, commercial and residential categories. The next level that we have analyzed is the 25,000/25,000 tpy CO_2e threshold. At that level, more than 7,000 more sources would become subject to PSD each year—almost all due to modifications—and another 4,000 sources would become subject to title V each year. These sources would be even smaller than those that already will have become subject to PSD and title V due to their GHG emissions. We do not think it reasonable to subject more of those types of sources, and smaller ones, to permitting costs within the next 6 years.

Finally, we note that moving from a 50,000 tpy CO_2e threshold to 25,000 tpy CO_2e will increase the emissions coverage of GHG stationary sources from 70 percent to 75 percent nationwide, which we consider to be a relatively small amount.

We recognize that our progress in developing streamlining methods will be a key determinant to the ability of permitting authorities to administer, and sources to comply with, PSD and title V at GHG emission levels below 50,000/50,000 tpy CO_2e. Although we commit to pursue streamlining, we cannot predict our progress. This uncertainty may be problematic for stakeholders, primarily permitting authorities and industry. That is, permitting authorities will face uncertainty in planning the scope of their programs over the next few years, and industry will face uncertainty as to what new construction projects and modifications will be subject to PSD for GHGs. By determining now that for the next 6 years we will not impose PSD requirements below a floor at the 50,000/50,000 tpy CO_2e level, we add a measure of needed certainty.

We also recognize that selecting a level that is too high or keeping a level for too long means that some sources may construct or modify without implementing BACT level controls, and this could result in additional emissions of GHGs. We need to be vigilant and to protect against this outcome. Even so, all things considered, we believe that our determination not to apply the PSD or title V permitting requirements to sources below the 50,000/50,000 tpy CO_2e level for the first 6 years also represents a reasonable balancing of protection of the environment with promotion of economic development. This type of balancing is consistent with our authority under the PSD provisions.

We also raised the issue of "hollow" or "empty" permits in discussing our rationale for why it may make sense to delay title V permitting under our proposal. We were concerned that many title V permits for GHG sources would contain no applicable requirements, and their issuance would therefore be of little value and would not be the best use of scarce resources. Several commenters agreed that implementing title V for GHGs will, at least initially, require "empty permits" to be issued to GHG sources because such sources will not be subject to "substantive" requirements, and that this would not be the best use of scarce resources.

We believe that the amount of resources that would be spent on, and the limited value that would result from, "empty permits" does warrant consideration under the *Chevron* analysis, taking account of the "absurd results" doctrine. Therefore, we intend to consider the role of "empty permits" when we undertake future rulemaking. However, we believe the issue of "empty permits" has limited or no relevance to the first two steps of the phase-in that we are promulgating in this rule. During Step 1, permitting for GHGs is only required if the source is otherwise subject to permitting for its emissions of non-GHGs. Those sources very likely will be subject to existing substantive applicable requirements for non-GHGs (*e.g.,* NSPS, Maximum Achievable Control Technology (MACT), and SIP requirements, including PSD). Thus, there should be no, or at least no additional, "empty permits" during Step 1. For Step 2, it is possible that sources that become subject to title V requirements for GHG emissions may not be subject to other requirements, but our assessment suggests that this is very unlikely. We estimate that virtually all of the 550 newly-major sources in Step 2 will be subject to applicable requirements under the CAA because they are from categories that have been traditionally subject to regulations, such as smaller industrial sources from already regulated categories, large landfills, and oil/gas/coal production. Even the approximately 50 newly-subject commercial sources in Step 2, which we estimate to be comprised of very large hospitals, are likely to be covered by standards for medical waste incinerators. In addition, we expect these sources may well be subject to SIP requirements. Thus, we do not expect any, or at most very few "empty permits" during Step 2.

In later stages of implementation (*e.g.,* prospective Step 3) or in the event that we permit smaller, non-traditional sources of GHGs that have never otherwise been subject to major source permitting, there would be a greater potential for "empty permits" to be issued under title V. Cognizant of this, we intend to further explore in the rulemaking for Step 3 "empty permit" theories under the "absurd results" rationale that may serve to permanently narrow the scope of title V to exclude sources that would potentially be required to obtain an "empty permit" due to GHG emissions.

In this action, EPA is also finalizing its proposal to commit to conduct an assessment of the threshold levels—to be completed in 2015, 5 years after this action—that will examine the permitting authorities' progress in implementing the PSD and title V programs for GHG sources as well as EPA's and the permitting authorities' progress in developing streamlining methods. We further commit to undertake another round of rulemaking—beginning after the assessment is done, and to be completed by April 30, 2016—to address smaller sources.

We disagree with the commenter who asserted that we do not need 6 years to study and implement PSD and title V for smaller sources. As we discussed in the proposal, and reiterate in this final action, we do not have sufficient information at this time to determine the applicability and effectiveness of the various permitting streamlining techniques. For reasons discussed in more detail in section V.E.1 regarding streamlining, we are not now able to determine how such techniques will be implemented or whether they will prove viable or effective. We agree with the commenter that these measures may reduce the scope, cost, and complexity of these programs, but there is considerable uncertainty as to the extent of this effect. We do commit in this action to fully investigate, propose, and evaluate permit streamlining techniques to determine where they may have applications, how they would be applied, and whether they can withstand legal challenge. Even for

those techniques that may ultimately be deemed viable, there is a significant time period necessary for rulemaking and state adoption, all of which could take up to 3 years or more. We also note that we will be required to complete our study of the effectiveness of these techniques within 5 years, meaning that, in order to complete it in time, we will essentially need to begin the study as soon as relevant data are starting to become available. Finally, the sixth year, in which EPA must complete rulemaking, requires proposal and promulgation of a rule within 1 year, which is an ambitious schedule. Therefore we believe that 6 years is appropriate for this type of effort. We also have received a substantial number of comments from permitting authorities that agreed with our 5-year timeframe, or a greater timeframe, to get more prepared for permitting smaller sources.

d. Other Comments on "Absurd Results" Doctrine

We received other comments on our application of the "absurd results" doctrine, which we respond to in the RTC document. One comment was overarching, and so we respond to it here: Commenters have asserted that under the "absurd results" doctrine, EPA does not have authority to, or at least should not, promulgate the endangerment/cause or contribute findings (which we will sometimes refer to as the "findings") or the LDVR because doing so would trigger the PSD and title V requirements, which in turn would give rise to "absurd results". According to commenters, under the "absurd results" case law, EPA is obliged to avoid taking any action that would trigger absurd results and in this case that means foregoing the endangerment/cause or contribute findings and/or the LDVR, or at least deferring finalizing them until EPA has time to streamline PSD and title V requirements so as to avoid "absurd results". Commenters made the related comment that if we promulgate the LDVR, and thereby trigger PSD, we cannot rely on the "absurd results" doctrine because it is our own actions—the promulgation of the LDVR—that will have given rise to the "absurd results," and under those circumstances, the doctrine is not available.

The comments that EPA had no authority to promulgate, or should not have promulgated, the endangerment/cause or contribute findings or the LDVR at the times that EPA did are not relevant to this rule, the Tailoring Rule. EPA has already promulgated the findings and the LDVR, and the LDVR triggers PSD and title V applicability, as we have seen. These comments would have been relevant only to the proposed findings and LDVR, and we are not, in this rulemaking, revisiting or reopening the findings or the LDVR.[48]

Commenters claim that if EPA promulgates the LDVR, the "absurd results" doctrine will no longer apply to the Tailoring Rule because it will have been EPA's own action—promulgation of the LDVR—that gives rise to the "absurd results". We disagree for several reasons. For one thing, commenters have not cited case law, and our research has disclosed none, in which a court specifically addressed a similar situation and issued a holding along the lines of what commenters urge. Moreover, commenters' approach would be punitive because the absurd results would occur absent this rule going final. Such an outcome would be counter to the purpose of the doctrine. That is, it would mean that PSD and title V would apply to GHG sources by their terms—at the statutory levels, as of January 2, 2011—with all the adverse consequences described elsewhere.

In any event, and although we are not obligated to respond to these comments on the merits, they are incorrect on the merits, for the reasons that follow. This discussion should not be viewed as reopening the endangerment/cause or contribute findings or the LDVR because, as stated previously, we are not reconsidering or reopening those two actions in this rule.

In determining and implementing congressional intent, it is important that the statutory provisions at issue be considered together—(1) The obligation to make a determination on endangerment and contribution under CAA section 202(a); (2) if affirmative endangerment/cause or contribute findings are made, the obligation to promulgate standards applicable to the emission of any air pollutant from new motor vehicles or new motor vehicle engines under CAA section 202(a); and (3) the PSD and title V applicability provisions. The most appropriate reading, and certainly a reasonable reading, is that we are required to take the action we have taken, and are taking with this rule, and that is to issue the findings, promulgate the LDVR, and promulgate the Tailoring Rule. Our approach gives effect to as much of Congress's intent for each of these provisions, and the CAA as a whole, as possible.

With respect to the endangerment/cause or contribute findings under CAA section 202(a), congressional intent is clear that, as we stated in making the findings and the Supreme Court held in *Massachusetts* v. *EPA,* we are precluded from considering factors other than the science based factors relevant to determining the health and welfare effects of the air pollution in question. Accordingly, EPA determined that under *Massachusetts* v. *EPA,* 549 U.S. 497 (2007) we were precluded from deferring or foregoing the findings due to concern over impacts on stationary sources affected by PSD or title V requirements. *See* 74 FR at 66496, 66500–01 ("Taken as a whole, the Supreme Court's decision clearly indicates that policy reasons do not justify the Administrator avoiding taking further action on the questions here."); *see also Massachusetts* v. *EPA,* 549 U.S. at 533; *see also* 74 FR at 66515–16 (December 9, 2009). (The Administrator "must base her decision about endangerment on the science, and not on the policy considerations about the repercussions or impact of such a finding).[49] Moreover, as EPA also noted, "EPA has the ability to fashion a reasonable and common-sense approach to address greenhouse gas emissions and climate change." 74 FR at 66516.

Regarding the timing of the LDVR, Congress's intent was that endangerment/cause or contribute findings under section 202(a) would in fact lead to control of the air pollutants from new motor vehicles and new motor vehicle engines contributing to the harm. The primary goal of section 202(a) is to achieve such reductions by requiring that EPA adopt emissions standards, and as a result, proceeding with the LDVR is consistent with that goal. In contrast, deferring the LDVR and thereby delaying achievement of the public health and welfare benefits Congress expected and required under section 202(a) would run directly counter to what Congress intended under section 202(a)—EPA issuing emissions standards to address the public health and welfare problems that were identified, not EPA refusing to do so.

Moreover, we have compelling reasons to proceed with the LDVR, in the manner that we did. As we stated in the LDVR, in response to similar comments that we were not obligated to

[48] EPA does have pending before it ten petitions to reconsider the endangerment and cause or contribute findings. EPA is carefully evaluating those petitions and expects to issue its decision(s) on or about July 30, 2010.

[49] Note, that at least one petition for reconsideration on the endangerment/contribution findings raises the same arguments related to the timing of decisions and absurd results. As noted before, EPA is carefully evaluating all the pending petitions for reconsideration.

conduct that rulemaking, or to conduct it at the time that we did:

Some of the comments relating to the stationary source permitting issues suggested that EPA should defer setting GHG standards for new motor vehicles to avoid * * * [adverse] stationary source permitting impacts. EPA is issuing these final GHG standards for light-duty vehicles as part of its efforts to expeditiously respond to the Supreme Court's nearly three year old ruling in Massachusetts v. EPA, 549 U.S. 497 (2007). In that case, the Court held that greenhouse gases fit within the definition of air pollutant in the Clean Air Act, and that EPA is therefore compelled to respond to the rulemaking petition under section 202(a) by determining whether or not emissions from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision. The Court further ruled that, in making these decisions, the EPA Administrator is required to follow the language of section 202(a) of the CAA. The Court stated that under section 202(a), "[i]f EPA makes [the endangerment and cause or contribute findings], the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant." 549 U.S. at 534. As discussed above, EPA has made the two findings on contribution and endangerment. 74 FR 66496 (December 15, 2009). Thus, EPA is required to issue standards applicable to emissions of this air pollutant from new motor vehicles.

The Court properly noted that EPA retained "significant latitude" as to the "timing * * * and coordination of its regulations with those of other agencies" (id.). However it has now been nearly three years since the Court issued its opinion, and the time for delay has passed. In the absence of these final standards, there would be three separate federal and state regimes independently regulating light-duty vehicles to increase fuel economy and reduce GHG emissions: NHTSA's CAFE standards, EPA's GHG standards, and the GHG standards applicable in California and other states adopting the California standards. This joint EPA–NHTSA program will allow automakers to meet all of these requirements with a single national fleet because California has indicated that it will accept compliance with EPA's GHG standards as compliance with California's GHG standards. 74 FR at 49460. California has not indicated that it would accept NHTSA's CAFE standards by themselves. Without EPA's vehicle GHG standards, the states will not offer the federal program as an alternative compliance option to automakers and the benefits of a harmonized national program will be lost. California and several other states have expressed strong concern that, without comparable federal vehicle GHG standards, the states will not offer the federal program as an alternative compliance option to automakers. Letter dated February 23, 2010 from Commissioners of California, Maine, New Mexico, Oregon and Washington to Senators Harry Reid and Mitch McConnell (Docket EPA–HQ–OAR–2009–0472–11400). The automobile industry also strongly supports issuance of these rules to allow implementation of the national program and avoid "a myriad of problems for the auto industry in terms of product planning, vehicle distribution, adverse economic impacts and, most importantly, adverse consequences for their dealers and customers." Letter dated March 17, 2010 from Alliance of Automobile Manufacturers to Senators Harry Reid and Mitch McConnell, and Representatives Nancy Pelosi and John Boehner (Docket EPA–HQ–OAR–2009–0472–11368). Thus, without EPA's GHG standards as part of a federal harmonized program, important GHG reductions as well as benefits to the automakers and to consumers would be lost.165 In addition, delaying the rule would impose significant burdens and uncertainty on automakers, who are already well into planning for production of MY 2012 vehicles, relying on the ability to produce a single national fleet. Delaying the issuance of this final rule would very seriously disrupt the industry's plans.

Instead of delaying the LDV rule and losing the benefits of this rule and the harmonized national program, EPA is directly addressing concerns about stationary source permitting in other actions that EPA is taking with regard to such permitting. That is the proper approach to address the issue of stationary source permitting, as compared to delaying the issuance of this rule for some undefined, indefinite time period.

75 FR 25,402 cols. 1–3 (May 7, 2010) (footnote omitted).

With respect to both the endangerment/cause or contribute findings and the LDVR, it would require speculation and conjecture to defer—or, certainly, to forego altogether—the findings or LDVR until EPA completed streamlining the PSD and title V requirements on grounds that doing so would allow full compliance in the future with all PSD and title V statutory provisions. That is the gist of commenters' argument—that EPA should defer or forego issuance of the findings and the LDVR to avoid causing an absurd result from implementation of the separate PSD and title V programs. Underlying this claim is the assumption that this would allow EPA to avoid the "absurd results". As we discuss elsewhere in this rulemaking, there is no basis at this point to determine that streamlining will ultimately allow full compliance with the PSD and title V requirements. Rather, it is possible that EPA may conclude that none of the available streamlining techniques will allow all GHG sources at the statutory thresholds to comply with PSD and title V requirements in a manner that does not impose undue costs on the sources or undue administrative burdens on the permitting authorities. Under these circumstances, EPA may then permanently exclude GHG source categories from PSD or title V applicability under the absurd results doctrine. Moreover, it may well take many years before EPA is in a position to come to a conclusion about the extent to which streamlining will be effective and therefore be able to come to a conclusion as to whether any source categories should be permanently excluded from PSD or title V applicability. In our rulemaking today, we describe what actions we expect to take in the first 6 years after PSD and title V are triggered for GHG sources, and we may well be in a situation in which we continue to evaluate streamlining measures and PSD and title V applicability to GHG sources after this 6-year period.

Accordingly, deferring the endangerment/cause or contribute findings and LDVR until such time that PSD and title V streamlining would allow full implementation of these programs at the statutory limits would serve only to delay the benefits of the LDVR, as well as the benefits that come from phasing in implementation of the PSD program to cover larger sources first. It would rely on an assumption that is unfounded at this point, that is, that such full compliance will be required at some point in the future. Delaying the emissions benefits of the LDVR and the related emissions benefits from partial implementation of the PSD program fails to implement Congress' intent that the endangerment/cause or contribute findings "shall" lead to emissions standards for new motor vehicles contributing to the endangerment, and related emissions controls for the same air pollutant under the PSD program. EPA need not determine at this time what approach would be appropriate if there was a determination that full compliance with PSD and title V would in fact occur at some point in the future. In this case, absent such a determination, it would be improper to rely on speculation of such a future possibility as a basis under section 202(a) to defer or forego issuance of the LDVR on the grounds that EPA should defer or forego the LDVR to avoid causing an absurd result. Likewise there is no basis to defer proceeding at this time with the streamlining of the PSD and title V programs.

With respect to the PSD and title V applicability requirements, as we discuss elsewhere, we believe that Congress expressed a clear intent to apply PSD and title V to GHG sources and that the phase-in approach incorporated in the Tailoring Rule is fully appropriate. Proceeding now with the endangerment/contribution findings and LDVR, even if phasing-in of the PSD and title V programs is required, is

consistent with our interpretation of the PSD and title V applicability requirements. Delaying the endangerment/contribution findings or LDVR, and thereby delaying the triggering of PSD and title V requirements for GHG sources, would lead to the loss of a practicable opportunity to implement the PSD and title V requirements in important part, and thereby lead to the loss of important benefits. As discussed elsewhere, promulgating the LDVR and applying the PSD and title V requirements to the largest GHG sources, as we do in this Tailoring Rule, is practicable because the sources that would be affected by the initial implementation steps we promulgate in this rule are able to bear the costs and the permitting authorities are able to bear the associated administrative burdens. Promulgating the LDVR now provides important advantages because the sources that would be affected by the initial steps are responsible for most of the GHG emissions from stationary sources.

It should also be noted that as discussed elsewhere in this rulemaking, our ability to develop appropriate streamlining techniques for PSD and title V requirements is best done within the context of actual implementation of the permitting programs, and not in isolation of them. That is, because the great majority of GHG sources have not been subject to PSD and title V requirements, we will need to rely on the early experience in implementing the permitting requirements for the very large sources that initially will be subject to those requirements in order to develop streamlining techniques for smaller sources. It is the real world experience gained from this initial phase that will allow EPA to develop any further modifications that might be necessary. This would not and could not occur if the LDVR were delayed indefinitely or permanently, so that PSD and title V requirements were not triggered. It is unrealistic to expect that delaying action until a future tailoring rule could resolve all of the problems identified in this rulemaking, absent any real world implementation experience.

At its core, commenters' argument is that EPA should delay (if not forego altogether) doing *anything* to address GHG emissions and the problems they cause until it can do so in a way that does not cause any implementation challenges, even if that delay results in continued endangerment to public health and welfare. EPA does not take such a myopic view of its duties and responsibilities under the CAA. Congress wrote the CAA to, among other things, promote the public health and welfare and the productive capacity of the population. CAA § 101(b)(1). EPA's path forward does just this. Thus, proceeding with the endangerment/cause or contribute findings, the LDVR, and with PSD and title V through the phase-in approach of the Tailoring Rule maximizes the ability of EPA to achieve the Congressional goals underlying sections 202(a) and the PSD and title V provisions, and the overarching CAA goal of protecting public health and welfare. Congress called for EPA (1) To determine whether emissions from new motor vehicles contribute to air pollution that endangers, (2) if that the determination is affirmative, to issue emissions standards for new motor vehicles to address the endangerment, and (3) to implement the PSD and Title V program to address similar emissions in their permitting program as another tool to address the air pollutant at issue. Delaying both the LDVR and PSD/title V implementation, as commenters have called for, would run directly counter to these Congressional expectations. Commenters' calls for deferral or foregoing of the findings or LDVR are generally phrased in a conclusory fashion, and do not demonstrate how EPA could take the required CAA actions concerning GHGs while remaining within the requirements of each of the various CAA provisions, and achieving the overall goals of the CAA. As such the comments do not provide a valid basis for the deferral of agency action they suggest.

9. "Administrative Necessity" Basis for PSD and Title V Requirements in Tailoring Rule

EPA believes that the "administrative necessity" doctrine, within the *Chevron* framework, also justifies this rulemaking. Applying the applicability requirements of the PSD and title V programs according to a literal reading of their terms (as EPA has narrowed them in the past through interpretation) to GHG sources beginning on the January 2, 2011 date that regulation of GHGs takes effect would sweep so many sources into those programs as to render the programs impossible for the permitting authorities to administer. Although streamlining the PSD and title V programs offers some promise to improve the administrability of the programs, given the time needed to implement such streamlining, the step-by-step expansion of PSD and title V requirements to GHG sources that we are promulgating is the most that the permitting authorities can reasonably be expected to administer.

This section discusses the application of the "administrative necessity" doctrine. Our views concerning this doctrine remain similar to what we said at proposal, except that in this rulemaking we place the doctrine more clearly in the *Chevron* analytical framework, we revise our assessment of the administrative burdens due to new analysis we have conducted and information we have received since proposal, and we make certain revisions to the tailoring approach.[50] This analysis and information, as well as the revisions to the tailoring approach, have already been presented previously, in the discussion of the "absurd results" basis. In addition, it is not necessary to reiterate the lengthy discussion of the "administrative necessity" doctrine that we included in the proposal or the factual data presented previously; as a result, this section briefly highlights the conclusions we have reached about the application of this doctrine.

As noted previously, under the PSD and title V applicability provision—read literally, as we have long interpreted them—EPA's recent promulgation of the LDVR will trigger the applicability of PSD and title V for GHG sources at the 100/250 tpy and 100 tpy threshold levels, respectively, as of January 2, 2011. This is because PSD applicability hinges on the definition of "major emitting facility" and title V applicability hinges on the definition of "major sources," and those terms, read literally, and under EPA's long-standing narrowing interpretation, apply PSD and title V, respectively, to sources of any air pollutant that is subject to regulation under another provision of the CAA. EPA's promulgation of the LDVR means that GHGs will become subject to regulation on the date that the rule takes effect, which will be January 2, 2011.

Absent tailoring, the January 2, 2011 trigger date for GHG PSD applicability will give rise to an extraordinarily large number of PSD permitting actions—we estimate more than 81,000 per year—representing an increase of almost 300-fold over the current 280 PSD permitting actions each year. In addition, over 6 million sources will become subject to title V, an increase of

[50] In addition, we base our reliance on the "administrative necessity" doctrine on the administrative burdens to the permitting authorities of permitting smaller GHG sources, but not on the relatively small amount of GHG emissions associated with the smaller sources. *See Alabama Power* v. *Costle,* 636 F.2d 323, 357 (DC Cir. 1980) (establishing the "administrative necessity" doctrine as "inherent in the administrative process" and presumptively available under the statutory scheme, absent clear congressional intent to the contrary; but adding that in contrast, "there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits").

more than 400-fold over the 14,700 sources that currently are subject to title V. The permitting authorities will find it impossible to administer programs of these sizes as of that date.

All this results from a literal application of the PSD and title V applicability provisions to GHG sources. However, under *Chevron,* we must interpret and apply statutory requirements on the basis of congressional intent. Although the literal meaning of the statutory provisions is the first and generally the best indicator of congressional intent, there are cases in which that is not so. As discussed previously, we believe that as a general matter, statutory directives should be considered to incorporate Congress's intent that they be administrable, and we believe that this proposition is implicit in the "administrative necessity" doctrine that the DC Circuit has established and that we believe applies here. *See Alabama Power* v. *Costle,* 636 F.2d 323, 356–57 (DC Cir. 1980). This doctrine authorizes EPA to undertake a process for rendering the PSD and title V requirements administrable. Indeed, the Court in *Alabama Power* established this doctrine specifically in the context of the PSD provisions, including, in particular, the modification provision. As noted elsewhere, the Court held that EPA may "consider the administrative burden" associated with applying PSD for emissions increases, and establish significance levels designed to avoid "severe administrative burdens on EPA, as well as severe economic burdens" on sources. *Id.* at 405.

As we said in the proposal, we read the case law to establish a three-step approach for implementing the "administrative necessity" doctrine: An agency is not required to adhere to literal statutory requirements if the agency, as the first step, makes every effort to adjust the requirements within the statutory constraints, but concludes with justification—at the second step—that it would be impossible to comply with the literal reading of the statute. Under those circumstances, the agency may—at the third step—develop what is in effect a compliance schedule with the statutory requirements, under which the agency will implement the statute as much as administratively possible and as quickly as administratively possible. *See* 74 FR 55315—55316.

a. First Step of the "Administrative Necessity" Analysis: Streamlining

In the proposed rulemaking, EPA discussed at length the prospect of streamlining both PSD and title V. EPA described "several potentially useful tools available in the streamlining toolbox for the PSD permitting threshold level, the PSD significance level, and the title V permitting threshold," specifically:

> For the PSD permitting threshold level and significance level, there are at least three such tools: The first is interpreting the definition of "potential to emit" so that the amount of a source's emissions that counts in determining whether it qualifies as a major source and therefore is above the permitting threshold requirements is closer to the amount of its emissions when it is in actual operation, rather than the amount of emissions that the source would emit if it were operating continuously. Narrowing the definition of PTE is a potentially extremely important tool in this context because identifying the amount of a source's emissions as closer to its actual emissions in this manner would mean that very large numbers of residential and commercial sources would have significantly lower emissions and would fall below the statutory threshold requirements for triggering PSD. Second, EPA believes it may be able to develop programs involving general permits, under which large numbers of similarly situated sources would each be covered by essentially the same permit established through a regulatory action by the permitting authority. This approach could achieve economies of scale and thereby reduce administrative burden. Third, EPA believes it may be able to streamline the single most time-consuming element of the PSD permit program, which is the determination of BACT as required under CAA § 165(a)(4), by establishing presumptive BACT levels for certain source categories that comprise large numbers of sources. As for title V, as discussed below in detail, EPA believes that defining "potential to emit" to reflect more closely a source's actual operation and developing a program of general permits could streamline the administration of title V permits.
>
> 74 FR 55315 col. 2–3.

At proposal we stated that we would, and we still commit to, vigorously pursue development of these streamlining measures, and, as indicated in our discussion of streamlining methods in section V.E.1 and in response to comments, we have already begun developing those measures. For example, as described elsewhere, we have done much work—both with stakeholders and in-house—to begin to develop recommendations for what controls would qualify as BACT for various industries. This work is important as a foundation for developing presumptive BACT, which is a potentially efficient streamlining measure.

However, it is not possible for us or the state and local permitting authorities to develop and implement streamlining techniques by the time that PSD and title V are triggered for sources emitting GHGs—January 2, 2011—or shortly thereafter. Developing streamlining methods would entail acquiring more information about the affected industry, may entail rulemaking, and would likely entail some type of public review of proposals for streamlining even if not done through rulemaking. As discussed in section V.E, we do not expect that we could complete all those steps for meaningful streamlining measures within 2 years.

b. Second Step of the "Administrative Necessity" Analysis: Demonstration of Administrative Impossibility

With no streamlining measures available at the time that PSD and title V would apply to sources of GHGs or shortly thereafter, under the second step of the "administrative necessity" analysis, we must determine whether implementation of the statutory requirements at that time would be administratively impossible for the permitting authorities. We are mindful that the DC Circuit has cautioned that this showing is a high hurdle. *See* 74 FR 55317.

Even so, we believe there is no question that a literal application of the PSD and title V programs to GHG sources as of January 2, 2011 would be flatly impossible for the state and local permitting authorities to administer for at least an initial period of time.[51] The key facts have been recounted previously, and no more than a brief recitation is necessary here. On the PSD side, annual permit applications would increase by over 300-fold, from 280 to almost 82,000; costs to the permitting authorities would increase more than 100-fold, from $12 million to $1.5 billion; and the permitting authorities would need to hire, train, and manage 9,772 FTEs. For title V, total permit applications would increase by over 400-fold, from 14,700 to 6.1 million; costs to the permitting authorities would increase from $62 million to $21 billion; and the permitting authorities would need to hire, train, and manage 229,118 FTEs.

We have elaborated upon these burdens elsewhere in this notice. They bespeak an impossible administrative task. It is not hyperbole to say that if these administrative responsibilities are not considered impossible within the

[51] We recognize that in a few states, we are the permitting authority. We do not think that this changes the calculation of administrative burdens. We do not believe that we could reasonably be expected to adjust our budget to accommodate the large new permitting burdens, and even if we could, the administrative burdens would remain in most of the rest of the nation where it is the state or local agencies that bear permitting responsibility.

meaning of the "administrative necessity" doctrine, then it is difficult to imagine what would be considered impossible.

c. Third Step of the "Administrative Necessity" Analysis: Tailoring

Under the third step of the "administrative necessity" analysis, we must demonstrate that the steps we intend to take towards implementation of the statutory requirements are the most that can be done during the indicated time frames, in light of administrative resources. In this manner, we adhere most closely to the statutory requirements. *See* 74 FR 55318. This amounts to establishing a schedule for phasing in PSD and title V applicability to GHG sources. Because this step is based on the administrative resources of the permitting authorities, our analysis is similar, and leads to the same conclusions, as we described previously concerning the "absurd results" basis. That is, we believe that our tailoring approach—including Step 1, to be implemented as of January 2, 2011; Step 2, to be implemented as of July 1, 2011; the additional rulemaking that we commit to finalize by July 1, 2012, and that will address further threshold reductions as a Step 3; the study and subsequent rulemaking to address smaller sources by April 30, 2016; and the determination not to lower the threshold below 50,000/50,000 tpy CO_2e before April 30, 2016 at the earliest—is the most that we can do to expand the PSD and title V programs, based on administrative resources and the information we currently have about the prospects for streamlining and increasing permitting resources.

As noted previously, at some point in the process of additional rulemaking, we may conclude under the "absurd results" doctrine that we will not apply PSD or title V to GHG sources below a certain size level. The same conclusion may be supportable under the "administrative necessity" doctrine if we decide, based on the information available to us, that even with all of the streamlining that we are able to accomplish and even with a significant expansion of permitting resources, it may not be administratively feasible to implement PSD or title V to sources below that level. *See Alabama Power* v. *Costle,* 636 F.2d at 358 (acknowledging, in discussing the "administrative necessity" doctrine, that "[c]ategorical exemptions from the clear commands of a regulatory statute [are] sometimes permitted," although emphasizing that such exemptions "are not favored").

In addition, as noted above, in a subsequent rulemaking, we may conclude that title V should not apply to GHG sources with "empty permits," under the "absurd results" doctrine. The basis for this conclusion could be a determination that (1) although the applicability provisions apply by their terms to sources on the basis of their emissions, and without regard to whether the sources would hold "empty permits," those provisions cannot be read literally under the "absurd results" doctrine; and (2) it is not clear whether Congress intended that title V apply to such sources, and EPA has reasonably determined, under *Chevron* Step 2, that title V does not. If we come to that conclusion, then, at that point in time, the "administrative necessity" doctrine would remain relevant for title V purposes only if it is necessary, for administrative reasons, to phase in the application of title V to GHG sources that have applicable requirements, and that therefore do not have "empty permits." This is because the "administrative necessity" doctrine is relevant only when a statutory directive, read literally, imposes impossible administrative obligations, and Congress may be presumed to have intended that the directive be administrable. The "administrative necessity" doctrine would not come into play if it is concluded either that under the "absurd results" doctrine Congress did not intend the statutory directive or that, under that doctrine, Congress's intent was not clear and EPA reasonably decided that the directive does not apply.

10. "One-Step-at-a-Time" Basis for Tailoring Rule

In addition to the "absurd results" and "administrative necessity" doctrines, the "one-step-at-a-time" judicial doctrine, within the *Chevron* framework, supports EPA's Tailoring Rule. The case law under this doctrine, described previously, indicates that the doctrine justifies an agency's step-by-step approach under the following circumstances or conditions: (1) The agency's ability to comply with a statutory directive depends on facts, policies, or future events that are uncertain; (2) the agency has estimated the extent of its remaining obligation; (3) the agency's incremental actions are structured in a manner that is reasonable in light of the uncertainties; and (4) the agency is on track to full compliance with the statutory requirements. EPA's Tailoring Rule fulfills each of those four.

First, as the DC Circuit stated in *National Association of Broadcaster* v. *FCC,* 740 F.2d 1190, 1210 (DC Cir. 1984) ("*National Association of Broadcasters*"), incremental agency action is most readily justifiable "against a shifting background in which facts, predictions, and policies are in flux and in which an agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken." Those circumstances are present here, and so is that fact that the task at hand is extraordinarily demanding. As discussed previously, EPA and the permitting authorities' progress in implementing the PSD and title V programs for GHG sources will depend in large measure on the development of streamlining measures and increases in permitting authorities' resources, and those things carry some uncertainty and in any event, under the best of circumstances, cannot have much impact for at least several years. It will take EPA that long to develop streamlining measures, and it will take permitting authorities that long to begin to raise money and hire and train FTEs.

Second, as the Court stated in *National Association of Broadcasters,* "the agency [should] ma[k]e some estimation, based upon evolving economic and technological conditions, as to the nature and magnitude of the problem it will have to confront when it comes to [undertake the remaining steps]" and that estimation must be "plausible and flow from the factual record compiled." *Id.* at 1210. Here, EPA has done this by estimating the number of PSD and title V permits and the costs of issuing them, and has provided as much information as possible about the development of streamlining methods and permitting authority resources.

Third, again as the Court stated in *National Association of Broadcasters,* it must be "reasonable, in the context of the decisions made in the proceeding under review, for the agency to have deferred the issue to the future. With respect to that question, postponement will be most easily justified when an agency acts against a background of rapid technical and social change and when the agency's initial decision as a practical matter is reversible should the future proceedings yield drastically unexpected results." *Id.* at 1211. Here, our tailoring approach is reasonable in light of changes in permitting authority capacity that may occur with the development of streamlining methods and increased resources. In addition, the first two steps that EPA promulgates today are reasonable initial steps that we expect to build on by lowering thresholds, as appropriate, in the future. We have no reason to suspect that we may need to reverse either of the first

two steps. Having received and analyzed extensive comment on the number of permitting actions to expect and on permitting authority resources, we consider it unlikely that we would need to establish a higher threshold level than what we have established in Steps 1 and 2. In addition, if we were to adopt an "empty permits" approach for title V, we would not need to reverse either of Steps 1 and 2, as explained above.

Finally, as the DC Circuit stated in *Grand Canyon Air Tour Coalition* v. *F.A.A.,* 154 F.3d 455, 477–78 (DC Cir. 1998), the Courts will accept an initial step towards full compliance with a statutory mandate, as long as the agency is headed towards full compliance, and we believe that the doctrine is applicable here. EPA intends to require full compliance with the CAA applicability provisions of the PSD and title V programs, but we believe that in the case of GHG-emitting sources, by application of the "absurd results" doctrine or the "administrative necessity" doctrine, full compliance with the applicability provisions does not necessarily mean full compliance with the literal terms of those provisions.[52] Rather, as we have explained elsewhere, in the case of GHG sources, full compliance may mean compliance with higher levels that are consistent with congressional intent, under the "absurd results" doctrine, or that are within the reach of permitting authorities in light of their administrative constraints, under the "administrative necessity" doctrine. This rulemaking constitutes a package of initial steps towards that full compliance, and, seen in that light, is supported by the "one-step-at-a-time" doctrine.

Even if the doctrine were found to apply only when an agency is committed to fully implementing statutory requirements according to their literal terms, we believe that the steps we promulgate in this notice would be considered valid under the one-step-at-a-time doctrine. This is because even if we are incorrect about the applicability of the "absurd results" and "administrative necessity" doctrines, so that GHG sources are required to comply with the literal terms of the PSD and title V applicability provisions, the "one-step-at-a-time" doctrine would allow PSD and title V applicability to be phased in, and the first two steps we promulgate in this notice would be upheld as reasonable initial steps toward full compliance with the literal terms of the CAA. As we have described elsewhere, there is little question but that sources and permitting authorities cannot reasonably be expected to comply with or implement PSD and title V applicability requirements in the near term—by January 2, 2011 and July 1, 2011—except to the limited extent described under Steps 1 and 2. Nor is applicability of the PSD and title V requirements at levels below 50,000 tpy CO_2e reasonable before 6 years from promulgation of this rule, as discussed elsewhere. If further steps resulting in full compliance with the literal terms of the applicability provisions of PSD and title V were required, it would be reasonable for those steps to occur in the future, as part of the rulemaking to be completed by the sixth year after promulgation, to which EPA commits itself as part of this action, or as part of subsequent actions. *See Grand Canyon Air Tour,* 891 F.2d at 476–77 (upholding agency action as a step towards full compliance with statutory mandate when the agency expected full compliance to occur some 20 years after the deadline in the statute).

C. Mechanisms for Implementing and Adopting the Tailoring Approach

In this section, we discuss three issues related to adoption of the tailoring approach within our regulations and by permitting agencies. The first is the regulatory mechanism for implementing the tailoring approach—that is, the specific way we are revising the PSD and title V applicability provisions to incorporate the tailoring approach—and our rationale. The second is the process by which state or local permitting authorities may incorporate the tailoring approach into their PSD SIP and title V permit programs. Finally, we discuss our reasons for delaying action on our proposal to limit approval of both SIP-approved PSD programs and title V programs, and we request certain information from states on both of their programs and their actions in response to this rule.

In brief, we proposed to exempt sources emitting GHGs below certain threshold levels from the definition of the regulatory terms "major stationary source" and "major modification" in PSD programs and the definition of the regulatory term "major source" in title V programs. We further proposed to effectuate this change in SIP-approved PSD programs (as included in SIPs) and EPA-approved part 70 title V programs by limiting our prior approval of those programs to the revised applicability thresholds for GHGs.[53] These changes would have the effect of putting the higher thresholds adopted under the Tailoring Rule in place in states PSD and title V programs as a matter of federal law. However, state commenters expressed concern that they would not be able to adopt the Tailoring Rule under state laws on an expeditious basis. To address this, our final action differs from our proposed rule in the way we incorporate the limitations promulgated in this Tailoring Rule into the "major stationary source," "major modification" and "major source" definitions. This approach relies on further defining the term "subject to regulation" and although this approach is not substantively different in effect from the proposed rule, it will facilitate more rapid adoption and implementation of the Tailoring Rule by states through interpretation of language in existing state regulations. We believe these differences are a logical outgrowth of our proposed rule. We are also delaying action on our proposed limited approval of EPA-approved PSD programs and part 70 title programs to determine how each state will implement the final rules.

1. PSD Approach: Background and Proposal

Under CAA section 165(a), no "major emitting facility" may construct or modify unless it receives a preconstruction permit that meets the requirements of the PSD program. CAA section 169(1) defines a major emitting facility as "any * * * source[]" in one of 28 specified source categories that "emit[s], or ha[s] the potential to emit, one hundred tons per year or more of any air pollutant;" or "any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." EPA's regulations replace the term "major emitting facility" with the term "major stationary source" and define the term as "[a]ny of * * * [28 types of] stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant" or "any stationary source which emits, or has the potential to emit 250 tons per year or more of a regulated NSR pollutant." 40 CFR 51.166(b)(1)(i)(*a*)–(*b*). The term "regulated NSR pollutant" is defined to include, among other things,

[52] For reasons explained elsewhere, our reference to the literal terms of the applicability provisions means the literal terms of the definition of "major emitting facility" for PSD and "major source" for title V, as EPA has narrowed those definitions to refer to "any pollutant" that is subject to regulation under the CAA.

[53] In the alternative, we also proposed to use our section 110(k)(6) error correction authority to revise SIP-approved PSD program. We are also delaying action on this proposal.

"any * * * air pollutant that otherwise is subject to regulation under the Clean Air Act." 40 CFR 51.166(b)(50). Note that the regulatory definition in effect interprets the statutory definition more narrowly to read "one hundred [or two hundred and fifty] tons per year or more of any air pollutant *subject to regulation under the Clean Air Act*" (emphasis added).

Similarly, under the statute, a modification occurs if there is a physical change or change in the method of operation "which increases the amount of any air pollutant emitted * * * ." CAA section 165(a), 169(2)(c), and 111(a)(4). As with the major stationary source definition, we have limited coverage of the modification provision to physical changes or changes in the method of operation that result a significant net emissions increase in emissions of a "regulated NSR pollutant." 40 CFR 51.166(b)(2)(i).

Our proposed rule revised the definition of "major stationary source to (1) exempt GHG from the regulated NSR pollutants that, if emitted by a source in the 100 or 250 tpy quantities, would cause the source to qualify as a "major stationary source," and (2) add a specific threshold at which a source that emits a specified quantity of GHGs (at proposal, that quantity was 25,000 tpy CO_2e) would qualify as a "major stationary source." 74 FR 55351, proposed 40 CFR 51.166(b)(1)(i)(*a*), (*b*), and (*d*). We also proposed a significance threshold, which is the amount of an increase needed to trigger PSD for a modification or to require BACT for a new source, at a level between 10,000 and 25,000 tpy CO_2e. 74 FR 55351; 40 CFR 51.166(b)(23)(i).

Additionally, we recognized that it may take some time before states could change their SIP-approved PSD programs and that as a result, absent additional action on our part, GHG-emitting sources would remain subject to the 100 or 250 tpy thresholds, and subject to a zero significance threshold for major modifications as a matter of federal law. To address this issue, we proposed to narrow our previous approval of those SIPs. The effect of our proposal would be that EPA would have approved the SIP PSD programs only to the extent they apply PSD and requirements to GHG sources at or above the thresholds established in the Tailoring Rule (which, generally, were 25,000 tpy CO_2e), and EPA would have taken no action on the SIP PSD programs to the extent they apply PSD requirements to GHG sources below that threshold. We relied on the authority of the APA and the general authority of CAA section 301 and, in the alternative, on the error correction mechanism under CAA section 110(k)(6). Our limited approval would revise existing EPA-approved SIP PSD programs to authorize permitting under the CAA only for GHG sources at the appropriate levels.

In response to our proposed approach, we received numerous comments from state and local permitting agencies expressing significant concern. They observed that our proposed approach could meet its objectives to avoid applying PSD requirements to small sources under federal law, but would not succeed in avoiding the application of PSD requirements to those small sources under *state* law. The commenters explained that, although EPA was changing federal PSD applicability thresholds; for GHG-emitting sources to incorporate the tailoring approach, and limiting the scope EPA approval of SIPs consistent with these thresholds, the state rules containing the originally-approved SIP thresholds would continue to apply as a matter of state law. As commenters explained, for the most part, the laws and regulations states adopt to implement federal PSD programs mirror EPA's regulations, so that the state laws, apply PSD to sources that emit air pollutants subject to regulation at the 100/250 tpy threshold. Commenters reasoned that, until the states can change their state laws, the 100/250 tpy thresholds will continue to apply as a matter of state law, even though the higher thresholds apply as a matter of federal law.

Importantly, these commenters emphasized, their state process requires that they promulgate a rulemaking, or in some cases, a legislative change, to incorporate the higher thresholds for GHG sources in their SIPs. These processes would require many months and in some cases as long as 2 years. As a result, sources that emit GHGs below the federally established levels in the final rule, but at above the 100/250 tpy levels in state laws and rules, would still be required to obtain PSD permits under state law. As a result, states, in attempting to implement state permitting requirements, would be faced with the same administrative difficulties that EPA recognized in the proposed rule as impossible. Commenters emphasized that this situation was untenable.

In addition to the state comments just described, we received comments that took issue with our view that we were in effect revising the numerical thresholds for PSD applicability as the legal mechanism for the tailoring approach. They asserted that in fact, our mechanism consisted of interpreting the term "any source" to exclude small GHG-emitting sources. Other commenters objected to our proposed mechanism of narrowing our previous SIP approval, arguing that this mechanism was without legal basis.

2. Rationale for Our Final Approach To Implementing PSD

In response to these concerns, we are adding another mechanism to implement the tailoring approach for PSD, and that is to adopt a definition, within our PSD regulations, the phrase "subject to regulation," as found within the phrase "any regulated NSR pollutant," which, in turn, is part of the definitions of "major stationary source" and "major modification." To implement this mechanism, we are defining the phrase "subject to regulation" so that the GHGs emitted by sources that fall below the thresholds or scope established in Steps 1 and 2 are not treated as "subject to regulation," and therefore do not trigger PSD for the sources that emit them. As discussed in section V.B.3., the term "subject to regulation" is one of four terms that should be considered not to apply literally in the case of GHG sources.

To understand this approach, it is useful to return to the definition of "major stationary source," which, again, is central to PSD applicability. The definition, quoted previously, employs the term "regulated NSR pollutant," which is a defined term. The definition incorporates many other elements as well (*e.g.,* the 100/250 threshold requirements), but for convenience, we quote it as follows: A "major stationary source" is "[a]ny * * * source[–] of air pollutants, which emits, or has the potential to emit, [depending on the source category, either] 100 [or 250] tons per year or more of any air pollutant that is subject to regulation under the Clean Air Act." 40 CFR 51.166(b)(1)(i)(a)–(b). Applying our definition of "subject to regulation" to exclude GHG sources that emit below specified thresholds, the definition may now be paraphrased as follows: A "major stationary source" is any source of air pollutants, which emits, or has the potential to emit, depending on the source category, either 100 or 250 tpy or more of any air pollutant subject to regulation under the CAA, except that the source's GHGs are considered to be subject to regulation under the CAA only the extent indicated under Steps 1 and 2 of the Tailoring Rule, *e.g.,* for Step 2, only if the source's GHG emissions exceed the threshold established in Step 2. We adopt the same approach for the

definition of the regulatory term "major modification."

Although EPA is revising its regulations to apply the phrase subject to regulation in this manner, we have been advised that states may be able to adopt our approach without having to undertake a rulemaking action to revise their state regulations or without requiring an act of the state legislature. Instead, it is our understanding that states may adopt our approach by interpreting the term "subject to regulation" reflected in their regulations to have the same meaning that we are assigning to that term in our regulations in this rulemaking. This is particularly—although not exclusively—the case in a state that has taken the position, or determines now, that the state's definition of "subject to regulation," or, more broadly, "regulated NSR pollutant" or "major stationary source" or "major modification," is intended to be interpreted in a way that tracks the meanings that EPA has assigned to these phrases. Such states can adopt the meaning of "subject to regulation" that we establish in this rule by January 2, 2011, and thereby avoid the situation in which, as a matter of state law, GHG-emitting sources above the 100 or 250 tpy thresholds become subject to PSD by that date. The following explains our basis for concluding that states may apply EPA's approach under existing regulations that use the term "subject to regulation." On December 18, 2008, EPA issued the Interpretive Memo, establishing EPA's interpretation of the definition "regulated NSR pollutant" found at 40 CFR 52.21(b)(50). EPA intended this memorandum to resolve ambiguity in subparagraph (iv) of this definition, which includes "any pollutant that otherwise is subject to regulation under the Act." Specifically, the memorandum stated that EPA will interpret the definition of "regulated NSR pollutant" to exclude pollutants for which EPA regulations only require monitoring or reporting but to include pollutants subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant.

After reconsidering this interpretation through a formal notice-and-comment process, EPA refined its interpretation to establish that the PSD permitting requirements will not apply to a newly regulated pollutant until a regulatory requirement to control emissions of that pollutant "takes effect." 75 FR 17704. Importantly, as stated previously, because the term "regulated NSR pollutant" is embedded within the definition of "major stationary source," this interpretation effectively defines which major stationary sources are subject to PSD permitting. As a result, for example, EPA explained that PSD and title V permitting requirements for GHGs will not apply to GHGs until at least January 2, 2011, following the anticipated promulgation of EPA regulations requiring control of GHG emissions under title II of the CAA. *Id.*

In the RTC document for EPA's reconsideration of the PSD interpretative memorandum, we stated that,

> Absent a unique requirement of state law, EPA believes that state laws that use the same language that is contained in EPA's PSD program regulations at 52.21(b)(50) and 51.166(b)(50) are sufficiently open-ended to incorporate greenhouse gases as a regulated NSR pollutant at the appropriate time consistent with EPA's interpretation of these regulations (emphasis added). (Docket ID No. EPA–HQ–OAR–2009–0597–0128).

Because the state regulations that include EPA's definition of the term "subject to regulation" in the reconsideration of the Interpretive Memo are "sufficiently open-ended to incorporate greenhouse gases as a regulated pollutant," those state regulations are also sufficiently open-ended to incorporate the further refinement to the meaning of the phrase "subject to regulation" that we make in this rulemaking.

By the same token, EPA has historically interpreted certain state SIP-approved programs as sufficiently open-ended such that the rules provide for the "automatic assumption for the responsibility for review" of new pollutants before the general deadline for states to revise their PSD programs. *See, e.g.,* 52 FR 24682. Conversely, we have also read federal rules and state rules approved in SIPs to provide for the automatic removal of a pollutant when such pollutant is no longer "subject to regulation." For example, the 1990 CAA Amendments exempted HAPs listed in section 112(b)(1) from the PSD requirements. *See* CAA section 112(b)(6). Following passage of the amendments, EPA issued "New Source Review (NSR) Program Transitional Guidance," a memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards to Regional Air Division Directors on March 11, 1991. In that guidance, EPA interpreted its PSD regulations to automatically cease to apply to listed HAPs (with some noted exceptions), and implicitly stated that a state with an open-ended SIP-approved PSD rule could also take the position that its SIP-approved rule automatically ceased to regulate HAPs.

After reviewing these past practices in the PSD permitting program, and EPA's prior statements regarding pollutants subject to the PSD program, we conclude that states with SIP-approved rules that contain the same language as used in 40 CFR 52.21(b)(50) or 40 CFR 51.166(b)(49), or that otherwise have sufficiently open-ended PSD regulations, would be able to implement our Tailoring Rule approach to permitting by interpreting their regulations, and without needing to promulgate a regulation or seek state legislative action. This is particularly—although not exclusively—the case for states that take the position that they intend their rules to apply in the same manner as EPA's counterpart rules. If states adopt this reading of their regulations, GHG sources falling below the specified cutoffs would not be emitting pollutants "subject to regulation" within the definition of "regulated NSR pollutant" and therefore would not be subject to PSD permitting as a major stationary source or for making a major modification.

During our consideration of this action, we participated in teleconferences with one local and six state agency permitting authorities to discuss this issue of whether they could implement the proposed rule without the need for state law or regulation changes or a revision of the provisions of state law that are a part of the SIP. We specifically discussed whether defining the phrase "subject to regulation" would better facilitate state incorporation of the limitations in this final rule. The state and local agencies participating in the calls generally agreed that defining the phrase "subject to regulation" would, compared to our proposed approach, better facilitate state incorporation of the limitations in the final rule in states with regulations that mirror the existing federal rules, or in states whose rules are otherwise sufficiently open-ended to incorporate the limitations in the final rule by interpretation. Participants from each agency also indicated that their rules contain the term "subject to regulation" and that term has not been previously interpreted in ways that would preclude application of the meaning assigned to the term by EPA. We therefore concluded it is likely the state rules are sufficiently open-ended to apply EPA's approach by interpretation (although some states indicated they may elect to pursue rulemaking in addition to or instead of interpretation). Accordingly, we selected the "subject to regulation" regulatory approach as the mechanism for implementing the final rule.

3. Other Mechanisms

As just described, we selected the "subject to regulation" mechanism because it most readily accommodated the needs of states to expeditiously revise—through interpretation or otherwise—their state rules. Even so, it is important to recognize that this mechanism has the same substantive effect as the mechanism we considered in the proposed rule, which was revising numerical thresholds in the definitions of major stationary source and major modification. Most importantly, although we are codifying the "subject to regulation" mechanism, that approach is driven by the needs of the states, and our action in this rulemaking should be interpreted to rely on any of several legal mechanisms to accomplish this result. Thus, our action in this rule should be understood as revising the meaning of several terms in these definitions, including: (1) The numerical thresholds, as we proposed; (2) the term, "any source," which some commenters identified as the most relevant term for purposes of our proposal; (3) the term, "any air pollutant; or (4) the term, "subject to regulation." The specific choice of which of these constitutes the nominal mechanism does not have a substantive legal effect because each mechanism involves one or another of the components of the terms "major stationary source"—which embodies the statutory term, "major emitting facility"—and "major modification," which embodies the statutory term, "modification," and it is those statutory and regulatory terms that we are defining to exclude the indicated GHG-emitting sources.[54]

4. Codification of Interpretive Memo

As noted previously, we recently affirmed and refined our interpretation of the term "subject to regulation" as it applies broadly to the PSD program through a formal notice and comment process. "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 FR 17004. In the proposal associated with that action, we requested comment on whether we should codify our interpretation in the regulatory text. 74 FR 51535, 51547 (October 7, 2009). We elected not to codify our interpretation in the final action on reconsideration of the Interpretive Memo because we concluded such an action was not necessary and that it was important to apply the refined interpretation immediately. 75 FR 17015. However, in the RTC document for that action, we indicated that we had not ruled out the option of codifying our interpretation at a later time. Since we are otherwise adopting a definition of "subject to regulation" in this rule as the mechanism for implementing the phase-in, it makes sense in this final rule to codify the interpretation reflected in the Interpretive Memo and the final action on reconsideration at the same time to bring clarity to our rules. Specifically, the definitions of the term "subject to regulation" contain a paragraph that reflects our existing interpretation of that term (*i.e.,* prior to adopting the provisions that implement the phase-in). Codification of the Interpretive Memo in this action makes sense to ensure the regulations reflect a complete picture of the meaning of "subject to regulation" applied by EPA. We also are moving existing exceptions (*e.g.,* section 112 HAPs) to a new paragraph within the definition of "subject to regulation." This minor reorganization of these regulations is not intended to effect any change in how they are to be implemented, but merely simplifies and clarifies the regulations by clearly delineating different terms and concepts.

This codification of this interpretation of "subject to regulation" from the reconsideration for the Interpretive Memo is not necessary to assure the effectiveness of the interpretation, and it does not disturb states' existing authority to adopt the definition through interpretation of their existing rules. Codifying our existing interpretation in this action will ensure that parties reading the regulations have a full understanding of how EPA applies the PSD program requirements. Since the interpretation described in the Interpretive Memo and the April 2, 2010 final action are otherwise applicable at this time, the particular time sensitivity discussed in the latter action is not the same for this final action tailoring the PSD requirements.

5. Delaying Limited Approvals and Request for Submission of Information From States Implementing a SIP-Approved PSD Program

Because we now anticipate that many states will be able to implement our tailoring approach through interpretation of the term "subject to regulation," and without the need to revise their SIPs, we are delaying further action on our proposal to limit our approval of SIPs until we better understand how permitting authorities will, in fact, implement our tailoring approach. For this purpose, we ask each state to submit a letter to the appropriate EPA Regional Administrator no later than August 2, 2010. In that letter, the state should explain whether it will apply EPA's meaning of the term "subject to regulation" and if so, whether the state intends to incorporate that meaning of the term through interpretation, and without undertaking a regulatory or legislative process. If a state must undertake a regulatory or legislative process, then the letter should provide an estimate of the time needed to adopt the final rules. If a state chooses not to adopt EPA's meaning by interpretation, the letter should address whether the state has alternative authority to implement either our tailoring approach or some other approach that is at least as stringent, whether the state intends to use that authority. If the state does not intend to interpret or revise its SIP to adopt the tailoring approach or such other approach, then the letter should address the expected shortfalls in personnel and funding that will arise if the state attempts to carry out PSD permitting for GHG sources under the existing SIP and interpretation.

For any state that is unable or unwilling to adopt the tailoring approach by January 2, 2011, and that otherwise is unable to demonstrate adequate personnel and funding, we will move forward with finalizing our proposal to limit our approval of the existing SIP. Although we received comments questioning our authority to limit approval as proposed, using our general rulemaking and CAA section 110(k)(6) authorities, we are not responding to those comments at this time. We will address these comments in any final action we take to implement a limited approval.

In our proposed rule, we also noted that a handful of EPA-approved SIPs fail to include provisions that would apply PSD to GHG sources at the appropriate time. This is generally because these SIPs specifically list the pollutants subject to the SIP PSD program requirements, and do not include GHGs in that list, rather than include a definition of NSR regulated pollutant that mirrors the federal rule, or because the state otherwise interprets its regulations to limit which pollutants the state may regulate. At proposal, we indicated that we intended to take separate action to identify these SIPs, and to take regulatory action to correct this SIP deficiency.

We ask any state or local permitting agency that does not believe its existing

[54] We also think that this approach better clarifies our long standing practice of interpreting open-ended SIP regulations to automatically adjust for changes in the regulatory status of an air pollutant, because it appropriately assures that the Tailoring Rule applies to both the definition of "major stationary source" and "regulated NSR pollutant."

SIP provides authority to issue PSD permits to GHG sources to notify the EPA Regional Administrator by letter, and to do so no later than August 2, 2010. This letter should indicate whether the state intends to undertake rulemaking to revise its rules to apply PSD to the GHG sources that will be covered under the applicability thresholds in this rulemaking, or alternatively, whether the state believes it has adequate authority through other means to issue federally-enforceable PSD permits to GHG sources consistent with this final rule. For any state that lacks the ability to issue PSD permits for GHG sources consistent with this final rule, we intend to undertake a separate action to issue a SIP call, under CAA section 110(k)(5). As appropriate, we may also impose a FIP through 40 CFR 52.21 to ensure that GHG sources will be permitted consistent with this final rule.

6. Title V Programs

Our final action also differs from the proposal in the specific regulatory mechanism by which we tailor the definition of "major source" for title V permit programs, but is a logical outgrowth of our proposed rule. EPA proposed to implement tailoring for GHGs under title V by excluding sources of GHGs from the general definition of "major source" under 40 CFR 70.2 and 71.2, and adding a separate definition of "major source" with tailored thresholds for sources of GHGs. In response to comments, particularly from states concerned with implementation of the proposed approach under state law, EPA is adopting an approach in the final rule that (1) amends the definition of "major source" by codifying EPA's longstanding interpretation that applicability for a "major stationary source" under CAA sections 501(2)(B) and 302(j) and 40 CFR 70.2 and 71.2 is triggered by sources of pollutants "subject to regulation," and (2) adds a definition of "subject to regulation." Further, we are delaying our action to move forward with limiting our previous approval of existing state part 70 programs.

We are finalizing this alternative approach to address concerns similar to those we received with respect to state implementation of SIP-approved PSD programs. Specifically, we received comments that the mechanism we proposed would not address the significant administrative and programmatic considerations associated with permitting GHGs under title V, because the 100 tpy threshold would continue to apply as a matter of state law. Commenters stated that states would need to undertake a regulatory and/or legislative process to change the threshold in their state laws which they could not complete before the laws would otherwise require issuance of operating permits to GHG sources.

After considering the commenters' concerns, we are finalizing an approach designed to address the state law concerns for states. As a result, it is unnecessary to move forward at this time with our proposed approach to limit approval of existing part 70 programs in many states.

EPA's approach involves the interrelationship of terms within the part 70 definition of "major source" in title V and EPA's implementing regulations, and EPA's historical practice of interpreting the term "any air pollutant" in the "major stationary source" component of that definition. EPA believes the approach in the final rule will allow many states to adopt the final rule through interpretation of existing state laws. Specifically, paragraph (3) within the definition of "major source" found in 40 CFR 70.2 and 71.2 defines a major source as "a major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits or has the potential to emit, 100 tpy or more of any air pollutant * * *." The EPA previously articulated the Agency's interpretation that the regulatory and statutory definitions of "major source" under title V, including the term "any air pollutant," applies to pollutants "subject to regulation." Memorandum. EPA recently re-affirmed this position in EPA's Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs. 75 FR 17704, 17022–23 (April 2, 2010) (Interpretive Memo reconsideration final action).

Accordingly, under our long-established policy, states historically have interpreted the term "any air pollutant" under the title V definition of "major source" to mean any pollutant "subject to regulation" under the Act. Thus, as a matter of established interpretation, EPA and states effectively read the definition of "major source" under title V to include a source "* * * that directly emits or has the potential to emit, 100 tpy or more of any air pollutant *subject to regulation under the Act*" (emphasis added). By amending our regulations to expressly include and define "subject to regulation" to implement our tailoring for GHGs under title V, we are seeking to enable states to adopt and implement this approach through a continued interpretation of the phrase "any air pollutant" within the "major source" definition, without the need for changes to state regulations or statutes. States may be able to track EPA's approach to tailoring for GHG permitting without regulatory or statutory changes, for example, where a state has taken the position, or determines now, that the state's interpretation of "major source," "subject to regulation" and/or "any air pollutant" is intended to track EPA's interpretation.

Thus, EPA is adding the phrase "subject to regulation" to the definition of "major source" under 40 CFR 70.2 and 71.2. EPA is also adding to these regulations a definition of "subject to regulation." Under the part 70 and part 71 regulatory changes adopted, the term "subject to regulation," for purposes of the definition of "major source," has two components. The first component codifies the general approach EPA recently articulated in the "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting." 75 FR 17704. Under this first component, a pollutant "subject to regulation" is defined to mean a pollutant subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant and that has taken effect under the CAA. *See id.* at 17022–23; Wegman Memorandum at 4–5. To address tailoring for GHGs, EPA includes a second component of the definition of "subject to regulation," specifying that GHGs are not subject to regulation for purposes of defining a major source, unless as of July 1, 2011, the emissions of GHGs are from a source emitting or having the potential to emit 100,000 tpy of GHGs on a CO_2e basis.

As explained previously, we find no substantive difference between the alternative mechanisms for implementing GHG tailoring in the final rule. Whether we add GHG thresholds directly to the definition of "major source" (as we proposed), or alternatively, expressly add and define the term "subject to regulation," both approaches revise the definition of "major source" to implement the Tailoring Rule. Accordingly, we adopt the later approach to facilitate state implementation of the final rule through an interpretation of existing state part 70 programs. Similar to our explanation previously for PSD, while we adopt the "subject to regulation" mechanism for implementing GHG tailoring in the final rule, the thrust of our rulemaking is to apply the title V definition of "major source"—which includes the statutory term, "major stationary source"—to GHG sources by treating only GHG sources

that emit at levels above the Steps 1 and 2 thresholds as meeting that definition. Further, we believe that our action may reasonably be construed to revise any of several terms in that definition, including (1) The numerical thresholds, as we proposed; (2) the term "any air pollutant," (3) the term "a major stationary source," (4) the term "subject to regulation," which, as discussed previously, our regulations graft into the definition of "major source." We believe that the specific choice of which term constitutes the legal mechanism does not have a substantive legal effect because each mechanism involves one of the components of the regulatory term "major source"—which embodies the meaning of the statutory term, "major source"—and it is that term that we are interpreting to tailor title V applicability for GHG-emitting sources. Thus, while the "subject to regulation" mechanism facilitates expeditious implementation by states, and we are therefore revising our regulations to adopt this approach, we otherwise find no substantive difference between the alternative mechanisms we may use to finalize the proposed rule.

Further, similar to our revised approach for addressing state SIP-approved PSD programs, we are delaying our action to limit our previous approvals for state part 70 operating permit programs. In our proposed rule, we explained our concern that states lack adequate personnel and resources to carry out part 70 operating permit programs for GHG sources that emit or have the potential to emit 100 tpy of GHGs. Accordingly, we proposed to use our general rulemaking authority under section 301(a) of the CAA and APA section 553 to limit our prior approval of state operating permit programs. This limited approval action would have had the effect of applying CAA permitting requirements only to sources that exceed the permitting thresholds established in this rule for the phase-in, because only those sources would be covered by the federally approved part 70 programs. 74 FR 55345. As discussed previously, we are proceeding with a slightly revised approach to address concerns similar to those raised with our proposed approach for addressing SIP-approved PSD permit programs. Because we now recognize that, like the PSD program, many states will be able to implement the final rules without the need to revise their existing part 70 operating permit programs, we are delaying further action on our proposal to limit approval of existing part 70 programs until we better understand how permitting authorities will implement our final rule.

In addition to the information requested previously on SIP-approved PSD permit programs, we ask each state to submit a letter to the appropriate EPA Regional Administrator no later than August 2, 2010 detailing the state's plan for permitting of GHG sources under the state's part 70 program. In that letter, states should explain whether they will adopt an interpretation of the terms "major source" or any of its component terms—"a major stationary source," "any air pollutant," or "subject to regulation," or the numerical thresholds—that is consistent with EPA's regulatory interpretation of these terms as codified at 40 CFR 70.2, and whether the state intends to adopt the interpretation without undertaking a regulatory or legislative process. This approach may be available, for example, where a state has taken the position, or determines now, that the state's interpretation of these terms is intended to track EPA's interpretation, resulting in title V permitting for sources of GHGs as described in EPA's regulations adopted in this rule. If a state must revise its title V regulations or statutes to implement the interpretation, we ask that it provides an estimate of the time to adopt final rules or statutes in its letter to the Regional Administrator. If a state chooses not to (or cannot) adopt our interpretation, the letter should address whether the state has alternative authority to implement the GHG tailoring approach or some other approach that is at least as stringent, but which also addresses the expected shortfalls in personnel and funding and delays in permitting that would exist if the state carried out permitting under part 70 program thresholds lower than those adopted by EPA in this final rule. For any state that is unable or unwilling to adopt the permitting thresholds in the final rules, and otherwise is unable to demonstrate adequate personnel and funding, EPA will move forward with finalizing a narrowed limited approval of the state's existing part 70 program. If we do so, then we will respond in that action to comments on our proposal.

In our proposed rule, we also noted that a handful of part 70 operating permit programs may include provisions that would not require operating permits for any source of GHG emissions because, for example, the programs may apply only to pollutants specifically identified in the program provisions, and the provisions do not specifically identify GHGs. In these cases, states may be unable to interpret their regulatory provisions to interpret the term "any pollutant" to include pollutants "subject to regulation." We indicated that we intended to take separate action to identify these programs, and to take regulatory action to correct this deficiency. Accordingly, we ask any state or local permitting agency that does not believe its existing part 70 regulations convey authority to issue title V permits to GHG sources consistent with the final rule to notify the EPA Regional Administrator by letter as to whether the state intends to undertake rulemaking to revise its rules consistent with these applicability thresholds. This notification should be done no later than the previously described letter regarding adoption of the Tailoring Rule, and could be combined with similar notifications we request regarding the PSD program. We intend to undertake a separate regulatory action to address part 70 programs that lack the ability to issue operating permits for GHG sources consistent with the final rule. We also intend to use our federal title V authority to ensure that GHG sources will be permitted consistent with the final rule.

D. Rationale for Treatment of GHGs for Title V Permit Fees

The title V program requires permitting authorities to collect fees "sufficient to cover all reasonable (direct and indirect) costs required to develop and administer [title V] programs."[55] To meet this requirement, permitting authorities either collect an amount not less than a minimum amount specified in our rules (known as the "presumptive minimum"), or may collect a different amount (usually less than the presumptive minimum). We did not propose to change the title V fee regulations in our notice of proposed rulemaking for this action, nor did we propose to require new fee demonstrations when title V programs begin to address GHGs. However, we did recommend that each state, local or tribal program review its resource needs for GHGs and determine if the existing fee approaches will be adequate. If those approaches will not be adequate, we suggested that states should be proactive in raising fees to cover the direct and indirect costs of the program or develop other alternative approaches to meet the shortfall. We are retaining this proposed approach, and are not changing our fee regulations as part of this final action establishing Steps 1 and 2 of the phase-in. However, we are offering some additional clarification of our fee

[55] The fee provisions are set forth in CAA section 502(b)(3) and in our regulations at 40 CFR 70.9 and 71.9.

approach during these steps in response to comments we received on this issue. Additional discussion of fees will be included as part of subsequent actions establishing Step 3 and beyond.

A few state commenters suggested that EPA should modify part 70 to adopt a presumptive minimum fee (or range for such fee) for GHGs, some of whom suggested that current fees may be insufficient to cover the costs of their program. It is important to clarify that altering the presumptive minimum would only affect those states that chose to charge the presumptive minimum fee to sources. Most states—including some of the commenters asking EPA to raise the presumptive minimum—collect a lower amount that is not based on the presumptive minimum, but rather, relies on another fee schedule that it developed and EPA approved as adequate to cover costs. Therefore, it is useful to first discuss our approach to programs that have fee schedules resulting in a different amount before discussing our approach to the presumptive minimum.

Because of the added GHG title V permitting workload described elsewhere in this notice, any state that will not, under its current fee structure, collect fees adequate to fund the permitting of GHG sources must alter its fee structure in order to meet the requirement that fees be adequate to cover costs. Changes may not be required in every instance; circumstances will vary from state to state. For example, a state may see increases in revenue from newly-covered sources (based on emissions of pollutants already subject to fees) that fully cover the state's increased costs, or a state may be over-collecting fees now and could use the surplus to offset the increased costs. Nonetheless, in many cases, we think states will need to adjust their fee structures to cover the costs of GHG permitting in order to meet the requirements of the Act and our regulations.

For this reason, although we are not calling for new fee demonstrations at this time, we plan to closely monitor state title V programs during the first two steps of the Tailoring Rule to ensure that the added workload from incorporating GHGs into the permit program does not result in fee shortfalls that imperil operating permit program implementation and enforcement, whatever the basis of the states' fee schedule. As described in the proposal, such fee oversight by EPA may involve fee audits under the authority of 40 CFR 70.9(b)(5) to ensure that adequate fees are collected in the aggregate to cover program costs, with emphasis on whether the additional GHG workload is being appropriately funded. Also, EPA retains the ability to initiate a program revision under 40 CFR 70.4(i)(3) or issue a notice of deficiency under the process described in 40 CFR 70.10(b) to address fee adequacy issues, which may be uncovered during a fee audit. By relying on existing oversight measures, we are ensuring that the fee requirements are met with a minimum of disruption to existing programs at a time when they will already be facing significant challenges related to GHG permitting.

Turning to the minority of states that do use the presumptive minimum, we did not propose to change the presumptive minimum calculation method to account for GHGs. Currently under the statute and our rules, the presumptive minimum is based on a subset of air pollutants (*i.e.,* VOCs, NAAQS pollutants except for CO, and pollutants regulated under the NSPS and MACT standards promulgated under sections 111 and 112 of the Act, respectively) that does not include GHGs. The amount is specified on a per-ton basis and changes with inflation (it is currently set at $43.75/ton), but does not apply to emissions over 4,000 tpy of a given pollutant from a given source. We noted several difficulties in applying the presumptive minimum to GHG, including the large amounts of GHG emissions relative to other pollutants and the need for better data to establish a GHG-specific amount. Noting that GHGs are not currently included in the Act's list of pollutants to which the presumptive fee applies, we also invited comment on whether we should raise the fee for listed pollutants to cover the added cost of GHG permitting.

A few state commenters asked us to set a presumptive fee for GHGs, which we take to mean we should add GHGs to the list of pollutants to which a presumptive fee would apply. However, many commenters noted that the current presumptive minimum fee is unreasonable for GHGs because GHGs are emitted in greater quantities than the pollutants currently subject to presumptive fees, which would result in excessive fees. These commenters believe that EPA needs to limit the fees that states can charge for GHGs. Moreover, one commenter read the statute to prohibit us from listing GHGs in the presumptive fee calculation in the first place. Several commenters disagreed with the idea of increasing the presumptive fee for other pollutants to cover the cost of regulating GHGs, some of whom believed that this would unfairly punish existing sources or would bring in no new revenue from sources triggering title V for the first time.

After considering these comments, we remain disinclined, as we were at proposal, to change the presumptive fee calculation regulations. While there is some support for changing the regulations, the comments confirm the challenges in doing so. While we expressly rejected charging the full presumptive cost per ton amount for GHG, we also did not propose language to establish a different amount just for GHG, to establish whether a different tpy cap would apply, or to assess whether GHGs could even be added to the list. Thus, many commenters were very concerned about whether the full $43.75 or the 4000 tpy cap would apply to GHG if we listed it as a regulated pollutant for fee purposes. Furthermore, we noted at proposal, and commenters did not disagree, that more data would be needed to establish the appropriate basis for the GHG presumptive minimum. We are not taking a final position in this notice on whether the statute is amenable to including GHG in the presumptive fee calculation currently, but these comments illustrate some of the difficulties of such an approach.

At the same time, we are not increasing the presumptive minimum for other pollutants already included in the fee calculation. We disagree with the commenter who said such an approach would bring in no new revenue from newly-subject sources. Many of the newly-subject sources would emit already-included pollutants. If new revenue from these pollutants were insufficient, and because the Act does not specify how the shortfall must be addressed, the amount of any projected shortfall could be made up by increasing fees on these pollutants. In fact, the projected shortfall could be addressed without having to inventory GHG emissions from title V sources, since the emissions of already-included pollutants are well-known. We also note that, although some commenters are concerned that failing to assess fees for GHGs directly would be unfair, the statute does not provide that the presumptive fee be proportional to each type of pollutant or be proportionally allocated to all sources. Rather, the presumptive fee approach provides a backstop for states that do not wish to adopt a more tailored approach. Nonetheless, we have decided not to increase the presumptive fee amounts for other pollutants because we lack information about the extent to which shortfalls exist due to GHG permitting, and which mix of sources and fees is appropriate for addressing any such

shortfall in a state. This decision also provides greater flexibility to states and minimizes disruption to existing programs.

We note that, contrary to the statements of some commenters, the CAA provisions allowing for a presumptive fee calculation do not override the basic requirement that fees be adequate to cover costs. As noted previously, we expect states to see a revenue increase from emissions of listed pollutants at newly-major sources for GHGs, and it is also possible that the presumptive minimum may currently be resulting in over-collection of fees in a state. Thus, a state continuing to use the presumptive minimum may not have a shortfall. However, if states using the presumptive minimum approach do have a revenue shortfall due to GHG permitting, the statute requires the shortfall to be addressed. The EPA has had, and will continue to have, the ability to require states that use the presumptive minimum to increase their fees if the presumptive minimum results in a revenue shortfall that imperils operating permit program implementation and enforcement. Thus, although we are not changing the presumptive minimum in our regulations, we plan to follow the same oversight approach for states using the presumptive minimum as for those collecting less based on a resource demonstration. As described previously, this approach may involve fee audits with emphasis on whether the additional GHG workload is being appropriately funded, and other appropriate follow-up.

Consistent with our proposal, EPA is not modifying its own part 71 fee structure (which closely mirrors the presumptive minimum) in order to charge an additional fee for GHGs. EPA must revise its fee schedule if the schedule does not reflect the costs of program administration. We have not determined that the existing fee structure will be inadequate to fund the part 71 programs costs during the first two phases of permitting GHGs as set forth in this action. However, we are required to review the fee schedule every 2 years, and make changes to the fee schedule as necessary to reflect permit program costs. 40 CFR 71.9(n)(2). Thus we will continue to examine the increases in part 71 burden due to GHG permitting, the current revenue collection, and the increases in revenue from newly-subject part 71 sources, and will adjust the part 71 fee approach accordingly.

Finally, several state and industry commenters asked EPA to provide guidance and recommendations for an appropriate GHG fee structure. We note that title V grants permitting authorities considerable discretion in charging fees to sources for title V purposes and does not require or prohibit fees specifically for GHGs, provided the states collect fees in the aggregate that are sufficient to cover all the direct and indirect program costs. In responding to requests for guidance, we do not wish to limit state discretion. For example, some commenters suggest that EPA prohibit emissions-based fees for GHGs or cap the amount that can be collected, while others suggest we provide a range of acceptable fees. We are concerned that, given the wide variety of fee approaches that states now take, providing specific guidance may be disruptive, rather than helpful, to states.

On the other hand, we recognize that it will initially be difficult for states to establish an appropriate emissions fee for GHGs. As noted previously, there are currently limited data available for establishing such a fee, and, due to the large quantities of GHG emissions, such a fee may only amount to a few cents per ton. At the same time, as noted in the proposal, a number similar to that used for other pollutants (*e.g.,* the presumptive minimum of approximately $45/ton of GHG) would be inappropriate because it would likely result in huge over-collection. Because of this challenge, we note that 40 CFR 70.9(b)(3) allows the state to charge fees to individual sources on any basis (*e.g.,* emission fee, application fee, service-based fees, or others, in any combination). While most states use emissions-based fees, there is merit to considering all the available fee bases to address increased GHG workload, including approaches that do not require a GHG emissions inventory for fee purposes. For example, where it is possible to estimate a revenue shortfall as a percentage of fee revenue, it may be appropriate to simply attach a percentage-based surcharge to each source's fee to match that shortfall. Similarly, where the shortfall could be estimated as a total dollar amount, a flat surcharge could be added to each source's fee to address the shortfall.

These suggestions should not be read to indicate that EPA prefers any particular approach, or that EPA rejects a cost per ton approach. Rather, they illustrate that it is possible to address a revenue shortfall without establishing a GHG per-ton fee. While the EPA is declining to recommend specific approaches in this preamble, we are committed to assisting states in implementing the fee requirements for GHG. Therefore, we will work with any state that requests assistance from EPA in developing a workable fee approach.

E. Other Actions and Issues

1. Permit Streamlining Techniques

In our proposal, we stated that while we were phasing-in permitting requirements, we would make a concerted effort to assess and implement streamlining options, tools, and guidance to reduce the costs to sources and permitting authorities of GHG permitting. We recognized that the development and implementation of these techniques should be an integral part of our strategy during the phase-in period, and we stated that we would undertake as many streamlining actions as possible, as quickly as possible. We discussed several streamlining techniques in particular, including: (1) Defining PTE for various source categories, (2) establishing emission limits for various source categories that constitute presumptive BACT, (3) establishing procedures for use of general permits and permits-by-rule, (4) establishing procedures for electronic permitting, and (5) establishing "lean" techniques for permit process improvements. The first three of these approaches have the potential to have the greatest impact in reducing the numbers of sources subject to PSD or title V (the definition of PTE) or of reducing permitting costs (presumptive BACT and general permits or permits-by-rule).

In our proposal, we also described the timing for development and implementation of these streamlining techniques. We explained that each of the first three techniques would generally take 3–4 years to develop and implement, and therefore would be of limited use in the near-term. This time frame is necessary because EPA will first need to collect and analyze small source data that we do not currently have—because these are sources that EPA has not traditionally regulated—in order to assess which of these techniques are viable or effective for such sources. In general, EPA will then need to conduct notice-and-comment rulemaking to establish the approaches, and that rulemaking will need to address various legal and policy aspects of these approaches. After that, the permitting authorities will need some time to adopt the streamlining techniques as part of their permitting programs.

We received several comments on streamlining techniques. In general, the comments indicate widespread support for our pursuit of streamlining approaches, but some commenters were

concerned that one or more of EPA's identified streamlining options were complex, vague, ineffective, and questionable legally. Noting our proposal to phase in permitting, in part to allow more time to develop streamlining options for smaller sources, some commenters suggested that we should delay permitting for larger sources for the same reasons. We disagree. Such a delay is not justified under our legal basis for this rule. While implementation of Steps 1 and 2—which will cover larger sources—will pose implementation challenges, and some of the streamlining tools could assist with meeting these challenges, we have assessed the burdens associated with GHG permitting and have established a phase-in schedule that represents a manageable workload, even in the absence of streamlining techniques. On the other hand, we do agree with these commenters that, absent streamlining, applying PSD and title V requirements to the much larger number of small sources would lead to absurd results and administrative impossibility. The sources for whom the phase-in delays applicability are precisely the sources that have the greatest need for streamlining measures, and thus the greatest need for a deferral while we develop and implement streamlining options.

In addition, commenters generally echoed many of our concerns about why it will take time to put these measures in place, and no commenter presented any information to suggest that our 3–4 year estimate for the PTE, presumptive BACT, and general permit measures was invalid.

For these three techniques, we continue to believe that as we noted at proposal, we will require collection of significant category-specific data for source and emission unit types that have heretofore generally not been regulated by the CAA (*e.g.,* furnaces, water heaters, etc.), which could take up to 1 year. Moreover, commenters had differences of opinion as to whether and how we should move forward on these approaches, and some raised policy and legal issues that we would likely want to explore through a notice and comment process in order to assess which of these measures are viable to pursue further.[56] Even if a rulemaking were done expeditiously, it would likely require 1 year. Finally, unlike lean and electronic permitting, these approaches, once finalized by EPA, will likely require additional time of up to 2 years for states to adopt. Thus, it is clear that these approaches will not be in place in time to ease any burden prior to the planned rulemaking for Step 3.

Some commenters did observe that the fourth and fifth techniques, lean and electronic permitting, could, at least theoretically, become available sooner. However, these commenters also noted that successful design and implementation of these approaches will require implementation experience with GHG permitting that is not now available. We expect that for the lean and electronic permitting techniques, at least 1 year of implementation experience (of the type that we will gain starting in 2011) would be required, plus at least an additional year to extrapolate that experience to small sources and put these approaches into effect for small source permitting. Thus, we do not think the lean and electronic permitting would be in place before the beginning of 2013. Moreover, a handful of commenters questioned whether lean and/or electronic permitting would alleviate significant burden. Thus we are not able, at this time, to presume that these approaches will ease any burden prior to the planned rulemaking for Step 3.

It is also important to note that, as a practical matter, while these efforts to streamline the program for small sources are underway, EPA and states will also be devoting a significant amount of their permitting resources and expertise to implementing the PSD and title V programs for the GHG-emitting sources covered under Steps 1 and 2. We have established these steps in a manner that they will be feasible for EPA and state/local/tribal authorities, but even so, they will not only consume current permitting authority resources, but they will also require substantial additional resources. As a result, the efforts to develop and implement streamlining techniques will have to compete with the work necessary to administer existing programs. For example, during the remainder of 2010, as described elsewhere in this notice, EPA permitting program resources will, in addition to continuing to administer programs for non-GHG pollutants, be used to conduct *at least* the following GHG-related activities in addition to streamlining: (1) Develop BACT and other information and guidance for implementing programs for sources covered by Step 1, followed by additional guidance and information for sources covered by Step 2; (2) review and act on information we receive regarding state adoption of GHG permitting requirements, which may entail narrowing of previous SIP approvals or processing of other programmatic revisions; and (3) propose and finalize measures to address programs with deficiencies in GHG coverage. As the beginning of Step 2 nears, we will also begin to receive and process the first applications for permits that will incorporate GHG requirements (*i.e.,* those that will be issued after January 2, 2011). States seeking to implement streamlining approaches will face similar competition for permitting resources.

These time frames and resource considerations for streamlining confirm the approach to phase-in that we are taking in this rule. First and foremost, they make clear that it will not be possible to have streamlining measures in place in time for either Step 1 or Step 2. Therefore our selection of threshold for those steps is not built on assumptions that streamlining will remove some or all of the burden during those steps.

Second, they make clear that, while no significant streamlining can be in place by the time we must begin to develop the Step 3 rule (*i.e.,* latter half of 2011, to promulgate by July 2012, effective July 2013), it is likely that by that time EPA and states will have had an opportunity to gain implementation experience that could serve as the basis for beginning to implement streamlining techniques that do not require rulemaking or state adoption (*e.g.,* lean and electronic permitting). It is also likely that we will have had an opportunity to gather technical information—which we have already begun to gather—for certain source and emissions unit categories that would be necessary to support proposal of PTE or presumptive BACT approaches for those categories. We expect that the Step 3 rulemaking will provide an opportunity for us to use that experience and data to begin to propose streamlining approaches that need notice and comment rulemaking. We can also begin to take into account any burden reductions from possible early streamlining efforts—that is, through lean and electronic permitting—in the establishment of Step 3.

Third, it is clear that the potential availability of streamlining measures does not call into question our decision that in no event will we broaden PSD and title V applicability to cover GHG-emitting sources below the 50,000 tpy CO_2e level prior to July 2016, as discussed elsewhere. EPA cannot now

[56] We do not attempt to address or resolve the various opinions about what legal or policy direction we must take regarding any of these streamlining options. The proper forum for doing that will be in the action(s) where we apply a given option. Nonetheless, our RTC document provides additional detail about the options we described and what commenters said about our proposed options. In addition, the comments themselves can be accessed in the docket for this action.

predict the resources that will be required to implement PSD and title V programs for GHG-emitting sources once various streamlining techniques are ultimately completed. This is uncertain not only because we need data and implementation experience with GHG permitting during Steps 1, 2, and 3 that we can apply to estimates for small sources, but also because, as comments indicate, there is a broad range of legal and policy issues to consider in crafting the streamlining approaches we ultimately adopt. We have presented an initial assessment of options and obtained views of commenters both supporting and opposing them, and it is the result of these future actions, whose outcomes are uncertain at this time, that will ultimately determine the extent to which streamlining approaches will allow for the administration of PSD and title V programs for numerous small sources. Thus, while we are optimistic that we can craft workable, common-sense solutions, we nonetheless, believe it is important to preserve our small source exclusion until we have not only had time to put the streamlining approaches in place, but also have had time to assess the burdens that remain, before we bring in additional sources below the 50,000 tpy CO_2e levels. We believe that the 6-year timeframe will require a sustained intensive effort by EPA and states to develop, adopt, and implement streamlining techniques, and will require EPA to then evaluate those techniques and complete a rulemaking concerning PSD and title V applicability to small-sources based on that evaluation. In this manner, the 6-year period will give us the necessary time to make the best decisions about the actions we should take beyond Step 3.

While comments make clear that there are issues to be addressed, nothing in the comments has persuaded us that we should abandon our streamlining efforts. To the contrary, the strong support for these efforts shown by many commenters reinforces our intention, as stated at proposal, to move forward with these approaches as an integral part of our phase-in approach. Moreover, notwithstanding the competition for GHG permitting resources and expertise, we believe it is critical that we move forward expeditiously. As noted previously, we are already taking a first step by initiating permitting for larger sources, beginning January 2011, that will begin to provide valuable implementation experience. This experience can be useful in allowing states to begin implementing early streamlining measures, like lean and electronic permitting, which do not require EPA action. We have also already begun, and will continue, developing data necessary to support possible rulemakings addressing approaches such as PTE, presumptive BACT, and/or general permits. We expect to be able to use these data to support possible rulemakings on these topics, as appropriate, at about the same time as our Step 3 rulemaking. There may also be available streamlining options that were not described in our proposal that warrant further consideration. Because of the uncertainty surrounding such approaches, we are not committing to finalize rules on any particular approach, but we do plan to explore all streamlining options as expeditiously as possible, beginning immediately and proceeding throughout the phase-in period, and we encourage permitting authorities to do the same. We commit to consider a wide array of possible streamlining measures, and we commit to propose and take comment on, in the Step 3 rulemaking, a set of those measures that we determine are viable to pursue further.

2. Guidance for BACT Determinations

The CAA requires that a PSD permit contain, among other things, emissions limits based on the BACT for each pollutant subject to regulation under the Act emitted from the source that triggers PSD. 42 U.S.C. 7475(a)(4); 42 U.S.C. 7479(3). BACT is defined as follows:

> (3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 111 or 112 of this Act. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to enactment of the Clean Air Act Amendments of 1990.

42 U.S.C. 7479(3).

Thus, the BACT process is designed to determine the most effective control strategies achievable in each instance, considering energy, environmental, and economic impacts. However, the case-by-case nature of BACT, together with the range of factors and technologies that must be considered, presents a challenge in determining BACT for newly regulated pollutants. When a new pollutant is regulated, the first permit applicants and permitting authorities that are faced with determining BACT for a new pollutant will likely need to invest more time and resources in gathering and analyzing information necessary to make an assessment of BACT under the statutory criteria. Once the PSD permitting program matures with respect to the new pollutant, successive BACT analyses will establish precedents that can inform subsequent BACT determinations. While the BACT provisions clearly contemplate that the permitting authority evaluate control strategies on a case-by-case basis, EPA recognizes the need to develop and share policy guidance and technical information for sources and permitting authorities as they begin to permit sources of newly regulated pollutants, such as GHGs. When applied in a practical manner, this additional EPA guidance and technical information should reduce time and resource needs when evaluating BACT for newly regulated pollutants.

As described in the proposed Tailoring Rule, EPA intends to compile and make available technical and background information on GHG emission factors, control technologies and measures, and measurement and monitoring methodologies for key GHG source categories. We expressed our intent to work closely with stakeholders in developing this supporting information and to ensure this information is available in sufficient time to assist permitting agencies in their BACT determinations. The proposal took comment on what other types of support or assistance EPA can provide to initially help air pollution control agencies with the permitting of GHGs.

Commenters on the proposed Tailoring Rule generally supported EPA providing technical information and policy guidance for sources of GHGs. Several commenters specifically requested guidance to clarify GHG-related issues, such as how to compute CO_2e emissions, how to evaluate emissions of CO_2 from biomass fuel, and whether an air quality analysis will be required for GHGs. Additionally, commenters requested that EPA issue "white papers" and other tools that would provide information on a range of control technologies and measures for major stationary source categories, such as power plants, cement kilns, glass

furnaces, and other sources. Many of these commenters further requested that EPA provide an opportunity for stakeholder input on the guidance, and a few commenters insisted that permitting for sources of GHGs should not begin prior to issuing final guidance.

Consistent with our commitment at proposal to involve all stakeholders in our guidance development, EPA called upon the CAAAC in September 2009, to provide assistance and recommendations for what types of guidance and technical information would be helpful.[57] Specifically, our charge to the CAAAC was "* * * to discuss and identify the major issues and potential barriers to implementing the PSD Program under the CAA for greenhouse gases * * * [and] focus initially on the BACT requirement, including information and guidance that would be useful for EPA to provide concerning the technical, economic, and environmental performance characteristics of potential BACT options." This charge also requested the CAAAC to "identify and discuss approaches to enable state and local permitting authorities to apply the BACT criteria in a consistent, practical and efficient manner."

At its October 6, 2009 meeting, the CAAAC established a Climate Change Work Group, made up of 35 representatives from a variety of industries, state and local governments, and environmental and public health non-profit organizations, organized under CAAAC's Permits, New Source Review and Toxics Subcommittee. The Work Group initially focused its attention on the procedure for evaluating BACT and decided that the process and criteria for determining BACT for criteria pollutants represented a workable and acceptable framework for GHGs. The Work Group also recommended a second phase, in which the Work Group would consider member proposals regarding possible alternative or supplementary approaches to applying the PSD program to GHG sources.

[57] The CAAAC is a senior-level policy committee established in 1990 to advise the U.S. EPA on issues related to implementing the CAA Amendments of 1990. The committee is chartered under the Federal Advisory Committee Act and has been renewed every 2 years since its creation. The membership is approximately 40 members and experts representing state and local government, environmental and public interest groups, academic institutions, unions, trade associations, utilities, industry, and other experts. The CAAAC meets three times a year, normally in Washington, DC. It provides advice and counsel to EPA on a variety of important air quality policy issues. The committee has formed several subcommittees to provide more detailed discussion and advice on many technical issues.

In February 2010, the CAAAC completed work on the first phase of its effort and sent EPA a list of recommendations that highlighted areas of the BACT determination process that are in need of technical and policy guidance. For more information, see the Interim Phase I Report on Issues related to BACT for GHGs, February 3, 2010 that is located in the public docket for this rulemaking and at *http://www.epa.gov/air/caaac/climate/2010_02_InterimPhaseIReport.pdf.* In response, we are working on a number of fronts to develop technical information, guidance, and training to assist states in permitting large stationary sources of GHGs, including identifying GHG control measures for different industries. EPA is currently working with states on technical information and data needs related to BACT determinations for GHGs. This includes developing the EPA Office of Research and Development GHG Mitigation Strategies Database, enhancing the RACT/BACT/LAER Clearinghouse to include GHG-specific fields, and preparing technical information on sector-based GHG control measures. Also, EPA is actively developing BACT policy guidance for GHGs that will undergo notice and comment and will culminate in training courses for state, local, and tribal permitting authorities. The results of all of these efforts will roll out over the remainder of 2010. EPA currently awaits the Work Group's recommendations from its second phase of deliberations, which is underway as of the date of this notice.

EPA does not agree with some commenters' suggestion that EPA should delay permitting of any sources until final BACT guidance is issued. As discussed in the final action on reconsideration of the Interpretive Memo, delaying the application of BACT to enable the development of guidance or control strategies is not consistent with the BACT requirements. 63 FR 17008. Furthermore, as just described, EPA expects such a delay to be unnecessary because EPA will soon begin providing technical information to inform BACT decisions, and will continue to provide additional guidance prior to the date that GHG permitting begins. However, even in the absence of such guidance, a delay would not be justified under the legal doctrines of "absurd results" and "administrative necessity." While implementation of the BACT requirement during Steps 1 and 2 will pose implementation challenges, EPA has assessed the burden associated with GHG permitting with consideration given to these challenges, and has established a phase-in schedule that represents a manageable workload.

Thus, while BACT will remain a case-by-case assessment, as it always has been under the PSD program, EPA is confident that this guidance development effort will help support a smooth transition to permitting emissions of GHGs. Furthermore, EPA will continue to work to provide the most updated information and support tools to allow permitting authorities to share and access the most updated information on GHG BACT determinations as they are made once permitting of GHGs begins. EPA remains committed to involving stakeholders in the upcoming efforts to develop guidance to help permitting authorities in making BACT determinations for sources of GHGs.

3. Requests for Higher Category-Specific Thresholds or Exemptions From Applicability

Although we did not propose any categorical exemptions, many commenters requested exemptions from major source and major modification applicability determinations under title V and PSD for certain types of GHG-emitting sources or certain types of GHG emissions as follows:

Source Categories. Many commenters requested various exemptions or exclusions from source applicability for GHGs under both PSD and title V permitting, either during the phase-in period or permanently, citing anticipated burdens, societal costs, and differences in emission characteristics. Commenters representing non-traditional sources or source categories (sources that have not historically been required to get permits) requested exemptions from permitting based on GHG emissions, including agricultural sources, residential sources, and small businesses. In general, these commenters sometimes, but not always, cited "absurd results" and "administrative necessity" arguments in their exemption requests.

Several commenters from sectors that consume a great deal of energy in their industrial processes and that are subject to international competitiveness, such as aluminum, steel, cement, glass, pulp and paper, and other manufacturers, requested that they be exempt from permitting under this final rule. These commenters state that we have not carefully considered the environmental and economic consequences of this action because if we had, we would have exempted them for several reasons, including (1) other countries typically exempt similar sources from GHG cap

and trade programs because the industries are making significant energy efficiency improvements even in the absence of GHG regulation, and (2) permitting such sources may cause many facilities to move to countries that have less regulation or no regulation for GHGs.

Other industry groups cited unique characteristics of their emissions, or the quantities in which they are emitted, that they argued should justify exclusion or unique thresholds. Semiconductor production facilities asked for exemptions, arguing that combustion-related GHG emissions are different from their GHG emissions, which result from the use of high-GWP industrial gases, such as PFCs, with higher GWP values that are more likely to trigger permitting requirements at relatively low tpy values. One lime production commenter stated that EPA could encourage energy efficiency projects at its plants by excluding calcination and other process emissions, arguing that these emissions are a relatively small portion of the national inventory that will have no material effect on air quality and global warming. Another commenter requested that EPA exclude emissions from poultry production (natural bird respiration) from permitting consideration because the IPCC excludes them from its GHG emission estimates. Representatives of the landfill industry pointed to the relationship between current statutory thresholds that apply to their regulated emissions, primarily NMOC, and the equivalent amount of GHG emissions this corresponds to. They argued for a source-category specific threshold that is at least equivalent to their current NMOC threshold, or roughly 750,000 tpy CO_2e according to their estimate.

Although the proposal for the Tailoring Rule generally addressed how the statutory requirements for major source applicability (100/250 tpy thresholds) could be phased in in ways that would offer relief to traditional and non-traditional sources, such as residences, farms, small business, and semiconductor manufacturers, it did so by establishing relatively high CO_2e thresholds during the early implementation period and lowering the thresholds over time as streamlining mechanisms become available to reduce administrative burdens. We did not propose any permanent exemptions of any kind or temporary exemptions based on source category. Also, note that the proposal discussed energy efficiency, process efficiency improvements, recovery and beneficial use of process gases, and certain raw material and product changes in the context of short-term, low-cost means of achieving GHG emission reductions for small-scale stationary sources, but not in the context of exemptions.

As discussed previously, we are still considering whether permanent exemptions from the statute are justified for GHG permitting based on the "absurd results" legal doctrine. We do not have a sufficient basis to take final action at this time to promulgate any of the suggested exclusions on the grounds, described previously, suggested by the commenters. We note, however, that nothing in this rule forecloses the opportunities we may have to explore such options in the future. Therefore, we are taking no action in this rule on these various commenters' requests for exclusions.

Some commenters also recommended that we create exclusions for their particular source categories for the specific purpose of avoiding overwhelming permitting burdens. We did solicit comment on alternative approaches to burden relief in the proposal. Some commenters suggested that the "administrative necessity" or "absurd results" rationale, each of which would be based on extraordinary administrative burdens, could be used to create at least temporary exclusions that would allow more sources to escape permitting than what we proposed. However, commenters have not, to date, provided specific information about the costs and administrative burdens associated with permitting their source categories.

Regarding the specific concerns about the need for a small business exclusion, we note that the Office of Advocacy of the SBA made several recommendations on the proposal to address concerns about large numbers of small businesses becoming subject to the permit programs. For example they recommended that EPA adopt major source thresholds of 100,000 tpy and major modification thresholds of 50,000 tpy CO_2e. They also recommended that we adopt an interpretation of the effective date of the LDVR to provide additional time to prepare. We took action consistent with the latter recommendation in the Interpretive Memo, and we are taking action consistent with the former recommendation in this rule (although the threshold for modifications we are adopting is higher, for reasons explained previously). We are finalizing Steps 1 and 2 using the threshold-based approach, which applies the various legal doctrines, in the context of the *Chevron* framework, in a way that effectively exempts all small sources during this part of the phase-in, while assuring the administrability of the permitting programs for the sources that remain subject to them. We anticipate that virtually all small businesses not already subject to PSD and title V would be excluded under this approach. Similarly, with respect to high GWP gases as discussed previously, we are maintaining the statutory mass-based threshold, and this should address commenters' concerns regarding the inclusion of those gases. Therefore, we reiterate that we are not finalizing any such exclusions in this rule and, as noted above, we are not taking final action in the commenters' requests for exclusions.

Concerning the comment that we did not take appropriate economic and environmental considerations into account for this rulemaking action, we disagree. The approach we finalize in this notice for Steps 1 and 2 minimizes economic burdens by limiting permitting to the largest GHG emission sources. We further note that the PSD program as applied to the sources that are covered in Steps 1 and 2 contains an express requirement to take energy, environmental, and economic considerations into account when making control technology (*i.e.,* BACT) decisions and accordingly many of the concerns about control costs will be able to be accounted for in that analysis.

Biomass Combustion/Biogenic Emissions. Several commenters request that EPA exempt emissions from biogenic activities or biomass combustion or oxidation activities, including solid waste landfills, waste-to-energy projects, fermentation processes, combustion of renewable fuels, ethanol manufacturing, biodiesel production, and other alternative energy production that uses biomass feedstocks (*e.g.,* crops or trees). For example, commenters urged that EPA exclude emissions from biomass combustion in determining the applicability of PSD to GHGs based on the notion that such combustion is "carbon neutral" (i.e., that combustion or oxidation of such materials would cause no net increase in GHG emissions on a lifecycle basis). Some commenters oppose the exemption of biogenic/biomass activities, claiming the lack of a valid scientific basis for treating these GHG emissions differently than other GHG emissions and expressing concern that we should not assume all biomass combustion is carbon neutral.

The proposed Tailoring Rule did not address this issue of exemptions for biomass combustion or biogenic emissions. We are mindful of the role that biomass or biogenic fuels and feedstocks could play in reducing

anthropogenic GHG emissions, and we do not dispute the commenters' observations that many state, federal, and international rules and policies treat biogenic and fossil sources of CO_2 emissions differently. We note that EPA's technical support document for the endangerment finding final rule (Docket ID No. EPA–HQ–OAR–2009–0472–11292) states that "carbon dioxide has a very different life cycle compared to the other GHGs, which have well-defined lifetimes. Instead, unlike the other gases, CO_2 is not destroyed by chemical, photolytic, or other reaction mechanisms, but rather the carbon in CO_2 cycles between different reservoirs in the atmosphere, ocean, land vegetation, soils, and sediments. There are large exchanges between these reservoirs, which are approximately balanced such that the net source or sink is near zero."

Nevertheless, we have determined that our application of the "absurd results," "administrative necessity," and one-step-at-a-time legal rationales that support this rule, which are based on the overwhelming permitting burdens described previously, does not provide sufficient basis to exclude emissions of CO_2 from biogenic sources in determining permitting applicability provisions at this time. This is because such an exclusion alone, while reducing burdens for some sources, would not address the overwhelming permitting burdens described above, and a threshold-based approach would still be needed. As noted above, we have not examined burdens with respect to specific categories and thus we have not analyzed the administrative burden of permitting projects that specifically involve biogenic CO_2 emissions taking account of the threshold-based approach, nor did the commenters provide information to demonstrate that an overwhelming permitting burden would still exist, justifying a temporary exclusion for biomass sources.

At the same time, the decision not to provide this type of an exclusion at this time does not foreclose EPA's ability to either (1) provide this type of an exclusion at a later time when we have additional information about overwhelming permitting burdens due to biomass sources, or (2) provide another type of exclusion or other treatment based on some other rationale. Although we do not take a final position here, we believe that some commenters' observations about a different treatment of biomass combustion warrant further exploration as a possible rationale. Therefore, although we did not propose any sort of permanent exclusion from PSD or title V applicability based on lifecycle considerations of biogenic CO_2, we plan to seek further comment on how we might address emissions of biogenic carbon dioxide under the PSD and title V programs through a future action, such as a separate Advance Notice of Proposed Rulemaking (ANPR). This action would seek comment on how to address biogenic carbon under PSD and title V, the legal and policy issues raised by options regarding implementation. We will provide an opportunity for public comment before adopting any final approach.

We further note that, while we are not promulgating an applicability exclusion for biogenic emissions and biomass fuels or feedstocks, there is flexibility to apply the existing regulations and policies regarding BACT in ways that take into account their lifecycle effects on GHG concentrations. This topic has already been explored by the CAAAC workgroup on BACT issues related to GHGs that recently provided recommendations to EPA. These recommendations are located in the public docket for this rulemaking and at *http://www.epa.gov/air/caaac/climate/2010_02_InterimPhaseIReport.pdf.* While that group was unable to come to a consensus on how biomass-based emissions should be treated, it provided us with information that we will consider as we issue guidance on BACT. As previously discussed, we plan to issue BACT guidance later this year, but are not doing so as part of this rulemaking. Without prejudging the outcome of our process to seek comment whether and how we might address emissions of biogenic carbon under the PSD and title V programs through a future action, this issue warrants further exploration in the BACT context as well, and we plan to fully explore it and take action if appropriate.

Fugitive Emissions. Numerous commenters believe that fugitive GHG emissions should be excluded from major source determinations, citing difficulties in measuring or estimating such emissions. Others believe EPA did not address fugitive emissions in the proposal and they ask for clarification of the treatment of fugitive GHGs in applicability determinations under PSD and title V. Some of these commenters state that EPA has not undertaken a rulemaking under CAA section 302(j) for any source category of fugitive GHGs, so they should not be included. Several commenters representing the solid waste disposal industry requested exemptions for fugitive emissions for landfills and waste-to-energy projects, pointing out that current practice under PSD is for fugitive emissions from certain landfills to not be counted toward major source determinations.

In the proposal, EPA did not offer any specific guidance or discuss exemptions for fugitive emissions of GHGs. Commenters did not suggest that a fugitive exemption would address the overwhelming permitting burdens described previously, or that it was necessary to specifically tailor GHG applicability through the use of a fugitive emissions exclusion for categories that would otherwise be required to include them.

We do agree with commenters who stated that we should clarify how to count fugitives in determining applicability under this rule. In response, we note that we are not taking final action with respect to commenters' request, and we are not finalizing any special rules for fugitive emissions related to GHG. Thus, EPA's rules related to the treatment of fugitives would apply. Regarding the comment that a CAA section 302(j) rulemaking is required before fugitive emissions may be counted, we disagree. As we read section 302(j), once EPA has established by rule that fugitive emissions are to be counted for a specific source category, nothing in section 302(j) requires EPA to conduct new rulemaking to allow for the counting of additional pollutants from that category. We read section 302(j) as imposing an obligation to determine if fugitive emission generally should be counted from a source or source category and not requiring that EPA list both source categories and relevant pollutants. Indeed, our practice in listing categories has not been to limit the pollutants to which the listing applies. Therefore, we are applying our existing rules and policies for fugitive emissions for GHG as we would any other pollutant.

Pollution Control Projects. Other commenters request exemptions for pollution control projects from PSD major modification requirements, particularly projects that increase the efficiency or thermal performance of a unit or facility, resulting in emission reductions on a pounds/megawatt-hour or production basis. The current PSD rules do not exclude pollution control projects from being considered a physical change or change in the method of operation that would—if it resulted in a significant net emissions increase—constitute a major modification, and the case law makes clear that we could adopt a permanent exclusion in the future.[58] To the extent

[58] On June 24, 2005, the United States Court of Appeals for the District of Columbia Circuit vacated

Continued

that the commenters seek an exclusion for pollution control projects that relies solely on "absurd results" or "administrative necessity" for reasons similar to those described previously for other requested exclusions, we take no action on this request in this rulemaking.

4. Transitional Issues Including Requests for Grandfathering

In the Tailoring Rule proposal, we did not discuss or specifically ask for comment on any provisions to address the transition from a permitting regime that does not incorporate GHGs to one that does, such as "grandfathering" provisions or similar approaches that would exempt previously issued permits or pending applications from having to incorporate requirements for GHGs. We nonetheless received several public comments that addressed a variety of transitional issues. One group of comments addresses situations prior to permit issuance where a PSD or title V application is either administratively complete or more generally being processed prior to the trigger date for GHG permitting ("in process" applications). Another group of comments addresses situations where a PSD or title V permit is issued prior to the GHG trigger date and the commenters request that the application and/or permit be exempt from any requirements for updates related to GHGs after permit issuance.

With respect to PSD, many commenters requested that we adopt a "grandfathering" approach to applicability to exempt projects that have administratively complete PSD or minor NSR permit applications pending when the GHG permitting requirements go into effect. Several commenters urged us to promulgate transition provisions (without specifically using the term "grandfathering"), pointing out that we have provided transition periods for revising pending PSD permits, in the past, when new PSD rules were issued (*e.g.,* in late 1970s and 1980). These commenters assert that GHG requirements will cause more disruption than those previous rule changes. Several commenters asked that PSD applications be evaluated on the basis of the PSD requirements effective when the application is submitted and if submitted prior to the trigger date, then the application and permit would not need to address GHGs. Several commenters also asked that PSD sources with a valid permit that commences construction within 18 months of the trigger date not be required to seek a revised PSD permit for GHGs. Similarly, several commenters asked that PSD permits issued prior to the GHG trigger date not be required to be reopened only for the purpose of addressing GHG emissions. Additional commenters asked that we clarify that sources or projects not be required to obtain PSD permits if they obtained a determination that PSD did not apply (a "non-applicability" determination) prior to the GHG trigger date. Finally, many commenters also requested "grandfathering" for title V so that existing title V applications and permits do not need to be amended, revised, or resubmitted to address GHGs after they become "subject to regulation." Other commenters asked that transition provisions for title V be provided in the final action that would be similar to those requested for PSD.

We partially addressed transitional issues for PSD permitting in our April 2, 2010 final action on reconsideration of the Interpretive Memo. 75 FR 17021. This action addressed the applicability of PSD permitting requirements for GHGs to pending PSD permit applications that were (or will be) submitted prior to January 2, 2011 based on emissions of pollutants other than GHGs. However, we have not yet addressed the questions raised by public comments concerning sources that obtain PSD permits, minor NSR permits, or determinations that no such permits are needed prior to the Step 1 period set forth in this rule. We have also not yet addressed questions about the applicability of PSD permitting requirements for sources that are not currently required to submit an application for a PSD permit but that could be required to do so in Step 2 of the phase-in established in this action. In addition, our April 2, 2010 action did not address transitional issues concerning the application of the title V provisions to GHGs.

a. Transition for PSD Permit Applications Pending When Step 1 Begins

In our action on April 2, 2010, EPA explained that the Agency did not see grounds to establish a transition provision for pending PSD permit applications because we had determined that PSD permitting requirements would not apply for GHGs for another 9 months. We explained that permit applications submitted prior to April 2, 2010 should in most cases be issued prior to January 2, 2011 and, thus, effectively have a transition period of 9 months to complete processing before PSD requirements become applicable to GHGs. We also observed that, in the case of any PSD permit application review that cannot otherwise be completed within the next 9 months based on the requirements for pollutants other than GHGs, it should be feasible for permitting authorities to begin incorporating GHG considerations into permit reviews in parallel with the completion of work on other pollutants without adding delay to permit processing. Additional discussion of EPA's reasons for not developing transition provisions for PSD permit applications that are pending on January 2, 2011 are provided in the April 2, 2010 notice. 75 FR 17021–22.

For these same reasons, we continue to feel that a transition period is not warranted to incorporate GHG requirements into any PSD permit applications that are pending when Step 1 of the permitting phase-in begins for those sources that would otherwise need to obtain a PSD permit based on emissions of pollutants other than GHGs. Thus, this action makes no change to the position we expressed on this particular issue in the April 2, 2010 notice. In this final rule on tailoring the PSD program to address GHGs, we have determined that the additional burden of incorporating GHG requirements into PSD permits for the sources already required to obtain such permits is manageable in the Step 1 period. Thus, this rule has added no additional requirements or limitations that would justify deferring the establishment of pollution controls for this category of GHG sources once PSD permitting requirements are initially triggered for GHGs.

While we do not provide for grandfathering of PSD applications, we do note that there are more than 7 months left before GHG BACT requirements will be triggered at anyway sources for projects that increase GHG emissions by more than 75,000 tpy CO_2e and more than a year before the requirements would be triggered at sources solely because of emissions of GHGs (more than 100,000 tpy of CO_2e). We intend to work constructively and affirmatively with permitting authorities to use this time to ensure expeditious processing of pending permits and to further assure that the triggering of BACT requirements at such sources will not result in adverse impacts on pending projects. We have separately described our plans to expeditiously issue GHG

the portions of the 2002 and 1992 NSR rules that pertained to pollution control projects, among other provisions. In response to this Court action, on June 5, 2007, EPA removed these provisions from the NSR regulations. (*See* 72 FR 32526). These provisions were added as part of EPA's NSR improvement rule that was issued on December 31, 2002.

BACT guidance, but we understand that for pending projects that will be permitted soon after January 2, 2011, an opportunity for earlier engagement with EPA on BACT issues would be beneficial for permitting authorities to issue these permits without delay.

Therefore, following the issuance of this rule, we will contact permitting authorities that have pending PSD permit applications to identify those applications with a reasonable likelihood that final issuance will occur after January 2, 2011, and therefore will be required to contain GHG BACT limits. We will then work closely with those permit agencies to provide technical, legal, or policy assistance to help prepare BACT analysis and provide additional support as necessary to expedite permitting for those pending applications. Similarly, when EPA is the permitting authority, we will provide assistance to applicants with pending permits to ensure that GHG permitting decisions are made promptly, and that administrative processes move forward expeditiously.

b. PSD Permits Issued Prior to Step 1

EPA has not historically required PSD permits to be updated or reopened after they are issued in the absence of an action by the applicant to change the physical or operational characteristics of the source described in the permit application. EPA's PSD permitting regulations contain no provisions that address the modification or amendment of a PSD permit or require a PSD permit to be reopened or modified on the basis of new PSD permitting requirements that take effect after the final permit is issued. Since PSD permits are construction permits, EPA has not required updates to PSD permits in the same manner as is typically required for operating permits that incorporate a variety of applicable requirements (such as title V permits and National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act). In addition, unlike operating permits, PSD permits are not required to be renewed. However, if construction under a PSD permit is not commenced in a timely manner or is discontinued for an extended period, a PSD permit may expire if an extension is not requested or justified. *See* 40 CFR 52.21(r)(2); 40 CFR 124.5(g).

With respect to the application of PSD permitting requirements for GHGs beginning on January 2, 2011, we do not see any cause to deviate from our historical practice of not requiring PSD permits to be reopened or amended to incorporate requirements that take effect after the permit is issued. Thus, we are not promulgating any new rules or requirements pertaining to PSD permits issued prior to Step 1 of the phase-in described in this rule. There is no mandatory requirement to reopen a previously issued PSD permit to incorporate GHG requirements that were not applicable at the time the permit was issued.

A major source that obtains a PSD permit prior to January 2, 2011 will not be required under EPA regulations to reopen or revise the PSD permit to address GHGs in order for such a source to begin or continue construction authorized under the permit. Our current PSD permitting regulations provide that "[n]o new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states the major stationary source or major modification will meet those requirements." 40 CFR 51.166(a)(7)(iii); 40 CFR 52.21(a)(2)(iii). The term "begin actual construction" generally means "initiation of physical onsite construction activities on an emissions unit which are of a permanent nature" and includes activities such as "installation of building supports and foundations, laying underground pipework and construction of permanent storage structures." 40 CFR 51.166(b)(11); 40 CFR 52.21(b)(11). A source that begins actual construction authorized under a PSD permit prior to January 2, 2011 will not be in violation of the prohibition described previously if it continues construction after that date. This portion of the regulation precludes only beginning construction without the appropriate preconstruction permit and does not require a permit to be updated to continue actual construction that has already begun.

Furthermore, a source that is authorized to construct under a PSD permit but has not yet begun actual construction on January 2, 2011 may still begin actual construction after that date without having to amend the previously-issued PSD permit to incorporate GHG requirements. Sections 51.166(a)(7)(iii) and 52.21(a)(2)(iii) require "a permit that states that the major stationary source or major modification will meet those requirement," which refers to the "requirements in paragraphs (j) through (r)(5)" referenced earlier in those provisions. EPA construes this language to describe a permit that meets the requirements of paragraph (j) through (r)(5) that are in effect at the time the permit is issued. Permitting and licensing decisions of regulatory agencies must generally reflect the law in effect at the time the agency makes a final determination on a pending application. *See Ziffrin* v. *United States,* 318 U.S. 73, 78 (1943); *State of Alabama* v. *EPA,* 557 F.2d 1101, 1110 (5th Cir. 1977); *In re: Dominion Energy Brayton Point, LLC,* 12 E.A.D. 490, 614–616 (EAB 2006); *In re Phelps Dodge Corp.,* 10 E.A.D. 460, 478 n. 10 (EAB 2002).

Thus, a source may begin actual construction on or after January 2, 2011 under a PSD permit that authorized construction to begin prior to January 2, 2011 because such a permit states that the source will meet the requirements of paragraphs (j) through (r)(5) of these regulations (or state equivalents) that were in effect at the time the permit was issued. However, this would not be the case if the permit has expired because the applicant has discontinued construction or failed to commence construction by the necessary date. *See* 40 CFR 52.21(r)(2).

This approach is consistent with EPA's practice when the preconstruction permitting requirements change by virtue of the designation of an area as a nonattainment area after a PSD permit is issued. In transitional guidance issued by EPA in 1991, EPA explained that "the area designation in effect on the date of permit issuance by the reviewing agency determines which regulations (part C or D) apply to that permit." Memorandum from John S. Seitz, Director OAQPS, New Source Review (NSR) Program Transitional Guidance, page 6 (March 11, 1991). This memorandum explained further that "where a source receives a PSD or other permit prior to the date the area is designated as nonattainment, the permit remains in effect" as long as the source meets the conditions necessary to prevent the permit from expiring. *Id.* at 6.

This approach does not apply if the source engages in a major modification after January 2, 2011 that is not authorized by the previously issued permit. Once Step 1 of the phase-in begins, if the PSD requirements for GHGs are applicable to a previously-permitted source that engages in a major modification not covered by the permit, such a source will need to obtain a new PSD permit to authorize the modification and that permit may need to include GHG requirements depending on the level of increase in GHGs that results from the modification.

c. Additional Sources for Which PSD Applies in Step 2

In light of the terms of existing PSD regulations and the lead time provided in this action for sources that will first

become subject to PSD permitting in Step 2, we do not believe there is presently a need to establish transition provisions for sources that will be required to obtain PSD permits for the first time in Step 2 of the phase-in. As described previously, under our current PSD permitting regulations, a new major stationary source or major modification may not begin actual construction without a PSD permit that meets the applicable preconstruction permitting requirements. 40 CFR 51.166(a)(7)(iii); 40 CFR 52.21(a)(2)(iii).

Since a permit must be obtained before a major source may begin actual construction, the major source preconstruction permitting requirements in 40 CFR 51.166 and 52.21 of the regulation do not generally apply to a source that begins actual construction at a time when it was not a major source required to obtain a PSD permit. One exception, however, is the unique circumstance when a source becomes a major source solely by virtue of the relaxation of an enforceable limitation on the source's PTE. 40 CFR 51.166(r)(2); 40 CFR 52.21(r)(4). But absent these circumstances, PSD preconstruction permitting requirements do not generally preclude a source from continuing actual construction that began before the source was a source required to obtain a PSD permit. Thus, a source that began actual construction under the authorization of any previously required minor source or state construction permit is not required to meet any PSD preconstruction permitting requirement that becomes applicable after actual construction begins unless the source engages in a major modification after PSD permitting requirements are applicable. Likewise, a PSD permit is not required after a source begins actual construction based on a valid determination (by the source or the permitting authority) that the source need not obtain either a major PSD permitting requirements or and minor NSR permit. Based on these provisions in existing regulations, EPA will not require any sources to which PSD permitting requirements begin to apply in Step 2 to obtain a PSD permit to continue construction that actually begins before Step 2 begins.

However, we will expect Step 2 sources that begin actual construction in Step 2 (*i.e.,* beginning July 1, 2011) to do so only after obtaining a PSD permit in accordance with 40 CFR 52.21 or 51.166, or any applicable state regulation that meets the requirements of 40 CFR 51.166. We recognize the potential for the triggering of Step 2 to result in a change in status where a project may legally have begun actual construction before Step 2 but did not do so and would then need a PSD permit. However we also note that we are providing over a year of lead time before PSD permitting requirements become applicable to Step 2 sources. If projects would be adversely affected by this change in status, this lead time affords an opportunity for sources planning such projects to secure appropriate minor NSR permits (which generally take less than a year to issue), non-applicability determinations, etc. in time to avoid such a change in status. If a new or modified source that would become newly subject to PSD in Step 2 plans to begin actual construction before Step 2, it has more than a year to obtain the applicable preconstruction approvals and begin actual construction. Likewise, a Step 2 source that does not anticipate the ability to begin actual construction before Step 2 begins should have enough lead time to submit a PSD permit application and obtain the necessary permit without significantly delaying the project further. Therefore, we do not think it is necessary or appropriate to promulgate a transition provision that would exempt Step 2 sources from PSD permitting requirements that will apply based on construction that begins after Step 2 takes effect.

This approach for Step 2 sources that have obtained a minor source construction permit or non-applicability determination differs from the approach described previously for source that obtained a PSD permit prior to Step 1. As described previously, a Step 1 source that is authorized to begin actual construction before January 2, 2011 under a previously-issued PSD permit may begin actual construction under that permit after January 2, 2011 without modifying the PSD permit to address GHGs. However, a Step 2 source that was not required to obtain a PSD permit before Step 2 begins would need to obtain a PSD permit addressing GHGs if it has not yet begun actual construction prior to Step 2, even if the source had obtained any preconstruction approvals that were necessary to authorize construction prior to Step 2. This is because such a Step 2 source that begins actual construction after Step 2 would likely be doing so without having any permit meeting the requirements of paragraphs (j) through (r)(5) of 40 CFR 52.21 or 51.166, or a state equivalent. A source that has obtained only a minor source permit prior to Step 2 but that begins actual construction after July 1, 2011 would violate the requirements of 40 CFR 52.21(a)(2)(iii) or 51.166(a)(7)(iii), or a state equivalent, unless the source took care to ensure that it was authorized to construct under a PSD permit or could demonstrate that the source's minor source construction permit makes clear that requirement of paragraphs (j) through (r)(5) of 40 CFR 52.21 or 51.166, or a state equivalent, would be met by the source even though such a permit was not nominally a PSD permit. This difference in approach for non-PSD sources is driven by the terms of 40 CFR 52.21(a)(2)(iii) and 51.166(a)(7)(iii). Since we have not provided any prior notice that we might be considering revisions to 40 CFR 52.21 and 51.166 to address this topic, we are unable to revise the regulations in this action to achieve the same result for non-PSD sources as for PSD sources. Furthermore, at the present time, we see no indication that this difference in approach is unreasonable since non-PSD sources will not trigger permitting for GHG until Step 2 (only anyway PSD source trigger in Step 1). Thus sources will have until July 1, 2011, an additional 6 months of lead time (for a total of more than 14 months), to prepare for the transition described here. Nevertheless, we recognize that the transition to the increased coverage of new sources and modifications that occurs in July will represent an unusual occurrence that may have unanticipated impacts. For this reason it is important to note that nothing in this rule forecloses our ability to further address such impacts, as necessary, by adopting rule changes or using other available tools.

EPA has previously promulgated exemptions that have authorized some sources that were not previously subject to the PSD regulations to commence construction on the basis of minor source permits after the date new PSD requirements have took effect in 1978 and 1980. *See, e.g.,* 40 CFR 52.21(i)(1)(iv)–(v). There is a notable distinction between these provisions, which use the term "commence construction," and the terms of 40 CFR 52.21(a)(2)(iii) and 51.166(a)(7)(iii), which use the term "begin actual construction." "Commence construction" is defined more broadly than "begin actual construction" to include obtaining all necessarily preconstruction approvals and either beginning actual on-site construction or entering into binding contracts to undertake a program of actual construction. 40 CFR 52.21(b)(9); 40 CFR 51.166(b)(9). The term "commence construction" is also defined in the CAA. 42 U.S.C. 7479(2)(A). Among

other purposes, the term "commence construction" is generally used in the Act and EPA regulations to distinguish construction activities that are exempt from new PSD permitting requirements from those that are not. *See, e.g.,* 42 U.S.C. 7475(a); 40 CFR 52.21(i)(1)(i)–(v). In the absence an explicit exemption in the CAA or the PSD regulations that uses the term "commence construction," we do not believe we can use the date a source "commences construction" under a minor source construction permit approval as a demarcation point for Step 2 sources that may continue ongoing construction activities without having to obtain a PSD permit based on emissions of GHGs. Since we did not provide prior notice of an intention to adopt transition provisions applicable to this situation, we are unable to adopt such an exemption in this action that applies the term commence construction in this context. Consequently, the approach described previously applies the term "begin actual construction" based on the language in 40 CFR 52.21(a)(2)(iii) and 51.166(a)(7)(iii).

d. Transitional Issues for Title V Permitting

Since the title V permitting regulations already include a robust set of provisions to address the incorporation of new applicable requirements and other transitional considerations, we do not see grounds to establish unique transition or grandfathering provisions for GHGs in this action. Furthermore, since the purpose of title V is to collect all regulatory requirements applicable to a source and ensure compliance, we do not believe special exemptions for GHG requirements are likely to be justified. The existing title V rules do not provide any exemptions that relieve the obligation to incorporate all applicable requirements into a title V permit. However, the title V regulations contain numerous provisions that allow a reasonable period of time for incorporating new applicable requirements or applying for a title V permit that was not previously required. Transitional issues for incorporation of GHG requirements into title V permitting generally involve questions in the following categories: (1) Permit application requirements for sources not previously subject to title V that will become subject to title V requirements in Step 2 of the phase-in; (2) the need for updates or amendments to title V permit applications that are pending when GHGs become subject to regulation in Step 1 of the phase-in; and (3) the incorporation of new applicable requirements for GHGs into existing permits for sources currently subject to title V.

With respect to the first category, a title V source applying for the first time must submit its permit application within 12 months after the source "becomes subject to the [operating] permit program" or such earlier time that the permitting authority may require (*see* 40 CFR 70.5(a)(1)). Sources not otherwise subject to title V can become major sources subject to title V due to emissions of GHG no sooner than July 1, 2011. If a source becomes "subject to the [operating] permit program" on July 1, 2011, then its permit application under the title V operating permit program would typically have to be submitted no later than July 1, 2012.

There are also existing regulations relevant for the second category of GHG transition issues, where sources currently subject to title V have title V permit applications pending with a permitting authority as of January 2, 2011. Where additional applicable requirements become applicable to a source after it submits its application, but prior to release of a draft permit, the source is obligated to supplement its permit application. *See* 40 CFR 70.5(b); 71.5(b). Furthermore, title V permits are generally required to contain provisions to assure compliance with all applicable requirements at the time of permit issuance. *See* CAA section 504(a); 40 CFR 70.6(a)(1) and 71.6(a)(1). If a permitting authority determines that additional information is necessary to evaluate or take final action on an application (*e.g.,* because of uncertainty over whether a draft permit assures compliance with all applicable requirements), it may, and should, request additional information from the source in writing and set a reasonable deadline for a response. *See* 40 CFR 70.5(a)(2); 71.5(a)(2).

Likewise, the existing title V regulations provide sufficient transition for the third category of issues, where a source has additional GHG-related applicable requirements (such as the terms of a PSD permit) that must be incorporated into its existing title V permit. Where a source is required to obtain a PSD permit, the source must apply for a title V permit or permit revision within 12 months of commencing operation or on or before such earlier date as the permitting authority may establish (or prior to commencing operation if an existing title V permit would prohibit the construction or change in operation). *See* 40 CFR 70.5(a)(1)(ii); 71.5(a)(1)(ii); *see also* 40 CFR 70.7(d) and (e); 71.7(d) and (e) (permit modifications). In addition, where a source becomes subject to additional applicable requirements, the permitting authority is required to reopen the permit to add those applicable requirements if the permit term has three or more years remaining and the applicable requirements will be in effect prior to the date the permit is due to expire. *See* 40 CFR 70.7(f)(1)(i); 71.7(f)(1)(i).

Finally, EPA notes that the existing title V regulations require sources to furnish permitting authorities, within a reasonable time, any information the permitting authority may request in writing to determine whether cause exists for modifying, revoking, and reissuing, or terminating the permit, and for other reasons, and further provide that permitting authorities shall reopen and revise permits if EPA or the permitting authority determine that the permit must be revised or revoked to assure compliance with applicable requirements. *See* 40 CFR 70.6(a)(6)(v); 71.6(a)(6)(v) and 70.7(f)(1)(iv); 71.7(f)(1)(iv).

Thus, EPA believes that the existing title V regulations provide an adequate regulatory framework for managing the transition to incorporating GHG requirements in title V permits and additional specific exemptions or transition rules for title V are not currently warranted.

VI. What are the economic impacts of the final rule?

This section of the preamble examines the economic impacts of the final rule including the expected benefits and costs for affected sources and permitting authorities. The final rule uses a phased-in approach for requiring sources of GHG emissions to comply with title V operating permit and PSD statutory requirements, essentially lifting this burden for the phase-in period for a large number of smaller sources of GHG. Thus, this rule provides regulatory relief rather than regulatory requirements for these smaller GHG sources. For larger sources of GHGs that will be required to obtain title V permits and/or comply on PSD requirements, there are no direct economic burdens or costs as a result of this final rule, because these requirements are not imposed as a result of this rulemaking. Statutory requirements to obtain a title V operating permit or to adhere to PSD requirements are already mandated by the CAA and by existing rules, not by this rule. Similarly, this rule will impose costs to society in the form of foregone environmental benefits resulting from GHG emission reductions that, absent this rule, might otherwise

have occurred at sources deferred from permitting during the phase-in period.

The RIA conducted for this final rule provides details of the benefits or regulatory relief that smaller GHG sources will experience in terms of costs avoided as a result of this final rule and the potential for social costs in terms of foregone environmental benefits during this 6-year period. Complete details of the RIA conducted for this final rule may be found in the document "Regulatory Impact Analysis for the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," in the docket for this rulemaking.

This rulemaking provides permitting thresholds for sources of GHG that exceed levels contained in the CAA, and these levels are phased-in steps based upon application of the "administrative necessity" and "absurd results" doctrines as explained in section V.B. For Step 1, which is effective from January 2, 2011, through June 30, 2011, only sources required to undergo title V or PSD permitting based upon non-GHG air pollutants are required to obtain an operating permit or PSD permit to include GHG emissions (referred to as the "anyway" threshold). Step 2, effective from July 1, 2011, until such time as EPA acts on a rule to amend it (which for reasons described previously, we assume is June 30, 2013, for the purposes of this analysis), will phase in title V permit requirements for larger sources emitting GHG above 100,000 tpy CO_2e (if they do not already have one) and phase in for such sources, PSD requirements when they are newly constructed or modify in a way that increases emissions by more than a 75,000 tpy CO_2e significance level. Step 2 is referred to as the 100,000 tpy CO_2e threshold. Thereafter, EPA makes an enforceable commitment to consider a possible Step 3 to further lower thresholds below 100,000 tpy CO_2e and/or permanently exclude some sources from the program(s), but only after a regulatory process is conducted addressing "administrative necessity" and "absurd results" considerations based upon the actual permitting experiences in the first two steps of the phase-in. In addition, EPA provides a deferral of permitting until we take required action in April 2016 for sources and modifications that emit below 50,000 tpy CO_2e. The deferral will end when a required study is conducted of the permitting process for sources of GHG and EPA acts, based on the study, to promulgate a rule that describes the additional GHG permitting requirements beyond 2016. In the 6 years following promulgation of this rule, the EPA estimates that compared to baseline estimates that do not include the effects of this rule, over six million sources of GHG emissions in total will be allowed to continue to operate without a title V operating permit. During this period, tens of thousands of new sources or modifying sources each year will not be subject to PSD requirements for GHG. For this large number of smaller sources, this rule alleviates the regulatory burden associated with obtaining an operating or PSD permit or complying with NSR BACT requirements. Therefore, this final action may be considered beneficial to these small sources because it provides relief from regulation that would otherwise be required.

This decision does potentially have environmental consequences in the form of higher emissions during the 6-year period of time (generally because emissions increases would have been lower if BACT were applied). These consequences are limited due to the fact that sources between 100/250 and 100,000 tpy CO_2e account for an estimated 11 percent of the six directly emitted GHG nationally from industrial, commercial, and residential source categories, while representing over 95 percent of the total number of sources potentially requiring an operating or PSD permit for GHG under current permitting thresholds in the CAA. Moreover, requiring such a large number of small sources to obtain permits for the first time would overtax the permitting authorities' abilities to process new permits and would therefore interfere with any such benefits actually being achieved. Moreover, reductions from these small sources will still be occurring, notwithstanding the fact that permitting requirements would not apply to them. These smaller sources of GHGs will be the focus of voluntary emission reduction programs and energy efficiency measures that lead to reductions in GHGs. We will also reevaluate this decision after a 6-year period and complete a study of the implications for those sources and permitting authorities of permitting smaller GHG sources beyond 2016.

In reaching the preceding decisions for this final rule, we carefully considered comments received on the Tailoring Rule proposal. We received several comments specifically on our description of the impacts of this rule. Most of these comments disagreed with our assertion that the rule is a "relief" rule. Others assert that we should have prepared a more comprehensive RIA than prepared for the rule proposal. Those commenting contend: (1) We understated the burdens of the rule while overstating its relief at proposal; (2) we erroneously omitted the impacts for "larger sources" of GHGs from the proposal RIA and should have recognized the burden to "larger sources" due to other GHG actions; (3) the economic impacts the rule will have on industry and the U.S. economy and society in general will be burdensome, especially given the current state of the economy; and (4) we need to propose a full RIA or a complete estimation of impacts to comply with CAA section 307(d) and the APA.

EPA has carefully considered the comments addressing the issue of whether the Tailoring Rule is a regulatory "relief rule," and we are not persuaded that we erred in concluding that the effect of the Tailoring Rule is to provide regulatory relief to a large number of sources of GHG for a period of up to 6 years. This final rule will provide relief from title V permitting to over 6 million sources of GHG in this country. Likewise tens of thousands of sources potentially subject to PSD permitting requirements annually for GHG will have regulation postponed for a period of up to 6 years under this rule, followed by an additional required rule addressing the period beyond 6 years. While larger sources of GHG may be required to obtain title V permits or modify existing permits and to comply with PSD requirements, these burdens result not from the Tailoring Rule but rather from the CAA requirements to apply PSD and title V to each pollutant subject to regulation, which are triggered when the LDVR takes effect. To clearly illustrate this, consider what would occur if EPA did not complete the Tailoring Rule. Sources would not be relieved of the requirement to obtain permits addressing each pollutant subject to regulation when they construct or modify, nor would they be relieved of their obligation to obtain title V permits. Instead, these requirements would simply apply to a much larger population of sources and modifications, and would lead to the absurd results and severe impairment to program implementation that this rule is designed to address.

In response to comments asserting that the RIA completed for proposal of this rulemaking: (1) Understated the burdens of the rule and overstated the benefits, (2) did not fully recognize the rule will be burdensome, especially given the current state of the economy; and (3) does not consider a complete estimation of impacts to comply with the APA and CAA section 307(d) and needs to correct flawed or erroneous

assumptions, EPA did make improvements and modifications to the RIA completed for this final rule. Based upon comments, EPA modified estimates of the number of sources affected at various threshold levels upward. EPA also improved the burden estimates associated with obtaining permits for sources and permitting authorities.

After consideration of the burden imposed by the proposed rule with these improved estimates for affected sources, the EPA modified the steps of the phase-in period to include two initial steps, described in section V, that are higher, and therefore cover fewer sources and are less burdensome than the proposal threshold of 25,000 tpy CO_2e emissions. EPA also increased the threshold below which permitting would not apply for 6 years from 25,000 to 50,000 tpy CO_2e. After the initial two step period, EPA has committed to consider lower thresholds but only down to 50,000 tpy CO_2e, and only after a regulatory process that uses information gathered on actual permitting activity during the first two steps of the phase-in period. The RIA conducted for the final rule also incorporates improvements in our estimates of the number of sources affected at alternative thresholds and improved estimates of the costs of obtaining permits by sources and processing permits by permitting authorities. The EPA acknowledges that the regulatory relief associated with the control costs due to BACT requirements for PSD new and modifying sources is not included in the RIA for the final rule due to the lack of sufficient data about the nature of those requirements. However, it is the case that, as it relates to burden, those estimates would simply increase the amount of regulatory relief associated with this final rule.

Finally, with regard to comments that the RIA should have been a more comprehensive analysis to include the larger sources of GHG that will be required to obtain permits when GHG are regulated, the EPA maintains as previously explained that there are no direct economic burdens or costs as a result of this rule for these sources. Requirements for larger GHG sources to obtain title V or PSD permits are already mandated by the Act and by existing rules and are not imposed as a result of the Tailoring Rule. Thus the economic impacts for larger sources of GHG do not occur because of this Tailoring Rule. To include these larger sources in the RIA would actually be an inaccurate assessment of how this rule affects sources and would ignore the fact that this rule provides regulatory relief.

A. What entities are affected by this final rule?

As previously stated, this final rule does not itself result in the application of permitting requirements to any industrial, commercial, or residential entities. Entities affected by this rule are those who experience regulatory relief due to the higher thresholds and deferred applicability set forth in this rule. This action increases the threshold to obtain a title V and PSD permitting from statutory CAA levels using a phased-in step process as previously discussed. As Table VI–1 shows, this action lifts permitting requirements for over six million potential title V sources in total and tens of thousands of potential PSD new sources annually that would be otherwise required by the CAA to obtain permits. Under Step 1, over six million title V sources in total and approximately 20 thousand new PSD sources per year will not be required to obtain permits. Under Step 2, requiring sources over a 100,000 tpy CO_2e to obtain a permit, over six million title V sources in total and approximately 19.9 thousand new PSD sources per year will obtain regulatory relief. While the threshold approach differs for Steps 1 and 2 of the phase-in plan, the estimated number of sources affected does not differ greatly as shown in Table VI–1. Sectors experiencing this regulatory relief include electricity, industrial, energy, waste treatment, agriculture, commercial and residential.

TABLE VI–1—ESTIMATED NUMBER OF AFFECTED SOURCES EXPERIENCING REGULATORY RELIEF [1, 2]

Sector	Number of sources experiencing regulatory relief			
	Step 1 Anyway		*Step 2 100,000 tpy*	
	Title V	New PSD	Title V	New PSD
Electricity	285	93	285	33
Industrial	170,910	604	170,654	599
Energy	2,588	48	2,536	44
Waste Treatment	3,358	2	3,165	1
Agriculture	37,351	299	37,351	299
Commercial	1,355,921	12,041	1,355,870	12,039
Residential	4,535,500	6,915	4,535,500	6,915
Totals	6,105,913	20,002	6,105,361	19,930
% Emissions Covered [3]	13%		11%	

Notes: (1) Number of sources is determined on a PTE basis. Estimates for title V are the total number of sources expected to experience regulatory relief. PSD sources are annual estimates of newly constructed facilities and do not include modifications at existing facilities that may also be subject to PSD requirements. (2) See appendices to "Regulatory Impact Analysis of the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" for more details of how thresholds and sources affected are developed. (3) Percentage of emissions covered represent estimated actual emissions from sources expected to experience regulatory relief as a percentage of total stationary source GHG emissions.

B. What are the estimated annual benefits to sources due to regulatory relief from the statutory requirements?

EPA estimated the annual benefits (avoided costs) to sources of GHG emissions and permitting authorities anticipated from this final rule. In addition, an accounting of the benefits from this action as measured by avoided permit processing costs for state, local, and tribal permitting authorities is provided. These benefits or avoided costs relate specifically to permit burden costs postponed for smaller sources of GHG emissions otherwise required to obtain an operating permit under title V or required to modify an existing permit to address GHG

emissions. Avoided costs shown also include permit burdens for additional PSD permits postponed for new or modifying smaller sources of GHG, as well as the avoided costs to state, local and tribal permitting authorities. We are providing an illustrative monetary estimate of statutory permitting requirements to show the magnitude of the savings that hypothetically result from this rulemaking. While we believe it is impossible to implement these permit requirements by January 2, 2011, for the reasons laid out in this preamble, it is useful to understand the scale of what the burden may have been. For sake of simplicity, we refer to this illustrative monetary estimate as the monetized benefits of the regulatory relief presented by this rulemaking or regulatory relief benefits for brevity.

These benefit estimates do not consider avoided emission control costs associated with PSD requirements for potential BACT requirements. Estimates for BACT are unavailable at this time because of the difficulty predicting the results of the BACT process as it would be applied to new pollutants and classes of sources for which there is no previous BACT experience on which to rely.

1. What are annual estimated benefits or avoided burden costs for title V permits?

Table VI–2 shows that the estimated annual title V benefits to sources and to permitting authorities in terms of avoided information collection cost resulting from this final action to be approximately $70,535 million under Step 1 of the phase-in. These avoided costs become $70,520 million annually under Step 2 of the phase-in. where permitting is required for sources at or above the 100,000 tpy CO_2e threshold. Under the anyway threshold Step 1, approximately $49,457 million in regulatory relief will accrue to sources and approximately $21,078 million to permitting authorities annually in the form of avoided permit processing costs. With the 100,000 tpy CO_2e threshold for phase-in Step 2, these annual regulatory relief benefits are expected to be quite similar at $49,447 million for sources of GHG emissions and $21,072 million for permitting authorities. Industrial sources permitting costs are estimated to be $46.4 thousand per permit for a new permit and $1.7 thousand for a permit revision. The EPA estimates that over tens of thousands of industrial sources per year will avoid incurring these permitting costs under Steps 1 and 2 of the phase-in period. The cost for a permit for new commercial and residential sources is estimated to be $23.2 thousand per permit with approximately 2 million of these permits avoided annually.

State, local, and tribal permitting authorities will also benefit in terms of avoided permitting administrative costs of over $21 billion as a result of the decisions final in this action. For industrial sources, the cost for permitting authorities to process a new industrial title V permit is approximately $19.7 thousand per permit and $1.8 thousand for a permit revision. Similarly, permitting authority avoided permit processing costs are approximately $9.8 thousand per permit for a new commercial or residential title V permit. All estimates are stated in 2007 dollars.

TABLE VI–2—ANNUAL TITLE V REGULATORY RELIEF FOR SOURCES AND PERMITTING AUTHORITIES [1, 2]

Activity	Cost per permit (2007$)	*Step one anyway*		*Step two 100,000 tpy CO_2e*	
		Number of permits	Avoided costs (millions 2007$)	Number of permits	Avoided costs (millions 2007$)
Sources:					
New Industrial	$46,350	71,829	$3,329	71,657	$3,321
New Commercial/Residential	23,175	1,985,948	46,024	1,985,930	46,024
Permit revisions due to GHG	1,677	61,836	104	60,921	102
Source Total	.....	2,119,613	49,457	2,118,508	49,447
Permitting Authority:					
New Industrial	19,688	71,829	1,414	71,657	1,410
New Commercial/Residential	9,844	1,985,948	19,550	1,985,930	19,550
Permit revisions due to GHG	1,840	61,836	114	60,921	112
Permitting Authority Total	.....	2,119,613	21,078	2,118,508	21,072
Total Title V Regulatory Relief	.....	.....	70,535	.....	70,520

Notes: Sums may not add due to rounding.

[1] Annual title V avoided costs estimates represent information collection costs for one third of the total number of title V sources obtaining regulatory relief shown in Table VI–1 potentially requiring permits or permit revisions for GHG.

[2] More details on these estimated regulatory relief benefits are available in the appendices to the "Regulatory Impact Analysis for the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule."

2. What are annual benefits or avoided costs associated with NSR permitting regulatory relief?

Table VI–3 summarizes the estimated annual permit burden costs avoided by sources and permitting authorities for PSD permitting due to this Tailoring Rule. The benefits associated with avoided cost of compliance for BACT for these sources is not included in these estimates due to a lack of available data. The estimated avoided burden or reporting and recordkeeping cost that would occur absent this rule for new industrial sources to obtain permits is estimated to be $84.5 thousand for a modifying PSD industrial source and $59.2 thousand for a modifying commercial or multi-family residential source. New PSD sources will also be required to obtain a title V permit increasing these costs to $130.9 thousand per permit for new industrial sources and to $82.3 thousand per permit for new commercial or multi-family residential sources. (Note the title V costs for these new PSD sources have been included in title V estimates shown in Table VI–2.) New and modifying sources avoid approximately $5.5 billion annually in PSD permitting costs with this rule under the phase-in Step 1 threshold. Under the phase-in Step 2, 100,000 tpy CO_2e threshold and 75,000 tpy CO_2e significance level, this avoided PSD permitting cost estimate

becomes $5.4 billion annually. State, local, and tribal permitting authorities are expected to avoid about $1.51 billion annually in administrative expenditures associated with postponing PSD program requirements for these GHG sources under Step 1 and $1.49 billion under Step 2. All estimates are shown in 2007 dollars.

TABLE VI–3—ANNUAL PSD REGULATORY RELIEF FOR SOURCES AND PERMITTING AUTHORITIES [1, 2]

Activity	Cost per permit (2007$)	*Step one anyway*		*Step two 100,000 tpy threshold, 75,000 significance level*	
		Number of permits	Avoided costs (millions 2007$)	Number of permits	Avoided costs (millions 2007$)
Sources:					
New Industrial	$84,530	26,089	$2,205	25,174	$2,128
New Commercial/Residential	59,152	55,509	3,283	55,505	3,283
Source Total		81,598	5,489	80,679	5,411
Permitting Authority:					
New Industrial	23,243	26,089	606	25,174	585
New Commercial/Residential	16,216	55,509	900	55,505	900
Permitting Authority Total		81,598	1,506	80,679	1,485
Total Title V Regulatory Relief			6,995		6,896

Notes: Sums may not add due to rounding.

[1] All estimates are based upon PTE. Regulatory relief shown represents annual estimates of PSD permitting costs avoided under Steps 1 and 2 of the phase-in period.

[2] More details on these estimated regulatory relief benefits are available in the appendices to the "Regulatory Impact Analysis for the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule."

C. What are the economic impacts of this rulemaking?

This final rulemaking does not impose economic burdens or costs on any sources or permitting authorities, but should be viewed as regulatory relief for smaller GHG emission sources and for permitting authorities. Although sources above the thresholds set in this rule will become subject to permitting on January 2, 2011, those impacts are not attributable to the present rulemaking. Rather they are mandated by the CAA and existing regulations and automatically take effect independent of this action.

In addition to considering the regulatory relief expected for affected entities as a result of this final rule, the EPA considered the impact of this rulemaking to small entities (small businesses, governments and non-profit organizations) as required by the *Regulatory Flexibility Act* (RFA) and the *Small Business Regulatory Enforcement Fairness Act* (SBREFA). For informational purposes, the RIA includes the SBA definition of small entities by industry categories for stationary sources of GHG and potential regulatory relief from title V and NSR permitting programs for small sources of GHG. Since this rule does not impose regulatory requirements but rather lessens the regulatory burden of the CAA requirements to smaller sources of GHG, no economic costs are imposed upon small sources of GHG as a result of this final rule. Rather this action provides regulatory relief for small sources. These avoided costs or benefits accrue because small sources of GHG are not required to obtain a title V permit and new or modifying small sources of GHG are not required to meet PSD requirements. Some of the small sources benefitting from this action are small entities, and these entities will benefit from the regulatory relief finalized by this rule. For discussion of comments received and EPA responses regarding small entities impacts, *see* section VII of this preamble.

D. What are the costs of the final rule for society?

EPA examined the social costs of this final rule. These social costs represent the foregone environmental benefits that will occur as a result of the regulatory relief offered to sources of GHG emissions. This action is one of regulatory relief since it increases the emissions thresholds for the title V and PSD programs, as they apply to sources of GHG emissions, to levels above those in the CAA. In this preamble section, the benefits or avoided regulatory costs of such relief are discussed, but there is also a social cost imposed by such relief, because this rule may forego some of the possible benefits associated with title V and PSD programs for sources of GHG emissions below the permitting thresholds established. These benefits are those attributed to title V and PSD permitting programs in general. These benefits are based upon the relevance of these programs to policymaking, transparency issues, and market efficiency, and therefore are very difficult to quantify and monetize. For title V, they include the benefits of improved compliance with CAA requirements that stem from (1) Improved clarity regarding applicability of requirements, (2) discovery and required correction of noncompliance prior to receiving a permit, (3) improving monitoring, recordkeeping, and reporting concerning compliance status, (4) self-certification of compliance with applicable requirements initially and annually, and prompt reporting of deviations from permit requirements, (5) enhanced opportunity for the public to understand and monitor sources' compliance obligations, and (6) improved ability of EPA, permitting authorities, and the public to enforce CAA requirements. However, it is important to remember that a title V permit generally does not add new requirements for pollution control itself, but rather collects all of a facility's applicable requirements under the CAA in one permitting mechanism. Therefore, the compliance benefits above are less when title V permits contains few or no CAA applicable requirements. During the initial steps of the phase-in plan established under this action, we expect that the vast majority of sources excluded from title V would be sources that have no CAA applicable

requirements for GHG emissions and few or no requirements for other pollutants because their emissions of those pollutants are so small. For this reason, while it is extremely difficult to measure the degree of improved compliance, if any, that would be foregone, or to quantify the social costs that would be imposed, we expect that they would be small. We will be evaluating this issue further during subsequent phases.

For PSD, the primary social cost imposed by the Tailoring Rule stems from the foregone benefit of applying BACT to the tens of thousands of small new sources and modifications that will be below our final thresholds during the first steps of the phase-in. This social cost potentially weighs against the cost savings described previously that stem (in part) from avoiding the administrative and control costs of applying BACT to these sources. The BACT requirement assures that new and modified sources, when they increase their emissions are using state-of-the-art emission controls and affords the public an opportunity to comment on the control decision. It does not prohibit increases but it assures that such controls are applied. Delaying the BACT requirement for numerous small sources during the first steps of the phase-in for this final rule could allow increases from these smaller sources that are greater than they would be if BACT were applied. A detailed analysis of this difference is beyond the scope of this rule, because we do not have detailed information on the universe of these tens of thousands of small PSD actions, the candidate BACT technologies for each of them, how permitting authorities would make the BACT decisions, and how the BACT limit would compare to what would otherwise be installed absent BACT.

It is not possible at this time to quantify the social costs of avoided BACT. However, we note that the universe of possible emissions that would be regulated by sources excluded under the Tailoring Rule is small compared to those that would remain subject to PSD. The sources excluded in these first two steps of the phase-in plan of this action comprise only 11 percent of total stationary source GHG emissions, while 67 percent remain subject to regulation. Furthermore, we expect the emissions differences due to BACT controls for such sources to be relatively small due to the lack of available capture and control technologies for GHG at such sources that are akin to those that exist for conventional pollutants and sources, as well as the likelihood that even in the absence of BACT such sources would already be installing relatively efficient GHG technologies to save on fuel costs. Thus, while potential benefits would be foregone by excluding smaller sources from the permitting programs, these benefits are likely to be small. Under the Tailoring Rule, we will be working during the 6-year period to greatly improve our understanding of both the administrative costs of regulating and the social costs of not regulating smaller sources under PSD and title V, and we will be relying on that information to support our future threshold analyses called for under the action.

In reaching the decisions for this Tailoring Rule, the EPA recognizes that GHG emissions can remain in the atmosphere for decades to centuries, meaning that their concentrations become well-mixed throughout the global atmosphere regardless of emission origin, and their effects on climate are long lasting and significant. A detailed explanation of climate change and its impact on health, society, and the environment is included in EPA's TSD for the endangerment finding action (Docket ID No. EPA–HQ–OAR–2009–0171). The EPA recognizes the importance of reducing climate change emissions for all sources of GHG emissions including those sources afforded regulatory relief in this rule and plans to address potential emission reductions from these small sources using voluntary and energy efficiency approaches. Elsewhere, we have discussed EPA's interest in continuing to use regulatory and/or non-regulatory tools for reducing emissions from smaller GHG sources because we believe that these tools will likely result in more efficient and cost-effective regulation than would case-by-case permitting.

E. What are the net benefits of this final rule?

The net benefits of this GHG tailoring rule represent the difference between the benefits and costs of this rule to society. As discussed in this preamble, this rule is one of regulatory relief and the benefits to society are estimates the regulatory relief (avoided permit burden costs) to sources and permitting authorities for Steps 1 and 2 of the phase-in period. The social costs of the rule are the foregone environmental benefits in the form of potential GHG emission reductions that could occur during the phase-in period and are discussed qualitatively.

This rulemaking provides regulatory relief for a phase-in period to smaller sources of GHG by phasing in the statutory permitting threshold at levels above statutory requirements. This final rule establishes thresholds and PSD significance levels for Steps 1 and 2 of the phase-in period (the 2.5 year period between January 2, 2011 and July 1, 2013), commits to considering a further Step 3, and indicates floor title V and PSD threshold levels from July 1, 2013 through April 30, 2016. The net benefits of the final rule for Steps 1 and 2 are $193,598+*B*–*C* million for the 2 and one-half year period where *B* denotes the unquantified benefits and *C* the quantified costs of this final rule. These unquantified benefits of this rule include the avoided PSD BACT costs for new and modifying sources. The unquantified costs previously discussed relate to the foregone environment benefits or GHG emission reductions that might be possible during the 2.5 year Step 1 and 2 phase-in period. These estimates are subject to significant uncertainties that are discussed at length in the Regulatory Impact Analysis for the Prevention of Significant Deterioration and Title V GHG Tailoring Rule contained in the docket to this final rule. All dollar estimates shown are based upon 2007$.

TABLE VI–4—NET BENEFITS OF THE RULE FOR STEPS 1 AND 2 OF THE PHASE-IN PERIOD

	Final rule amounts (millions of 2007$)
Benefits—Regulatory Relief:	
Sources	
Title V [1]	$123,624
PSD [2]	$13,567
Total Source Regulatory Relief	$137,190
Permitting Authority:	

TABLE VI–4—NET BENEFITS OF THE RULE FOR STEPS 1 AND 2 OF THE PHASE-IN PERIOD—Continued

	Final rule amounts (millions of 2007$)
Title V [1]	$52,684
PSD [2]	$3,724
Total Permitting Authority	$56,407
Total Regulatory Relief	$193,598+*B*
Costs—Foregone GHG Emission Reductions	
Title V & PSD	*C*
Net Benefits [3]	$193,598+*B–C*

Benefits represent regulatory relief for sources with the annual potential to emit below the thresholds shown.
B—Unquantified benefits of the rule include regulatory relief from BACT requirements for PSD sources.
C—Unquantified social costs of tailoring rule represents economic value of foregone environmental benefits (potential GHG emission reductions) during Step 1 and 2 of the phase-in period. Foregone GHG emission reductions are not known at this time.
[1] Reflects estimates of regulatory relief or avoided permit burden costs for title V GHG sources and permitting authorities.
[2] Shows estimates of regulatory relief or avoided permit burden costs for GHG PSD sources and permitting authorities.
[3] Includes one-half year of Step 1 (anyway threshold), 2 years of Step 2 (100,000 threshold).

VII. Comments on Statutory and Executive Order Reviews

In this section, we provide responses to comments we received for various Executive Orders.

A. Comments on Executive Order 12866—Regulatory Planning and Review

At proposal, EPA prepared an analysis of the potential costs and benefits associated with EPA's Tailoring Rule proposal in an RIA. Several commenters state that EPA's failure to estimate the full costs of the effects of its interpretation of PSD applicability in the proposed Tailoring Rule violates Executive Order 12866. Some of these commenters maintain that Executive Order 12866 directs EPA to submit to the Office of Management and Budget (OMB) new significant regulations under consideration by the EPA. These commenters assert that, in the section 202 rule, EPA failed to analyze the effect on stationary sources in the cost benefit analysis and there is no indication that EPA included these impacts in its submission to OMB. According to the commenters, in EPA's proposal for this rulemaking, EPA has similarly failed to analyze the costs and benefits of triggering PSD for stationary sources. The commenters assert that without this key information, OMB could not fully review the impacts of the proposed rule. The commenters believe that EPA's failure to account for known costs that will occur as a direct result of the promulgation of the proposed rule in conjunction with the section 202 rule violates several applicable requirements of Executive Order 12866, including sections 6(B)(ii) and 6(C)(iii), which require assessments of the potential costs and benefits of the regulatory action and "reasonably feasible alternatives to the planned regulation, identified by the Agencies or the public * * *" thereby violating both the APA and CAA section 307(d) because they deprive businesses and permitting authorities alike of a meaningful opportunity to comment on the rule.

The EPA has prepared a revised RIA assessing the benefits and costs of the final Tailoring Rule to support this rulemaking in accordance with Executive Order 12866, as was done with the proposal for this rulemaking. Similarly, the RIA completed for this action is subject to review by an Interagency review panel that includes OMB, as was the case with the proposal RIA. Further, the RIA completed for this final rule fully assesses the known benefits and costs associated with the Tailoring Rule. This final rule is one of regulatory relief from statutory requirements in which a large number of sources of GHGs will be relieved of the burden of title V and PSD permitting for a period of at least 6 years. This final rule will provide relief from title V permitting to over 6 million sources of GHG in this country. Likewise tens of thousands of sources potentially subject to PSD permitting requirements for GHGs will have regulation postponed for a period of at least 6 years. While larger sources of GHG may still be required to obtain title V permits or modify existing permits and to comply with PSD requirements, these burdens result from existing statutory requirements, not from this final Tailoring Rule.

B. Comments on the Paperwork Reduction Act

At proposal, we stated in the preamble that we did not believe that the proposal would impose any new information collection burden. We concluded that the proposed action would reduce costs incurred by sources and permitting authorities relative to the costs that would be incurred if EPA did not revise the rule and provided estimates of those reduced costs. Further, we stated that, despite our estimated burden reductions, it was unnecessary for us to submit a new ICR to the OMB because the ICR contained in the existing regulations for PSD (*see, e.g.,* 40 CFR 52.21) and title V (*see* 40 CFR parts 70 and 71) had already been approved under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and was assigned OMB control number 2060–0003 and OMB control number 2060–0336, respectively.

However, several commenters disagree that it was unnecessary for us to submit a new ICR for the proposed action. These commenters believe that (1) prior approval of an ICR for the PSD and title V programs ignores the fact that there would be an increase in the paperwork burden as a result of applying PSD and title V permitting requirements; and (2) unless EPA resubmits the information collection approval request to OMB with a proper and fully-inclusive analysis, EPA will lack authority to collect information from stationary sources for PSD and title V GHG emissions permitting.

As we stated in the proposal, this is a burden relief rule and as such it does not impose any new requirements for the NSR or title V programs that are not currently required. For that reason, we concluded that for purposes of this rule it was unnecessary for us to submit a new ICR to the OMB and that the ICR contained in the existing regulations for PSD (*see, e.g.,* 40 CFR 52.21) and title V (*see* 40 CFR parts 70 and 71) that had already been approved under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and was assigned OMB control number 2060–0003 and OMB control number 2060–0336, respectively, still applies.

Nevertheless, we understand that once GHGs are regulated under the PSD and title V programs, there might be an increase in the overall paperwork burden for these programs. EPA will have to assess this possible burden during the normal course of 3-year renewal ICR process.

C. Comments on the RFA

At proposal, EPA certified that the proposed rule would not have a significant impact on a substantial number of small entities and therefore we are not obligated to convene a formal Small Business Advocacy Review (SBAR) panel. This certification was based upon the fact that the proposed action would relieve the regulatory burden associated with the major PSD and title V operating permits programs for new or modified major sources that emit GHGs, including small businesses. Nevertheless, EPA was aware at proposal that many small entities would be interested in the various GHG rulemakings currently under development and might have concerns about the potential impacts of the statutory imposition of PSD requirements that may occur as a result of the group of EPA actions, notwithstanding the relief provided to small businesses by the Tailoring Rule. For these reasons, and in collaboration with the SBA, EPA conducted an outreach meeting designed to exchange information with small entities that may be interested in these regulations. The outreach effort was organized and led by representatives from EPA's Office of Air Quality Planning and Standards within the Office of Air and Radiation, EPA's Office of Policy Economics and Innovation, the Office of Information and Regulatory Affairs within OMB, and the Office of Advocacy of the SBA. This meeting was conducted on November 17, 2009 in Arlington, VA, and documentation of this meeting, which includes a summary of the advice and recommendations received from the small entity representatives identified for the purposes of this process, can be obtained in the docket for this rulemaking. (*See* Docket No. EPA–HQ–OAR–2009–0517–19130.)

During the comment period, several commenters alleged that EPA inappropriately limited its RIA and RFA/SBREFA analysis, and that had we done a comprehensive analysis, we would not have been able to certify that any of the proposed rules will not have a significant economic impact on a "substantial number of small entities." Thus they conclude that EPA failed to prepare and publicize an initial regulatory flexibility analysis (IRFA). Additional commenters stated that EPA's failure to conduct an IRFA to assess the full costs of the effects of its interpretation of PSD applicability in the proposed Tailoring Rule violates a host of statutes and Executive Orders requiring analysis and public review of regulatory burdens. These commenters conclude that EPA should have convened one or more SBAR Panels.

We are not persuaded that we should have taken into account effects beyond those caused by the Tailoring Rule when we made our certification of no significant economic impact on a substantial number of small entities for this rule. No permitting requirements are imposed by this final Tailoring Rule. Instead, this final Tailoring Rule offers regulatory relief to over an estimated six million sources of GHG emissions that would otherwise be required to obtain a title V permit and tens of thousands of sources of GHG emissions subject to PSD permitting requirements that would otherwise be required statutorily to obtain permit. The RFA does not require that an agency complete a regulatory flexibility analysis or conduct an SBAR panel where the rule does not have any negative impact on small entities. For more discussion of RFA issues, please see the RTC document.

D. Comments on the Unfunded Mandates Reform Act

At proposal, EPA asserted that the Tailoring Rule does not impose unfunded mandates on any entities including sources and permitting authorities. Since the proposed Tailoring Rule is one of regulatory relief, it alleviates the burden of adhering to statutorily required permitting thresholds and does not impose regulatory requirements.

Some commenters on the proposed rule assert that EPA has failed to comply with the requirements of the Unfunded Mandates Reform Act (UMRA), pursuant to which EPA must assess the effects of the proposed rule on state, local, and tribal governments and the private sector. Specifically, these commenters state that section 202 of the UMRA requires EPA to prepare a written statement, including a cost-benefit analysis, for proposed rules with "federal mandates" that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. According to the commenters, in concluding that "the revisions would ultimately reduce the PSD and title V program administrative burden that would otherwise occur in the absence of this rulemaking," EPA did not account for the billions of dollars that permitting authorities and stationary sources will soon be required to spend once PSD is triggered for GHGs. Additionally, a few commenters contend that the EPA underestimated the impacts to public utilities which are owned/operated by local governments and also to state regulatory agencies.

The EPA has carefully considered the comments on unfunded mandates expressed by commenters to the proposed rule. The EPA did complete a RIA for the final rule assessing the benefits and costs of the Tailoring Rule, including any unfunded mandates. As previously discussed, the Tailoring Rule is one of regulatory relief because it increases the GHG emissions threshold for NSR and title V permitting substantially above otherwise statutory requirements. As such, the EPA has determined that this Tailoring Rule does not impose unfunded mandates on any entities. This RIA of the final rule incorporates the extensive changes made in this final rule, including increased threshold levels for title V and PSD above those contained in the proposed rule. While we also incorporated improved estimates of the costs for sources to obtain permits and for permitting authorities to process permits, they do not change our conclusion that this final rule does not impose unfunded mandates on any entities.

E. Comments on Executive Order 13132—Federalism

Some comments received on the proposed rule assert that federalism concerns were ignored, in violation of Executive Order 13132. According to the commenters, EPA cannot maintain that the Tailoring Rule "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 between various levels of government," such that Executive Order 13132 does not apply. Some of these commenters assert that the proposed rulemaking would require radical changes in state laws, interjects GHGs into permit programs never once conceived for that purpose (any more than was EPA's), requires massive staff hiring at state agencies, and rewrites SIPs in place for years or even decades.

As we stated previously, this is a burden relief rule and as such it does not impose any requirements for the NSR or title V programs that are not currently required. In addition, this action does not interject GHGs into the permit programs, nor does it change state laws or SIPs to impose any new permitting requirements. Instead, this

action will significantly reduce the burden and costs incurred by sources and permitting authorities relative to the burden and costs that would be incurred if EPA did not revise the permitting provisions to account for higher applicability thresholds for GHG emissions.

However, since this rule finalizes burden reducing thresholds that will not otherwise apply to the PSD and title V programs, we are aware that a few states may have to amend their SIPs to incorporate these new thresholds if they do not incorporate federal rules by reference and cannot adopt our approach through interpretation. Executive Order 13132 is still not implicated by this rule because it finalizes burden reducing thresholds that would not otherwise apply to the PSD and title V programs.

F. Comments on Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The National Tribal Air Association (NTAA) supports EPA's proposed rule but requests that tribal air grant funding be increased to reflect the air quality-related needs of tribes across the nation, and to allow these tribes the opportunity to implement the CAA's PSD and title V programs. The NTAA states that, not only are tribes eligible for section 103 grant funding to conduct air quality monitoring, emissions inventories, and other studies and assessments, but they may also obtain section 105 grant funding to implement CAA regulatory programs. According to the NTAA, tribes are facing many of the same air-related issues that neighboring state and local jurisdictions are facing, but are significantly underfunded to address such issues.

The Agency is aware and concerned about the resource needs for the tribal air program and we are working to see how grant funding might be increased in the future. Nevertheless and for the purpose of the permitting programs, we want to clarify that tribes that develop Tribal Implementation Plans (TIPs) can charge for permits and tribes with delegation or authorization would develop permit fee programs under their authority (*e.g.,* Navajo's permit fee program for their delegated title V permit program) to fund both the NSR and title V programs. For these reasons, there are a number of ways we would like to work with tribes to address the funding concern, including encouraging delegation or authorization of permitting programs and having model codes available for tribes that want to do TIPs for NSR and title V permitting.

G. Comments on Executive Order 13211—Actions That Significantly Affect Energy Supply, Distribution, or Use

Other commenters assert that EPA's analysis under Executive Order 13211 is insufficient because it addresses only smaller sources. These commenters contend that EPA has not meaningfully examined the energy implications of its proposed actions and interpretations of the CAA. The commenters disagree with EPA's conclusion that the imposition of costly PSD obligations on power plants would have no impact on power supply, distribution, or use, when those plants will have had no time to prepare for compliance and no idea what BACT may be for GHG emissions. Other commenters opine that the adoption of BACT for some industries newly-subject to PSD permitting requirements for GHGs could involve fuel-switching, and increased energy costs (due to the need for a source to convert from coal to natural gas to meet BACT).

Again, this action is a burden relief rule and as such it does not create any new requirements for sources in the energy supply, distribution, or use sectors. For the purpose of the BACT determinations for GHGs, the long-standing top-down BACT selection process still applies. Under the CAA and EPA's implementing regulations, BACT is still an emission limitation based on the maximum degree of emission reduction achievable through application of production processes and available methods, systems, and techniques that considers energy, environmental, and economic impacts. In other words, BACT determinations for GHGs will still have to consider energy, environmental and economic feasibility for the various control technologies under consideration before selecting a particular technology as BACT for a specific source. For that reason, what BACT may be for GHG emissions will vary by source, and the technology that is ultimately selected has to be one that is feasible based on the current energy, environmental and economic impacts that the planned technology might have. Thus, we do not believe that this action is likely to have a significant adverse effect on the supply, distribution, or use of energy.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), this action is an "economically significant regulatory action" because it is likely to have an annual effect on the economy of $100 million or more. Accordingly, EPA submitted this action to the OMB for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the RIA for this final rule. A copy of the analysis is available in the docket for this action and the analysis is briefly summarized in section VII of this preamble.

This rule uses a phased-in approach for requiring larger sources of GHG emissions to comply with title V operating permit and PSD statutory requirements, essentially lifting this burden for a period of at least 6 years for a large number of sources of GHG. Thus, this rule provides regulatory relief rather than regulatory requirements for these GHG sources. For sources of GHG that will be required to obtain title V permits and/or comply with PSD requirements, there are no direct economic burdens or costs as a result of this final rule, because these requirements are not imposed as a result of this rulemaking. Statutory requirements to obtain a title V operating permit or to adhere to PSD requirements are already mandated by the CAA and by existing rules, not by this rule. As a result, this Tailoring Rule annual effect on the economy will be positive because it will result in billions of dollars of regulatory relief during the phase-in period.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Instead, this action will significantly reduce costs incurred by sources and permitting authorities relative to the costs that would be incurred if EPA did not revise the rule. Based on our revised GHG threshold data analysis, we estimate that over 80,000 new and modified facilities per year would be subject to PSD review based on applying a GHG emissions threshold of 100/250 tpy using a CO_2e metric. This is compared to 280 PSD permits currently issued per year, which is an increase of more than 280-fold. Similarly, for title V, we estimate that over six million new sources would be affected at the 100-tpy threshold for GHGs using the CO_2e metric. By increasing the volume of permits by over 400 times, the administrative burden would be unmanageable without this rule.

However, OMB has previously approved the information collection

requirements contained in the existing regulations for PSD (*see, e.g.,* 40 CFR 52.21) and title V (*see* 40 CFR parts 70 and 71) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003 and OMB control number 2060–0336. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of this final action on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. SBA size standards (*see* 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this final action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

We have therefore concluded that this final rule will relieve the regulatory burden for most affected small entities associated with the major PSD and title V operating permits programs for new or modified major sources that emit GHGs, including small businesses. This is because this rule raises the major source applicability thresholds for these programs for the sources that emit GHGs. As a result, the program changes provided in this rule are not expected to result in a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate 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 1 year. Only those few states whose permitting authorities do not implement the federal PSD and title V rules by reference in their SIPs will have a small increase in burden. These states will have to amend their corresponding SIPs to incorporate the new applicability thresholds, since the burden reducing thresholds that we are finalizing with this rule will not otherwise apply to the PSD and title V programs. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As discussed earlier, this rule is expected to result in cost savings and an administrative burden reduction for all permitting authorities and permittees, including small governments.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. These final amendments will ultimately simplify and reduce the burden on state and local agencies associated with implementing the PSD and title V operating permits programs, by providing that a source whose GHG emissions are below the proposed levels will not have to obtain a PSD permit or title V permit. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposed rule from state and local officials.

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

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. There are no tribal authorities, currently issuing major NSR permits; however, this may change in the future.

EPA consulted with tribal officials early in the process of developing this regulation to allow them to have meaningful and timely input into its development by publishing an ANPR that included GHG tailoring options for regulating GHGs under the CAA. (73 FR 44354, July 30, 2008) As a result of the ANPR, EPA received several comments from tribal officials on differing GHG tailoring options presented in the ANPR which were considered in the proposal and this final rule. Additionally, we also specifically solicited comment from tribal officials on the proposed rule (74 FR 55292, October 27, 2009).

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

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

because this action would not create any new requirements for sources in the energy supply, distribution, or use sectors.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

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

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

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

EPA has concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority and/or low income populations from this rule. This rule is necessary in order to allow for the continued implementation of permitting requirements established in the statute. Specifically, without this rule, the CAA permitting programs (PSD and title V) would become overwhelmed and unmanageable by the millions of GHG sources that would become newly subject to them. This would result in severe impairment of the functioning of these programs with potentially adverse human health and environmental effects nationwide. Under this rule and the legal doctrines of "absurd results," administrative necessity, and one-step-at-a-time, EPA is ensuring that the CAA permitting programs continue to operate by limiting their applicability to the maximum number of sources the programs can possibly handle. This approach is consistent with congressional intent as it allows PSD applicability to at least the largest sources initially, at least to as many more sources as possible, and as promptly as possible over time. By doing so, this rule allows for the maximum degree of environmental protection possible while providing regulatory relief for the unmanageable burden that would otherwise exist. Therefore, we believe it is not practicable to identify and address disproportionately high and adverse human health or environmental effects on minority populations and low income populations in the United States under this final rule.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by SBREFA, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective August 2, 2010.

L. Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by August 2, 2010. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements. Pursuant to section 307(d)(1)(V) of the Act, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine." This action finalizes some, but not all, elements of a previous proposed action—the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Proposed Rule (74 FR 55292, October 27, 2009).

IX. Statutory Authority

The statutory authority for this action is provided by sections 307(d)(7)(B), 101, 111, 114, 116, and 301 of the CAA as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Hydrofluorocarbons, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

Dated: May 13, 2010.

Lisa P. Jackson,

Administrator.

■ For reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as set forth below.

PART 51—[AMENDED]

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Subpart I—[Amended]

■ 2. Section 51.166 is amended:
■ a. By adding paragraph (b)(48);
■ b. By revising paragraph (b)(49)(iv); and
■ c. By adding paragraph (b)(49)(v).

The revisions and additions read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(48) *Subject to regulation* means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(i) *Greenhouse gases (GHGs),* the air pollutant defined in § 86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation except as provided in paragraphs (b)(48)(iv) through (v) of this section.

(ii) For purposes of paragraphs (b)(48)(iii) through (v) of this section, the term tpy *CO_2 equivalent emissions (CO_2e)* shall represent an amount of GHGs emitted, and shall be computed as follows:

(*a*) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials.

(*b*) Sum the resultant value from paragraph (b)(48)(ii)(*a*) of this section for each gas to compute a tpy CO_2e.

(iii) The term *emissions increase* as used in paragraphs (b)(48)(iv) through (v) of this section shall mean that both a significant emissions increase (as calculated using the procedures in (a)(7)(iv) of this section) and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in paragraph (b)(23)(ii) of this section.

(iv) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(*a*) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(*b*) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(v) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(48)(iv) of this section, the pollutant GHGs shall also be subject to regulation:

(*a*) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(*b*) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(49) * * *

(iv) Any pollutant that otherwise is subject to regulation under the Act as defined in paragraph (b)(48) of this section.

(v) Notwithstanding paragraphs (b)(49)(i) through (iv) of this section, the term *regulated NSR pollutant* shall not include any or all hazardous air pollutants either listed in section 112 of the Act, or added to the list pursuant to section 112(b)(2) of the Act, and which have not been delisted pursuant to section 112(b)(3) of the Act, unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

* * * * *

PART 52—[AMENDED]

■ 3. The authority citation for part 52 continues to read as follows:

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

Subpart A—[Amended]

■ 4. Section 52.21 is amended:
■ a. By adding paragraph (b)(49);
■ b. By revising paragraph (b)(50)(iv); and
■ c. By adding paragraph (b)(50)(v).

The revisions and additions read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(49) *Subject to regulation* means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(i) *Greenhouse gases (GHGs),* the air pollutant defined in § 86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation except as provided in paragraphs (b)(49)(iv) through (v) of this section.

(ii) For purposes of paragraphs (b)(49)(iii) through (v) of this section, the term tpy *CO_2 equivalent emissions (CO_2e)* shall represent an amount of GHGs emitted, and shall be computed as follows:

(*a*) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials.

(*b*) Sum the resultant value from paragraph (b)(49)(ii)(*a*) of this section for each gas to compute a tpy CO_2e.

(iii) The term *emissions increase* as used in paragraphs (b)(49)(iv) through (v) of this section shall mean that both a significant emissions increase (as calculated using the procedures in paragraph (a)(2)(iv) of this section) and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in paragraph (b)(23)(ii) of this section.

(iv) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(*a*) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(*b*) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(v) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(49)(iv) of this section, the pollutant GHGs shall also be subject to regulation

(*a*) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(*b*) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(50) * * *

(iv) Any pollutant that otherwise is subject to regulation under the Act as defined in paragraph (b)(49) of this section.

(v) Notwithstanding paragraphs (b)(50)(i) through (iv) of this section, the term *regulated NSR pollutant* shall not include any or all hazardous air pollutants either listed in section 112 of the Act, or added to the list pursuant to section 112(b)(2) of the Act, and which have not been delisted pursuant to section 112(b)(3) of the Act, unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

* * * * *

■ 5. A new § 52.22 is added to read as follows:

§ 52.22 Enforceable commitments for further actions addressing the pollutant greenhouse gases (GHGs).

(a) Definitions.

(1) *Greenhouse Gases (GHGs)* means the air pollutant as defined in § 86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(2) All other terms used in this section shall have the meaning given in § 52.21.

(b) *Further action to regulate GHGs under the PSD program.*

(1) *Near term action on GHGs.* The Administrator shall solicit comment, under section 307(b) of the Act, on promulgating lower GHGs thresholds for PSD applicability. Such action shall be finalized by July 1, 2012 and become effective July 1, 2013.

(2) *Further study and action on GHGs.*

(i) No later than April 30, 2015 the Administrator shall complete a study projecting the administrative burdens that remain with respect to stationary sources for which GHGs do not constitute a regulated NSR pollutant. Such study shall account, among other things, for permitting authorities ability to secure resources, hire and train staff; experiences associated with GHG permitting for new types of sources and technologies; and, the success of streamlining measures developed by EPA (and adopted by the states) for reducing the permitting burden associated with such stationary sources.

(ii) Based on the results of the study described in paragraph (b)(2)(i) of this section, the Administrator shall propose a rule addressing the permitting obligations of such stationary sources under § 52.21 and § 51.166 of this chapter. The Administrator shall take final action on such a rule no later than April 30, 2016.

(iii) Before completing the rule described in paragraph (b)(2)(ii) of this section, the Administrator shall take no action to make the pollutant GHGs subject to regulation at stationary sources that emit or have the potential to emit less than 50,000 tpy CO_2e, or for physical changes or changes in the method of operations at stationary sources that result in an emissions increase of less than 50,000 tpy CO_2e (as determined using the methodology described in § 52.21(b)(49)(ii).)

PART 70—[AMENDED]

■ 6. The authority citation for part 70 continues to read as follows:

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

■ 7. Section 70.2 is amended:

■ a. By revising the introductory text of paragraph (2) of the definition for "major source"; and

■ b. By adding a definition for "Subject to regulation" in alphabetical order.

The revision and addition read as follows:

§ 70.2 Definitions.

* * * * *

Major source * * *

(2) A major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits, or has the potential to emit, 100 tpy or more of any air pollutant subject to regulation (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

* * * * *

Subject to regulation means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(1) *Greenhouse gases (GHGs),* the air pollutant defined in § 86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tpy CO_2 equivalent emissions.

(2) The term *tpy CO_2 equivalent emissions (CO_2e)* shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials, and summing the resultant value for each to compute a tpy CO_2e.

* * * * *

■ 8. A new § 70.12 is added to read as follows:

§ 70.12 Enforceable commitments for further actions addressing greenhouse gases (GHGs).

(a) *Definitions.*

(1) *Greenhouse Gases (GHGs)* means the air pollutant as defined in § 86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(2) All other terms used in this section shall have the meaning given in § 70.2.

(b) *Further action to regulate GHGs under the title V program.*

(1) *Near term action on GHGs.* The Administrator shall solicit comment,

under section 307(b) of the Act, on promulgating lower GHGs thresholds for applicability under § 70.2. Such action shall be finalized by July 1, 2012 and become effective July 1, 2013.

(2) *Further study and action on GHGs.*

(i) No later than April 30, 2015 the Administrator shall complete a study projecting the administrative burdens that remain with respect to stationary sources for which GHGs do not constitute a pollutant subject to regulation. Such study shall account, among other things, for permitting authorities ability to secure resources, hire and train staff; experiences associated with GHG permitting for new types of sources and technologies; and, the success of streamlining measures developed by EPA (and adopted by the states) for reducing the permitting burden associated with such stationary sources.

(ii) Based on the results of the study described in paragraph (b)(2)(i) of this section, the Administrator shall propose a rule addressing the permitting obligations of such stationary sources under § 70.2. The Administrator shall take final action on such a rule no later than April 30, 2016.

(iii) Before completing the rule described in paragraph (b)(2)(ii) of this section, the Administrator shall take no action to make the pollutant GHGs subject to regulation at stationary sources that emit or have the potential to emit less than 50,000 tpy CO_2e (as determined using the methodology described in § 70.2.)

PART 71—[AMENDED]

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

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

Subpart A—[AMENDED]

■ 10. Section 71.2 is amended:

■ a. By revising the introductory text of paragraph (2) of the definition for "major source"; and

■ b. By adding a definition for "Subject to regulation" in alphabetical order.

The revision and addition read as follows:

§ 71.2 Definitions.

* * * * *

Major source * * *

(2) A major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits or has the potential to emit, 100 tpy or more of any air pollutant subject to regulation (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

* * * * *

Subject to regulation means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(1) *Greenhouse gases (GHGs),* the air pollutant defined in § 86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tpy CO_2 equivalent emissions.

(2) The *term tpy CO_2 equivalent emissions (CO_2e)* shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials, and summing the resultant value for each to compute a tpy CO_2e.

■ 11. A new § 71.13 is added to subpart A to read as follows:

§ 71.13 Enforceable commitments for further actions addressing Greenhouse Gases (GHGs)

(a) *Definitions.*

(1) *Greenhouse Gases (GHGs)* means the air pollutant as defined in § 86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(2) All other terms used in this section shall have the meaning given in § 71.2.

(b) *Further action to regulate GHGs under the title V program.*

(1) *Near term action on GHGs.* The Administrator shall solicit comment, under section 307(b) of the Act, on promulgating lower GHGs thresholds for applicability under § 71.2. Such action shall be finalized by July 1, 2012 and become effective July 1, 2013.

(2) *Further study and action on GHGs.*

(i) No later than April 30, 2015, the Administrator shall complete a study projecting the administrative burdens that remain with respect to stationary sources for which GHGs do not constitute a pollutant subject to regulation. Such study shall account, among other things, for permitting authorities ability to secure resources, hire and train staff; experiences associated with GHG permitting for new types of sources and technologies; and, the success of streamlining measures developed by EPA (and adopted by the states) for reducing the permitting burden associated with such stationary sources.

(ii) Based on the results of the study described in paragraph (b)(2)(i) of this section, the Administrator shall propose a rule addressing the permitting obligations of such stationary sources under § 71.2. The Administrator shall take final action on such a rule no later than April 30, 2016.

(iii) Before completing the rule described in paragraph (b)(2)(ii) of this section, the Administrator shall take no action to make the pollutant GHGs subject to regulation at stationary sources that emit or have the potential to emit less than 50,000 tpy CO_2e, (as determined using the methodology described in § 71.2.)

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Thursday,
June 3, 2010

Part III

Department of Agriculture

Commodity Credit Corporation

7 CFR Part 1470
Conservation Stewardship Program; Final Rule

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1470

RIN 0578–AA43

Conservation Stewardship Program

AGENCY: Commodity Credit Corporation, Natural Resources Conservation Service, United States Department of Agriculture.

ACTION: Final rule.

SUMMARY: Section 2301 of the Food, Conservation, and Energy Act of 2008 (2008 Act) amended the Food Security Act of 1985 to establish the Conservation Stewardship Program (CSP). On July 29, 2009, the Natural Resources Conservation Service (NRCS) published an interim final rule for CSP with a 60-day public comment period. On September 21, 2009, the public comment period was extended 30 days. NRCS is publishing a final rule that addresses the comments received on the interim final rule and makes other minor adjustments to improve clarity of the rule.

DATES: *Effective Date:* The rule is effective June 3, 2010.

FOR FURTHER INFORMATION CONTACT: Dwayne Howard, Branch Chief, Financial Assistance Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5237 South Building, Washington, DC 20250; Telephone: (202) 720–1845; Fax: (202) 720–4265; or e-mail *CSP2008@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Regulatory Certifications

Executive Order 12866

Pursuant to Executive Order 12866 (FR Doc. 93–24523, September 30, 1993), this final rule is an economically significant regulatory action since it results in an annual effect on the economy of $100 million or more. The administrative record is available for public inspection at the Department of Agriculture, 1400 Independence Avenue, SW., Room 5242 South Building, Washington, DC 20250.

Pursuant to Executive Order 12866, NRCS conducted an economic analysis of the potential impacts associated with this program. A summary of the economic analysis can be found at the end of the Regulatory Certifications section of this preamble and a copy of the analysis is available upon request from Dwayne Howard, Branch Chief, Financial Assistance Programs Division, Department of Agriculture, Natural Resources Conservation Service, Room 5237 South Building, Washington, DC 20250 or electronically at *http://www.nrcs.usda.gov/programs/csp/* under the *CSP Rules and Notices with Supporting Documents* title.

Regulatory Flexibility Act

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

Environmental Analysis

Availability of the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI). A programmatic environmental assessment was prepared in association with the CSP interim final rule. The analysis determined that there was not a significant impact to the human environment and as a result an Environmental Impact Statement was not required to be prepared (40 CFR part 1508.13). The EA and FONSI were available for review and comment for 30 days from the date the interim final rule was published in the **Federal Register**.

For this final rulemaking, the agency has determined that there are no new circumstances or significant new information that has a bearing on environmental effects which warrant supplementing the previous EA and FONSI. The proposed changes identified in this final rule are considered minor changes that should be implemented for the program. The majority of these changes are administrative or technical or corrections to the regulation.

Copies of the EA and FONSI may be obtained from Matt Harrington, National Environmental Coordinator, Ecological Sciences Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6151 South Building, Washington, DC 20250. The CSP EA and FONSI are also available at the following Internet address: *http://www.nrcs.usda.gov/programs/Env_Assess.*

Civil Rights Impact Analysis

NRCS has determined through a Civil Rights Impact Analysis (CRIA) that the interim final rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. The final CRIA provides responses to the interim final rule's CRIA comments. The Department of Agriculture (USDA), Office of Assistant Secretary for Civil Rights (OASCR), Office of Compliance, Policy, and Training (formally the Office of Adjudication and Compliance) worked with NRCS in the initial preparation of the proposed interim final rule and CRIA. Based on these preliminary meetings and their review, it was determined there was no adverse impact. The OASCR concurred with the CRIA for the proposed final rule.

The data presented indicates producers who are members of the protected groups have participated in NRCS conservation programs at parity with other producers. Extrapolating from historical participation data, it is reasonable to conclude that NRCS programs, including CSP, will continue to be administered in a non-discriminatory manner. Outreach and communication strategies are in place to ensure all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in USDA programs. CSP applies to all persons equally regardless of their race, color, national origin, gender, sex, or disability status. Therefore, the CSP rule portends no adverse civil rights implications for women, minorities, and persons with disabilities.

Paperwork Reduction Act

Section 2904 of the 2008 Act provides that the promulgation of regulations and the administration of Title II of the 2008 Act, which contain the amendments that authorize CSP, will be made without regard to chapter 35 of Title 44 of the U.S.C. also known as the Paperwork Reduction Act. Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this interim final rule.

Government Paperwork Elimination Act

NRCS is committed to compliance with the Government Paperwork Elimination Act, which requires government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. To better accommodate public access, NRCS has developed an online application and information system for public use.

Executive Order 12988

This final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The provisions of this final rule are not retroactive. The provisions of this final rule preempt State and local laws to the extent that such laws are inconsistent with this

final rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 614, 780, and 11 must be exhausted.

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

Section 304 of the Department of Agriculture Reorganization Act of 1994, Public Law 103–354, requires that a risk assessment be prepared in conjunction with any notice of proposed rulemaking for a major regulation. Pursuant to section 2904 of the 2008 Act, NRCS is promulgating this final rule, and therefore, a risk assessment is not required. However, risks associated with the final rule have been assessed pursuant to the analysis prepared in compliance with Executive Order 12866.

Unfunded Mandates Reform Act of 1995

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

Executive Order 13132

This final rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. USDA has determined that this final rule conforms with the Federalism principles set forth in the Executive Order, would not impose any compliance costs on the States, and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities on the various levels of government. Therefore, USDA concludes that this final rule does not have Federalism implications.

Executive Order 13175

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. NRCS has assessed the impact of this final rule on Indian tribal governments and concluded that this final rule will not negatively affect Indian tribal governments or their communities. The rule neither imposes substantial direct compliance costs on tribal governments nor preempts tribal law. However, NRCS plans to undertake a series of at least six regional tribal consultation sessions before December 30, 2010, on the impact of NRCS conservation programs and services on tribal governments and their members to establish a baseline of consultation for future actions. Reports from these sessions will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. NRCS will respond in a timely and meaningful manner to all tribal governments' requests for consultation.

Small Business Regulatory Enforcement Fairness Act of 1996

Section 2904(c) of the 2008 Act requires that the Secretary use the authority in section 808(2) of title 5 U.S.C., which allows an agency to forgo the Small Business Regulatory Enforcement Fairness Act of 1996 usual congressional review delay of the effective date of a regulation if the agency finds that there is a good cause to do so. NRCS hereby determines that it has good cause to do so in order to meet the congressional intent to have the conservation programs authorized or amended by Title II in effect as soon as possible. Accordingly, this rule is effective upon filing for public inspection by the Office of the **Federal Register**.

Section 2708 of the 2008 Act

Section 2708, "Compliance and Performance," of the 2008 Act added a paragraph to section 1244(g) of the Food Security Act of 1985 Act entitled, "Administrative Requirements for Conservation Programs," which states the following:

"(g) Compliance and performance.—For each conservation program under Subtitle D, the Secretary will develop procedures—

(1) To monitor compliance with program requirements;

(2) To measure program performance;

(3) To demonstrate whether long-term conservation benefits of the program are being achieved;

(4) To track participation by crop and livestock type; and

(5) To coordinate activities described in this subsection with the national conservation program authorized under section 5 of the Soil and Water Resources Conservation Act of 1977 (16 U.S.C. 2004)."

This new provision presents in one place the accountability requirements placed on the agency as it implements conservation programs and reports on program results. The requirements apply to all programs under Subtitle D, including the Wetlands Reserve Program, Conservation Security Program, Conservation Stewardship Program, Farm and Ranch Lands Protection Program, Grassland Reserve Program (GRP), Environmental Quality Incentives Program (EQIP) (including the Agricultural Water Enhancement Program), Wildlife Habitat Incentive Program (WHIP), and Chesapeake Bay Watershed initiative. These requirements are not directly incorporated into these regulations which set out requirements for program participants. However, certain provisions within these regulations relate to elements of section 1244(g) of the Food Security Act of 1985 Act and the agency's accountability responsibilities regarding program performance. NRCS is taking this opportunity to describe existing procedures that relate to meeting the requirements of section 1244(g) of the Food Security Act of 1985, and agency expectations for improving its ability to report on each program's performance and achievement of long-term conservation benefits. Also included is reference to the sections of these regulations that apply to program participants and that relate to the agency accountability requirements as outlined in section 1244(g) of the Food Security Act of 1985.

Monitor compliance with program requirements. NRCS has established application procedures to ensure that participants meet eligibility requirements and follow-up procedures to ensure that participants are complying with the terms and conditions of their contractual arrangement with the government and that the installed conservation measures are operating as intended. These and related program compliance evaluation policies are set forth in agency guidance (Conservation Programs Manual_440_Part 512 and Conservation Programs Manual _440_Part 508) *(http://directives.sc.egov.usda.gov/)*. The program requirements applicable to participants that relate to compliance are set forth in these regulations in § 1470.6 "Eligibility requirements," § 1470.21 "Contract requirements," § 1470.22 "Conservation stewardship plan," and § 1470.23 "Conservation activity operation and maintenance." These sections make clear the general program eligibility requirements, participant obligations for implementing a conservation stewardship plan, contract obligations, and requirements for operating and maintaining CSP-funded conservation activities.

Measure program performance. Pursuant to the requirements of the Government Performance and Results Act of 1993 (Pub. L. 103–62, Sec. 1116) and guidance provided by Office of

Management and Budget Circular A–11, NRCS has established performance measures for its conservation programs. Program-funded conservation activity is captured through automated field-level business tools, and the information is available to the public at *http://ias.sc.egov.usda.gov/PRSHOME/*. Program performance is also reported annually to Congress and the public through the annual performance budget, annual accomplishments report, and the USDA Performance Accountability Report. Related performance measurement and reporting policies are set forth in agency guidance (GM_340_401 and GM_340_403) (*http://directives.sc.egov.usda.gov/*).

The conservation actions undertaken by participants are the basis for measuring program performance; specific actions are tracked and reported annually, while the effects of those actions relate to whether the long-term benefits of the program are being achieved. The program requirements applicable to participants that relate to undertaking conservation actions are set forth in these regulations in § 1470.21 "Contract requirements," § 1470.22 "Conservation stewardship plan," and § 1470.23 "Conservation activity operation and maintenance." These sections make clear participant obligations for installing, adopting, improving, maintaining, and managing conservation stewardship activities which in aggregate result in the program performance that is reflected in agency performance reports.

Demonstrating the long-term natural resource benefits achieved through conservation programs is subject to the availability of needed data, the capacity and capability of modeling approaches, and the external influences that affect actual natural resource condition. While NRCS captures many measures of "output" data, such as acres of conservation practices, it is still in the process of developing methods to quantify the contribution of those outputs to environmental outcomes.

NRCS currently uses a mix of approaches to evaluate whether long-term conservation benefits are being achieved through its programs. Since 1982, NRCS has reported on certain natural resource status and trends through the National Resources Inventory (NRI), which provides statistically reliable, nationally consistent land cover/use and related natural resource data. However, lacking has been a connection between these data and specific conservation programs.[1] In the future, the interagency Conservation Effects Assessment Project (CEAP), which has been underway since 2003, will provide nationally consistent estimates of environmental effects resulting from conservation practices and systems applied. CEAP results will be used in conjunction with performance data gathered through agency field-level business tools to help produce estimates of environmental effects accomplished through agency programs, such as CSP. In 2006 a Blue Ribbon panel evaluation of CEAP [2] strongly endorsed the project's purpose but concluded "CEAP must change direction" to achieve its purposes. In response, CEAP has focused on priorities identified by the panel and clarified that its purpose is to quantify the effects of conservation practices applied on the landscape. Information regarding CEAP, including reviews and current status, is available at *http://www.nrcs.usda.gov/technical/NRI/ceap/*. Since 2004 and the initial establishment of long-term performance measures by program, NRCS has been estimating and reporting progress toward long-term program goals. The NRI and assessment and the performance measurement and reporting policies are set forth in agency guidance (GM_290_400, GM_340_401, and GM_340_403) (*http://directives.sc.egov.usda.gov/*).

Demonstrating the long-term conservation benefits of conservation programs is an agency responsibility. Through CEAP, NRCS is in the process of evaluating how these long-term benefits can be achieved through the conservation practices and systems applied by participants under each of its programs. The CSP program requirements applicable to participants that relate to producing long-term conservation benefits are located in § 1470.21 "Contract requirements," § 1470.22 "Conservation stewardship plan," and § 1470.23 "Conservation activity operation and maintenance." These requirements and related program management procedures supporting program implementation are set forth in agency guidance (Conservation Programs Manual 440_Part 512 and Conservation Programs Manual _440_Part 508).

[1] The exception to this is the CRP; since 1987 the NRI has reported acreage enrolled in CRP.

[2] Soil and Water Conservation Society. 2006. Final Report from the Blue Ribbon Panel Conducting an External Review of the US Department of Agriculture Conservation Effects Assessment Project. Ankeny, IA: Soil and Water Conservation Society. This review is available *at http://www.nrcs.usda.gov/technical/NRI/ceap/*.

Coordinate these actions with the national conservation program authorized under the Soil and Water Resources Conservation Act (RCA). The 2008 Act reauthorized and expanded on a number of elements of the RCA related to evaluating program performance and conservation benefits. Specifically, the 2008 Act added a provision stating:

> "Appraisal and inventory of resources, assessment and inventory of conservation needs, evaluation of the effects of conservation practices, and analyses of alternative approaches to existing conservation programs are basic to effective soil, water, and related natural resources conservation."

The program, performance, and natural resource and effects data described previously will serve as a foundation for the next RCA, which will also identify and fill, to the extent possible, data and information gaps. Policy and procedures related to the RCA are set forth in agency guidance (GM_290_400 and GM_130_402) (*http://directives.sc.egov.usda.gov/*).

The coordination of the previously described components with the RCA is an agency responsibility and is not reflected in these regulations. However, it is likely that results from the RCA process will result in modifications to the program and performance data collected, to the systems used to acquire data and information, and potentially to the program itself. Thus, as the Secretary proceeds to implement the RCA in accordance with the statute, the approaches and processes developed will improve existing program performance measurement and outcome reporting capability and provide the foundation for improved implementation of the program performance requirements of section 1244(g) of the Food Security Act of 1985.

Economic Analysis—Executive Summary

Pursuant to Executive Order 12866, Regulatory Planning and Review, NRCS conducted a cost-effectiveness analysis (CEA) of the CSP as formulated for the interim final rule.

This CEA describes how CSP financial assistance and technical assistance are made available to farmers and ranchers who agree to install and adopt additional conservation activities; and improve, maintain, and manage conservation activities in place in accordance with CSP's objectives. The CEA compares the impact of these activities in generating environmental benefits with program costs. Many of these improvements can produce beneficial impacts concerning onsite

resource conditions (such as conserving soil) and significant offsite environmental benefits (such as cleaner water, improved air quality, and enhanced wildlife habitat).

The environmental outcomes expected to be generated by enhancement activities are based on extrapolations of the environmental outcomes that have been studied and associated with many traditional NRCS conservation practices. While the outcomes from many traditional conservation practices have been assessed, the impacts generated from these enhancements are not as well studied. In conducting economic analyses where benefits are not well understood or difficult to measure, but activity costs are available, the traditional benefit-cost analysis is generally replaced with a CEA, the approach used for both this assessment and the interim final rule.

In considering alternatives for implementing CSP, NRCS followed the legislative intent to establish a clear and transparent method to determine in an open and participatory process, potential participants' current and future levels of conservation stewardship in order to gauge their environmental impacts and compare them. Because CSP is voluntary, the program is not expected to impose any obligation or burden upon agricultural producers and nonindustrial private forestland (NIPF) owners who choose not to participate.[3]

Congress authorized the enrollment of 12,769,000 acres for each fiscal year (FY) for the period beginning October 1, 2008, through September 30, 2017. For FY 2009 through FY 2012, CSP has been authorized 51,076,000 acres (4 years multiplied by a 12,769,000 acre program cap per year).

Total program costs for CSP are shown in Table 1. Full participation is assumed for each of the 4 years CSP is offered, and the duration of each contract is 5 years. Total costs include only costs to the government.[4] Cumulative program costs for four program ranking periods are estimated to be $2.990 billion in constant 2005 dollars, discounted at 7 percent. At a 3 percent discount rate, program costs increase to $3.520 billion in constant 2005 dollars.

The information in Table 1 highlights the cumulative impacts of four ranking periods and 5-year contracts. Each sign-up creates a commitment of $229.842 million for 5 years. Participants in the initial ranking period receive payments through FY 2014; participants in the last ranking period receive payments through FY 2017. The largest outlays of program funds occur in FY 2013 and FY 2014 and then begin to taper off as contracts from the first and later ranking periods end.

TABLE 1—TOTAL PROGRAM COSTS OF CSP, FY 2010 TO FY 2017

	Yearly cost [1] (million $)	GDP price deflator [2] (chained, 2005=100)	Yearly cost in constant dollars [1] (million $)	Discount factors for 3%	Present value of costs – 3% (million $)	Discount factors for 7%	Present value of costs – 7% (million $)
FY10	229.842	108.5	211.836	0.9709	205.666	0.9346	197.978
FY11	459.684	110.1	417.515	0.9426	393.548	0.8734	364.674
FY12	689.526	111.3	619.520	0.9151	566.949	0.8163	505.713
FY13	919.368	113.1	812.881	0.8885	722.234	0.7629	620.143
FY14	919.368	115.6	795.301	0.8626	686.034	0.7130	567.039
FY15	689.526	118.1	583.849	0.8375	488.965	0.6663	389.043
FY16	459.684	120.7	380.848	0.8131	309.665	0.6227	237.173
FY17	229.842	123.4	186.258	0.7894	147.034	0.5820	108.404
Total	4596.840		4008.008		3520.093		2990.166

[1] Congress set a maximum acreage limit of 12,769,000 acres and a national average payment rate of $18 per acre.
[2] USDA Agricultural Projections to 2019. Office of the Chief Economist, World Agricultural Outlook Board, U.S. Department of Agriculture. Prepared by the Interagency Agricultural Projections Committee. Long-term Projections Report OCE–2010–1, page 15.

Methodology Employed in This Study

Many conservation practices have been extensively studied, but similar studies pertaining to enhancement activities have not been conducted. We do not have sufficiently detailed, site-specific information on existing conservation practices and environmental outcomes. As a result, estimation of a true baseline of environmental conditions before and after CSP implementation is not possible.

The methodology employed in this final assessment is the same methodology applied in the interim final rule except that data from the initial CSP ranking period are substituted for the representative farm and environmental data. Although instructive in identifying possible outcomes of different formulations of CSP, actual enrollment and contract data are necessary to provide a fuller assessment of CSP outcomes. A relative comparison of results from the interim final rule and the final rule was also conducted to identify differences between predicted and actual outcomes, determine why differences were observed, and make recommendations, when necessary, to improve CSP's cost effectiveness. This comparison should not be used beyond its stated purpose because of different data sets in the two analyses.

CSP and the Conservation Measurement Tool

CSP is a challenging program given its purpose, statutory mandates, assessments of existing and future conservation activities and their associated conservation indices, allocation of program funds and acres across States, and price setting. The following are key elements about CSP and the conservation measurement tool (CMT).

(a) NRCS allocated acreage for enrollment across States according to each State's proportion of the Nation's agricultural land base.

(b) NRCS State offices created ranking pools, selected three to five priority

[3] An impact could be expected in cases where CSP funds activities that lead to large increases of certain environmental services and goods where those markets are beginning to get started.

[4] Given the wide set of possible initial resource conditions and conservation activities likely to be adopted, it is not possible to ascertain whether (or to what extent) CSP payments offset expected costs to producers in adopting new activities or past activities.

resource concerns for every pool, and allocated acres and program dollars from the national office across the pools.

(c) A national team of NRCS cropland, pastureland, rangeland, and forest land specialists developed sets of questions by land use category to identify conservation activities already applied to the land and the associated level of stewardship by assigning conservation performance points. The team also identified additional enhancements for increasing stewardship and assigned conservation performance points to the additional enhancements. NRCS' Conservation Practice Physical Effects methodology was used in both of these instances to assign performance points. Conservation performance points earned by land use should be viewed as "environmental indices."

(d) NRCS developed a CMT to determine eligibility by verifying that minimum stewardship thresholds were met, estimating conservation performance from existing and additional activities, and ranking applications.

(e) NRCS field staff tested the questions and the CMT and made suggestions that improved CMT's use.

(f) During the initial ranking period, NRCS assisted producers in completing their resource inventories in the CMT and determining program eligibility. Eligible applicants identified additional activities—enhancements and traditional conservation practices—they were willing to adopt. Each applicant's resource inventory and additional activities recorded in the CMT earned conservation performance points per acre by land use.

(g) Every application was ranked within a pool according to the sum of four equally weighted ranking factors. The maximum ranking score is 1,000; the minimum zero. NRCS selected applications for enrollment beginning with the highest ranked one and worked down the ranked list until a pool's funding limit or acreage limit was reached. A fifth ranking factor came into play as a "tie breaker" when two or more applications were ranked equally. When this situation occurred, the application that minimized the cost to government was selected.[5] The four equally weighted ranking factors are below:

(1) Ranking factor one measures the existing level of conservation stewardship for *priority* resource concerns at the time of enrollment.

(2) Ranking factor two measures the *degree* that new conservation activities improve *priority* resource concern conditions.

(3) Ranking factor three measures the *number* of *priority* resource concerns the applicant agrees to meet during the contract period.

(4) Ranking factor four measures the *degree* that new conservation activities improve *other* resource concern conditions.

(h) CSP payment per land use equals conservation performance points per acre multiplied by acres multiplied by the land use payment rate. Total payment per contract equals the sum of the individual land use payments.[6]

(i) The four policy options used in the interim final rule are also used in the final rule to identify tradeoffs among the policy options, especially changes in program acres, conservation performance points, program costs, and implications with respect to CSP's acreage and funding constraints.

Detailed descriptions of CSP, CMT, ranking period results, and CEA analysis can be found in the main body of the report and the appendices.

Analysis

Results of this analysis show that CSP participation was high across the nation. As of December 1, 2009, NRCS had classified 15,015 applications as eligible. These applications involved slightly more than 20.8 million acres, close to double CSP's maximum allowable of 12.179 million acres.[7]

Some concerns were raised regarding participation in ranking pools. No applications were received in 250 of the 693 pools created for CSP. NRCS found that the majority of these pools were established specifically for conservation access by beginning farmers or ranchers and socially disadvantaged farmers or ranchers. All eligible applications were preapproved in 303 ranking pools because allotted acreage and funding allocations were not fully committed. The remaining 140 pools accounted for slightly more than 86 percent of eligible acres, making them highly competitive.

More than 80 percent of the eligible applicants across all land uses were already meeting and frequently exceeding minimum stewardship levels on five of the eight resource concerns. Applicants in the initial CSP ranking period appear to be practicing stewardship at a fairly high level. As a result, one would expect to see conservation performance points earned for existing activities to be higher than performance points earned for additional activities. Summary data from pre-approved applications in the initial ranking period confirm this expectation. Existing conservation performance points amounted to 61 percent of total points awarded nationally. This 61–39 percent split between existing and additional conservation performance points carried directly over into payments, with 63 percent of projected $142.6 million in financial assistance tied to existing activities.

The policy options described and analyzed using representative farm and environmental data in the interim final rule indicated that CSP outcomes could be fine-tuned at the national level by changing the relative importance of the ranking factors. Based on that analysis, policy option 1 (four ranking factors were weighted equally) was selected and used for the initial CSP ranking period. Because three of the four ranking factors are linked directly to additional activities, an equal weighting scenario places considerable importance on additional activities—enhancements and traditional conservation practices—proposed to be applied over a 5-year period. The expectation was that the highest ranked applications would include substantially more additional conservation activities than lower ranked applications. One of the other policy options might be used to influence the mix between existing and additional activities after reviewing actual CSP enrollment.

The five policy options and their reported acreage and program costs by land use are summarized in Table 2. Policy option 1 represents the actual CSP ranking period where the ranking factors are equally weighted. Analyses conducted for policy option 2 (ranking factor 1 receives 5 times the weight—62.5 percent—of the other ranking factors), policy option 3 (ranking factor 2 receives 5 times the weight—62.5 percent—of the other ranking factors), policy option 4 (ranking factor 3 receives 5 times the weight—62.5 percent—of the other ranking factors), and policy option 5 (ranking factor 4 receives 5 times the weight—62.5 percent—of the other ranking factors) did not appreciably change the percentage splits between existing and additional performance points and funding. Though acres and costs shifted among the different land uses, the

[5] "* * * *the Secretary shall rank applications based on * * * (E) the extent to which the actual and anticipated environmental benefits from the contract are provided at the least cost relative to other similarly beneficial contract offers.*"

[6] For CSP ranking period one, payment rates are $0.0605 for every cropland conservation performance point, $0.0329 for pasture, $0.0120 for rangeland, and $0.0164 for NIPF.

[7] To avoid enrolling too many acres or spending more than the $230 million available for this first ranking period, NRCS initially allocated 95 percent of the 12.769 million acres. As enrollment progressed, NRCS allocated the remaining acres.

impact on total program costs and costs per acre suggests that policy options 2 through 5 did not substantially change the current distributions of funds and acres under policy option 1, which was used for the initial CSP ranking period.

TABLE 2—SUMMARY OF PROGRAM ACREAGE AND COSTS BY LAND USE AND POLICY OPTIONS FOR CSP SIGN-UP ONE

Policy Option	Cost per acre	Acres funded in program [a]					Total program cost [b]				
		Crop land	Pasture	Range land	NIPF	Total[2]	Crop land	Pasture	Range land	NIPF	Total
		(millions of acres)					($ millions)				
No CSP	N/A	0	0	0	0	0	0	0	0	0	0
								14.30	38.90	9.96	180.48
PO–1	$14.82	4.833	0.797	5.529	1.019	12.179	117.308	6	9	3	6
								14.33	39.16	9.68	176.16
PO–2	14.79	4.570	0.792	5.568	0.985	11.914	112.988	2	2	7	9
								14.36	37.08	9.36	171.47
PO–3	14.66	4.752	0.786	5.204	0.951	11.694	110.659	4	3	7	2
								14.36	38.41	9.86	177.85
PO–4	14.88	4.726	0.773	5.452	1.004	11.955	115.581	8	5	6	0
								13.83	36.13	9.32	179.46
PO–5	15.27	4.949	0.757	5.097	0.950	11.753	120.171	6	7	1	5

[a] For this analysis, the CSP acreage cap is 12.179 million acres including the 10 percent allocated to NIPF. This was the initial allocation distributed to States shortly after closure of the initial CSP ranking period.
[b] Includes financial and technical assistance.

NRCS noticed some large operations fell just below the cutoff line in many of the pools for policy option 1, the actual ranking period. These operations moved up the ranked list and effectively prevented the distribution of the full amount of acres under the other policy options. Their impact can be seen by examining the total acres in Table 2.

In examining the summaries of conservation performance points and costs per point, the agency reached a similar conclusion regarding the effectiveness of policy options 2 through 5 in changing the emphasis of CSP between existing and additional activities (*see* Table 3). The relatively insignificant changes in total conservation performance points and dollars per point suggest that significant changes in the ranking process yield few tangible results in practice. A closer examination of the applications show considerable shifting of the applications in terms of rankings, but few of the applications that were ranked low during the actual ranking period moved up the list to the level of approval.

TABLE 3—SUMMARY OF CONSERVATION PERFORMANCE POINTS AND COST PER POINT FOR CSP POLICY OPTIONS

	Existing activities	Additional activities	Total points	Dollars per point	
				Additional activities	All activities
	(millions of conservation performance points)			($)	
No CSP [a]	Indeterminate	N/A	N/A	N/A	N/A
PO–1	3,960	2,488	6,448	0.0573	0.0221
PO–2	3,964	2,368	6,332	0.0590	0.0220
PO–3	3,779	2,502	6,281	0.0564	0.0225
PO–4	3,920	2,398	6,319	0.0587	0.0223
PO–5	3,790	2,481	6,271	0.0576	0.0228

[a] Assumes CSP is not available to landowners. Data are not available to assess this situation.
[b] Indeterminate.

Other possible reasons were identified to explain why the ranking process produced such minor shifts in conservation performance points and funding between existing and additional activities. Applicants, for example, who were addressing a State's priority resource concerns received more ranking points than applicants who chose to address fewer priority resource concerns. As part of the policy analysis, it became apparent that ranking factor 3 moved closely with ranking factor 1. A recommendation in the conclusions and recommendations section breaks this relationship with ranking factor 1, making it strictly a factor that awards ranking points based on proposed new activities that assist producers in meeting minimum stewardship levels of priority resource concerns.

Another possible reason is the CMT and how activities and conservation performance points are assigned. An additional reason is the ranking process itself. Modifications to account for these two reasons are detailed in the recommendations.

The results reported above and other secondary results from the analysis of eligible applications and preapproved contracts in CSP's initial ranking period substantiate many of the initial CEA findings reported in the interim final rule. One primary finding was that the policy constraints on the program posed serious challenges for the model developers. It is obvious that these constraints will pose similar challenges in implementing this program. In particular, achieving the national annual acreage enrollment goal at the designated average costs per acre mandated in legislation will be a challenge given the heterogeneity of producers' initial resource conditions and demand for enhancements. This cautionary observation held true in the initial ranking period and appears to be a major concern in subsequent ranking periods.

Second, the annual contract limit of $40,000 per contract imposed by the interim final rule influences program

outcomes. CSP gains program acreage when large operations, 13.8 percent of the preapproved contracts in the first ranking period, hit the maximum annual payment limit and remain enrolled. Costs per acre for the program decrease because program funding is spread over more acres. As predicted though, CSP's acre constraint of 12.769 million acres becomes the controlling factor because of the acres linked to the large operations. Though NRCS received an apportionment of $229,842,000, the financial assistance portion cannot be fully spent because the acreage constraint was met for the initial CSP ranking period. Furthermore, NRCS offices incur technical assistance costs associated with these additional acres, regardless if the acres are capped for payment.

Third, the policy options that were part of the CEA in the interim final rule proved useful in the final assessment. The different policy scenarios reinforced the fact that CSP outcomes depend to a large extent on the applications submitted for enrollment. The policy scenarios also contributed to a better understanding of how the ranking factors were defined and implemented.

Finally, program design and adaptive program management are critical in satisfying the mandated constraints of this program. The model results of the CEA used in the interim final rule showed that caution must be used in setting land use payment rates. This is due to the changing land use compositions and conservation performance outcomes that resulted under each alternative policy option. Such changes could be expected in subsequent ranking periods and alter the acreage and conservation performance points produced. Such changes would need to be included in the calculation of appropriate land use payment rates that conform to the CSP statute, particularly the $18 per acre national program cost constraint.

Conclusions and Recommendations

As part of the 2008 Act, Congress created the CSP and instructed the Secretary of Agriculture to develop a program that compensates a producer for "* * * installing and adopting additional conservation activities; and improving, maintaining, and managing conservation activities in place at the operation of the producer at the time the contract offer is accepted by the Secretary." Producers must also meet minimum stewardship levels before they become eligible for CSP. Acreage, budget, a national average price of $18 per acre, and a maximum annual payment of $40,000 per contract established in the interim final rule also complicate program implementation.

The CSP as currently implemented received more than enough applications to make it a competitive program. Of the 15,015 eligible applications, 10,743 were preapproved for enrollment, and those selected were the highest ranked eligible applications. The preapproved applications resulted in 61–39 percent split in conservation performance points and 63–37 percent split in program payments between existing and additional activities, respectively. The acreage constraint limited the ability of NRCS to distribute all the funds provided by Congress.

Though little guidance is given on a suitable split of financial assistance funds between existing and additional conservation activities, preliminary analysis indicates that the initial CSP ranking period attracted practicing conservationists. Almost every applicant met the stewardship threshold requirement at the time of application. More than 80 percent of the applicants were meeting five resource concerns at time of application. The $40 thousand cap per contract and the requirement that all acres of an operation must be enrolled impacted CSP. The acreage constraint became the limiting factor because 1,487 (13.8 percent) preapproved applications exceeded the cap, but their acres were counted, making it impossible for NRCS to distribute all the funds.

A total of five policy options were developed as candidates for improving CSP's overall cost effectiveness at the national level. These policy options are directly tied to CSP's ranking process. Under policy option 1, the four ranking factors are equally weighted. In the remaining options, each ranking factor is separately weighted five times more important than the other factors. Based on the interim analysis, the ranking process recommended and implemented for the first CSP sign-up was policy option 1. This translated into an effective weighting scheme of 25 percent for existing activities and 75 percent for additional activities.

For the most part, these policy options exhibited their intended impacts. With each change in the weights assigned to the ranking factors, ranking scores changed, and applications moved up and down in ranking based on their mix of existing and additional conservation activities and whether priority resource concerns were being targeted. With five times the weight assigned to ranking factor 1 (policy option 2), for example, NRCS observed applications with many existing practices earning more ranking points than applications with fewer existing practices and applications with similar additional activities. When weights were assigned to ranking factors that captured additional activities, NRCS observed the opposite. Applications with many additional activities ranked higher than applications with a similar complement of existing activities and applications with fewer additional activities. Overall, policy options 2 through 5 did not yield substantially different changes in conservation performance points and financial assistance between existing and additional activities. Analysis of the data suggests that this initial CSP ranking period attracted practicing conservationists. NRCS expects future ranking periods to be more representative of the larger agricultural sector as others learn about CSP and the remaining population of practicing conservationists yet to enroll declines with each ranking period.

There is insufficient evidence of improved cost effectiveness to replace policy option 1 with any of the other options. Prior to CSP ranking period two, NRCS will review key program components—eligibility requirements, minimum stewardship levels, conservation activities and conservation performance points, CMT, and ranking factor specifications—and make any necessary modifications. In addition, NRCS will investigate other ranking factor processes, additional ranking criteria, and separate prices for existing and additional conservation performance points. As data becomes available and is analyzed from each new ranking period, NRCS will make necessary changes to improve CSP's cost effectiveness.

Discussion of Program

The 2008 Act amended the Food Security Act of 1985 to establish the CSP and authorize the program in fiscal years 2009 through 2012. The CSP statute provides that the Secretary will carry out a stewardship program to encourage producers to address resource concerns in a comprehensive manner by (1) undertaking additional conservation activities, and (2) by improving, maintaining, and managing existing conservation activities. On July 29, 2009, NRCS published an interim final rule for CSP with a 60-day public comment period. On September 21, 2009, the public comment period was extended 30 days.

NRCS explained in the preamble of the interim final rule, that it will provide financial and technical assistance to eligible producers to

conserve and enhance soil, water, air, and related natural resources on their land. Eligible lands include cropland, grassland, prairie land, improved pastureland, rangeland, NIPF, agricultural land under the jurisdiction of an Indian tribe, and other private agricultural land (including cropped woodland, marshes, and agricultural land used for the production of livestock) on which resource concerns related to agricultural production could be addressed.

The NRCS State Conservationist, in consultation with the State Technical Committee and local working groups, will focus program impacts on natural resources that are of specific concern for a State, or the specific geographic areas within a State. Applications will be evaluated relative to other applications addressing similar priority resource concerns to facilitate a competitive ranking process among applicants who face similar resource challenges. The program is national in scope, and participation is voluntary.

CSP provides participants with two possible types of payments: (1) Annual payments will be offered through split-rate payments; one payment for installing and adopting additional activities, and one for improving, maintaining, and managing existing activities. This payment structure is different from the annual payments offered for contracts selected in the 2009 enrollment period. Contracts selected in the 2009 enrollment period will receive an annual payment that combines the conservation performance from additional and existing conservation activities. Annual payments may also include compensation for on-farm research and demonstration activities or pilot testing, and (2) Supplemental payment for the adoption of resource-conserving crop rotations on cropland.

The 2008 Act directed the development of the CMT to estimate the level of environmental benefit to be achieved by a producer in implementing conservation activities. NRCS successfully implemented the CMT during its first sign-up. The CMT effectively evaluated the stewardship threshold requirements, estimated conservation performance, generated a ranking score, and calculated conservation performance payment points. Preliminary data analysis showed the CMT fairly evaluated conservation performance on different sizes and types of operations, across different land uses, for all regions of the country. Although the tool performed well, NRCS recognized that improvements were necessary to improve clarity of the questions being asked of clients. Therefore, NRCS assembled a team of technical experts to analyze the questions in the CMT that could be misunderstood, identify those needing adjustment, and provide recommendations to the Chief.

NRCS designed the program to recognize excellent stewards and deliver valuable new conservation on every CSP contract. The agency developed multiple program features to enable it to realize this objective, including:

(1) Bundling enhancements to encourage participants to address additional resource concerns in a more comprehensive manner. NRCS updated its enhancement list and adopted the concept of bundling for the second ranking period. Certain enhancements will be offered as "bundles." The bundling concept enables participants and the nation to realize conservation benefits from the synergy that results when activities are implemented as a system. Participants who elect to bundle enhancements receive a positive adjustment in their ranking score and payments.

(2) Calculating payments based on a process that considers conservation performance points rather than just acres. Each conservation activity has a performance value. Basing payments on conservation performance points rather than a rate per acre enables participants to influence their payment rates according to the type and number of conservation activities they are willing to adopt.

(3) Placing a higher value on payments for additional activities versus existing activities through split-rate payments. For contracts selected for enrollment during the first ranking period, NRCS provided participants with an annual payment. Although the single annual payment was calculated giving consideration to both new and existing activities, participants could not readily distinguish the value of each since the participant received one payment. For the second and future application ranking periods, NRCS intends to calculate payments for additional conservation activities at a higher payment rate than existing activities with the goal of providing a majority of payments to compensate producers for implementing additional conservation. In the initial ranking period, 63 percent of the payments were attributed to existing conservation activities. NRCS believes this higher payment for additional conservation performance will encourage producers to apply additional activities and serve to maximize net additional environmental benefits as much as possible beyond the current 63:37 ratio.

(4) Requiring the adoption of additional conservation activities to earn annual payments. To earn annual payments for an eligible land use, a participant must schedule, install, and adopt at least one additional conservation activity on that land-use type. Eligible land-use types that fail to have at least one additional conservation activity scheduled, installed, and adopted will not receive annual payments.

(5) Implementing a State allocation process that considers the extent and magnitude of conservation needs associated with agriculture production. The State allocation process will consider natural resource data from sources like the NRI related to the nation's major resources concerns, including water quality and quantity, soil quality, air quality, and wildlife habitat.

(6) Developing contract renewal criteria that require new conservation activities. In order to renew a contract after the initial contract period, participants will need to expand the degree, scope, and comprehensiveness of conservation activities by meeting an expanded stewardship threshold requirement and agreeing to adopt additional activities during the renewal period.

In establishing the measures and methodologies NRCS will use to monitor program performance, the agency believes the CMT will assist in measuring outcomes. The conservation performance the CMT estimates is measured in terms of relative physical effects; they are not true environmental benefits. However, the CMT performance estimates are a step forward from output measures, like acres of conservation practices, used by former programs. NRCS acknowledges challenges, but intends to pursue the use of CEAP results with CMT performance data to help produce meaningful estimates of environmental effects accomplished through CSP.

NRCS received numerous comments on CSP as it relates to organic farming, including that the regulations and overall design of the program should include specifically organic conservation activities, as well as ensuring that all conservation activities rewarded under the program include appropriate variations relevant to organic farms where the standard conservation practice may be inappropriate for organic systems; organic crop and livestock systems should be recognized for their environmental benefits.

Since organic producers have adopted a number of conservation measures that

have significant environmental benefits, CSP provides opportunities for their participation. The NRCS document entitled "The Conservation Stewardship Program's Contribution to Organic Transitioning" highlights how CSP can be used by organic producers. The questions in the CMT are designed to assess conservation outcomes on the land. As such, the questions do not specifically distinguish between organic and non-organic producers. However, in most instances organic producers should score very well in the CMT by the use of cover crops, perennials, diverse rotations, and limited use of pesticides. In addition, CSP offers a number of enhancements targeted specifically at organic producers.

NRCS takes seriously its responsibilities related to providing conservation opportunities to organic producers. The agency is working to ensure its field office staffs have adequate training to work with organic farmers. Individual States conducted numerous training sessions on conservation planning with organic producers. A national teleconference on organic certification has been conducted, and plans are in place to work with several private organic groups to provide training to NRCS State specialists on organic farming systems.

Summary of Initial Ranking Period

NRCS began accepting program applications for the initial ranking period on August 10, 2009. The cut-off for the initial ranking period was September 30, 2009.

Each application was evaluated for basic eligibility criteria: applicant eligibility, land eligibility, and the stewardship threshold requirement. To meet the stewardship threshold requirement, an applicant must meet or exceed the threshold level for at least one resource concern at the time of the application, and at least one priority resource concern by the end of the contract period.

NRCS assisted applicants with completing a resource inventory of their operation using the CMT. The CMT estimates conservation performance to determine if the application meets the minimum stewardship threshold requirement. Conservation performance points estimated by the CMT are also used to determine application ranking scores and contract payment levels.

The conservation performance ranking score is used to determine the priority of funding for an applicant. Applicants will be funded starting with the highest score and working down the list until acres are exhausted. The conservation performance ranking score is based on five factors:

(1) The level of conservation treatment on priority resource concerns at the time of application.

(2) The degree to which treatment on priority resource concerns increases conservation performance.

(3) The number of priority resource concerns to be treated to meet or exceed thresholds by the end of the contract.

(4) The extent to which other resource concerns will be addressed to meet or exceed stewardship thresholds by the end of the contract.

(5) A tie-breaker factor is used in the event that application ranking scores are similar. The application that represents the least cost to the program will be given higher priority.

To reach CSP's authorized annual acreage enrollment limit of 12,769,000 acres, NRCS allocated acreage to States based primarily on each State's proportion of eligible land. Within States, NRCS pre-approved applications for funding based on ranking scores and funding pool acreage allocations. As of December 1, 2010, over 10,700 applications were pre-approved for program participation.

Preliminary analysis of the initial ranking period provided NRCS with some key findings.

(a) Producer interest in CSP was high. During the initial ranking period, NRCS received over 21,000 applications on an estimated 33 million acres from across the Nation including the Caribbean and Pacific Island areas. In general, applicants were diverse in terms of size of operation, land use type, and geographical location. Rangeland was the land use most offered for program consideration (51 percent of acres), followed by cropland (37 percent), NIPF (7 percent), and pastureland (5 percent).

(b) Water quality (89 percent of pools), plants (85 percent pools), wildlife (77 percent pools), soil quality (nearly 70 percent of pools) were the top priority resource concerns identified in the funding pools by the States.

(c) Eligible applicants share a common characteristic—they are excellent stewards of the land. In fact, 80 percent of applicants met five resource concerns at the time of application. Conservation performance payment points from existing activities equaled 63 percent of the total points generated. This dominance of practicing land stewards in the initial ranking period limited the agency's ability to change the relative weights on the factors in the ranking process and substantially alter the distribution of conservation performance payment points between existing and additional activities. Future sign-ups will likely draw applicants from the larger agricultural community where the level of stewardship may be lower, thus giving additional activities a larger role in the ranking of applications.

Discussion of Comments and Regulatory Changes

NRCS solicited comments on the CSP interim final rule from July 29, 2009, through October 28, 2009. The original comment period ended on September 28, 2009, but was extended through October 28, 2009, to enable the public to submit comments throughout the program's first enrollment period. NRCS received 208 letters representing 208 individual signatures. The total number of letters received includes five identical duplicate letters and eight letters from eight individuals submitting more than one unique letter. A total of 1,534 comments were assessed during the content analysis process.

In addition to requesting public comment in general on the rule and the environmental analysis, NRCS sought comment on the following specific issues:

Ranking Factors—NRCS requested input on the appropriate weighting of the five ranking factors that are intended to maximize environmental benefits while maintaining consistency with the statutory purposes of the program.

Payments—Setting the annual payment rates represented a significant challenge for NRCS. In addition to managing the program within the national average rate of $18 per acre, the 2008 Act also provides an acreage enrollment limit of 12,769,000 acres for each fiscal year. To address these constraints, NRCS used the first ranking period as a payment discovery period to arrive at a uniform payment rate per conservation performance point by eligible land use type. NRCS requested public comment on ways to address program acreage and payment constraints, refine the payment approach, and make annual payments more consistent and predictable. Additionally NRCS sought public comment on the proper distribution of CSP annual payments between payment for additional activities and payment for existing activities.

Contract Renewal Criteria—Section 1470.26 in the interim final rule provided that NRCS will permit contract renewals to foster participant commitment to increased conservation performance. NRCS sought public comment on the contract renewal criteria.

State Allocations—NRCS requested comments on the factors used to allocate acres to States.

Stewardship Threshold—NRCS requested input on whether meeting the stewardship threshold on *one* resource concern and one priority resource concern is adequate, or if that number should be greater.

Wildlife as Priority Resource Concerns—NRCS requested comments on whether or not at least one of the priority resource concerns should specifically be identified to address wildlife habitat issues.

The topics that generated the greatest response include 1470.7 Enhancements and Conservation Practices, 1470.20 Application and Ranking, and 1470.24 Payments.

The public comments are addressed by section number. The CSP regulation is organized into three subparts: Subpart A—General Provisions; Subpart B—Contracts; and Subpart C—General Administration. Below is a summary of the comments received for each section and the agency response.

Subpart A—General Provisions

Section 1470.1 Applicability

A total of 16 comments were received. This section sets forth the purpose, procedures, and requirements of CSP. The subject of the comments varied considerably. Commenters offered thoughts and ideas regarding the intent of the program, program goals, and whether CSP appeals to new farmers or small farmers using CSP in coordination with other Farm Bill programs, organic production, local food sources, and education and training.

NRCS received four comments in support of the program intent. Commenters expressed that this program is an improvement over the Conservation Security Program from the perspective of fairness in measuring sustainability and as a tool that has the possibility of being an agent of change, making agriculture more sustainable and coexisting, or as a part of essential ecosystems; the new CSP holds tremendous potential to make a significant contribution to assisting farmers, ranchers, and private forest landowners in solving some of the nation's most pressing environmental problems. A third identified that implementation in all States is critical to maximizing the program's potential; the fourth commented that the program is long overdue—both farms and the environment will benefit from the program. Some commenters expressed that CSP should be available for small farmers.

NRCS Response

No changes are made to the rule in response to these comments. NRCS agrees that CSP can make a significant contribution in assisting farmers, ranchers, and private forest landowners with their conservation efforts regardless of the size of the operation, production type, or land use.

Comments

Three commenters expressed thoughts related to program goals. One commenter expressed that sustainability is related to not only soil conservation and crop yields but also an ecological responsibility. CSP goals should include helping farmers in similar farming systems become more sustainable. One commenter supported the organic production assistance as long as the conservation priorities and requirements for air, water, soil, and wildlife are being met. The third commenter advised that NRCS should follow the intent of the law. The statutory purpose of CSP is comprehensive resource management with emphasis on producers improving or adding additional conservation activities to their operation.

NRCS Response

No changes are made to the rule in response to these comments. NRCS determined the regulation aligns with the commenters recommendations. Section 1470.1, paragraph (d) identifies that NRCS will provide program participants financial and technical assistance for the conservation, protection, and improvement of soil, water, and other related natural resources. By addressing resource concerns in a comprehensive manner, farming systems will become more sustainable.

NRCS is following the program's intent provided for in statute. The statute directs the Secretary to carry out a CSP to encourage producers to address resource concerns in a comprehensive manner by:

(a) Undertaking additional conservation activities; and

(b) Improving, maintaining, and managing existing conservation activities.

Comments

NRCS received concerns about CSP only reaching those who already participate in conservation programs, as well as a recommendation for more levels of conservation in the categories in both the CMT and enhancement list. While the overall score may not allow a lower conservation threshold to enter a contract under current acreage limitations, demand for the program and ecological benefits to the public could drive an increase in legislative acreage and funding levels.

NRCS Response

No changes are made to the rule in response to these comments. NRCS disagrees that the CSP only reaches farmers who currently use conservation programs. NRCS conducts outreach to all producers without limiting participation because of size or type of operation or previous participation in conservation programs. The level of producer interest for the initial ranking period demonstrates that the program is attractive to all producers who are willing to install new or improve, maintain, or manage existing conservation systems.

It is clear by the establishment of the stewardship thresholds in the CSP statute that CSP is to be delivered to lands that have existing conservation measures addressing at least one resource concern and must meet one priority resource concern by the end of the contract period. NRCS places no priority on existing conservation measures having been previously installed under USDA or other conservation programs. NRCS will continue to provide planning assistance to other cost-share programs for beginning resource stewards and those not approved for CSP. As producers improve their environmental performance they may have their application re-evaluated in subsequent ranking periods.

NRCS agrees that demands for the program and ecological benefits may influence the authorized acreage and funding levels.

Comments

Four commenters expressed recommendations related to CSP being a working lands program. The commenters largely want the program to be targeted to the needs of working agriculture lands and their operators and improving the land for the next generation.

NRCS Response

No changes are made to the rule in response to these comments. The program rules and ranking process focus on conservation activities on working lands. In addition, the majority of the conservation activities available through the program are specifically targeted to working lands.

Comments

NRCS received comments related to placing particular focus, attention,

weight, and publicity on programs that increase local food that is grown using local resources.

NRCS Response

Although NRCS welcomes new ideas related to working with small farms, local food production, and improving the resource conditions on these farms, no change is made to the rule in response to these comments. In recognition of the importance of the locally grown movement to the nation's food producers, the program offers an enhancement specifically for locally grown and marketed farm products for those interested in improving their resource stewardship and selling produce through local markets.

Comments

One commenter requested NRCS clarify that CSP can be used in a coordinated manner with all other Farm Bill conservation programs to address resource concerns in a comprehensive manner. This approach is consistent with the Managers' Report that encourages NRCS to use other conservation programs to assist landowners in achieving conservation objectives. The rule should clarify that enrollment in other conservation programs, such as EQIP and WHIP, does not exclude producers from CSP, and these programs can be used in conjunction with CSP to address resource concerns provided that producers do not receive duplicate payments on the same acres.

NRCS Response

NRCS promotes the use of other programs to address resource concerns in a comprehensive manner. The agency allows applicants to identify other practices they are willing to implement to meet resource concerns that they are not currently meeting. These additional practices could be cost-shared through other NRCS programs if the practices are not being compensated through CSP. In addition, NRCS encourages producers that are not currently eligible for CSP to contact their NRCS office or visit the Web site at *http://www.nrcs.usda.gov/programs/* to find out about other conservation programs that can assist them on meeting their conservation needs. To address the concerns by the public, NRCS amends the rule in paragraph 1470.7 by adding paragraph (c) to read, "CSP encourages the use of other NRCS programs to install conservation practices that are required to meet the agreed-upon stewardship thresholds, but the practices may not be compensated through CSP."

Comments

One commenter offered that there is a need for expert education and training and close CSP implementation scrutiny.

NRCS Response

No changes are made to the rule in response to this comment. NRCS agrees that its employees and clients need to be well informed about this program and that it needs to monitor operations to ensure the program is being applied consistently across the country. To address the educational component of the comment, NRCS made available to the public detailed documentation explaining program processes, payment rate establishment, CMT matrixes, questions, and scoring calculations. Documentation can be found at *http://www.nrcs.usda.gov/programs/new_csp/csp.html.* In addition, NRCS conducted a series of demonstrations and informational meetings for internal and external customers.

Section 1470.2 Administration

Comments

A total of 35 comments were received on section 1470.2, "Administration." This section describes the roles of NRCS at the national and State levels. Most of the comments related to acreage enrollment levels and historically underserved producers. However, a few comments were received related to sign-up administration, and one comment related to pollinators.

One commenter expressed the need for NRCS to ensure policies are being implemented consistently across field offices. The commenter identified that the farmers they work with noted clear variability between county offices in the interpretations of various aspects of CSP, both in answering CMT questions and the application of conservation practices and enhancement activities.

NRCS Response

NRCS recognizes the need for consistency in implementing this program. NRCS will ensure training of field office staff on a continuous basis to ensure quality program delivery.

Sign-Up Periods

Comments

Four comments were received related to sign-up periods; the commenters are concerned about the timing of the sign-up, urging NRCS to choose sign-up periods carefully and avoid closing ranking periods and farm evaluations during busy times of the year for farmers, such as spring planting and fall harvest. NRCS received inquiries regarding whether allocated acres will be transferred to other States if they are not used, and how the rankings are created other than the electronic tool available only to NRCS personnel; and one commenter expressed that agriculture funds are not intended just for an ever shrinking group who are growing certain commodities.

NRCS Response

NRCS recognizes that having a sign-up at a time that is suitable to its clients is critical for the success of the program. Therefore, NRCS offers a continuous sign-up which allows producers to submit their application at any time. NRCS is fine-tuning the CMT design so it can be used to evaluate applications accepted throughout the continuous sign-up period, allowing for applications to be ready for evaluation in advance of an announced sign-up and funding cycle. NRCS will make every effort to enable those interested in applying for the program to have ample time to do so.

Regarding the need for information about ranking, ranking pools within States were established based on geographic area boundaries. Each State identified, with review and input from the State Technical Committee, a minimum of three and a maximum of five priority resource concerns for each geographic area. The priority resource concerns selected for each ranking pool are used on three out of the four ranking factors, thereby ensuring that program dollars are addressing the critical resource concerns for each State ranking pool area. Priority resource concerns rank higher than non-priority resource concerns.

In any fiscal year, acres allocated to a State that are not enrolled by a date determined by the Chief, may be reallocated with associated financial and technical assistance funds to another State for use in that fiscal year.

The CMT is the only approved tool to determine the relative conservation physical effects of conservation activities on natural resource concerns and energy to estimate the existing conservation performance levels and the additional conservation performance improvement to be achieved by an applicant. The tool is currently Web based and linked to the NRCS Programs Contracting Software. There is no way to make the tool available to the public at this time. However, it is NRCS' intention to move the tool to a Web environment where it can be accessible by the public. Until these adjustments are complete, NRCS will provide producers with a hard copy of the questions that may be used to evaluate their applications if requested.

NRCS disagrees that program funds are targeted to a small select group. The CSP is a nationwide program open to all eligible producers regardless of the type of crops that are grown. Payments through CSP are not subsidies, but rather a contract payment for providing environmental benefits from maintaining existing conservation activities and adopting new conservation activities. CSP is not limited to commodity producers and is "operation size" neutral in its application ranking.

Comments

One commenter requested clarification on how NRCS arrived at its policy option findings by evaluating in its decisionmaking matrix both the computerized-modeling formula and the key statutory-policy phrase "to the maximum extent practicable."

NRCS Response

The policy option findings that were reported in the benefit-cost analysis were generated using a model that incorporated most of the CSP's program constraints, as well as using secondary data on the characteristics of potential participants and a prototype of the CMT. The CMT was not complete when the analysis was done. The objective of the analysis was to estimate the direction of change in program outcomes given certain policy options—not to predict with certainty what future program enrollment and outcomes would be. In that analysis, any outcomes that involved violations in the program constraints were reported, even though care was taken so as to meet them "to the maximum extent practicable."

Acreage Enrollment Levels

Comments

Twenty-two comments were received relaying the same message; the entire acreage designated by Congress should be available over the life of the Farm Bill. NRCS also received comments that it should decrease its administrative costs. The conservation stewardship plan will clearly be an important integral part of any contract, but the plan development and oversight costs must be balanced with the implementation costs borne by the participating farm operator. One commenter recommended a new paragraph (4) be added to 1470.2(c) to stipulate that NRCS will develop and make available the organic crosswalk; one commenter recommended NRCS change paragraph 1470.2(c)(1) by inserting "each year" immediately prior to "to determine enrollments." In paragraph (d) insert after "$18 per acre" the following words directly from the statute: "During the period beginning on October 1, 2008, and ending on September 30, 2017."

NRCS Response

NRCS conducted an analysis using the Cost of Programs Model to determine the funds needed to promote and deliver the CSP. In addition, real time application data was used to establish the national payment rates to determine the distribution of financial assistance to meet program constraints. The CSP presents a significant shift in how NRCS delivers and provides conservation program payments. Under CSP, participants are paid for conservation performance. Therefore, it is inappropriate to compare a traditional program like EQIP with CSP.

NRCS does not agree that additional direction related to providing assistance for organic production is necessary. The statute provides that outreach and technical assistance are available to specialty crop and organic producers and their ability to participate in the program. Additionally, the program offers activities for the transition to organic cropping and organic grazing systems.

To achieve the conservation goals of CSP, NRCS will:

(1) Make the program available nationwide to eligible applicants on a continuous application basis with one or more ranking periods to determine enrollments. One of the ranking periods will occur in the *first quarter of each fiscal year,* to the extent practicable; and

(2) To add clarity to the regulation, NRCS will amend paragraph 1470.2(d) to read as follows: During the period beginning on October 1, 2008, and ending on September 30, 2017, NRCS will, to the maximum extent practical: (1) Enroll in CSP an additional 12,769,000 acres for each fiscal year, and (2) Manage CSP to achieve a national average rate of $18 per acre, which includes the costs of all financial and technical assistance, and any other expenses associated with program enrollment and participation.

Historically Underserved Populations

Comments

Several comments were received related to historically underserved producers with the majority of the concerns directed to socially disadvantaged farmers or ranchers and beginning farmers or ranchers. One commenter expressed that the CRIA is incomplete and appeared to overstate conclusions. Additional analysis is necessary, as is implementation of transparency and accountability provisions in section 14006 of the Farm Bill. Another commenter recommended NRCS require and conduct reviews in each State to address anticipated needs as well as gaps in participation in specific programs by federally recognized Indian tribes and by socially disadvantaged and other historically underserved producer groups by race, gender, and ethnicity. A third commenter expressed that NRCS must have a methodology for informing socially disadvantaged producers of the reasons for the refusal of a CSP contract. Another requested that NRCS ensure the set-asides for socially disadvantaged farmers or ranchers and beginning farmers or ranchers are swiftly and thoroughly implemented. One commenter requested sections 1470.2(e) and 1470.20(1)(3) be revised to establish that the 5 percent set-aside for beginning farmers or ranchers and for socially disadvantaged farmers or ranchers be target floors, not ceilings.

NRCS Response

NRCS has standard procedures to formally inform all applicants of the reasons they were not awarded a CSP contract. Along with the determination, applicants are offered appeal rights. This agency policy can be found in the Conservation Program Contracting Manual, Part 512 located at *http://directives.sc.egov.usda.gov/RollupViewer.aspx?hid=25932.*

CSP policy provides that each State set aside a minimum of 5 percent of their State acre allocation for these ranking pools. To add clarity and provide flexibility to set aside more than 5 percent, NRCS moved the language related to ranking pools for these groups by deleting the text in 1470.2(e) and adding text in 1470.4(b) to read as follows: Of the acres made available for each of fiscal years 2009 through 2012 to carry out CSP, NRCS will use, as a minimum: (1) 5 percent to assist beginning farmers or ranchers, and (2) 5 percent to assist socially disadvantaged farmers or ranchers. Paragraph (b) has been redesignated as paragraph (c) and amended for clarity to read "In any fiscal year, allocated acres that are not enrolled by a date determined by NRCS, may be reallocated with associated funds for use in that fiscal year under CSP."

Section 1470.3 Definitions

Comments

Thirty-eight comments were received on section 1470.3, "Definitions." This

section sets forth definitions for terms used throughout this regulation.

Agriculture Land

Comments

One commenter requested NRCS insert "including energy" after "agricultural products."

NRCS Response

NRCS is retaining the definition in the interim final rule to be consistent with other NRCS programs. Crops for producing energy are included in the term agricultural products. Although NRCS is retaining the definition for consistency and clarification purposes, NRCS adds the following text to the end of the definition: "Agriculture lands may also include other land and incidental areas included in the agricultural operation as determined by NRCS. Other agricultural lands include cropped woodland, marshes, incidental areas included in the agriculture operation, and other types of agricultural land used for production of livestock."

Agriculture Operation

Comments

One commenter responded that the definition is inconsistent with the statute, which reads "eligible land shall include all acres of an agricultural operation of the producer, whether or not contiguous, that is under the effective control of the producer at the time the producer enters into a stewardship contract." There is a conflict between the words "under effective control * * * for the term of the proposed contract" vs. "under effective control * * * at the time the producer enters into a stewardship contract."

One commenter expressed support for the definition in the interim final rule because it allows landowners to participate.

NRCS Response

NRCS agrees that the definition of agriculture operation needs to be consistent with the intent of the statute. Therefore, NRCS amends the definition of agricultural operation and adds a definition for effective control to clarify that control of the land is needed from the time the producer enters the stewardship contract and for the required period of the contract. *Agricultural operation* means all agricultural land and other land, as determined by NRCS, whether contiguous or noncontiguous:

(1) Which is under the effective control of the applicant, and

(2) Which is operated by the applicant with equipment, labor, management, and production or cultivation practices that are substantially separate from other operations.

Effective control is defined to mean the possession of the land by ownership, written lease, or other legal agreement and authority to act as decisionmaker for the day-to-day management of the operation both at the time the applicant enters into a stewardship contract and for the required period of the contract.

Beginning Farmer or Rancher

Comments

One commenter requested NRCS change the definition of beginning farmer or rancher to make it conform to the definition of socially disadvantaged farmer or rancher with respect to entities. In both cases, entities in which at least 50 percent ownership in the farm business is held by the target population should qualify.

NRCS Response

No changes are made to the rule in response to this comment. NRCS retains the agency's official definition that was published in the interim final rule to be consistent with other USDA and NRCS programs.

Conservation Planning

Comments

One commenter requested the definition be revised to bring it into accord with statute concerning conservation planning, including the addition of conservation planning in the conservation activities definition, the contract definition, and the payments section.

NRCS Response

NRCS did not include conservation planning as part of the conservation activities to be compensated because the producer will not incur any cost for planning. The CSP delivery model necessitates a conservation stewardship plan prior to contract obligation. Therefore, the plan must precede the contract for which payment is granted. The authorizing language provides that payments will not be provided for conservation activities for which there is no cost incurred or income forgone. No changes are made to the rule in response to this comment.

Conservation Activities

Comments

One commenter requested NRCS change the definition to include enhancements and a change to the enhancement definition to incorporate environmental quality and to explicitly include the management and maintenance of existing enhancements and the adoption of new enhancements.

One commenter expressed concern that the definition in the statute includes agricultural drainage systems and that the wording may promote wetland drainage. The commenter encouraged NRCS to utilize other conservation programs such as those available through the continuous Conservation Reserve Program (CRP) (buffers, filter strips, etc.) to achieve priority resource concerns such as water quality.

NRCS Response

NRCS retains the current definition to be consistent with the language in the legislation. NRCS does not feel it is appropriate to add the program purpose to the definition of conservation activities.

NRCS acknowledges the concern related to the language in the statute that may promote wetland drainage. NRCS addressed this concern by offering two agricultural drainage water management enhancements with specific criteria to manage existing drainage system to reduce the potential for water quality problems from drainage water and to manipulate systems for wildlife habitat benefits. The program promotes buffers, filter strips, and other vegetative practices to address water quality concerns as well as other natural resources.

Conservation Practice

Comments

NRCS received a recommendation that it amend the definition to include "commonly used to meet a specific need in planning and carrying out soil and water conservation programs, including wildlife management and forest health for which standards and specifications * * *" The NRCS conservation practice standards not only address soil and water conservation but also wildlife habitat management and forest health.

NRCS Response

NRCS agrees with the comment and amends the definition to read as follows: *Conservation practice* means a specified treatment, such as a structural or vegetative practice or management technique, commonly used to meet a specific need in planning and carrying out conservation programs for which standards and specifications have been developed. Conservation practices are in the NRCS Field Office Technical Guide (FOTG), Section IV, which is based on

the National Handbook of Conservation Practices.

Enhancements

Comments

One commenter recommended NRCS change the definition for "enhancements" to read "a type of activity and the associated infrastructure and equipment installed and adopted to treat natural resources and improve conservation performance."

NRCS Response

No change is made to the rule in response to this comment. NRCS is retaining the current definition of enhancements. The definition provides that enhancements are a type of conservation activity used to treat natural resources and improve conservation performance. This includes, by implication, the "infrastructure and equipment" necessary for an enhancement. In many cases enhancements are management actions that do not require equipment or infrastructure.

Management Measure

Comments

One commenter requested NRCS insert "or conservation system" after "conservation practice."

NRCS Response

No change has been made to the rule in response to this comment. NRCS retains the current definition of management measure. A conservation system could be considered a management measure.

Nonindustrial Private Forest Land

Comments

NRCS received four comments on the definition of NIPF. One commenter supports the definition as written in the interim final rule. Another commenter requested NRCS remove or qualify the phrase "or is suitable for growing trees" to preclude the planting of trees in places that will further diminish habitat for at-risk species. A third commenter requested clarification on the overlap that exists between forest land and incidental forest lands on agricultural operations by defining incidental forest lands under the agricultural land definition. A fourth commenter requested the "agriculture land" and "agricultural operation" definitions be updated to include NIPF.

NRCS Response

The 2008 Act provides the definition of NIPF which is applicable to all Title 2 conservation programs, including CSP; therefore, NRCS keeps the current definition as provided in the interim final rule.

NRCS is preventing an overlap between NIPF and incidental forest land by not allowing incidental forest land to be included in an agricultural operation contract for program payments. However, if an applicant designates the forest land for funding consideration, then it will be considered as a component of the operation and will be offered as separate application.

Resource-Conserving Crops

Comments

NRCS received a significant number of comments on the definition of resource-conserving crops. Seventeen commenters requested that the definition specifically require a perennial grass, legume, or legume-grass mixture for use as a forage, seed for planting, or green manure to be part of the rotation. A number of these commenters also expressed that rotations that include only crops eligible for Farm Bill commodity subsidies should not qualify as resource-conserving.

Although one commenter supported the definition of resource-conserving crop and the use of supplemental payments for implementing resource-conserving crop rotations, many more were critical. Critical comments included the concern that a commodity crop rotation with "high" residue is not a sufficiently effective practice; NRCS should return to the strong definition used for the 2005 CSP interim final rule to ensure that farmers are being paid for significant environmental benefits; NRCS has chosen to allow the simplest of rotations, some of which result in no or close to no conservation benefits and are simply standard, production-related rotations; definition fails to meet the intent of the Farm Bill managers who "do not intend for the Secretary to pay for no-till or other common practices that have no cost to the producers; and fix the definition so that it clearly rewards complex rotations that deliver significant environmental benefits and so that farmers implementing rotations rightly merit the supplemental payments.

NRCS Response

NRCS has evaluated all comments received on the definition of "resource-conserving crop" and revises the definition to read as follows: resource-conserving crop means a crop that is one of the following: (1) A perennial grass, (2) a legume grown for use as forage, seed for planting, or green manure, (3) a legume-grass mixture, and (4) a small grain grown in combination with a grass or legume, whether inter-seeded or planted in rotation.

Section 1470.4 Allocation and Management.

Section 1470.4, "Allocation and management," addresses national allocations and how the proportion of eligible land will be used as the primary means to distribute CSP acres and associated funds among States. NRCS received three comments on allocations in general and seven comments on State allocations.

General Comments

One commenter requested allocations be conducted fairly by not being skewed towards large farms or established players. The commenter also requested a landscape management perspective be employed to maximize public benefit at the lowest cost per watershed.

Another commenter requested that NRCS work with other Federal agencies, including the Environmental Protection Agency (EPA), U.S. Geological Survey, U.S. Fish and Wildlife Service, and State natural resource agencies to identify the relative extent and magnitude of particular conservation needs associated with agricultural production in each State. The States with the greatest conservation needs should be prioritized, but their ranking should still be contingent on factor (ii), the degree to which implementation of CSP will impact the natural resource needs.

A third commenter questioned why, on page 37503 (table 1), the NIPF component (approximately 1.269 million acres) was not included in the analysis and whether or not the absence of that information would influence the choice of policy options.

NRCS Response

No changes are made to the rule in response to the comments. The regulatory text and the process for determining State allocations is not skewed toward large farms. The State acre allocations are based on each State's proportion of eligible acres to the number of eligible acres in all States and other consideration of funds, as determined by the Chief. NRCS used the 2003 NRI and 2007 Agricultural Census (AK, HI, Guam, and PR) data to determine the percent of agricultural lands (cropland, pastureland, and rangeland) per State. The National Woodland Owner Survey, 2006, from the U.S. Forest Service (USFS), Forest Inventory Analysis data was utilized to

determine the percent of NIPF per State. Once those values were established, the percentages were applied against the available agricultural lands (cropland, pastureland, and rangeland) for CSP which is 11,492,100 and against the 1,276,900 for NIPF, providing an equitable acreage allocation based on the national values. NRCS will also give consideration to conservation needs and the degree to which CSP implementation impacts those needs in future year's allocations.

NRCS is incorporating the actual data for all applicants from the initial ranking period in the final CEA. Although the initial CEA tried to control for the absence of NIPF, this final analysis will explicitly account for the exact acreage and budget outlays associated with NIPF. It is expected that the final CEA will be greatly improved with this additional information.

State Allocations—Comments Supporting the State Allocation Process

Two commenters expressed support for the acreage allocation system used to determine the acres available for each State in the first sign-up period and in the regulation. The one commenter opined that the acreage allocation process worked very well and requested the process be continued for the life of the program. The other commenter expressed that the allocation factors established by section 1238(b)(2)(A) and (B) of the Farm Bill and section 1470A(a)(2)(i) and (ii) of the rule are important for ensuring CSP does the most it can to drive environmental improvement. These factors can and should be emphasized by NRCS in making acreage allocations to States.

Another commenter expressed basic agreement with the interim final rule on allocations but urged sparing use of the additional considerations beyond the States' proportion of eligible land. The commenter urged NRCS to make only modest adjustments, if any, in the allocations to take into account the discretionary additional considerations. In the near term, any such modest adjustments should be based on both a clear and convincing need and on the proven effectiveness of the State in delivering the program.

NRCS Response

NRCS will explore other considerations for future sign-up periods.

Other Comments

NRCS received a comment that CSP is a premier working-lands platform for rice producers with the many attendant waterfowl and other wildlife benefits they provide to fulfill the CSP enhance and conserve requirements. For this reason, it is essential that rice producing States be allocated sufficient CSP acres that recognize their rice-related conservation benefits and provide an opportunity for rice producers' meaningful participation. In addition to the Farm Bill mandating a primary State-acreage allocation method, it also calls for consideration of other factors, which should be evaluated when CSP rice-producing State allocations are determined.

One commenter urged NRCS to emphasize factors (2)(i) and (2)(ii) from section 1470.4 of the rule ("the extent and magnitude of the conservation needs associated with agricultural production in each State," and "the degree to which implementation of the program in the State is, or will be, effective in helping producers address those needs").

One commenter recommended, in 1470.4(b), when a State does not use acres reserved for socially disadvantaged farmers or ranchers those acres be reallocated to other States with higher demand for the program.

NRCS Response

The State acre allocations are based on a formula that evaluates each State's proportion of eligible acres to the number of eligible acres in all States along with consideration of the extent and magnitude of the conservation needs associated with agriculture production in each State. NRCS amends paragraph (a)(2)(i) to clarify that this determination will use science-based resource factors that consider regional and State-level priority ecosystem areas. This ensures equitable acreage allocation. Additionally, NRCS amends 1470.4(b) to provide that State Conservationists allocate acres to ranking pools, to the extent practicable, based on the same factors the Chief uses in making State allocations. Additionally, allocated acres that are not enrolled in any fiscal year by a date set by the Chief, may be reallocated with associated funds for use in that fiscal year.

The text related to reserving acres for beginning farmers or ranchers, and socially disadvantaged farmers or ranchers is located in paragraph (c) and reallocating unused acres are found in paragraph (d). NRCS amends the new paragraph (d) to read, "In any fiscal year, allocated acres that are not enrolled by a date determined by NRCS may be reallocated with associated funds for use in that fiscal year under CSP. As part of the reallocation process, NRCS will consider several factors, including demand from applicants, national and regional conservation priorities, and prior-year CSP performance in States.

Section 1470.5 Outreach Activities.

This section describes how NRCS will establish special program outreach activities at the national, State, and local levels. Nine comments were received related to outreach activities for CRP lands, organic producers, and NIPF landowners. The comments are categorized in alphabetical order based on topic.

Conservation Reserve Program Lands

Comments

Several comments were received related to the eligibility provision for the CRP land. Six commenters recommended NRCS allow CRP participants to apply for CSP in the last year of the CRP contract. Additionally, the requirement that any farmable acres must have been farmed in 4 of the last 6 years is troubling. This provision leaves any land previously enrolled in CRP, but recently expired from the contract, completely ineligible for the program. One commenter suggests at the very least allow any acres classified as highly erodible to be eligible for CSP.

NRCS Response

No changes are made to the rule in response to the comments. The program's authorizing language states that land enrolled in CRP is not eligible for enrollment in the program. There is an exception for land that has not been farmed 4 of the last 6 years. The statute provides that the requirement will not apply if the land has previously been enrolled in CRP.

Comments

One commenter encouraged NRCS to include language in section 1470.5 clarifying that expiring CRP lands should be targeted by NRCS. The commenter recommends that NRCS provide guidance on how producers will be encouraged to protect conservation values on expiring CRP by enrolling in CSP.

NRCS Response

NRCS recognizes the natural resource benefits the nation has realized on CRP lands and is considering options for those producers with expiring CRP lands. However, NRCS is addressing this issue in policy rather than in the rule. Rather than targeting CRP lands specifically, NRCS considers the importance of maintaining land in conserving uses such as grassland and plans to spread this message through outreach and public announcements.

Nonindustrial Private Forest Land

Comments

NRCS received comment that it should work with other Federal and State agencies and non-governmental organizations that can assist them with outreach to forest landowners. Additionally, NRCS should conduct expanded outreach to this group of landowners since many NIPF landowners have not traditionally participated in USDA cost-share programs and are unfamiliar with the application process.

NRCS Response

NRCS agrees that many NIPF landowners have not traditionally participated in USDA conservation programs. NRCS encouraged State Conservationists to partner with other agencies and non-governmental organizations to ensure NIPF landowners were aware of the program. Some examples of efforts that States made to reach out to NIPF landowners were partnering with Small Woodland Owners Association, USFS, State Department of Forestry, and representatives from other local organizations. Some States provided training and promotional materials to each organization so they could provide accurate CSP information to their respective clients. Eight percent of the acres enrolled during the initial sign-up were NIPF.

Organic and Transitioning Farmers

Comments

NRCS received a few comments related to organic production. Comments included encouraging participation by organic and transitioning farmers; fully develop and implement, in close coordination with the National Organic Program, the CSP "organic crosswalk;" ensure outreach to organic and transitioning farmers by providing materials that are farmer-friendly and that account for the specific requirements of organic systems under the National Organic Program rule and how those requirements overlap with CSP; and seek to conduct outreach through avenues that organic and transitioning farmers use and access, which often are different from the information avenues that most conventional farmers use.

NRCS Response

No changes are made in the rule in response to the comments. NRCS is encouraging participation of organic producers by conducting special outreach efforts to this group. During the initial CSP sign-up period, outreach efforts were conducted in 17 States targeting organic farming organizations, groups, and individuals. Many States have representation on the State Technical Committee from organic organizations offering their views on how conservation programs are implemented within a State. State Conservationists have been encouraged to outreach to organic farmers, and NRCS will continue these efforts as we move forward with the program into the future.

Other

Comments

One commenter recommended NRCS conduct outreach programs to help make farmers and ranchers aware of the importance of providing habitat for managed and native bees and technical resources and available assistance.

NRCS Response

NRCS conducts outreach activities to a wide audience to promote the program and the benefits of addressing resource concerns in a comprehensive manner. CSP offers several opportunities to address pollinator habitat through questions in the CMT and enhancements. NRCS will consider additional outreach and publicity efforts to make producers aware of the opportunities to address pollinator habitat through CSP. No changes are made to the rule in response to this comment.

Section 1470.6 Eligibility Requirements

Comments

Section 1470.6, "Eligibility requirements," sets forth the criteria for determining applicant and land eligibility. NRCS received numerous comments on this section. One commenter expressed that a participant's personal details and proprietary operational information must be protected at all times by the Department.

NRCS Response

Information about applicants is generally not released to the public because individual privacy rights must be protected. The Freedom of Information Act (FOIA) and the Privacy Act, section 2004 of the Farm Security and Rural Investment Act of 2002, and section 1619 of the 2008 Act permit the government to withhold certain information. Refer to GM–120, Part 408, Subpart C, FOIA and Privacy Act, for NRCS policy regarding FOIA and the Privacy Act. The following information about conservation program contract applicants may not be released: Names, Addresses, Telephone Numbers, Social Security or tax identification numbers, and amount of Federal funds requested.

The 2008 Act does not impede the sharing of information between and among USDA agencies. However, information may only be shared with Federal agencies outside of USDA for specific purposes under a cooperative program, but not for general regulatory or enforcement purposes. Aggregate or statistical information about applications may be described in news releases, Web sites, and other tools used to inform the public.

When an applicant becomes a participant, additional information is available for release. The following information about participants may be released through a FOIA request: Names, limited address (State, city, or county), and conservation program contact obligation amount. Additional restrictions about the release of address information apply to some corporate and nonprofit business types. For more information, consult the NRCS General Manual GM–120, Part 408.

Comments

The other comments are discussed by the following categories: Applicant eligibility, operator of record requirements, control of land, land eligibility—general, land eligibility—agricultural operation, land eligibility—NIPF, and ineligible land.

Applicant Eligibility

Comments

A number of respondents expressed concerns about overarching Farm Bill eligibility requirements such as the treatment of landlords and tenants, Adjusted Gross Income (AGI) provisions, and actively engaged in farming determinations handled through the Farm Service Agency (FSA). One commenter requested NRCS coordinate closely with FSA.

NRCS Response

NRCS is coordinating closely with FSA regarding FSA's rules for legal farming arrangements. NRCS recognizes FSA responsibility in maintaining farm records and intends on utilizing these records, to the extent practicable, as a basis for program participation. However, NRCS will ensure that producers who would have an interest in acreage being offered receive fair treatment which NRCS deems to be equitable. NRCS may refuse to enter into a contract when there is a disagreement among joint applicants seeking enrollment as to an applicant's

eligibility to participate in the contract as a tenant.

Comments

NRCS received a comment that it is important when making AGI determinations that the current Internal Revenue Service rules governing income allocation apply. Accountants and other tax professionals are aware of these rules and knowledgeable when using them to make the necessary allocation amounts to spouses and other members of an entity. The Farm Bill provides an extensive list of income sources considered to be farm income for purposes of the farm AGI calculation. One area that is not specifically addressed is the categorization of wages earned from a farming corporation or other entity. Many times, partners or members of an entity receive a salary from the operation rather than or in addition to a distribution. NRCS should state clearly that this income is considered farm income for AGI purposes.

NRCS Response

The 2008 Act provides very specific AGI information applicable to all current Farm Bill programs. AGI clarification applicable to all Farm Bill programs is found in 7 CFR 1400.500.

Comments

NRCS received a comment urging the agency to factor into AGI determinations the fact that the Internal Revenue Service arbitrarily limits annual losses a producer can claim to $300,000 if the producer receives Farm Bill benefits, which if left unaddressed, could underestimate the extent of a producer's losses while exaggerating AGI, unfairly resulting in program ineligibility.

One commenter expressed that FSA "actively engaged in farming" rules should apply. These rules include crop share landlords and tenants as actively engaged, but reduce the ability of absentee investors to benefit and reduce the opportunity to create "paper" farms whose only purpose is to enable the beneficiary to collect payments in excess of the payment limit through well established payment limit avoidance devices that will not be captured by direct attribution. A reference to the actively engaged in farming rules applying to CSP should be added between paragraphs (g) and (h) in 1470.24. In addition, the definition of "producer" in 1470.2 should be modified to say "actively engaged in agricultural production or forest management" instead of just "engaged."

NRCS Response

No changes are made to the rule in response to these comments. NRCS is legally obligated to offer the program to everyone meeting eligibility. To apply for the program, the applicant must be the operator of the land in the FSA record system. An operator who is accepted and subsequently enrolled in a contract may include additional participants on their contract who may be landowners or others having control of the land enrolled in the contract and are included in the FSA record system. Such participants need to meet AGI requirements as well as Highly Erodible Land provisions and Swampbuster provisions. All participants included in a contract that receive funding will by law, be limited to the payment limitations set forth in the statute and the rule.

Comments

Two commenters requested NRCS establish reasonable procedures for reporting all members of a legal entity.

NRCS Response

It is FSA's responsibility to maintain customer records, including member information. FSA has forms available for entities to use to provide their member information; therefore, it is not necessary for NRCS to establish additional procedures. NRCS may obtain a copy of this information if needed. No changes are made to the rule in response to this comment.

Operator of Record in FSA Records

Comments

Nine comments were received on this topic. The commenters generally expressed dissatisfaction with the requirement that the applicant must be the operator of record in the FSA system. In their view, the requirement unfairly precludes certain legitimate producers or landowners from participating.

NRCS Response

The policy related to operators' results from a finding from the 2006 Office of the Inspector General (OIG) CSP audit that identified NRCS failed to detect improper identification of producers' agricultural operations. OIG recommended that NRCS complete ongoing coordination with FSA to utilize their existing data to independently verify applicant information for similar programs implemented in the future. However, NRCS recognizes this is a significant concern and amends paragraph 1470.6(a), Eligible applicant, to read as follows.

"To be an eligible applicant for CSP, a producer must be the operator in the FSA farm records management system. Potential applicants that are not in the FSA farm records management system must establish records with FSA. Potential applicants whose records are not current in the FSA farm records management system must update those records with FSA prior to the close of the ranking period to be considered eligible. NRCS may grant exceptions to the "operator of record" requirement for producers, tenants, and owners in the FSA farm records management system that can demonstrate to the satisfaction of NRCS they will operate and have effective control of the land for the term of the proposed contract." This change is not retroactive, and therefore, will not apply to the 2009 applications or participants. Paragraph 1470.6(a)(1) is deleted and subsequent paragraphs are redesignated accordingly. The new paragraph (a)(1) is revised to remove the requirement that the producers have "documented control" and to add a requirement that they have "effective control."

Control of Land

Comments

NRCS received multiple comments on this requirement. Commenters expressed dissatisfaction with the requirements that a producer must show control of the land for 5 years. NRCS received a comment recommending it work to the fullest extent allowed under the CSP statute to include rental acres in the program. Not doing so would mean that most modern commercial operations would be effectively excluded from CSP and the conservation incentives the program provides. It could be a significant administrative burden for both producers and NRCS personnel to modify the CSP contracts annually to accommodate changes in leased landowners. One commenter recommends that it be optional for a producer to enter leased land into the CSP.

NRCS Response

NRCS considers it a sound business practice to enter into contracts where the land will remain under contract for the full contract period. However, NRCS does recognize the need for flexibility to address those situations where operators have oral leases or other similar arrangements. Therefore, NRCS will modify its policy to remove the requirement for documented assurance

from the owner that the tenant will have control and will accept operator self-certification of control of the land for the contract period. Applicants who utilize the self-certification process will be subject to an annual review and verification process to confirm they maintain control throughout the contract period. In situations where operators do not anticipate having control of the land for the required period, such operators would not have effective control of that land and such land would not be considered part of their agriculture operation. NRCS does not expect applicants to project the unknown (*e.g.,* health, death, business failures, etc.); as long as applicants believe they will have the necessary control at the time of enrollment and for the required period of the contract, they are eligible.

Land Eligibility

Comments

Five respondents recommended that NRCS accept managed grazing land as cropland so it qualifies for a higher payment, ranks higher, and can support some enhancements not available in the pasture category. Operators who use cropland as pasture should be rewarded, not penalized by a lower CSP payment; one commenter felt the program should enable those who harvest wind to participate by expressing if the respondent grew crops to make biofuels they could participate; if they harvest wind they cannot; and one commenter requested NRCS implement the program in a size neutral manner. Producers of all sizes and descriptions are involved in cotton production and should have equal opportunities to access conservation programs.

NRCS Response

NRCS does not want to establish policy that may have an unintended consequence of encouraging producers to convert pastureland to cropland. Therefore, NRCS is establishing a "pastured cropland" program designation to provide a more accurate payment rate due to higher forgone income costs associated with maintaining a grass-based livestock production system on land suitable for cropland. The existing activity payment rate for pastured cropland will be higher than the pastureland rate. All technical assessments and determinations are completed as pastureland. Since the details regarding payment rates are not included in the regulation, no changes are made to the rule.

CSP does recognize wind power used to power agricultural operations on the farm through the CMT and enhancements offered by the program. However, land that is used solely for wind production does not meet the CSP definition of agricultural land as no "agricultural products or livestock" would be produced on the land.

No changes are made to the rule in response to these comments.

Comments

Two commenters requested NRCS clarify that the Conservation Security Program contracts may be eligible for CSP.

NRCS Response

NRCS retains the requirement that land enrolled in the Conservation Security Program is not eligible. After the Conservation Security Program contract expires, the land becomes eligible.

Comments

One commenter requested clarification of the term "other lands." The commenter requested NRCS identify what this term entails and what are the standards for demonstrating appropriate level of conservation on these lands that will determine eligibility and compliance. The rule itself is somewhat concerning in that it specifies that these areas must not have readily observable erosion or point sources of contamination such as gullies, manure runoff, or pesticide runoff. It is important to note that "agriculture storm water runoff" is not a point source and is allowed by Federal law under the Clean Water Act. The commenter encourages NRCS to revisit this element to make sure the standard of conservation sought on these lands is not a hindrance to farmer participation or conflicts with Federal law, particularly since payments will not be administered for practices on these lands.

NRCS Response

NRCS recognizes the concerns with using the words "point source" and will strike that language from procedures for assessing "Other lands." "Other lands" must be free from readily observable erosion, gullies, manure runoff, pesticide runoff, or other similar environmental concerns for the applicant to be eligible for the program.

Agricultural Operations

Comments

NRCS received a comment urging USDA to provide clear, detailed guidance about how it would implement "substantially separate" provisions to enable prospective applicants to determine if they would be able to participate on the business model their operation uses.

NRCS Response

The regulation identifies factors that will be used by applicants to determine whether operations are "substantially separate." Factors include equipment, labor, management, and cultivation or production practices. NRCS intends to clarify how these factors are used in procedures and guidance for producers.

Comments

One commenter expressed that the goal in the final rule is to make CSP simple and easy for CSP to be of real, concrete, and practical assistance to farmers struggling to deal with their real and immediate conservation and environment (needs); another expressed concern about treatment of eligible acres "agricultural operations" and rented land in the context of CSP contract requirements that are viewed to be unnecessarily restrictive and limiting; NRCS also was questioned about whether there is a statutory requirement that requires all of an applicant's operation to be covered by a contract. Section 1238E of the Food Security Act, as amended by the 2008 Act, says only that eligible land "shall include all acres of an agricultural operation of a producer, whether or not contiguous, that are under the effective control of the producer at the time the producer enters into a stewardship contract" (§ (b)(3)). While all such acres may be "eligible," there is no requirement that the applicant enroll all these eligible acres as the rule requires. If this language does not require the entire operation to be enrolled, we encourage NRCS to strike this requirement from the rule and instead adopt a more flexible approach that is fully reflective of the program's objective to provide comprehensive solutions working from a conservation systems' approach.

Another commenter recommends that NRCS require an operator to enroll a sufficient quantity and type of acres from the producer's operation to ensure that their operation's potential contribution to the area's resource and priority resource concerns can be properly addressed. This is not a fixed percentage of an operation, and it cannot be established in a one-size-fits-all approach.

NRCS Response

NRCS retains the requirement for the agricultural operation from section 1238E, *i.e.,* eligible land will include all acres of an agricultural operation whether or not contiguous, that are

under the effective control of the producer at the time they enter a stewardship contract, and operated by the producer with equipment, labor, management, and production or cultivation practices that are substantially separate from other agricultural operations, as determined by the Secretary. NRCS gives producers the opportunity to enroll owned land and rented ground for which they have effective control. NRCS amended paragraph 1470.6(b) to provide clarification that a participant may submit an application(s) to enter into additional contract(s) for newly acquired eligible land, which would than compete with other applications in a subsequent ranking period.

Nonindustrial Private Forest Land

Comments

NRCS received comments both in favor of and opposed to the agency policy of separating out NIPF in the enrollment process, so that forest land will be ranked and enrolled separately.

One commenter encourages NRCS to develop a way to track NIPF within their ProTracts system so that producers with both NIPF and agricultural lands are not required to file two applications.

By special rule no more than 10 percent of acres enrolled nationally in any fiscal year may be NIPF ownerships. This model potentially provides a larger contract payment to the landowner, but by the total enrollment calculation may overstate the benefits.

NRCS Response

NRCS determined it is necessary to maintain forest land applications separate to be able to meet the legislative requirement of enrolling no more than 10 percent of the annual acres enrolled nationally in any fiscal year in NIPF. NRCS chooses to retain the process established.

Section 1470.7 Enhancements and Conservation Practices

Comments

Forty-six comments were received on section 1470.7, "Enhancements and conservation practices." This section identifies that a participant's decisions describing the additional enhancements and conservation practices to be implemented under the CSP contract. The list of comments reflects the large selection of potential enhancements. The public provided input on managed grazing, pesticide management, energy, innovative practices, wildlife, forest management, and organic production.

NRCS Response

NRCS received numerous recommendations on innovative enhancements. NRCS is open to suggestions for additional enhancements on all land uses and welcomes innovative ideas for consideration. However, the program constraints limited how the financial assistance funds could be used. In order to achieve a national average rate of $18 per acre, enhancement activities emphasize management-based actions rather than structural practices. It is NRCS' intention that recommended changes and improvements will be incorporated in future ranking periods. New enchancement ideas will be evaluated and incorporated as time permits for future ranking periods. No changes are made to the rule in response to the comment.

Comments

One commenter recommends NRCS require cover crops and rotational grazing, rather than rewarding uninterrupted commodity crops that rob the soil.

NRCS Response

Program requirements to implement specific conservation activities would eliminate some farmers from eligibility for CSP. Instead, CSP recognizes there are many paths to conservation stewardship and asks questions in the CMT and offers enhancements that cover this spectrum. In addition, there are five enhancements available to producers that encourage the use of cover crops to manage nitrogen, break-up soil compaction, and improve bio-diversity. The resource-conserving crop rotation is another way CSP promotes crop diversity that includes grass and legume.

Comments

NRCS received criticism that the list of potential enhancements is long and exhaustive, and it will benefit potential program participants to know the ranking of each enhancement for both conservation performance effectiveness and relative cost. The commenter assumes that these rankings are, in turn, used in the CMT, and as such, the rankings reflected in this document should be subject to review and modification by the State Technical Committee to fully reflect that State's needs and priorities.

NRCS Response

The conservation values for each enhancement are posted on the NRCS Web site. NRCS welcomes input and thoughts on the relative value of each enhancement, but NRCS retains the right to make final decisions on the technical and resulting environmental impact of each enhancement. NRCS will continue to improve the development of information related to the CMT. NRCS recognizes the success of the program is dependent on a thorough understanding of resource needs and producer commitments, prior to entering a contract. Further, NRCS is looking at options to adjust the choices available by ranking pool, State, or region.

Comments

One commenter urged NRCS to consider offering enhancement practices for forest land that are innovative or not offered by other USDA programs, and to strongly consider potential environmental benefit when offering practices and ranking applications. The commenter recommended specific enhancements, some of which are already on the CSP enhancement list.

NRCS Response

The NIPF land enhancements are currently under review with changes in number of enhancements and scope to be completed before the next ranking period. NRCS will evaluate the enhancements recommended and will make its determinations public when changes, if applicable, are complete. The recommendations do not require a change to the rule.

Comments

NRCS received a recommendation that section 1470.7 be rewritten and re-titled to include both new enhancements and conservation practices to be implemented under a contract, as well as existing enhancements and conservation practices to be actively managed and maintained under a contract.

NRCS Response

NRCS chooses to retain the current information in section 1470.7 as this section is intended to address additional conservation activities to be adopted through CSP. Section 1470.23 deals with maintenance and management of existing activities.

Comments

Two commenters expressed that enhancements should reflect that commitment to flexibility and continuous improvement should allow for reasonable adaptation and modification during the life of the contract. Two commenters requested new enhancements be added to the toolbox of offerings as new conservation technologies are developed.

One commenter recommended allowing landowners 3 years to adopt forest enhancements, including forest stewardship plans which should be encouraged.

NRCS Response

The program has mechanisms in place to accommodate changes in operations during the life of the contract. The program allows change to the schedule or installed enhancements by allowing enhancements to be substituted as long as the conservation performance determined by NRCS is equal or better than the conservation performance offered at enrollment. In addition, a participant will not be considered in violation of the contract for failure to comply with the contract due to circumstances beyond the control of the participant.

CSP rules require that all enhancements be adopted by the third year of the contract. No changes are made to the rule in response to this comment.

Comments

One commenter recommended a thorough review of all CSP enhancements before the next ranking period and appropriate steps taken to improve benefits to fish, wildlife, and their habitats.

One commenter was opposed to implementing new practices through CSP. The commenter expressed that if farmers are interested in adopting new practices, they should be encouraged to apply for funding for the new adoption under EQIP instead.

NRCS Response

The program's statutory language provides that the term conservation activities mean conservation system, practices, or management measures that are designed to address a resource concern.

Comments

One commenter identified an interest in farmers that transition to a lower carbon footprint of production, including increasing soil carbon using managed intensive grazing systems, reduced tillage, and reduced pesticide use while another proposed a new category encompassing many of the CSP enhancements to help some of the endangered species, pollinators, and wildlife that are being pushed out by increasing housing developments. This should include inclusion and priority of biodiversity enhancing and organic farming practices.

NRCS Response

NRCS recognizes the merit of these conservation measures, and they are currently reflected in the CMT questions and enhancements offered through the program.

Innovative Enhancements

Comments

NRCS received multiple suggestions of practices and activities to add to the list of enhancements.

NRCS Response

NRCS conducted a thorough review of all CSP enhancements for all land uses, as well as evaluated the recommendations from the public. As a result, NRCS updated its enhancement list and adopted a new concept for the second ranking period related to the selection and implementation of enhancements. Certain enhancements will be offered as "bundles" while others will be offered individually. The bundling concept enables participants and the nation to realize conservation benefits from the synergy that results when activities are implemented as a system. For example, NRCS established a Sustainable Ag Bundle that includes enhancements for locally grown and marketed farm products, water quality, soil quality and plants, and beneficial insects.

The environmental benefits of each bundle will be reflected in the score and the resulting payment level. NRCS amended the rule in 1470.7(c) to make known the ability to incorporate bundled enhancements in the stewardship plan.

Comments

Another commenter requested NRCS provide clarity on the development and regular review of incentives for Socially Disadvantaged Farmers or Ranchers, Beginning Farmers or Ranchers, and Limited Resource Farmers or Ranchers, and Indian Tribes.

NRCS Response

The CSP does not provide incentive payments for historically underserved individuals. However, NRCS policy requires State Conservationists to address access to program enrollment for Socially Disadvantaged Farmers or Ranchers and Beginning Farmers or Ranchers through the establishment of special ranking pools. In addition, Indian tribes are exempt to payment limitation per legislation as stated in section 1238G(g) of the Statute.

Comments

NRCS should view the development of new technologies and management strategies in an entrepreneurial manner that fosters the addition of beneficial new activities as they are developed. New enhancements should be added to CSP's toolbox of offerings as new conservation technologies are developed in order to accelerate the adoption of conservation technologies with positive environmental benefits that will address societal needs.

One commenter noted that continued funding of large scale farms and conventional practices seems like others are continuing to get resources while innovators get nothing. Small scale farms are increasing across the country and at the same time, more CSA orientated marketing continues to spiral upwards as well.

NRCS Response

NRCS recognizes the value of small scale farms as well as large farms. As a result, the scoring and ranking system used for CSP is size neutral. No change is made to the rule in response to this comment.

Conservation Practices and Resource-Conserving Crop Rotation

Comments

Two commenters recommended that cover crops that best hold the soil in place whether legumes or perennial grasses with the least disruption causing erosion must be rewarded.

NRCS Response

Cover crops are given performance points in the CMT. There are also five CSP enhancements available that promote the adoption of cover crops in various ways. No changes are made to the rule in response to this comment.

Comments

Commenters supported the concept that resource-conserving crop rotations and managed rotational grazing should be rewarded through CSP.

NRCS Response

NRCS agrees and these activities are recognized in scoring and enhancements through CSP.

Comments

One commenter expressed that CSP is essential to the development of a better, more sustainable agricultural sector in this country, and therefore, it is necessary that the program provide support on a wide range of important practices like crop rotation.

Forty-nine commenters recommended that resource-conserving crop rotations

and management-intensive rotational grazing should receive strong support or high ranking and payment points. Cropping systems built around resource-conserving cropping and livestock systems based on rotational grazing are superior conservation approaches with multiple environmental benefits. They should be fully rewarded whether they are an ongoing conservation system or a newly adopted one.

NRCS Response

Applicants who choose to implement a resource-conserving crop rotation are recognized because they receive a separate payment for this activity above and beyond other payments they may qualify for under the program. NRCS recognizes the conservation value of crop rotations and rotational grazing. Both are scored highly in the CMT, and enhancements are offered for both of these activities. No changes are made to the regulation in response to these comments.

Comments

Another commenter expressed that it is also important that the funding amounts recognize the critical role that organic crop and livestock systems, resource-conserving crop rotations, and management-intensive rotational grazing play in strong and productive stewardship.

NRCS Response

CSP uses the CMT in evaluating the environmental impact that a management system provides. Those systems that provide the highest benefits receive the most conservation performance points resulting in higher ranking and increase payments. No changes are made to the rule in response to the comment.

Comments

A number of comments show support for small farmers like the one that expressed the concern that small family farmers raising a diversity of crops and animals, should receive high ranking and payment points based on resource-conserving crop rotations and management-intensive rotational grazing.

NRCS Response

Applicants in this category that are addressing natural resource concerns will score very well in the CMT and will have the potential for high stewardship levels. Recognizing that CSP may not offer financial resources to smaller operators that would encourage participation, NRCS amended the regulation in paragraph 1470.24 to add authority for the Chief to offer a minimum contract payment amount.

Comments

Farmers coming into newly adopted resource-conserving crop rotations and management-intensive rotational grazing (in addition to those who presently implement those practices) need to be able to sign-up for CSP.

NRCS Response

CSP scoring, ranking, and payments are based on both existing conservation activities and additional conservation activities that the applicant chooses to implement. This process allows for farmers who are at different levels of conservation to participate. NRCS uses an environmental focus and not a commodity-based focus when implementing CSP. No changes are made to the rule in response to the comment.

Comments

One commenter expressed that in reviewing the interim final rule and the materials posted on the NRCS Web site in reference to the rule, the resource-conserving crop rotation and its specific special payment is clearly a priority for NRCS. However, exact implementation of this provision still appears uncertain. As NRCS moves forward with this provision, the agency should strive to attain the objective of greater soil conservation and the building of carbon in the soil rather than a prescription that can only be met with the addition of a perennial crop or forage crop to the rotation.

NRCS Response

The resource-conserving crop rotation job sheet, describes the benefits of a resource-conserving crop rotation that includes reduced wind and water erosion, increased soil organic matter, improved soil fertility and tilth, interrupted pest cycles, reduced depletion of soil moisture or reduced need for irrigation in applicable areas, and provided protection and habitat for pollinators. Each State developed a list of plants and crops that met the criteria of a resource-conserving crop. No changes are made to the rule in response to the comment.

Comments

One commenter expressed that conservation methods in crop rotations are vital for a sound, conservation-based farm. Adequate rewards for resource-conserving methods such as green manure plantings and forage, is important to ensure such practices are implemented and maintained. Well managed rotational grazing systems for livestock are another superior conservation method with value-added gain to the environment.

NRCS Response

NRCS agrees with these comments as reflected in the questions in the CMT and the CSP enhancements. No changes are made to the rule.

Comments

One commenter expected real change with the implementation of the CSP. The commenter expressed that the new CSP actually rewards farmers who are early adopters and using long-term rotations or grass-based livestock systems.

NRCS Response

Questions in the CMT are designed to analyze an existing crop production system and award conservation performance points for those systems that provide the greatest environmental benefit. Systems that include greater crop diversity reduce tillage and high levels of nutrient and pest management receive more conservation performance points, increasing chances to be selected for funding. No changes are made to the rule in response to the comment.

Comments

One commenter was critical of the ranking process in situations where a producer has to change a rotation that is not on the list, and then the producer would have to go through some ranking changes each time.

NRCS Response

Participants can modify stewardship plans to address unforeseen contingencies, as long as they select enhancement activities with the same or greater environmental benefits. Further, NRCS does not consider a participant in violation of the contract for failure to comply with the contract due to circumstances beyond the control of the participant, including disaster or related conditions, as determined by the State Conservationist.

Comments

One commenter recommended that NRCS seek opportunities to increase bee forage when implementing other conservation practices, such as cover crops and resource-conserving crop rotations.

NRCS Response

NRCS feels that it has adequately addressed the concerns in the CMT and with the activities offered through the program. NRCS will conduct continuous

reviews to incorporate innovative ideas for future ranking periods. No changes are made to the rule in response to the comment.

Comments

One commenter requested clarification on whether or not orchard and vineyard crops are eligible for the resource-conserving crop rotation. Wine grape growers typically use a resource-conserving crop in their vineyards which meets the first definition, a perennial crop for soil fertility. Will vineyards be eligible for the supplemental payment?

NRCS Response

Resource-conserving crop rotations are not applicable for orchards or vineyards. A resource-conserving crop rotation is only applicable where there is an annually planted crop in the rotation.

On-Farm Research and Demonstration

Comments

NRCS received one comment on this provision. The commenter recommended the addition of a new paragraph (3) in 1470.2 to stipulate that NRCS will make available to eligible applicants design protocols and participation procedures for participation in CSP on-farm research and demonstration projects. In addition, the commenter recommended that either (a) current point values for on-farm research and demonstration be enhanced, or (b) that on-farm research and demonstration be taken out of the point system for payment purposes and compensated in a more traditional manner.

NRCS Response

NRCS amends section 1470.2(f)(1) to read as follows:

(f) The State Conservationist will:

(1) Obtain advice from the State Technical Committee and local working groups on the development of State-level technical, outreach, and program issues, including the identification of priority resource concerns for a State, or the specific geographic areas within a State, and design protocols and participation procedures for participation in on-farm research and demonstration and pilot projects.

States are working with their respective research institution in educating them on the use of on-farm research and demonstration projects to increase the list of available projects for the next ranking period.

Section 1470.8 Technical Assistance

Comments

Section 1470.8, Technical assistance, explains that NRCS or other technical service providers (TSP) could provide the technical consultation for installing conservation activities under CSP.

Two commenters recommended that more CSP money to be available for technical assistance through TSPs or cooperative agreements with entities such as State wildlife agencies in order to meet the anticipated program demand.

NRCS Response

States have an option to enter into cooperative agreements with TSPs or other agencies to assist in delivering the program. However, it is important to mention that the program constraints of managing the program to achieve a national average of $18 per acre for financial assistance and technical assistance will limit program servicing options.

Technical Assistance on Forest Land

Comments

A number of comments were received regarding technical assistance on forest land. Commenters expressed support for CSP with concerns on how the expertise and technical assistance will be delivered at the field level to NIPF; technical assistance for many NRCS forest projects is provided by agreement with the State Forestry Department, and in some cases, technical expertise is very limited; and respondents recommended that NRCS utilize the extensive network of forestry expertise through the Forest Stewardship Program, which includes State forestry agencies, consulting foresters, and other partners working to deliver technical assistance to NIPF landowners.

NRCS Response

NRCS field office staffs have diverse technical backgrounds and in some cases have forestry and agroforestry expertise, but in those situations where they do not, they will seek professional forestry assistance. NRCS has staff foresters in many States that provide technical guidance and training to field offices and can assist field offices with planning and application questions. In States without staff foresters, the field offices will assist the forest owner in seeking assistance from either State agency foresters, forestry TSPs, or other private consulting foresters in the local area who are providing forestry planning and application assistance such as forest stewardship planning.

Pollinators

Comments

One commenter recommended that NRCS further this objective by (1) designating a liaison at NRCS charged with working with beekeeping industry interests, and (2) establishing and convening a working group of beekeepers, qualified research and extension specialists, and interested agricultural producers to help conduct the necessary review and revisions.

Another commenter expressed that USDA should realize the full potential conservation assistance and incentive programs to help farmers and ranchers establish and maintain habitat for managed and native bees, and provide training to NRCS and other technical assistance providers to make them aware of the new Farm Bill authorities and the importance of habitat for managed and native bees and how programs can be used to assist farmers and ranchers.

NRCS Response

NRCS has a Pollinator Initiative through which it is pursuing increased attention to pollinators from a variety of approaches. A few of these approaches include the following: Establishment of an NRCS Liaison with beekeepers and with the United States beekeeping industry to ensure that the needs of beekeepers and honey bees are appropriately addressed in NRCS pursuits; revision of NRCS Conservation Practice Standards to encourage establishment of pollinator habitat and discourage management practices harmful to pollinators; implementation of the recently-developed NRCS Plant Materials Centers pollinator action plan which includes the field-testing of seed mixes for pollinators from an eco-region-specific perspective and crop-specific recommendations of plant materials that will provide preferred and extended pollinator forage and refugia for beneficial insects helpful in pest management; inclusion of a large number of opportunities for matching funds to create and enhance pollinator habitat through a variety of financial assistance and easement conservation programs; development of Web based training for NRCS staffs and for our partners and customers focused upon pollinators and their habitat requirements; and implementation of the NRCS pollinator communications plan for awareness-building concerning the critical roles of pollinators and what individuals can do to help us sustain pollinator habitat and the environmental services they provide.

NRCS takes seriously its responsibilities to ensure its field office staffs have adequate training to work with organic farmers. Individual States have conducted numerous training sessions on conservation planning with organic producers. A national teleconference on organic certification has been conducted, and plans are in place to work with several private organic groups to provide training to NRCS State specialists on organic farming systems. No changes are made to the rule in response to this comment.

Comments

One commenter questioned why NRCS included a definition of TSP. The commenter did not see where the term is used or referenced in the rule. The commenter expressed that the rule leads one to conclude that NRCS must provide all technical assistance relative to the CSP.

NRCS Response

Section 1470.8 states that NRCS may provide technical assistance to an eligible applicant or participant either directly or through a TSP as set forth in 7 CFR part 652.

Subpart B—Contracts and Payments

Section 1470.20 Application for Contracts and Selecting Offers From Applicants

Comments

Section 1470.20, "Application for contracts and selecting offers from applicants," identifies procedures associated with application acceptance, contract application requirements, and the application evaluation process. NRCS received 20 comments on the application process. Many of the commenters expressed frustration related to the amount of paperwork necessary to participate in CSP.

Application Process

Seven commenters expressed that there is too much paperwork or the program is too complex; other comments included that NRCS needs to control costs and if an applicant is rejected from program enrollment, the basis for the rejection needs to be explained to the applicant. NRCS received comments that information requirements should be fair, reasonable, and limited to data that is necessary, relevant, and related directly to determining an applicant's potential CSP participation. An applicant's personal details and proprietary operational information must be protected at all times by the Department; respondents urged NRCS to avoid onerous and invasive CSP documentation requirements and to be fair and reasonable. One commenter acknowledged that good recordingkeeping is integral to managing a successful farming operation; however, due to the newness of this program, some producers may not have records for all of the activities conducted that would aid them in their application for CSP. The commenter has concerns about how farmers will be treated in situations where they have recently acquired farm ground where previous records would not be available to the new operator, which could limit their eligible acres.

NRCS Response

No changes are made to the rule in response to the comments.

All applicants are provided written notification of all determinations related to their application.

NRCS designed the CSP to collect as little information from the applicants as feasible. It is always difficult to balance the information necessary for quality assurance and minimize burden on customers. NRCS feels strongly that proper documentation is required to avoid improper use of program funds. NRCS does not collect records to be kept in NRCS field offices. Records are used to verify that the information provided by the applicant is accurate when conducting the onsite field verification and State quality assurance process.

Acreage eligibility is not determined by the presence or absence of records; however, it may impact the applicant's ranking score. The applicants are required to offer all acres on their operation that are under effective control at the time of entry into a conservation stewardship contract. To participate in CSP, applicants need to be able to provide some form of verification for those activities that they are credited in the CMT. There are many ways that information can be verified during the onsite field verification such as equipment, crop residues, visible signs of erosions, existing practices on the ground, photos, receipts, existing conservation plans, aerial photos, etc. It is the applicant's responsibility to provide accurate information of the existing system that they will be compensated through program payments.

NRCS will evaluate ways to minimize burdens on producers while following policies and procedures to ensure that NRCS is accountable for the use of program funds. It is critical that participants maintain and supply information to verify eligibility. NRCS has the proper supporting contract documentation to ensure fair and consistent determinations are made.

Comments

Another area of interest related to the availability of information. Four commenters expressed that applicants should have access to enhancement points during the application process. For farmers to make good decisions, farmers should have access to the number of points each enhancement is assigned to make the best decision for their operation and for the overall environmental benefit of their contract. Three commenters expressed that the list of potential enhancements is long and exhaustive, and it will benefit potential program participants to know the ranking of each enhancement for both conservation performance effectiveness and relative cost. We assume that these rankings are in turn used in the CMT and, as such, the rankings reflected in this document should be subject to review and modification by the State Technical Committee to fully reflect that State's needs and priorities.

NRCS Response

NRCS has made available to the public the conservation performance effectiveness values for all activities offered through the program as well as for all the inventory questions. In addition, NRCS developed two detailed documents explaining how the points are used in the tool. This information is located at *http://www.nrcs.usda.gov/programs/new_csp/csp.html.*

No changes are made to the rule in response to these comments.

Conservation Performance Ranking Score

Comments

One commenter indicated that what is unclear is how the activity list relates specifically to the ranking process used in CSP contract approvals, if at all, and how this list relates to the CMT. NRCS should clarify how this list relates in this regard.

NRCS Response

The CMT is utilized to evaluate CSP applications using a point based system for environmental benefits. The CMT evaluates existing and proposed new activities to calculate conservation performance points that will be used for ranking and payment purposes. No changes are made to the rule in response to the comment.

Comments

One commenter encouraged NRCS to allow one application for producers

with agricultural lands that also contain NIPF. Another commented that the contract application requirements and ranking pool protocols for NIPF are not specified.

NRCS Response

NRCS deemed necessary the separation between NIPF from agricultural land applications to be able to meet the legislative requirement of not more than 10 percent of the annual acres enrolled nationally in any fiscal year may be NIP. However, NIPF applicants follow the same application requirements and ranking protocols that agricultural land applications follow. No changes are made to the rule in response to the comment.

Ranking Process

Comments

NRCS received nine comments related to the ranking process. The majority of the comments pertained to implementing CSP in a size neutral manner. The commenters encouraged NRCS to resist efforts that would place unnecessary size and income restrictions on CSP participation, especially if those restrictions go beyond the provisions Congress specifically included in the CSP authorization. CSP is a program that must be designed in a way that allows participants to be ranked and evaluated on the environmental merit of their on-farm activities, regardless of the overall size of their operation. One commenter expressed that CSP puts more emphasis on change. NRCS needs to be careful about what kind of change is being directly or indirectly promoted with taxpayer money. In the two sign-ups for the old CSP, the highest ranking applications were often continuous no-till row crop producers. With the emphasis on change, those applicants who are changing to no-till will rank high.

NRCS Response

The CSP is designed to allow participants to be ranked and evaluated on the environmental merit of their on-farm activities regardless of the overall size of their operation. The CMT evaluates existing and proposed new activities to calculate conservation performance points that will be used for ranking and payment purposes. The CMT is size neutral ensuring that all operations, despite the size of each operation, have the same potential to accrue a similar number of points.

NRCS is following the program's statute by crediting producers for the conservation performance from the existing and proposed system. In addition, NRCS is following the ranking factors stated in the statute. Three out of the four ranking criteria are related to new conservation activities. However, a review of the first sign-up data is being conducted, and any needed adjustments will be made before the next ranking period.

Comments

Two commenters responded with concerns related to wildlife issues; one commenter expressed concern if cost is figured into the ranking criteria, that wildlife and forest health enhancements will be negatively weighted because of the installation cost, low CSP payment, and no cost-share opportunities available for the producer.

NRCS Response

Cost is not a ranking factor unless there is a tie in ranking scores between two or more applications. When there is a tie, the application that represents the least cost to the program will be given priority. The CSP does not provide cost-share payments but rather compensates producers for the conservation performance.

Comments

One commenter supports a ranking scheme with no weighting for the adoption of new enhancements by the producer.

NRCS Response

NRCS is currently implementing the ranking factors without preferential treatment to any one factor. No changes are made to the regulation in response to this comment.

Comments

One commenter recommended NRCS award points for selecting conservation practices that address State, regional, or national resource concerns such as Gulf of Mexico hypoxia, Northern Bobwhite Conservation, and grassland bird initiatives.

NRCS Response

Conservation practices are used in CSP for the purpose of encouraging producers to meet additional stewardship thresholds. NRCS is evaluating options and methodologies to allow for State and regional adaptation of the CMT at some future point.

Conservation Measurement Tool

Comments

NRCS received 19 comments on the CMT. Most of the comments requested additional conservation considerations in the CMT. NRCS received both positive and negative comments related to CMT and agency implementation. For example, one commenter expressed the CMT is an attempt to provide a nationwide "level playing field" in ranking applicants and determining funding status across a large number of resource conservation areas. For this, the NRCS deserves some commendation. Unfortunately, the draft tools available for review thus far do not give clear indications of how some of the ranking decisions were made, nor how points are applied to producers' activities. Another commented that estimation of a true baseline of environmental conditions before and after CSP implementation is not possible.

NRCS Response

NRCS appreciates and understands the positive and negative comments on CMT. The first implementation of CMT was a learning process. Changes are already planned for CMT based on experiences at the field level. As field personnel become more familiar with the use of CMT, inconsistencies in its implementation will be minimized. In addition, NRCS will conduct additional training for field personnel on CMT to ensure consistent application and interpretation across the country.

NRCS entered into an agreement with the University of Illinois to conduct a scientific validation to assess its performance in evaluating environmental benefits.

Comments

One commenter expressed that the CMT considers the relative physical effects of existing and proposed conservation activities to estimate improvements in conservation performance. It does not measure true environmental benefits, e.g., tons of carbon sequestered or tons of soil saved.

NRCS Response

NRCS agrees with this commenter. The CMT was developed for the CSP as a means of providing an ordinal ranking of applicants based upon the level of conservation stewardship on the applicant's operation. The CMT does this by asking a series of questions about the outcomes of agricultural and ranching practices in terms that a typical landowner should be able to answer. In other words, it provides a means of saying that the environmental outcome on applicant A's farm as a result of the implementation of farming and conservation activities is better than applicant B's. However, NRCS will explore potential future additions for quantitative capability to the tool. For

the CMT to measure benefits will require incorporating other modules that can measure change such as Agricultural Policy Environmental Extender, Voluntary Reporting of Greenhouse Gases-Carbon Management Evaluation Tool, Nitrogen Loss and Environmental Assessment Package, etc.

Comments

Another commenter expressed that the CMT does not adequately encourage intensive tillage management for residue management or soil tilth.

NRCS Response

CMT seeks only to judge the results of conservation actions (or lack thereof). The encouragement comes as applicants see what actions they need to take in order to rank highly or increase their level of payment. CMT does in fact reward applicants through increased score that practice tillage techniques that maintain high residue levels and limit soil disturbance. In addition, by choosing enhancements that increase residue and otherwise improve soil quality, applicants can further increase ranking and payment levels.

Comments

One commenter expressed understanding that the CMT has been developed to determine if an applicant meets the basic stewardship threshold for entry into the program. The CMT should also be capable of assisting further in the ranking process by calculating and accounting for the practices of those farmers that have achieved a much higher level of conservation, above and beyond the entry level threshold. It must be remembered that many of the nation's best land stewards adopted and implemented these conservation practices with their own money because it was the "right" thing to do. In time, CSP will have the majority of the farms enrolled, but the poor land stewards must be aware of the successes of the best land stewards. The new CSP should continue to inspire farmers to be ranked among the best land stewards in the country.

NRCS Response

The CMT scores the exceptional steward much higher than the applicant that just barely meets eligibility. NRCS acknowledges that the number of enhancements available and the environmental points granted to a "barely eligible" producer could result in an application to be ranked higher than for an exceptional steward. NRCS will be reviewing the stewardship eligibility levels for each resource concern to ensure that good and poor stewards are properly indentified. This could ultimately have some effect on who is eligible for the program and better identify the good steward.

Comments

One commenter recommended the CMT needs to better recognize and score certain practices. For example, terracing is a conservation practice that was advocated for decades by the Soil Conservation Service and is still part of the FOTG. Terracing is a vital component in controlling water erosion, especially where residue production is low. No-till or cover crops are not always an acceptable substitute for terraces, and CMT scoring must recognize that fact. Producers who have installed and farmed with terraces have incurred significant costs in additional time, machinery, and labor requirements. Ignoring both the benefits and producer costs, the CMT recognizes terracing with at most only 45 points (questions 13 and 14) and specifically only 16 points (question 14).

NRCS Response

While NRCS recognizes the significant contribution that some applicants have made to improve the farming landscape by installing terrace systems, CMT is designed to judge the conservation outcome of activities rather than the capital and labor input to install the practices. Farmers make choices based on the land they farm, the crops they choose to grow, and other site-specific factors. In most cases, there are multiple paths to achieve a good conservation outcome. The CMT does not try to define the path, rather it tries to judge the result of the choices the farmer makes. The farmer is free to make these choices based on their operational goals.

Comments

One commenter opined that the CMT is particularly flawed in being heavily weighted towards practices that are impractical for some regions. Although it is recognized that the CSP is outcome based, it will not further national conservation efforts to exclude some regions. The CMT needs to be expanded with questions and points that match a reasonable conservation outcome for a given region. It also needs a mechanism to omit questions inappropriate for a particular region.

NRCS Response

NRCS will take this concern under advisement and look for opportunities for States or regions to customize the CMT within the constraints of a national program.

Comments

One commenter questioned in what manner does the CMT account for the costs (or lack thereof) of given practices/enhancements? Question 11 provides up to 64 points for the use of a no-till system. However, in many instances no-till systems are actually adopted for cost savings. This is in conflict with the language in section 1470.24 and with World Trade Organization requirements. Given these payment requirements, how do practices/enhancements such as no-till (which is potentially income enhancing) warrant high CMT points when significant conservation practices such as terracing (which clearly has high costs) are assigned much lower point values?

NRCS Response

NRCS developed CMT to determine the environmental benefits points using conservation physical effects and does not take into account costs of activities. The payment process takes into account costs incurred, income foregone, and to the extent practical, environmental benefits.

Comments

One commenter expressed that the CMT asks no questions related to strategies for the management of herbicide resistance in weeds. With reduced till/no-till systems relying on the availability of effective herbicides (especially glyphosate in which resistance is an increasing problem) this topic must be addressed.

NRCS Response

The CMT includes a section on pest management with the highest scoring being the use of an integrated pest management plan (IPM). The IPM can include a host of activities that range from the use of herbicides to avoidance techniques that rely on management strategies. This plan provides sufficient options to address herbicide resistant weeds and reward applicants that choose environmentally sound options without CMT prescribing the necessary treatment.

Comments

One commenter responded that other than referencing residue cover at planting, the CMT asks no major questions about management for the control of wind erosion. This is an example of an issue where regional practices/enhancements must be more fully addressed by the CMT. This commenter also expressed that despite

the otherwise heavy emphasis on plant diversity and cover crops, the CMT does not recognize the identical role that facilitating postharvest volunteer plant growth provides in wheat-fallow rotations.

NRCS Response

NRCS will take the comments under advisement to ensure that additional clarification is included in the CMT.

Comments

One commenter recommended that NRCS refine the CMT to allow for the creation of more precise resource concern categories within the land use category of forest land. This would allow States to set priorities for conservation on forest land in the same manner that they do for other land use types when selecting resource concerns and priority resource concerns for cropland, rangeland, or pasture.

NRCS Response

At this time NRCS does not anticipate changing the micro resource concerns that are considered by CSP. Cropland, pastureland, rangeland, and forest land are evaluated across the same 27 micro resource concerns.

Ranking—Environmental Benefits

Comments

NRCS received 102 comments on the ranking for environmental benefits. The majority of the comments pertained to organic farming and livestock systems and ranking applications based on environmental outcomes. NRCS received a few comments in support of small farms. The comments are summarized as follows:

Organic Production

NRCS received 43 comments related to organic production. The majority of these commenters expressed that organic crop and livestock systems should get extra consideration because of their environmental benefits. One commenter requested NRCS make the rules flexible enough to fit the various needs of organic farmers, since their overall system is beneficial but does not always fit the narrow guidelines for conventional farming. A number of commenters expressed that organic and those transitioning into organic should be treated similarly. Ranking and payment point values should be roughly equivalent for ongoing organic management and new conversions or transition to organic. Another commenter expressed that the points given to organic farmers are quite fair, and it is apparent that many organic farming practices are sustainable. Those practices may be adopted, at least in a modified form, by non-organic farms as a way to become more sustainable and protective of the environments.

Not all the commenters supported giving organic and livestock producers special consideration. One commenter expressed that organic and livestock practices should not be given higher ranking or points because it is organic. The end result is what matters; if conventional agriculture or organic agriculture accomplishes the same result, the reward should be the same. Another commenter expressed that organic farming is not sustainable, and the added tillage to control weeds only increases soil erosion. The use of manure encourages phosphorus run off, and there is not scientific proof that their producer is any better for humans than that produced with no-till.

NRCS Response

The CMT evaluates the impacts of organic systems in the same manner as for non-organic systems. All producers are required to meet the same stewardship threshold for each of the resource concerns. The CMT evaluates the environmental benefits provided by an operation regardless of operation size, land use, or production system.

Environmental Outcomes

Comments

NRCS received 36 comments recommending that CSP applications be ranked and paid based on environmental outcomes. Examples of specific comments include: Conservation strategies that yield the largest environmental performance and provide multiple benefits should receive priority ranking; it would be great if subsidy payments would shift towards CSP; effective application ranking that prioritizes enrollment of producers promising to do the most to address the important resource concerns in a particular area will be critical to maximizing the environmental benefits CSP can deliver; and reward good outcomes such as enhanced wildlife habitat, better watershed protection, and higher regard for air quality. These outcomes should be rewarded whether the conservation practice was adopted this year or in the past so that farmers with good practices are not punished for starting conservation early.

NRCS Response

The CMT will credit producers with higher points if their existing and proposed system is addressing the priority resource concerns identified by the State for the geographic area they are competing in. In addition, existing and proposed activities' performance are calculated by resource concern for each land use ensuring the producers are rewarded for multiple benefits they are producing.

Small Farms/Farm Size

Comments

Two commenters urged NRCS to encourage farms of all sizes to practice conservation methods on their farms.

NRCS Response

NRCS promotes conservation methods on all farms. The program is designed in a way that allows participants to be ranked and evaluated on the environmental merit of their on-farm activities, regardless of the size of their operation.

Comments

NRCS received comments expressing disappointment from applicants whose applications were not selected for participation. Commenters indicated their applications were rejected due to their size, lack of sufficient income, or cropping history.

NRCS Response

The CSP has no minimum income or size limitation. However, the CSP statute provides that land used for crop production after June 18, 2008, that had not been planted, considered planted, or devoted to crop production for at least 4 of the 6 years preceding that date is not eligible. Certain exceptions apply. NRCS recommends the commenters contact their local NRCS office for additional clarification.

Resource-Conserving Crop

Comments

One commenter recommended mechanical row crop cultivation with equipment leaving high levels of surface residue should be assigned some points when it results in a reduction of herbicide use. Another commenter recommended NRCS give more credit for spring planted small grains with an under seeding of a legume or legume/grass mix. This is a common practice among sustainable farmers here in the Midwest.

NRCS Response

CMT considers residue amounts and the use of pesticides (including herbicides) separately. The applicant has the opportunity to be scored for high residue levels under questions 2 and 11. Pesticide related questions are dealt with under question 15. In the case described above, high residue

levels could be part of an IPM plan to reduce the application of herbicides.

The use of a nurse crop of grass or legume should be credited under question 3 as a cover crop depending upon how it is handled after the small grain is harvested and under question 4 for increased crop diversity. It might also gain points from question 12 for wildlife considerations, again depending on how it is handled after harvest.

Fallow Practices

Comments

One commenter recommended that fallow practices are not all the same and should not all be ranked the same. The commenter suggested a way be established to account for conservation fallow such as chemical fallow. In arid agricultural regions, the purpose of this fallow type is to idle the land for a growing season, and conserve and even recharge soil moisture while maintaining a cover of previous crop stubble serving to protect the soil from wind and water erosion.

NRCS Response

NRCS recognizes that fallow with high residue was not accounted for in the current version of CMT. This oversight will be corrected for future sign-ups.

Wildlife Habitat/Riparian Buffers

Comments

One commenter requested riparian buffers wider than 50 feet should be rewarded. Currently the highest ranking is for buffers with a width of 33 feet or 2.5 times the stream channel width, but wider buffers capture more nutrients and provide real wildlife habitat.

NRCS Response

Water quality research has shown that most of the water quality benefits are attained in buffers in the first few yards. While we recognize that additional width is beneficial, in order to reduce the complexity of the CMT questions, we chose to craft question 7 under the Water Bodies/Water Courses section to ask about the minimum width necessary for water quality. Additionally, question 7 in Cropland and question 5 in Pasture will reward an applicant for buffers that are wider than the minimum for water quality. NRCS is not changing the riparian buffer requirements.

Comments

The buffer scoring should also reward higher levels of forest canopy in regions where forests were the predominant land cover prior to conversion to agricultural production. The current version does not differentiate between forests and shrubs or grasses.

NRCS Response

In the CMT, Questions 7 and 8 on Water Bodies/Water Courses ask questions about the quality of the vegetation in riparian buffers. Buffers that are composed of native vegetation should be scored higher than those that have non-natives.

Comments

Scoring for manure/pesticide application setbacks should be tiered to reward greater distances from water bodies. The current version only rewards setbacks greater than 33 feet. Higher scores should be available for setbacks greater than 100 feet (#9 on Water Bodies/Water Courses Existing Activity Conservation Performance).

NRCS Response

Water quality research has shown that most of the water quality benefits are attained in buffers in the first few yards. While we recognize that additional width is beneficial, in order to reduce the complexity of the CMT questions we chose to craft question 9 under the Water Bodies/Water Courses section to ask about the minimum width necessary for water quality.

Comments

One commenter requested NRCS provide special consideration to the environmental benefits of protection of wildlife habitats and corridors, promoting biodiversity and protecting species from the dangerous effects of overuse of pesticides.

NRCS Response

The CMT accomplishes this through a series of questions that address (1) the occurrence of native vegetation in buffer areas, (2) the current level of management of pesticides, and (3) additional enhancements the applicant will apply that will reduce pesticide exposure to the environment and improve the quality of wildlife habitat. Applicants that do all of these activities to protect and benefit wildlife should score well in the CMT.

Comments

A third commenter expressed that the commenter devoted many areas of their farm to providing habitat for reptiles and amphibians. A true environmentalist works from the bottom of the food chain up. These types of land stewards should be rewarded for protecting this base, not penalized.

NRCS Response

There are many opportunities in the CMT to recognize fish and wildlife activities an applicant is currently implementing, as well as many opportunities for enhancements to improve fish and wildlife habitat on a farm.

Pollinators

Comments

NRCS received requests that landowners be given credit in the scoring system for pollinator-related values of conservation practices that provide habitat for native and managed pollinators. Two examples are (1) the ecosystem services that native pollinators provide, and (2) giving beekeepers permission to place managed hives on their land to take advantage of natural forage. To the extent innovative approaches are developed that offer premium CSP payments, the same principles could apply. The scoring system could also be weighted to provide additional value to practices that provide multiple environmental benefits.

NRCS Response

NRCS recognizes the value of pollinators to agriculture and the environment. NRCS agrees to make changes in the CMT to specifically include pollinator habitat in areas that are managed for wildlife habitat. This will provide scoring in the CMT for those applicants that are managing non-cropped and non-pastured areas for pollinator habitat.

Comments

Another commenter recommended NRCS consider awarding additional points for selecting additional conservation practices that address State, regional, or national resource concerns.

NRCS Response

The CMT currently does this by rewarding applicants that choose to address additional State priority resource concerns during the life of the contract.

Other

Comments

One commenter requested NRCS consider ALL the environmental ramifications AND the food ramifications of its decisions. Another commenter expressed that CSP should continue to reward farmers who are farming at a high stewardship threshold and should provide an incentive to maintain those high standards.

NRCS Response

NRCS is following the legislation and program purpose. The CSP is a new program with a new purpose. The program is a voluntary conservation program that encourages producers to address resource concerns in a comprehensive manner by:

(1) Undertaking additional conservation activities; and

(2) Improving, maintaining, and managing existing conservation activities.

Applicants that are farming at high resource stewardship levels will score very well on the existing activities which will be reflected in program payments. NRCS is not authorized to provide payments solely for improving, maintaining, and managing conservation activities in place on the operation. Conservation programs are not authorized to make incentive payments. Under CSP, participants are paid for conservation performance; the higher the operational performance, the higher their payment will be.

Comments

Another commenter expressed that a practice designed to achieve wildlife or other conservation practices could generate significant benefits for native and managed pollinators by integrating modest enhancements such as selections of pollinator-beneficial plants. Similarly, conservation efforts for native and managed pollinators will advance other natural resource objectives including the new natural resource challenge of mitigating and managing the adverse impacts of climate change.

NRCS Response

A review of CSP enhancements and practices is currently underway with recommended changes and improvements to be incorporated into the next ranking period. Of the 82 CSP enhancements that were available during the first sign-up period, 27 included a wildlife focus or purpose. In addition, over 70 percent of the funding pools identified wildlife related issues as one of their priority resource concerns. No changes are made to the rule in response to these comments.

Comments

One commenter encouraged NRCS to consult with USFS on analysis of environmental benefits. Considerable data and research guidance on such matters is available from the USFS State and private forestry, as well as the recently established USDA Office of Ecosystem Services and Markets.

One commenter recommended NRCS give additional weight to projects that yield significant public benefits beyond the boundaries of the enrollee's property. For example, NRCS could develop a suite of priorities that pre-qualify proposals that achieve one or more of the following: Nitrogen and sediment run-off benefits in targeted watersheds.

Greenhouse Gas Sequestration Benefits

One commenter expressed that some areas of resource concerns seem undervalued. For example, the fertilizer decisionmaking questions in the operation profile focus on soil nutrient tests, but the California perennial crop growers have long used the more sophisticated plant tissue testing methods which are not mentioned until you reach the "enhancement" section.

One commenter requested NRCS encourage proposals/awards to farms/farmers that make a contribution to lessen $C0_2$ emissions from sunlight oxidizing organic material from bare soil on America's Farms.

NRCS Response

CSP currently rewards farmers who limit tillage and keep the soil covered either with residue or cover crops and practice advanced nutrient management techniques. This is done by questions in the CMT and through enhancements that are targeted to these concerns.

Application and Ranking—Weighting of Ranking Factors

Comments

NRCS received numerous comments regarding policy options for the weighting of ranking factors. The comments were evaluated and given consideration in the development of the CEA. To add clarity to the issue of weighting ranking factors, NRCS amended 1470.20(d) to read, "Weighting of ranking factors. To the extent CSP objectives, including implementing new conservation, are not being achieved as determined by the Chief, NRCS will adjust the weighting of ranking factors in order to place emphasis on improving and adding conservation activities." Additionally, NRCS adds a new paragraph (e) regarding State and local priorities that enables the Chief to develop and use additional criteria for evaluating applications to ensure national, State, and local priorities are effectively addressed.

Weight Between Existing/Additional Conservation Activities

Supporters of Equal Weighting

Overall, commenters expressed concern over how NRCS will weight new and existing practices. Numerous comments were received expressing concern that if NRCS selects those who have considerable conservation measures to adopt over those who have actively been practicing higher levels of stewardship, NRCS will be punishing those who are practicing good stewardship. A recurring theme within the comments is that NRCS should not discriminate against early adopters and that the sole measure should be the environmental benefits secured by the total conservation system regardless of the timing of adoption of various parts of the system.

Thirty-one comments were received expressing that CSP should equally balance the benefits of both existing and new practices. The most important aspect of CSP needs to be the measure and rewarding of conservation benefits secured by a farm regardless of the timing or adoption of various conservation measures or practices. Farmers who have adopted conservation measures should get the same incentive as a farmer who newly adopts conservation measures and agrees to continue them into the future. This policy will reward farmers who have been doing good things for the environment, it will give them an incentive to continue the conservation practices, and it will encourage surrounding farmers to do more conservation to qualify for CSP incentives. Ultimately this will result in better conservation of our environment overall. Another commenter who supported this position recommends existing and new practices have equal merit in determining participation because existing practices require intensive management to sustain them.

Similarly, 45 commenters expressed that farmers applying to participate in CSP should be ranked on environmental outcomes regardless of whether the conservation practice was previously adopted. A system that emphasizes the existing environmental outcome should be the ultimate goal.

Two commenters requested that conservation enhancements score higher than related conservation practices, and that point values for existing conservation score equally with new conservation. Moreover, the baseline portion of the CMT should allow farms to accumulate points for the full range of conservation practices and

enhancements that are in the non-baseline portion of the CMT.

NRCS Response

NRCS acknowledges the concerns and will seek to clarify that the CSP is not penalizing good stewards of the land. CSP is a competitive program that rewards applicants for their existing conservation system as well as for the proposed increased conservation performance. NRCS has designed the program as presented in the 2008 Act. The ranking factors used to evaluate an applicant's conservation performance are provided by the legislation, in which three out of the four factors are crediting producers for additional conservation activities. NRCS recognizes this is a significant concern for good stewards of the land, and while reviewing the first sign-up data, will consider all the comments made about this topic. NRCS will take in consideration all comments received for future analysis and if adjustments are needed, will be made before the next ranking period.

It is important to emphasize that each applicant's existing conservation activities are evaluated and used to determine if they have met the minimum stewardship threshold for resource concerns. Those applicants with a high level of conservation are more likely to exceed the minimum stewardship threshold on more resource concerns resulting in a higher ranking score, increasing their chances of being selected for program funding.

Good stewards are encouraged to adopt additional conservation activities while increasing the environmental benefits they are providing which in turn will result in a higher ranking score and increase their chances of being selected for program funding.

NRCS acknowledges the concerns and will seek policy options that ensure that CSP does not penalize good stewards of the land.

Supporters of More Weight on Additional Practices

Comments

Not all commenters supported the equal weighting concept. Five commenters supported placing greater weight on additional practices. One commenter expressed that both the law and conference report, "encourage the Secretary to place emphasis on improving and adding conservation activities." Therefore, NRCS should follow this guidance by placing an emphasis in the ranking criteria for new practices adopted with less weight for existing practices. Another urged that greater emphasis and valuation be given to scoring additional conservation practices and the increased outcomes they will provide. The third commenter urged implementation of the CSP consistent with statutory intent, with emphasis on rewarding landowners for additional conservation enhancements. Habitat loss and degradation is a major identified cause of decline for both native and managed pollinator populations. CSP provides economic reward to landowners to increase habitat as part of their farming, ranching, and stewardship actions.

Several comments suggested that more weight should be on existing practices. One commenter recommended that the program and its benefits be geared to those who have taken the steps to conserve their resources and that other USDA programs are available for those wanting to install new practices. Three others offer that the most cost-effective conservation practices are the ones already installed; therefore, early adopters should receive credit and not be penalized.

Other Comments

One commenter offered that during the most recent CSP application period, it was common for producers to have already enacted several of the enhancements listed. In many cases, compensation and recognition for these conservation efforts farmers have adopted on their own was not possible. There should be a way when establishing the producer's conservation activity baseline with the CMT that the questions asked and points offered correspond with the enhancements offered. The producer then would get credit in ranking factor 1 for those enhancements already adopted and correspondingly would be able to add them as enhancements and receive credit if they are not in practice.

One commenter recommended that if a producer receives credit for a practice as an enhancement, then a producer should receive the same credit for the practice if it is already implemented on their operation.

One commenter suggested that there needs to be a way within the CMT to address and give credit to farmers who have been extremely active in adopting conservation practices. If a practice is listed as an enhancement, then the producer that has already adopted that particular practice should receive equal points or credit within the CMT. If the CMT can be used to estimate the existing and proposed conservation performance, it should therefore be able to credit existing conservation practices.

NRCS Response

NRCS has thoroughly reviewed the questions in the CMT and the enhancements. Almost all of the enhancements are reflected either directly or indirectly in the CMT. The few that are not are inconsequential in terms of CMT scoring. Therefore, an applicant's current level of stewardship, even if it includes enhancement activities, should be reflected in the CMT score.

Comments

Seven commenters expressed that ranking and payment point values should be roughly equivalent for ongoing organic management and new conversions or transition to organic. Another recommended NRCS credit existing organic system plans with a specific baseline question and ranking score for existing conservation activities.

NRCS Response

The CSP evaluates each applicant's conservation activities as to their impact on seven resource concerns plus energy. No two systems will have the exact same impact on all resource concerns. Giving equal environmental benefits to an established organic system and one that is in transition would be penalizing the established organic producer at the expense of the one in transition. While over the course of time the transition farmer might catch up, the CSP rules require the conservation evaluation to be done on the system at the time of application. This same concept would apply to an organic system plan. While they all may meet the national organic plan rules, they all do not provide the same level of environmental benefits.

Comments

One commenter recommended that CSP continue to require additional practices, especially when the farm operator already is practicing multiple conservation practices.

NRCS Response

The CSP offers a defined, limited suite of management practices for the explicit purpose of encouraging producers to meet additional stewardship thresholds.

Comments

One commenter expressed that there are point values that are off by very large factors, well beyond any possible justification based on cost. For instance, NRCS estimates the payment range for newly adopted resource-conserving crop rotations at $12–16 per acre, yet the payment for an existing resource-

conserving crop rotation as reflected in the baseline assessment points could be as low as $1 per acre. This is a fundamental flaw in the current CMT that needs to be quickly addressed and remedied before the FY 2010 enrollment process gets underway. We have previously suggested different ways to fix this problem to the agency, and we are very interested in continuing to pursue practical solutions.

NRCS Response

NRCS respectfully disagrees with the comments. The contrast between payment for adopting a resource-conserving crop rotation and existing conservation activities is because they are compensated through two different payment types, not because CMT point values are off. By statute, CSP offers participants two possible types of payments:

(1) Annual payments for installing and adopting additional activities, and improving, maintaining, and managing existing activities; and

(2) A supplemental payment for the adoption of resource-conserving crop rotations.

NRCS received significant feedback from national, State, and regional organizations that emphasized the crop rotation provision's importance to the overall success of the program and the need to implement it in a comprehensive, meaningful manner. NRCS also found direction in the Farm Bill Joint Explanatory Statement of the Committee of Conference, which provided guidance that, "The Managers intend for the supplemental payment to encourage producers to adopt new, additional beneficial crop rotations that provide significant conservation benefits." With consideration to that feedback, NRCS used variable cost and price information to compare the difference in net-returns between "conventional" and "resource-conserving" crop rotations and arrive at the supplemental payment rate. Based on past program experience, NRCS believes this approach provides the level of meaningful compensation needed to encourage producers to adopt additional resource-conserving crop rotations and effectively use this aspect of the program.

Comments

This feature is of critical importance to sustainable and organic farming. The ranking and payment system, which is currently equally weighted between existing and new superior conservation, should be changed. USDA has indicated that serious consideration is being given to giving more weight to the adoption of practices, resulting in smaller enrollment chances and smaller payments for farmers already practicing superior land stewardship.

NRCS Response

NRCS is currently evaluating the first sign-up data and will make adjustments needed to the program to ensure the program objectives are met.

Stewardship Threshold

Comments

NRCS received nine comments on the topic of stewardship thresholds. One commenter encouraged forest landowners to participate in CSP and in general believe that conservation assistance should be available for farm, ranch, and forest lands. Eligible participants should meet the stewardship threshold for one resource concern at the time of their application. The commenter believes that this approach will allow more participants to be eligible for the program.

Two commenters recommended that the applicant should be meeting the stewardship threshold on a minimum of three resource concerns that includes at least one priority concern. Requiring producers to meet at least three of the nine potential resource categories is more commensurate with the goal of encouraging producers to adopt a rewardable level of conservation on their farmed lands.

One commenter expressed that meeting the stewardship threshold and one priority resource concern is not adequate unless that priority resource concern includes wildlife. Wildlife enhancements provide multiple resource benefits to soil, water, and wildlife as well as greater conservation return for the dollars invested. Another commenter thought the level was adequate, providing it is considered an entry level requirement for the program. The entry level must be low, but at the same time not discourage the best farmers in America.

NRCS Response

No changes are made to the regulation in response to this comment. The statute provides that to be eligible to participate in the CSP, a producer will demonstrate, to the satisfaction of the Secretary, that a producer, at the time of the contract offer, is meeting the stewardship threshold for at least one resource concern and would, at a minimum, meet or exceed the stewardship threshold for at least one priority resource concern by the end of the stewardship contract.

NRCS does not have authority to require a producer to meet a specific priority resource concern to participate in the program. The CSP authorizing language provides that three to five priority resource concerns are identified at the State level for each geographic area or region, in consultation with the State Technical Committee, as a priority for a particular watershed or area of the State.

Comments

One commenter requested each State be given the authority to increase the stewardship threshold if they wish to have a more targeted impact to achieve particular conservation goals.

NRCS Response

The CMT is not currently designed to allow States to make adjustments on scorings, thresholds, questions, or activities. The tool has been normalized and calibrated and to enable State access, will require a major rebuild of the tool that will also impact other program processes. However, NRCS will explore options to allow States to make adjustments as we move into the future with the program.

Comments

One commenter expressed that the statute provides a choice to the applicant to address one or more resource concerns as a condition of eligibility and requires them to choose one more priority resource concern to address either at the outset or during the first contract term, but does not provide discretion to the Department to require more. Therefore, the commenter does not recommend the agency consider changing the interim final rule provision.

NRCS Response

NRCS agree with the commenter and intends to maintain the provision in the interim final rule as stated in the legislation.

Comments

One commenter questioned how high is the stewardship threshold for the resource concern or priority resource concern?

Second, how comprehensive is the level of treatment required for each resource concern and priority resource concern, and is it truly based on resource outcomes and conditions?

NRCS Response

NRCS set the threshold numbers for each resource concern by running a nation-wide test on a sampling of farms. NRCS Conservationists judged the level of resource treatment on each farm, and the CMT was then run on each of the

farms. The resulting scores were compared to the level of treatment that was determined by the Conservationist. Threshold scores were then set at the average of the scores for the farms that were determined to be adequately addressing the resource concerns on the farm, what NRCS refers to as the Resource Management System level of treatment.

Comments

Third, is it possible that the priority resource concern might be the same as the resource concern? The answer to each of these questions will inform our understanding of whether the bar for participation in CSP has been set at an appropriate level.

NRCS Response

The resource concern and priority resource concern used to meet the stewardship threshold criteria must be different for the same land use. For example, an applicant is only meeting one resource concern, which also happens to be a priority resource concern at the time of application. That resource concern would meet the "one resource concern at the time of application" criterion. However, a different priority resource concern would need to be used to meet the "one priority resource concern at the time of application, or by the end of the stewardship contract" criterion.

Comments

One commenter expressed support for using EQIP practices that directly contribute to a CSP participant's ability to meet or exceed stewardship thresholds. It will both allow CSP to function properly and be an excellent use of EQIP, because the funds will be directed to meeting the stewardship threshold for priority resource concerns for the State or geographic area within the State. The commenter requested NRCS design a process that eliminates redundancy and minimizes paperwork in the sign-up process. The commenter urged NRCS to have this process ready for the 2010 sign-up period.

NRCS Response

NRCS agrees to address the recommendation by adding language to section 1470.7(c) as follows:

"CSP encourages the use of other NRCS programs to install practices that are required to meet the agreed-upon stewardship threshold only if the practice is not compensated through CSP."

Resource Concerns

Comments

NRCS received several comments related to resource concerns. NRCS should include consideration of habitat and forage needs for both native and managed pollinators, requiring producers to address multiple resource concerns fits within the purpose of CSP to promote comprehensive conservation planning and to encourage producers to adopt new activities or maintain existing ones. NRCS should include the addition of a special provision for first-year beginning farmers or ranchers in the eligibility section (1470.20(b)(1) concerning resource concerns.

NRCS Response

Regarding eligibility, NRCS decided to adopt the statutory provision without additional restrictions in order to attract a broad spectrum of eligible producers. NRCS does have flexibility with how it ranks applications. The greater the number of resource concerns the applicant addresses and those planning on being addressed, increases the ranking score. Data from the first sign-up shows that 99 percent of applicants are meeting more than one resource concern at the time of application.

Comments

Another commenter expressed concern that the practices that rank "very high" seem targeted at Midwestern grain producers.

NRCS Response

No changes are made to the regulation. NRCS keeps the language in the interim final rule to be consistent with the language in legislation. Practices are scored based on the environmental impact they have across 27 micro-resource concerns regardless of physical location. Further, program allocations and ranking pools are established and operated at the State level. Applications do not compete across State boundaries or ranking pools.

Pollinators

Comments

Several comments were received related to pollinators. Commenters asked NRCS to seek innovative ways in the CSP to maximize forage outcomes for honey bees and other pollinators; place emphasis on rewarding landowners for additional bee forage; enhance planting mixes to include plants that provide optimal forage for honey bees; and urged NRCS to allow planting mixes to be enhanced at the national and State levels by including plants suitable for each region that provide optimal forage for honey bees. Additionally, NRCS received a number of specific recommendations to address the habitat needs of native and managed native pollinators.

NRCS Response

NRCS welcomes suggestions on additional enhancements from all partners. NRCS solicited input from a wide source of expertise and will continue to do so for future enhancements. NRCS will evaluate the recommended enhancements and will incorporate those viable for future ranking periods.

Comments

One commenter urged the Chief to direct the development and integration of appropriate additional criteria that adequately reflect the objectives of the new conservation provisions of the Farm Bill for native and managed pollinators as an important part of ensuring that national, State, and local conservation priorities address resource needs related to native and managed pollinators and the agriculture pollination and ecosystem services they provide.

NRCS Response

No changes are made to the regulation in response to this comment. NRCS will modify the questions in the CMT to specifically mention pollinator habitat as part of these questions. Pollinator habitat can be considered when answering the inventory questions, specifically question 7 under cropland and question 5 under pasture. In addition, the program offers an enhancement to Establish Pollinator Habitat for cropland, pastureland, rangeland, and forest land. In the 2009 sign-up this enhancement was in the top ten most popular enhancements selected by applicants.

Priority Resource Concerns

Comments

NRCS received numerous comments on the topic of priority resource concerns. In the interim final rule, NRCS requested specific comments on whether wildlife should be a required resource concern, and as a result, many of the comments focused on wildlife. NRCS received the following feedback: NRCS should establish wildlife as one of the national ranking priorities by incorporating State wildlife action plans in the CSP ranking tool and require producers to address multiple resource and priority concerns, rather than just requiring all States to select "wildlife" as a priority resource concern. NRCS

should clearly require States to be more strategic by identifying particular indicator species or suites of species and specific habitats as priority resource concerns for at least one geographic area within the State. Forty-one respondents identified biodiversity and fish, wildlife, pollinator, and beneficial insect habitat to be specifically added as a priority resource concern; priority resource concerns related to the needs of native and managed pollinators should be incorporated, it is important that fish, forest, and wildlife resources be given adequate priority and attention; the agency should strongly encourage but not absolutely mandate that one or more wildlife habitat resource concerns be included among the up to five priority resource concerns in each watershed or State; NRCS should identify forage and habitat for agriculture pollinators—honey bees and native pollinators—as a national priority resource concern; State offices should be encouraged to make a similar determination, especially in States or regions where agriculture pollination services are important and where forage deficits are recognized as a limiting factor for healthy honey bees and native agriculture pollinators.

NRCS Response

Although the commenters preferred to include wildlife as a priority resource concern, NRCS has determined the decision will continue to be made at the State level in consultation with the State Technical Committee. NRCS prefers to have the resource concerns determined at the State level by people more familiar with the local issues. NRCS evaluated data from the initial program sign-up and determined it is not necessary to identify wildlife as a priority resource concern at the national level. Seventy-seven percent of the funding pools identified wildlife as one of the priority resource concerns. With such a high percentage of pools recognizing the importance of wildlife, the national designation seems unnecessary. Therefore, NRCS encourages commenters and others to voice their concerns or recommendations to the NRCS State Conservationist and the State Technical Committee in their respective State as to which resource concerns should be a priority in their State or area of the State.

Comments

Commenters questioned specific priority resource concerns selected by States.

NRCS Response

NRCS has chosen broader resource concerns categories which is consistent with the agency planning procedures. NRCS historically has planned to address soil, water, air, plants, and animal concerns. The recommended priority resource concerns fall under one or more existing categories that are used for CSP. NRCS encourages commenters and others to voice their concerns or recommendations to the NRCS State Conservationist and the State Technical Committee in their respective State as to which resource concerns should be a priority in their State or area of the State.

Comments

NRCS received suggestions regarding broad priority resource concern categories for State selection. Another commenter recommended biodiversity promoting Prairie Reconstructions (50 species or greater) as a priority resource concern.

NRCS Response

NRCS welcomes the suggestions to improve CSP and will consider recommendations related to priority resource concern categories. NRCS has included Prairie Reconstructions in the resource concerns under the Plants category. No changes are made to the regulation in response to this comment as the regulation does not include language on each priority resource concern.

Comments

Another commenter recommended farm energy efficiency and the reduction of direct and indirect fossil fuel based energy in agriculture needs to be more emphasized as a priority resource concern.

NRCS Response

NRCS already considers farm energy efficiency and the reduction of fossil fuels under the Energy category. No changes are made to the rule in response to the comment.

Comments

One commenter recommended that farms in impaired watersheds, listed by the EPA under section 303(d) of the Federal Clean Water Act, should be required to address water quality as one of their priority resource concerns. Another recommended, in addition to the priority resource concerns that are identified by the NRCS State offices, codify a suite of criteria tailored to ensure that CSP addresses targeted regional and national resource priorities that are inherently cross boundary and multi-jurisdictional; for example, projects that produce measurable downstream outcomes in reducing nitrogen and sediment run-off in targeted watersheds (*i.e.* the Chesapeake Bay) that are shared by multiple States or projects that have measurable benefits in sequestering or preventing the release of N20 and other greenhouse gasses.

Three commenters recommended NRCS set priorities on specific resource concerns at the State and local levels in close coordination with the landowners that the program is targeted to serve. Such coordination will provide the best opportunity for CSP to fulfill Congress' intent of targeting the conservation needs of working agricultural lands and their operators.

One commenter encouraged strategic emphasis on "at least" one priority resource concern.

NRCS Response

No change is made to the regulation in response to these comments. The priority resource concerns are selected at the State level. States use a variety of resources to determine the priority resource concerns. NRCS agrees that the 303(d) list of waters reports on streams and lakes could be a good reference to assist States in determining the priority resource concerns for their geographic areas. In the initial CSP sign-up, 89 percent of the funding pools listed water quality as one of the priority resource concerns.

Comments

One commenter expressed, with the exception of unusual geographic circumstances where the consensus is that one priority resource concern is overridingly important, the goal should be for landowners to meet more than stewardship threshold. Additional enhancements should be designed to meet more than one stewardship threshold where practicable.

NRCS Response

Most enhancements provide benefits to multiple resource concerns. Enhancements that produce multiple benefits across resource concerns are scored as such in the CMT. Producers will be rewarded for each resource concern individually.

Comments

One commenter recommended amending paragraph 1470.20(b)(2) to add "in addition to the resource concern described in (b)(1)" after the words "priority resource concern."

NRCS Response

NRCS agrees with the commenter and will amend paragraph 1470.20(b)(2) as suggested. The paragraph will read "Would, at minimum, meet or exceed the stewardship threshold for at least one priority resource concern in addition to the resource concern described in (b)(1) by the end of the conservation stewardship contract * * *"

Comments

Several commenters identified that resource and priority resource concerns for an area need to be specific, stable, and consistent to give producers confidence that bringing their operations up to the basic stewardship threshold level for one or more of the resource concerns may in fact lead to a CSP contract in the future. If the resource concerns change too often and in an unpredictable manner, CSP cannot serve as an effective incentive for operators to improve their performance.

NRCS heard from several commenters that it needs to provide clear guidance on how States choose priority resource concerns. One commenter requested NRCS take a close look at how all States selected priority resource concerns for the FY 2009 sign-up. States should choose priority resource concerns that are both specific and are, in fact, the most important environmental challenges associated with agricultural production in particular areas of the State. Another commenter suggested NRCS closely follow the definition set in the statute, and require States to select priority resource concerns for specific geographic areas.

NRCS received a comment that it should consider offering an incentive through higher acreage allocations to States that do a good job of implementing CSP to produce measurable improvements to specific habitat types and other specific priority resource concerns. Another commenter suggested States establish very broad priority resource concerns. NRCS also received a comment that the potential benefit of geographically-focused ranking pools may not be realized because it may be difficult to ensure that priority is given to applicants who offer to do the most to solve specific pressing resource concerns in each geographic area.

NRCS Response

NRCS will consider the recommendations for future ranking periods. NRCS will give States an opportunity to review the priority resource concerns to ensure they select the most appropriate priority resource concerns that best represent the impairments and concerns in their areas for subsequent ranking periods.

Applicants who offer a management system that addresses the priority resource concerns selected for the geographic area will score very well and increase their chances of being awarded a contract. However, applicants are competing among other applicants with similar resource challenges. Program funding, State acreage distribution among ranking pools, and characteristics of the applicants within a ranking pool will be determining factors in whether an applicant is awarded a contract.

Section 1470.21 Contract Requirements

Comments

NRCS received four comments related to the contract requirements in this section. The comments are addressed separately.

One commenter expressed there is considerable discussion regarding "available funds." Should a situation arise that Federal funding is incomplete or not available for CSP, the farmer's continued contract obligation should be reduced proportional to the reduction in payment.

NRCS Response

NRCS believes this scenario is unlikely to happen as Congress recognizes the positive benefits on the environment produced by the CSP. However, in the event that funds are reduced, NRCS will make Congress fully aware of the impacts this action will have on participants' contracts and on the landscape. No change is needed to the rule in response to this comment.

Comments

One commenter requested NRCS create an exception that allows for a temporary suspension of practices or a temporary reduction in conservation performance for the installation of infrastructure and equipment necessary to undertake additional CSP enhancements. This exception could be administered by setting a specific timeframe and conditioned on a requirement that the project is anticipated to result in higher overall levels of conservation performance.

NRCS Response

NRCS understands there may be circumstances where a temporary reduction is justified when the reduction is very minor compared to an eventual much larger stewardship gain or the plan might include mitigating activities to offset the temporary situation. In either case, it should be covered in the stewardship plan on a case-by-case basis and does not require any change in the CSP rule.

Comments

One commenter expressed that the 5 years of an operator's contract is not a very long time for an environmentally friendly conservation practice. The commenter suggested that 10 years of a landowner's commitment to a conservation practice is worth a lot more.

NRCS Response

No change in the rule is needed. NRCS is following a legislative requirement regarding the duration of the contract. A conservation stewardship contract will be for 5 years. However, at the end of an initial conservation stewardship contract NRCS may renew the contract for one additional 5-year period when the participant demonstrates compliance with terms of the existing contract and agrees to adopt new conservation activities.

Comments

One commenter observed that each of these provisions contains important applicant and participant rights and obligations about which they must be clearly and regularly informed during each of these CSP phases. Clear and regular NRCS guidance about these rights and obligations would give applicants and participants appropriate information to reinforce their ability to apply for or implement a CSP contract without reservation or uncertainty.

NRCS Response

Program contract requirements are explained in great detail on the Contract Appendix (Form NRCS–CPA–1202). The appendix is given to producers at the time of application. The Appendix is reviewed, accepted, and signed by the applicant before contract obligation and is incorporated into the contract by reference. Additional efforts to inform producers of their obligations are listed on the conservation performance summary report from CMT, producers self screening checklist, conservation stewardship plan, job sheets, and practice standards. In addition, NRCS continuously updates the CSP Web site with information pertaining to program requirements and participants' obligations.

Comments

Another commenter expressed that the conservation stewardship plan will

clearly be an important, integral part of any contract, but the plan development and oversight costs must be balanced with the implementation costs borne by the participating farm operator.

NRCS Response

Farm planning is an integral part of any agricultural operation, and developing and following a conservation plan does take time and effort. While financial assistance programs such as CSP compensate the landowner for many of the incurred costs of conservation measures, farm programs cannot cover all costs. The landowner (and the community) receives benefits from conservation activities in the form of sustainable crop and livestock yields, improved water quality, reduced labor, improved wildlife habitat, and many other monetary, social, and environmental benefits. NRCS requests that the commenter consider these benefits as off-setting the uncompensated planning costs of a conservation plan. No changes are made to the rule in response to this comment.

Section 1470.22 Conservation Stewardship Plan

Comments

NRCS received six comments related to conservation planning. One commenter recommended that the term "conservation stewardship plan" when expressed in the context of NIPF participation specifically reference the forest stewardship plan as the requisite plan to participate in CSP (pursuant to the Forest Stewardship Program, section 5 of the Cooperative Forestry Assistance Act of 1978). Another commenter expressed that nothing in the rule should prevent forest landowners with a FSP from participating in the program.

NRCS Response

No changes are made to the rule in response to the comments. The CMT is used to determine program eligibility, ranking score, and payment points. A FSP is not a requisite to participate in CSP. However, if a FSP exists it could be referenced in the conservation stewardship plan.

There is nothing in the rule that will prevent forest landowners with a conservation stewardship plan from participating in the program.

Comments

One commenter recommended, in paragraph 1470.22(b), NRCS add the words "maintained" after "managed."

NRCS Response

No changes are made to the rule in response to the comment. The Conservation Performance Summary Report from CMT documents the existing system that the participants are required to maintain. This information is not duplicated in the conservation stewardship plan. By signing the contract, applicants agree to the conservation plan and to maintain existing conservation performance levels and achieve additional conservation performance improvements as identified on the Conservation Performance Summary Report by land use for the contract period.

Comments

One commenter identified that the CTA conservation plan approach has long dealt at the field level with the realities of conservation planning for farms that have sizable quantities of rental acres. The commenter recommends that NRCS draw upon this field level expertise with preparing conservation plans for farms, in combination with the CSP's statutory direction to comprehensively address a farm's resource concerns, to determine on a case-by-case basis how much of a producer's acreage under their operational control must be enrolled in a CSP contract to make the conservation planning process work for that operation.

NRCS Response

No changes are made to the rule in response to the comments. However, minor changes were made to the rule in response to comments about control of the land. The rule was amended in 1470.6 to mirror the statute. The CSP statute states that eligible land will include all acres in an agricultural operation of a producer whether or not contiguous, that are under the effective control of the producer at the time the producer enters into a stewardship contract, and is operated by the producer with equipment, labor, management, and production or cultivation practices that are substantially separate from other agricultural operations.

Section 1470.23 Conservation Activity Operation and Maintenance

Comments

Section 1470.23, "Conservation system operation and maintenance," addresses the participant's responsibility for operating and maintaining existing conservation activities on the agricultural operation to at least the level of conservation performance identified at the time the application is obligated into a contract for the conservation stewardship contract period.

Operation and Maintenance

NRCS received two comments regarding operation and maintenance. In particular, both respondents recommended changing "Operation and Maintenance" to "Management and Maintenance" to reflect accurately the statutory terms.

NRCS Response

NRCS agrees with the commenters and amends section 1470.23, Conservation activity operation and maintenance, to read as follows: The participant will maintain and manage existing conservation activities to at least the level of conservation performance identified at the time the application is obligated for the contract period and any additional activities installed and adopted over the term of the contract.

Section 1470.24 Payments

Section 1470.24, "Payments," describes the types of payments issued under CSP, how payments will be derived, and payment limitations.

Payments-In General

NRCS received 53 comments on the topic of payments in general. These comments can be organized into subtopics including:

Adjustments

Comments

NRCS received three comments on adjustments to payments rates. One commenter urged NRCS to adjust payment rates based on the results of monitoring and evaluation and on-farm research and demonstration. Another commenter recommended if the payments are raised for any of the practices, they should be made retroactive to the farmers who sign-up this year. A third commenter strongly encouraged NRCS to clarify that CSP contracts may be modified to address additional resource concerns.

NRCS Response

CSP participants will receive an annual land use payment for operation-level environmental benefits they produce. Under CSP, participants are paid for conservation performance not for individual activities.

Payment supporting information used for establishing the 2009 national payment rates will not change for

contracts enrolled in the initial ranking period.

NRCS will not be modifying contracts to address additional resource concerns. Applicants will be evaluated based on the activities they have implemented and additional activities they commit to at the time of application that they are willing to install and adopt. NRCS will not allow contract improvement modifications that will increase annual payments in order to manage fund obligation amounts.

Rewarding Existing Conservation

Comments

One commenter expressed that maintaining payments for farms already engaged in sound conservation methods will provide a network for such farmers and new and beginning farmers. Another encouraged NRCS to continue to work toward establishing equity in benefits paid to farmers for equivalent levels of conservation to ensure that farmers who work towards greater levels of conservation are recognized for their contributions. One commenter expressed that the payment rate should be the same for current and new activities. This commenter could not select several enhancements because the commenter was already doing them.

NRCS Response

The CSP Managers' Report provides that the managers encourage the Secretary to place emphasis on improving and adding conservation activities. In general it costs more to implement new practices than to maintain existing practices. NRCS intends to implement a split payment structure with one payment rate for existing activities and a higher payment rate for additional activities. NRCS' payment structure will recognize producer's conservation contributions regardless of the timing of implementation. The structure is designed to encourage participants to adopt enhancements to accelerate their conservation efforts. NRCS amended the rule in paragraph 1470.24(a) to add "A split-rate annual payment structure will be used to provide separate payments for additional and existing conservation activities in order to place emphasis on implementing additional conservation." To further encourage additional activities, the final rule provides in paragraph (a)(2) that participants must schedule, install, and adopt at least one additional conservation activity on a land use in order for that land use to earn annual payments.

Statutory Adherence

Comments

NRCS received a few comments related to whether payment rates adherred to statutory provisions.

Two commenters identified that NRCS gives no apparent explanation in the interim final rule's Summary of Provisions why it is requiring in subpart B, one- and three-year schedules for the completion of contractual CSP enhancements. Congress does not address this issue in the Farm Bill or the Statement of Managers. Absence of an explanation makes the provision appear arbitrary. It should be dropped from the rule because the schedules would unfairly and unreasonably limit a participant's flexibility and adaptability to achieve, productively and realistically, the targeted conservation benefits.

NRCS Response

No changes are made to the rule in response to the comments. The requirement that a participant must schedule, install, and adopt at least one activity in the first year of the contract is an agency policy and is incorporated into the final rule. NRCS chooses to retain the requirement to be consistent with other NRCS programs and to accelerate conservation benefits. The requirement that all enhancements must be scheduled, installed, and adopted by the end of the third year is a programmatic decision to ensure that program objectives are met and allow sufficient time to evaluate the conservation system. Participants will receive prorated annual payments over 5 years for the activities they install, adopt, and maintain. The policy to require all enhancements to be started by year three of the contract is designed to achieve conservation benefits on the land at a faster rate than if producers choose to adopt activities in year four or five of the contract.

NRCS believes this policy maximizes the environmental benefits produced, minimizes contract administration, and helps producers maximize their payments. Payments are based on the participant's performance which is calculated based on the potential and environmental benefits produced. The longer the activity is on the ground, the more environmental benefits they produce translating to a higher payment.

Enhancements

Comments

Six respondents addressed the issue of payments for enhancements. NRCS received requests for higher payment levels; one commenter expressed that Enhancement ANM11, patch burning to enhance wildlife habitat, does not pay enough to persuade producers considering the danger and work involved. FSA pays considerably more to burn entire patches of CRP; one commenter expressed a willingness to plant native shrubs, trees, create shallow ponds, and otherwise create a haven for wildlife on his property rather than mow 10 acres like all of his neighbors if a financial incentive were provided; one commenter opined that based on the intent of the law it appears a producer would only receive the maximum CSP payment from NRCS if they had addressed all resource concerns on their entire operation. If such is the case, then the producer would simply continue receiving payments with a contract extension as long as they continued to follow their plan. If a producer had not addressed all resource concerns, then higher payments could only be awarded if additional resource concerns were addressed.

NRCS Response

No changes are made to the rule in response to the comments. Participants are being compensated for existing conservation through the annual payment. However, legislation requires that payments are made for existing and new conservation activities.

The CSP presents a significant shift in how NRCS provides conservation program payments. CSP participants will receive an annual land use payment for operation-level environmental benefits they produce. Under CSP, participants are paid for conservation performance—the higher the operational performance, the higher their payment.

Participants' annual payments are not determined using the traditional compensation model where they receive a percentage of the estimated practice installation cost or a per acre rental rate. Instead participants' annual payment level will be unique for their operation and land uses based on the combined total of environmental benefits from existing and new activities.

Comments

One commenter recommended NRCS add in paragraph (a)(4)(i)—"and practices" after "enhancements" both times and add "practice" after "enhancement." In paragraph (b) and (b)(2) add "or improve" after "adopt."

NRCS Response

No changes are made to the rule in response to the comments. CSP allows producers to substitute enhancements.

Practices are not to be substituted as they are utilized to encourage producers to meet additional resource concerns. A practice substitution may not meet the stewardship threshold for a resource concern which may result in a producer being ineligible for the program.

Other Program Payments

Comments

Five respondents address the interrelationship between CSP payments and other program payments. One commenter recommended that producers be allowed to utilize programs, including EQIP and WHIP, to help fund the installment of enhancements as long as they do not duplicate payments on lands enrolled in CSP. In addition, NRCS should allow the use of other conservation programs to assist producers with meeting comprehensive stewardship goals. Using other conservation programs will shift some of the costs to these programs and more readily allow NRCS to meet CSP acreage and funding requirements.

NRCS Response

No changes are made to the rule in response to the comments. The policy related to the source of payments is designed to avoid duplication of payment. When an enhancement is scheduled to be completed in CSP through the CMT, the producer is receiving compensation for the enhancement through their annual payment rather than receiving a direct cost-share payment like they would through EQIP. The statute prohibits payments to participants for new activities that were applied with financial assistance through other USDA programs on the same land.

If an applicant wishes to install conservation practices or activities not included in the CSP contract, then other programs could be used to assist producers meet their goals.

Comments

One commenter recommended that the rule explicitly exclude from the CSP annual payment rate calculation, costs incurred for conservation practices, or enhancements applied with financial assistance through other USDA conservation programs.

NRCS Response

No changes are made to the rule in response to the comment. Legislation states that the amount of conservation stewardship payment will be determined and based, to the maximum extent practicable, on the following factors:

(a) Cost incurred by the producer associated with planning, design, materials, installation, labor, management, maintenance, or training;

(b) Income forgone by the producer; and

(c) Expected environmental benefits as determined by the CMT.

Comments

One commenter strongly encouraged NRCS to improve estimated payment rates and clarify that CSP contracts can be modified to allow producers to participate in other Title II Conservation Programs such as CRP, EQIP, or WHIP.

NRCS Response

To manage CSP funding and meet legislative requirements, NRCS used the 2009 application period to arrive at a uniform payment rate per land use conservation performance point. NRCS modeled the annual land use payment rates using the following nationwide sign-up data from the 2009 application period pre-approved applications:

(a) New and existing environmental benefits measured in conservation performance points generated by land use type;

(b) Costs incurred and income foregone for conservation activities; and

(c) Available program funding levels.

Land use payment rates represent the costs of existing and new activities per performance point proportionally adjusted to manage program payments to achieve the national average rate of $18 per acre.

Each case where a potential modification could be needed will be evaluated in a case-by-case basis by the State to determine if contract provisions are being met.

Legislation prohibits land to be enrolled in CRP, WRP, or GRP and CSP at the same time. If a producer wants to transition out of the CSP contract to another land retirement or working land preservation program, the CSP contract will terminate with respect to the acres enrolled in the other program. The annual payment for the land remaining in CSP will be reduced in proportion to the acres removed.

It is also important to mention that CSP participants can participate in EQIP or WHIP, but must ensure they follow agency policy that prohibits the participants from receiving financial assistance from more than one program on the same land for the same practice or activity.

Public Information

Comments

One respondent addressed the need to keep the public informed. In addition, it is essential that USDA keep participants and the public informed on a regular basis about its payment rate findings during the first ranking period. USDA is to be commended for its dedication to making payments more consistent and predictable because these factors will have a strong impact on future CSP participation rates, and most importantly, achieving the conservation benefits desired by Congress.

NRCS Response

No changes are made to the rule in response to the comments. NRCS agrees that it is critical to keep the participants and the public informed of program information on a regular basis. NRCS continuously posts information on the NRCS Home Page at *http://www.nrcs.usda.gov* to ensure producers are informed and processes are transparent. NRCS has posted a one-page "Payment for Performance" document to explain the process used to establish the national payment rates. This information, along with other important information related to the program, can be found at *http://www.nrcs.usda.gov/programs/new_csp/csp.html.*

Fairness of Payments

Comments

Three respondents touched on the topic of fairness of CSP payments between farmers. One expressed that some have spent years increasing soil organic matter and nutrients, reducing soil erosion, and increasing beneficial wildlife habitat with our own resources while watching neighbors do just the opposite with intensive grain production on erodible land and having USDA pay them a subsidy for their actions; another expressed concern about huge sums of money for no-till planters of corn in Iowa as being unfair to small struggling dairy farmers that adopt practices that are much more sustainable in the long run; one recommended NRCS should be paying farmers for producing healthier soil, cleaner water, climate change mitigation, and greater bio-diversity instead of an approach that encourages farmers to get bigger, faster, better, and cheaper with little to no regard for the environmental impacts they have.

NRCS Response

No changes are made to the rule in response to the comments. The CSP provides an annual payment to contract holders for the combined total of environmental benefits from existing and new activities. Payments are not for specific conservation activities, instead

they are for the combined environmental benefits. The CMT calculated conservation performance for existing and additional conservation activities and benefits. It is computed by land use type for cropland, pastureland, rangeland, and forest land. The tool is size neutral, ensuring that all applicants regardless of the size or type of operation have the same opportunity to earn similar points.

Establishing Payments

Comments

NRCS received 17 comments related to recommendations about how NRCS should establish payment rates including setting the payment rate at inordinately low levels perpetuates the ground being conventionally cropped. NRCS should be emphasizing paying good stewards over poor stewards who agree to do better; USDA should increase the payment levels for cropland and pastureland. The 2009 estimated payment ranges are not sufficient; using the first ranking period as a payment discovery period was a good idea; and the preamble and rule do not correspond. The preamble states "This retrospective payment approach will allow NRCS to field-verify applied conservation activities prior to contract obligation and payment." No part of paragraph 1470.24, references the same intent and procedure. A reference would clarify the rule for NRCS employees and program participants.

Other comments included payment point values should be roughly equivalent for ongoing organic management and new conversions or transition to organic; encouragement to clarify exact payment levels for satisfying particular resource concerns and for meeting other resource concerns; and comments seeking information about exact payments for program enrollment. Regarding the contract payments under CSP, the majority of the payments should be dedicated to the base contract payments rather than separate enhancement payment. Applicants should be giving them priority points based on their conservation value or effectiveness which would be added into the point total for the contract which in turn would establish the per acre price.

NRCS Response

CSP does not provide payments for individual activities. Applicants are ranked and paid based on the conservation performance points generated by the environmental benefits produced by the existing and new activities. NRCS has made information available at *http://www.nrcs.usda.gov/programs/new_csp/csp.html.*

Comments

For many landowners, the promise of CSP-generated income will not be sufficient to prompt actions that advance conservation practices that will meet resource concerns, including those for native and managed pollinators. However, "bundling" of multiple values for the multiple benefits that conservation practices provide, such as carbon sequestration and water quality nutrient trading, is an approach that offers considerable potential to generate a combined economic value to landowners that will stimulate increased adoption and integration of conservation practices into their operations. Support was expressed for both types of payments to reward innovation and to advance new conservation practices, particularly those that yield multiple conservation outcomes. NRCS received comments that the CSP payment should recognize the environmental benefits for adopting a practice not only on the actual acres, but also the benefits gained on adjacent agricultural or forest land.

NRCS Response

Environmental benefits are based on the actual amount of the activity the producers agree to apply versus the potential of land that could receive the treatment. It measures the environmental benefits generated by the producer.

Comments

Four respondents recommended payments be based on environmental outcomes.

NRCS Response

To be able to implement the program and meet legislative requirements, the following three criteria were the driving factors for establishing the payment rates:

(1) Contract payment by CMT point per land use fixed nationwide for four eligible land uses: crop, pasture, range, forest;

(2) National average payment less than $18 per acre per year (includes technical assistance and financial assistance); and

(3) Payment limitations.

CSP makes payments for conservation activities that benefit both the landowner and community. The CSP program must be fair, equitable, and accessible to all landowners and easy to administer by government agencies. CSP cannot pay for all expenses incurred for conservation activities, but CSP can offset some expenses. CSP encourages landowners to maintain and adopt new conservation activities.

NRCS amended section 1470.20 to add paragraph (h) to read, "NRCS will conduct onsite field verification prior to contract obligation to substantiate that the information provided by pre-approved applicants during the application process is accurate prior to contract obligation."

Owners of Forest Lands

Comments

NRCS received three comments related to CSP payments and forest landowners. The rules propose payments for on-farm research, demonstration, and pilot testing. It is not clear if such payments are also available to NIPF components. The National Association of State Foresters recommends that forestry research and demonstration should also be eligible for annual payments.

NRCS Response

No changes are made to the rule in response to the comments. On-farm research and demonstrations and pilot projects are eligible for cropland, pastureland, rangeland, and NIPF. The protocols for the States to offer these activities can be found at *http://www.nrcs.usda.gov/programs/new_csp/csp.html.*

Comments

One commenter expressed that it would seem apparent that NIPF would deserve the highest annual payment per acre to encourage people to continue to invest time and labor to benefit our environment.

One commenter expressed concern that the low payment per acre and no cost-share will also discourage participation, especially among forest landowners.

NRCS Response

No changes are made to the rule in response to the comments. Land use payment rates represent the composite costs of existing and new activities per performance point proportionally adjusted to manage program payments to achieve the national average rate of $18 per acre. NRCS has supporting cost information to demonstrate that national payment rates were established following the established process and ensuring fairness with all land uses.

To manage CSP funding and meet legislative requirements, NRCS used the 2009 application period to arrive at a uniform payment rate per land use conservation performance point. NRCS modeled the annual land use payment

rates using the following nationwide sign-up data from 2009 application period pre-approved applications:

(a) New and existing environmental benefits measured in conservation performance points generated by land use type;

(b) Costs incurred and income foregone for conservation activities; and

(c) Available program funding levels.

Other

Comments

One commenter provided that the statement that no payment will be made for which there is no cost incurred or income forgone by the participant, is truly biased toward the individual who has in the past raped the soil, and now wants to possibly change his ways if you pay him enough. Not the spirit that CSP was intended to convey.

NRCS Response

No changes are made to the rule in response to the comment. NRCS is following CSP authorizing language that provides that the amount of conservation stewardship payment will be determined and based, to the maximum extent practicable, on the following factors:

(a) Cost incurred by the producer associated with planning, design, materials, installation, labor, management, maintenance, or training;

(b) Income forgone by the producer; and

(c) Expected environmental benefits as determined by the CMT.

Exclusions

SEC(e)(3)(B) payments to a producer will not be provided for conservation activities for which there is no cost incurred or income forgone to the producers.

Comments

One commenter recognized and applauded NRCS' effort to place the dollars in the hands of the operator. This policy avoids creating unnecessary angst within the farming communities.

NRCS Response

The CSP statutory authority requires that NRCS provide contract holders payments to compensate for installing and adopting additional conservation activities, and improving, maintaining, and managing conservation activities in place on the operation of the producer at the time the contract offer is accepted. NRCS has added clarity to the rule in paragraph 1470.6(a).

Interaction With Subsidy Payments

Comments

NRCS received two comments regarding CSP and subsidy payments. One commenter expressed that it is about time that we stop giving subsidies to specific farmers on the basis of specific crops. We can ALL benefit greatly if these subsidies were distributed instead on the basis of their environmental effectiveness; and two, in no way should these payments be added to the government's corn or grain subsidies obtained by those who rent the land.

NRCS Response

NRCS is following statutory authority by providing contract holders payments to compensate for installing and adopting additional conservation activities, and improving maintaining, and managing conservation activities in place at the operation of the producer at the time the contract offer is accepted. The CSP payment is based on environmental benefits accrued across the four major land uses authorized by the program and is not crop specific.

Annual Payments

Comments

Commenters expressed a number of concerns related to annual payments including that payment rates are too low and that low payment rates push landowners towards less beneficial enhancements. Additionally, the ability to receive cost-share assistance or use other conservation programs to improve conservation systems is a disincentive to participate in CSP, especially when combined with the low payment rate; producers cannot determine their exact cost and benefit of program participation if they are provided estimated annual payment rates; payment rates for cropland, pastureland, and managed grazing lands are too low; managed grazing land should be paid at the same rate as cropland; and NIPF deserves the highest annual payment rate. NRCS also heard that prompt payments are important to cover participant expenses incurred in the preceding months.

NRCS Response

The CSP statute provides a maximum acreage enrollment and funding level for each fiscal year. NRCS needed the payment discovery period, described in the "Discussion of Payment" section, because no historical information was available to be able to establish the rates for performance points and still be able to meet the program constraints. NRCS used real time data from the first sign-up to establish the national payment rate per point by land use. It is NRCS' intention to maintain, to the extent practicable, the per point payment rates established for the first sign-up in future ranking periods. This decision allows NRCS to provide estimated payment amounts to applicants early in the application process.

To manage CSP funding and meet legislative requirements, NRCS used the 2009 application period to arrive at a uniform payment rate per land use conservation performance point. NRCS modeled the annual land use payment rates using the following nationwide sign-up data from the 2009 application period:

(a) New and existing environmental benefits measured in conservation performance points generated by land use type;

(b) Costs incurred and income foregone for conservation activities; and

(c) Available program funding levels.

Note that land use payment rates represent the composite costs of existing and new activities per performance point, proportionally adjusted to manage program payments to achieve the national average rate of $18 per acre.

CSP payments by statute are based on the costs associated with agriculture on different land uses. In general, the costs associated with the maintenance and enhancements on pastureland are lower than those associated with cropland; therefore, the payment rate for pastureland is lower.

The CSP statute establishes that the Secretary look at current practices and future commitments to conservation. Historical changes to agricultural operations were made for a multitude of personal, financial, and cultural reasons. Although it is difficult to fairly assess past actions, CSP payments are calculated based on existing levels of conservation stewardship as well as a commitment to add conservation. A grass based farm should score well for existing levels of stewardship, and the CSP payment should reflect this.

NRCS has established that grassland, that is managed for hay or haylage, is considered cropland. If the land is also grazed, a determination must be made about which is the predominant activity, haying or grazing. The predominant activity will determine the land use category. If it is split evenly between the two activities the applicant should decide which land use will be considered.

Although many commenters referenced payment rates in terms of payment per acre, under CSP, participants are paid for operational conservation performance—the higher

the performance, the higher their payment. It is inappropriate to refer to the national payment rates on a per acre basis as the payments are made for performance points, and they are unique for each operation. NRCS clarifies that the estimated payment rates were made available to applicants in the 2009 sign-up to provide a proxy of type of national average payment that the program could offer. Additional information related to payments can be located at *http://www.nrcs.usda.gov/programs/new_csp/csp.html.*

Regarding concerns related to prompt payments, NRCS will make payments as soon as practicable after October 1 of each fiscal year for activities carried out in the previous fiscal year. NRCS amends 1470.24(d), timing of payments, to add, "For newly enrolled contracts, payments will be made as soon as practicable after October 1 following the fiscal year of enrollment."

Supplemental Payments—Resource-Conserving Crop Rotation

Comments

NRCS received 5 comments on the topic of supplemental payments.

One commenter expressed the timely release of the rules for implementation of and application for resource-conserving crop rotation supplemental payments is very important, in particular for rice, which is an irrigated crop. The Farm Bill says that the term resource-conserving crop means, in part, a rotation that reduces soil-moisture depletion or otherwise reduces the need for irrigation. With irrigation being the essence of rice production, rice producers who apply for the rotation supplement should not be disadvantaged in any way because they must irrigate their rice crop. Prompt USDA determinations about what rotations are beneficial and the definition of resource-conserving crops, for purposes of this program component, would assist prospective applicants in making informed, timely decisions about applying.

Another commenter recommended no supplemental payment will be made until the crop rotation is installed.

NRCS Response

NRCS acknowledges the concerns and encourages producers to refer to the activity criteria listed on the resource-conserving crop rotation jobs sheet at *http://www.nrcs.usda.gov/programs/new_csp/csp.html.* In addition, refer to the State Web site where eligible resource-conserving crops are posted. NRCS understands the importance of this under advisement for future ranking periods. However, the procedures allow applicants to schedule the resource-conserving crop rotation when the resource-conserving crop is planted on at least one-third of the rotation acres. The resource-conserving crop must be adopted by the third year of the contract and established or planted on all rotation acres by the fifth year of the contract.

Comments

One commenter requested NRCS provide more than one resource outcome, combined with the concept of supplemental payments. Consideration should be given to resource-conserving crops that provide nectar and pollen for native and managed pollinators. Alfalfa is a good example, so long as the practice includes allowing the plants to bloom and providing access to beekeepers.

NRCS Response

The benefits of a resource-conserving crop rotation include protection and habitat for pollinators. A resource-conserving crop rotation means a crop rotation that includes at least one resource-conserving crop, and reduces wind and water erosion, increases soil organic matter, improves soil fertility and tilth, interrupts pest cycles, reduces depletion of soil moisture or reduces the need for irrigation in applicable areas, and may provide protection and habitat for pollinators.

Comments

Finally, one commenter expressed that the payment for a resource-conserving crop rotation is inadequate to encourage change.

Payment Limitations

NRCS received 58 comments on the topic of payment limitations. Although commenters expressed both support for and dissatisfaction with payment limitations, more commenters supported the limitations than did not.

One commenter expressed that section 1470.24(g) imposes an arbitrary contract limit of $200,000 per contract regardless of the number of producers involved in the farming operation covered by the contract. This limit is outside the clear language of the statute and will negatively impact commercial-size farming operations.

Thirty-two respondents stated that the CSP payment limits should be retained and enforced. Many of these respondents also expressed that NRCS should resist pleas to incorporate payment limitation loopholes. One of the respondents expressed that USDA needs to ensure that as many farmers as possible can access the program for the greatest environmental benefit and farmers' bottom lines. Another respondent recommended an addition to the rule to make CSP contracts and payments subject to the FSA "actively engaged in farming" rules. One respondent identified that payment limits should remain a separate payment limitation and not be combined with other payments to encourage more moderate sized farms to participate and keep the total cost of the program at the limits of $40,000 per person or legal entity during any fiscal year, and $200,000 over any 5-year period.

Conversely, NRCS received many comments expressing that the only CSP payment limit the Farm Bill does declare explicitly is that $200,000 is the amount that a person or legal entity may receive in the aggregate, but may not exceed for all CSP contracts entered into during any 5-year period. A limit on a CSP contract as proposed in the interim final rule paragraph 1470.24 (g), is neither legislated in the Farm Bill nor discussed in the Statement of Managers.

NRCS Response

NRCS follows the Commodity Credit Corporation (CCC) regulation in 7CFR part 1400 when applying its statutory payment limitation requirements for CSP. This regulation is applicable to most CCC and FSA commodity, price support, and conservation programs.

NRCS used 7 CFR part 1400 as a guide for establishing the CSP contract limitation. A joint operation is composed by members who are either persons or legal entities. Based on how joint operations are characterized in section 1400.106, the statutory payment limitation applies to each person or legal entity that comprises the joint operation. NRCS recognizes the $200,000 contract limitation established in the interim final rule was too low and unfairly restricted certain joint operations who achieve the conservation performance levels needed to earn the payments. Therefore, NRCS raises, in the final rule, the CSP contract limitation to $400,000, which would allow two members of a joint-tenancy operation to earn the payments to obtain their $200,000 per person payment limitation authorized in statute. Further, NRCS establishes in paragraph (h) an annual contract limit for these joint operations of up to $80,000. These payment limitations do not apply to funding arrangements with federally recognized Indian tribes or Alaska Native corporations.

Comments

Twenty-one respondents expressed concern about the payment limits.

NRCS received comments suggesting where CSP accepted farming operations that exceed the $40,000 payment limit, NRCS should only include the acres necessary to reach the $40,000 payment limit against the State's allotted acres because the limit is understood and acceptable to producers. There is no advantage to NRCS offering a program that results in artificially low per acre contracts. If large farms only consumed their proportional share of the allotted CSP acres, large farms would present no threat to other operations. Large farms offer tremendous value to the United States taxpayer by providing more acres of conservation practices for the tax dollar. The current rule could result in large farms avoiding CSP.

NRCS Response

No changes are made to the rule in response to the comments. NRCS acknowledges the concern and explored this recommendation during the payment discovery period. NRCS cannot limit the acres it considers attributable to the authorized enrollment level. By statute, NRCS is required to enroll in the program no more than 12,769,000 acres for each fiscal year.

Comments

One respondent expressed that it is important to consider the longer-term implication of the agency's decision to create program provisions that run contrary to clear statutory language. If the agency can create its own set of payment limitations in each regulation it issues, the same overriding logic would allow it to impose its own set of environmental requirements, or allow it to change or override clear congressional guidelines with respect to expected environmental benefits.

One commenter recommended program participants should be able to roll over the annual payment limit for cause, so if they cannot undertake the conservation activity in a given year, but shift that work into the next year, the limit should be lifted if they request and extension on the activity.

NRCS Response

NRCS will not make payments for individual activities, so an annual payment amount will not be changed to adjust for actual performance. An actual performance level below what is required in the contract is considered a potential contract violation. Potential contract violations are addressed with a formal contract review as per agency policy in the Conservation Programs Manual, Part 512.55. In these cases, the annual payments will not be issued until NRCS and the applicant agree to a timeframe when the applicant will be back in compliance with the contract provisions. This agreement is official when form NRCS–CPA–153 has been signed by the participant and NRCS.

Statutory Acreage/Payment Constraints

Comments

NRCS received four comments on the statutory acreage and payment constraints. One respondent stated that payment constraints should be addressed in part by enrolling considerably more grassland than is assumed by the economic analysis, but rather is more in keeping with 2009 applications by land-use type. Payment constraints should also be addressed by allowing for year-to-year flexibility in meeting the statutory average per-acre payment cap over the full 9-year period provided by statute.

NRCS Response

No changes are made to the rule in response to the comments. NRCS is not limiting the acres of grassland that enrolls in the program. The amount projected in the economic analysis was used in lieu of historical data for analytical purposes only. The analysis is being reviewed with actual sign-up data which will reflect the amount of pastureland that sign-up for the program. NRCS is offering fair payment rates to encourage participation by operators of all land uses.

Comments

One respondent stated that as the level of CSP payments per acre is relatively low (not to exceed an average of $18 per acre), we anticipate that smaller acreage producers that might need to install a more costly enhancement on their own will be discouraged from applying for CSP because their expense to adopt some costlier enhancements (*e.g.* conversion of cropland to native grass for wildlife, alternative water sources, and exclusion fencing) may exceed their CSP payment. Thus, the commenter recommends that producers be allowed to utilize programs including EQIP and WHIP to help fund the installment of enhancements, as long as they do not duplicate payments on lands enrolled in CSP.

NRCS Response

No changes are made to the rule in response to the comments. NRCS recognizes the concerns related to small acreage producers. Participants have an extensive menu of enhancements to choose from that vary significantly in cost and environmental benefits. Although NRCS will not allow producers to combine programs to help producers install enhancements as that will be considered a duplicate payment, CSP participants can participate and receive funds under EQIP providing they do not receive payment for the same practice on the same land under both programs.

Comments

One respondent stated that given that the 2008 Farm Bill set caps on average payment rate and total acres, NRCS will need the flexibility to make changes based on the real data that a sign-up would offer to keep within the congressionally-set parameters.

NRCS Response

NRCS acknowledges the recommendation and will take under advisement for future ranking periods. However, it is NRCS' intention to maintain the per point payment rates in future ranking periods close to the same that was used in the first sign-up. This should allow NRCS to tell applicants early in their application process what their estimated payment will be.

Comments

One respondent urged NRCS to attempt to keep the average cost per acre for CSP down to $18 per acre "to the extent practicable" as required by the statute.

NRCS Response

NRCS followed rigorous processes during the payment discovery period to ensure payment rates were established based on sign-up data and not to exceed legislative requirements. NRCS is currently monitoring the contract obligation process, and program constraints are being met. However, the States have not completed the obligation process which may result in small variations of the expected results.

Minimum Contract Payment

Comments

NRCS received 55 comments expressing support that the final rule incorporates a minimum payment. Of these 55 comments, 21 respondents identified that the minimum payment should be at least $1,500. The respondents asserted that a minimum payment would encourage participation among small farms, especially among organic producers and producers in the New England States. The respondents expressed that small farms are important links in our ecological system. The respondents were

concerned that without this minimum, there may be no incentive for farmers operating at a scale smaller than 50–100 acres to take part in the program. However, one of the respondents, while supporting the $1,500 minimum payment, urged that the CSP payment limits in the interim final rule be retained and enforced to prevent payment limitation loopholes. NRCS also received comments that producers in certain geographic locations, such as Hawaii, Guam, and Alaska would potentially not participate in the program if the contract payment was too low.

NRCS Response

Under the existing payment structure, payments consider the environmental benefits produced on each acre. NRCS recognizes that small scale operations, beginning farmers or ranchers, and limited resource farmers or ranchers could be discouraged from participating, as well as producers in certain geographic locations and those who have been historically underserved. NRCS intends to encourage conservation on all agriculture operations regardless of size or type of operation, including organic production systems. NRCS is seeking CSP regulatory provisions to more directly encourage participation of small-scale producers, socially disadvantaged farmers or ranchers, beginning farmers or ranchers, and limited resource farmers or ranchers. NRCS believes that participation by these agricultural producers will provide for more conservation assistance for those who traditionally have not participated in USDA programs, as well as beginning farmers or ranchers seeking assistance with their operations.

Therefore, NRCS modified the rule in 1470.24 to add a new paragraph (d) that provides authority for minimum contract payments to socially disadvantaged farmers or ranchers, beginning farmers or ranchers, and limited resource farmers or ranchers. Paragraph (d) now reads, "Minimum contract payment. NRCS will make a minimum contract payment to participants who are socially disadvantaged farmers or ranchers, beginning farmers or ranchers, or limited resource farmers or ranchers at a rate determined by the Chief in any fiscal year that a contract's payment amount total is less than $1,000."

Section 1470.25 Contract Modifications and Transfers of Land

Comments

NRCS received ten comments on the topic of contract modifications and transfers of land.

NRCS received several comments in support of the provisions in the interim final rule. One commenter supported the interim final rule regarding NRCS' ability to modify, renew, and terminate contracts found in § 1470.25, § 1470.26, and § 1470.27. Another commenter supported the ability to transfer all or portions of the CSP contract if land is transferred or control of land changes. NRCS may wish to allow 90 days rather than 60 days to accomplish the transfer to ensure transfers are completed. However, another commenter expressed that the proposed rule provides for no contract modifications. Farm operations are dynamic organizations, and provisions should be allowed for the addition of qualifying land during the contract period. The other option would be to allow producers to enter into separate contracts for land added to the farm operation subsequent to an initial contract.

NRCS Response

NRCS chooses to retain the 60 days to accomplish the transfer to be consistent with other NRCS programs' contract prohibitions. NRCS has determined that although participants cannot modify contracts to add lands after a contract has been approved due to complexities related to ranking and payment rates, participants may offer new applications for additional lands they acquire after the initial contract is approved. The application on the newly acquired land will have to compete against other lands being offered for the program at the same time.

Comments

One commenter expressed that section 1470.25(b) prohibits modifications that increase the contract obligation over the initial amount with the exception of contracts that are renewed after the 5-year period. This prohibition has no basis in statute, and it is unclear why NRCS would want to prohibit contract modifications that increase the initial obligation as long as the increase is within the overall person or entity cap of $200,000.

NRCS Response

NRCS has amended the rule to allow participants who expand their farming operation to submit new applications for additional contracts on the newly acquired acreage. Any new application will have to compete with other applications received during the same ranking period. This policy enables producers to participate in CSP on newly acquired land while maintaining the integrity of the ranking and payment process.

Comments

Two commenters strongly encouraged NRCS to not penalize producers for amending their contract to enroll sensitive lands in other Title II Conservation Programs such as CRP, GRP, or WRP. Another recommended clarifying that CSP contracts can be modified to allow producers to enroll land into other conservation programs and payments should be modified to reflect the producers' costs and the environmental benefits gained on the entire field.

NRCS Response

NRCS agrees with the commenters and amended the final rule in paragraph 1470.25 to allow modifications to contracts to cancel and remove contract acres enrolled in programs like CRP, GRP, WRP, or other similar Federal or State programs without penalty to the participant.

Comments

One commenter recommended when renewable energy facilities and infrastructure are built on existing CSP contracts, the contract should be modified to address acres impacted by earthmoving and construction activities. These activities change the intent and purpose of the CSP contract.

NRCS Response

NRCS agrees with the commenter. NRCS will consider taking land out of production in a potential non-compliance situation. State Conservations will evaluate these cases individually and decide if contract termination is needed or if a modification of contract acres is permitted to allow the producer to maintain the contract with the reduced acres.

Section 1470.26 Contract Renewal

Comments

NRCS received nine comments on the topic of contract renewal. One commenter supported the interim final rule regarding NRCS' ability to modify, renew, and terminate contracts found in § 1470.25, § 1470.26, and § 1470.27.

NRCS Response

NRCS appreciated the positive feedback.

Comments

NRCS received a comment that it should be much clearer and more explicit in the final rule. As a condition of eligibility for renewal, the participant should be required to meet or exceed the stewardship threshold for at least two additional priority resource concerns during the second contract term, provided they are not already exceeding the threshold for all or at least four priority resource concerns. In addition, the requirement to adopt additional conservation activities should be tied directly to the requirement to meet or exceed the threshold on those additional priority resource concerns.

NRCS Response

NRCS intends to follow the Managers' Report language that provides, "The Secretary is provided authority to require new conservation activities as part of the contract renewal process. It is the intent of the Managers that this could include expanding the degree, scope, and comprehensiveness of conservation activities adopted by a producer to address the original priority resource concerns or addressing one or more additional priority resource concerns." To add clarity to the rule, NRCS amends paragraphs 1470.26(b)(3) and (4) to read as follows: "(3) At a minimum, meet stewardship thresholds for at least two priority resource concerns; and (4) agree to adopt additional conservation activities to address at least one additional priority resource concern during the term of the renewed conservation stewardship contract."

Comments

One respondent identified that section 1470.26 of the interim final rule provides that NRCS will permit contract renewals to foster participant commitment to increased conservation performance. The commenter believes that payment for implementing additional conservation activities should be equally weighted with payment for implementing existing conservation activities.

NRCS Response

NRCS established the National Payment Rates which include the conservation performance for existing and new activities. It anticipates it will maintain the same payment structure on renewed contracts.

Comments

One commenter supported the idea of contract renewals. Some practices take years of implementation before you actually see financial results. When transitioning to no-till farming practices in semi-arid Montana, it takes between 7 and 10 years before the nutrient requirements stabilize and the producer is able to reduce the amount of fertilizer that is required. Assisting farmers and ranchers with additional time to implement larger practices can only serve to help the meet the goals of CSP and improve our environment.

NRCS Response

NRCS agrees with the commenter. Contract renewal will ensure that conservation benefits achieved in the first period will be maintained longer. In addition, this will allow participants to adopt new conservation activities and address additional stewardship thresholds. No change is made to the rule in response to the comment.

Section 1470.27 Contract Violations and Termination

Comments

Section 1470.27, "Contract violations and termination," addresses the procedures that NRCS will take when a violation has occurred or a contract termination is needed. NRCS received four comments on this section.

One commenter recommended NRCS remove the penalty for terminating the CSP contract before the 5 years is done. The environment will reap a benefit from even just one year of CSP enrollment and conservation practices. We should be trying to encourage participation rather than instilling fear of repercussions.

NRCS Response

NRCS will follow agency contracting policies to be consistent with other NRCS programs and ensure program objectives are met. However, NRCS will not penalize a participant if they failed to comply with contract provisions due to circumstances beyond their control.

Comments

One commenter requested NRCS include verbiage that specifically says the landowner will not be held liable in any manner if their tenant does not fulfill the 5-year contract. This would encourage landowners to cooperate with tenants who want to do good things for the environment.

NRCS Response

NRCS does not consider it appropriate to include the language recommended above as NRCS may not have any contractual obligations with the landlords. NRCS enters into a contract with the applicant who is held responsible for meeting the contract provisions. NRCS has provisions that explain that participants will not be considered in violation of the contract for failure to comply with the contract due to circumstances beyond the control of the participant. In addition, NRCS will ensure that producers who would have an interest in acreage being offered received treatment which NRCS deems to be equitable.

Subpart C—General Administration

Section 1470.30 Fair Treatment of Tenants and Sharecroppers

Comments

Section 1470.30, "Fair treatment of tenants and sharecroppers," specifies that any CSP payments received must be divided in the manner specified in the contract. Where conflicts arise between an operator and landowner, NRCS may refuse to enter into a CSP contract. NRCS received two comments on this section.

One commenter expressed that tenant and sharecropper treatment must be a priority and communicated clearly and frequently to applicants and participants during every phase of the CSP process. In particular, USDA must clearly and frequently communicate to applicants and participants the interim final rule statement, i.e., that the Department may refuse to enter into a CSP contract when there is a disagreement amongst joint applicants seeking enrollment as to an applicant's eligibility to participate in the contract as a tenant.

NRCS Response

NRCS does not want to interfere with the contractual relationship between landowners and tenants. However, NRCS has a responsibility to ensure fair treatment of tenants. NRCS feels that this concern has been addressed in the program contract appendix which is given to the applicants at the time of application and reviewed, accepted, and signed before contract obligation. The contract appendix provides that:

No payment will be approved for the current year if the CCC determines that any of the following conditions exist: (1) The landlord or operator has not given the tenants that have an interest in the agricultural operation covered by the contract, or that have a lease that runs through the contract term at the time of sign-up, an opportunity to participate in the benefits of the program, and (2) The landlord or operator has adopted any other scheme or device for the purpose of depriving any tenant of any benefits to which such tenant would otherwise be entitled. If any such conditions occur or are discovered after payments have

been made, all or any part of the payments, as determined by the CCC, must be refunded according to paragraph 5F of the contract, and no further payments will be made.

Comments

The second commenter recommended NRCS adopt additional procedures to be sure that the contracts themselves provide fair treatment to tenants, and that landowners be required to disclose any operators on the land who may be farming on the land covered under CSP who lack adequate written lease agreements.

NRCS Response

NRCS accepts applications from the operator of record in the FSA farm records management system. Exceptions may be made for other tenants, other producers, and owners in the FSA farm records management system that can demonstrate, to the satisfaction of NRCS, they are the operator and have effective control of the land at the time of enrollment in the program. This should ensure that the contracts provide for fair treatment of tenants.

Section 1470.31 Appeals

No comments were received.

Section 1470.32 Compliance With Regulatory Measures

No comments were received.

Section 1470.33 Access to Operating Unit

NRCS received three comments regarding access to operating unit. One commenter requested USDA inform and make clearly available notices in its national, State, and local offices during public outreach activities, and during prospective applicants' and active participants' meetings, that its authorized representatives have certain limited rights to enter a private agricultural operation solely for CSP-related purposes. The interim final rule statement that NRCS will make every effort to contact the participant prior to the exercise of this provision must be honored and fulfilled to the fullest extent. Every effort to make prior contact must be documented and logged, using permissible and appropriate means of communication. Two commenters recommended that the right to access be extended to any representative of USDA, as in other USDA regulations. This will allow conservation partners with TSP agreements to assist with applications and conservation planning on the applications land.

NRCS Response

NRCS supports the comment and has inserted "or its authorized representative" after "NRCS" where appropriate within this section of the rule.

Section 1470.34 Equitable Relief

No comments were received.

Section 1470.35 Offsets and Assignments

No comments were received.

Section 1470.36 Misrepresentation and Scheme or Device

No comments were received.

Section 1470.37 Environmental Credits for Conservation Improvements

Section 1470.37, "Environmental credits for conservation improvements," provides NRCS' policy on environmental credits. NRCS received five comments on this section.

Two commenters were encouraged to see the provisions included on environmental credits and support the policy that any environmental credits (for example carbon or water quality) created in conjunction with a CSP contract are solely the property of the contract holder. This is consistent with policy statements made by USDA in reference to EQIP and CRP.

NRCS Response

NRCS appreciates the positive feedback. It is correct that the policy on this issue with respect to CSP is consistent with many other USDA programs. Although such assistance may favor program participants at the expense of non-participants, this stance is based on the Department's desire to foster the creation of credits to spur the supply side of these markets.

Comments

One commenter expressed that although NRCS is asserting no interest in the credits that may be generated due to participation in CSP, it is possible that the rules of an ecosystem services market may preclude the purchase of credits that may have already been partially funded by the taxpayer. In almost all cases, it is highly likely that NRCS has only financed the creation of a portion of the credits that may be generated by an operation, and that a large percentage of the potential ecosystem service credit is being generated through ongoing labor and investment on the part of the farm operator. It would help ensure the ability of all USDA conservation program participants to sell ecosystem services credits in any ecosystem services market if USDA would calculate what portion of the potential credit they have financed and what portion remains that could be sold into an ecosystem services market. This would create more stability and assurance for producers who wish to participate in these markets.

NRCS Response

USDA recognizes and respects the rights for markets to establish their own technical and trading requirements for market participants. The rationale for precluding environmental credits generated by taxpayer-assisted programs is that these markets only want to recognize "additional" credits produced without tax-payer assistance. These markets would contend that credits generated through such programs would have been produced regardless of the presence of an environmental market and in fact, could affect the decision of non-program participants to create and enter into environmental markets. Measuring the degree of distortion created by tax-payer assistance programs to extricate its portion of the credits due to their influence would add another level of complexity to these emerging markets.

Comments

One commenter supported the provision of the regulation regarding environmental credits for conservation improvements. It is important the conservation program participants be able to participate in future ecosystem services markets regardless of whether they have or have not participated in Federal conservation programs.

NRCS Response

USDA supports the creation of environmental markets and does not directly affect the decision of program participants to participate in them.

Comments

One commenter recommended NRCS provide additional weight to projects that acreage CSP program goals while concurrently facilitating emerging environmental credit markets (*i.e.* those projects that are well-tailored to resulting in the production of marketable climate and water quality credits). In addition to meeting program goals, these projects will meet the administration's goal for fostering economic stimulus through enhanced markets in ecosystem services.

NRCS Response

The CSP has the potential to address specific resource concerns by allowing the State Technical Committee to select

the priority resource concerns in their State. Also, although NRCS recognizes that there may be substantial indirect impacts on local economies and employment, NRCS' primary objective is to put conservation on the ground.

Other Regulatory Changes

NRCS made the following administrative changes to add clarity to the rule:

(1) Text related to funding reserves for Socially Disadvantaged Farmers or Ranchers and Beginning Farmers or Ranchers was removed from paragraph 1470.2(e) and relocated more appropriately under 1470.4, Allocation and Management;

(2) Paragraphs 1470.2(f)(1)(i) through (iii) were added to place responsibilities of the State Technical Committees and local working groups in one location within the rule.

(3) Paragraph 1470.4(e) was added to include a statutory requirement to identify that CSP may contribute to the Cooperative Conservation Partnership Initiative (CCPI). CCPI provides that, for the funds available for CCPI, 90 percent will be allocated for projects selected at the State level and 10 percent for projects offered through a national competitive process. For the percentage of funds allocated based on a national competitive process, this regulation identifies that funding allocation decisions will consider the extent to which the project addresses national and regional conservation priorities.

(4) Paragraph 1470.3 includes a new definition for limited resource farmer and rancher for consistency with other NRCS regulations.

(5) Outreach—in paragraph 1470.5(b), deleted redundant text and added paragraph 1470.5(d) clarifying that NRCS will conduct focused outreach in regions of national significance in order to maximize program participation.

(6) Paragraph 1470.6(b)(4) was amended to provide clarification to "other eligible lands" to include "other private agricultural land as determined by the Chief, on which resource concerns related to agricultural production could be addressed by enrolling the land in CSP."

(7) The text in paragraph 1470.20(e), Application, was deleted and relocated to "Administration" to keep reference to administrative functions in one location. A new paragraph (e) has been added regarding State and local priorities.

(8) Paragraph 1470.24(e) clarified the timing of payments for newly enrolled contracts. In paragraph (i) clarified payment limitation provisions for Indian tribes, Pueblos, and Indian nations. In paragraph (j) clarified that payments will be directly attributed to entity members.

List of Subjects in 7 CFR Part 1470

Agricultural operation, Conservation activities, Conservation measurement tool, Natural resources, Priority resource concern, Stewardship threshold, Resource-conserving crop rotation, Soil and water conservation, Soil quality, Water quality and water conservation, Wildlife and forest management.

■ For the reasons stated above, the CCC adds part 1470 of Title 7 of the CFR to read as follows:

PART 1470—CONSERVATION STEWARDSHIP PROGRAM

Subpart A—General Provisions

Sec.

Subpart B—Contracts and Payments

Subpart C—General Administration

Authority: 16 U.S.C. 3838d–3838g.

Subpart A—General Provisions

§ 1470.1 Applicability.

(a) This part sets forth the policies, procedures, and requirements for the Conservation Stewardship Program (CSP) as administered by the Natural Resources Conservation Service (NRCS), for enrollment during fiscal year (FY) 2009 and thereafter.

(b) The purpose of CSP is to encourage producers to address resource concerns in a comprehensive manner by:

(1) Undertaking additional conservation activities; and

(2) Improving, maintaining, and managing existing conservation activities.

(c) CSP is applicable in any of the 50 States, District of Columbia, Commonwealth of Puerto Rico, Guam, Virgin Islands of the United States, American Samoa, and Commonwealth of the Northern Mariana Islands.

(d) NRCS provides financial assistance and technical assistance to participants for the conservation, protection, and improvement of soil, water, and other related natural resources, and for any similar conservation purpose as determined by NRCS.

§ 1470.2 Administration.

(a) The regulations in this part will be administered under the general supervision and direction of the Chief, NRCS, who is a Vice President of the Commodity Credit Corporation (CCC).

(b) The Chief is authorized to modify or waive a provision of this part if the Chief deems the application of that provision to a particular limited situation to be inappropriate and inconsistent with the purposes of the program. This authority cannot be further delegated. The Chief may not modify or waive any provision of this part which is required by applicable law.

(c) To achieve the conservation goals of CSP, NRCS will:

(1) Make the program available nationwide to eligible applicants on a continuous application basis with one or more ranking periods to determine enrollments. One of the ranking periods will occur in the first quarter of each fiscal year, to the extent practicable; and

(2) Develop conservation measurement tools (CMT) for the purpose of carrying out the program.

(d) During the period beginning on October 1, 2008, and ending on September 30, 2017, NRCS will, to the maximum extent practicable:

(1) Enroll in CSP an additional 12,769,000 acres for each fiscal year; and

(2) Manage CSP to achieve a national average rate of $18 per acre, which includes the costs of all financial and technical assistance and any other expenses associated with program enrollment and participation.

(e) The State Conservationist will:

(1) Obtain advice from the State Technical Committee and local working groups on the development of State-level technical, outreach, and program matters, including:

(i) Establishment of ranking pools appropriate for the conduct of CSP within the State to ensure program availability and prioritization of conservation activities. Ranking pools may be based on watersheds, geographic areas, or other appropriate regions within a State and may consider high-priority regional and State-level resource concern areas;

(ii) Identification of not less than three, nor more than five priority resource concerns in particular watersheds, geographic areas, or other appropriate regions within a State;

(iii) Identification of resource-conserving crops that will be part of resource-conserving crop rotations;

(iv) Development of design protocols and participation procedures for participation in on-farm research, and demonstration and pilot projects; and

(v) Evaluation of Cooperative Conservation Partnership Initiative (CCPI) projects and allowable program adjustments for the conduct of projects.

(2) Assign NRCS employees as designated conservationists to be responsible for CSP at the local level; and

(3) Be responsible for the program in their assigned State.

(f) NRCS may enter into agreements with Federal, State, and local agencies, conservation districts, Indian tribes, private entities, and individuals to assist NRCS with program implementation.

§ 1470.3 Definitions.

The following definitions will apply to this part and all documents issued in accordance with this part, unless specified otherwise:

Agricultural land means cropland, rangeland, and pastureland on which agricultural products or livestock are produced and resource concerns may be addressed. Agricultural lands may also include other land and incidental areas included in the agricultural operation as determined by NRCS. Other agricultural lands include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock.

Agricultural operation means all agricultural land and other land, as determined by NRCS, whether contiguous or noncontiguous:

(1) Which is under the effective control of the applicant; and

(2) Which is operated by the applicant with equipment, labor, management, and production or cultivation practices that are substantially separate from other operations.

Animal waste storage or treatment facility means a structural conservation practice used for storing or treating animal waste.

Applicant means a person, legal entity, joint operation, or Indian tribe that has an interest in an agricultural operation, as defined in 7 CFR part 1400, who has requested in writing to participate in CSP.

Beginning farmer or rancher means:

(1) An individual or legal entity who:

(i) Has not operated a farm, ranch, or nonindustrial private forest land (NIPF), or who has operated a farm, ranch, or NIPF for not more than 10 consecutive years (this requirement applies to all members of a legal entity); and

(ii) Will materially and substantially participate in the operation of the farm or ranch.

(2) In the case of a contract with an individual, individually, or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in the county or State where the farm is located.

(3) In the case of a contract with a legal entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

Chief means the Chief of NRCS, or designee.

Conservation activities means conservation systems, practices, or management measures needed to address a resource concern or improve environmental quality through the treatment of natural resources, and includes structural, vegetative, and management activities as determined by NRCS.

Conservation district means any district or unit of State, tribal, or local government formed under State, tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a "conservation district," "soil conservation district," "soil and water conservation district," "resource conservation district," "land conservation committee," "natural resource district," or similar name.

Conservation measurement tool means procedures developed by NRCS to estimate the level of environmental benefit to be achieved by a producer using the proxy of conservation performance.

Conservation planning means using the planning process outlined in the applicable National Planning Procedures Handbook (NPPH).

Conservation practice means a specified treatment, such as a structural or vegetative practice or management technique, commonly used to meet a specific need in planning and carrying out conservation programs for which standards and specifications have been developed. Conservation practices are in the NRCS Field Office Technical Guide, section IV, which is based on the National Handbook of Conservation Practices.

Conservation stewardship plan means a record of the participant's decisions that describes the schedule of conservation activities to be implemented, managed, or improved. Associated supporting information that identifies and inventories resource concerns and existing conservation activities, establishes benchmark data, and documents the participant's conservation objectives will be maintained with the plan.

Conservation system means a combination of conservation practices, management measures, and enhancements used to address natural resource and environmental concerns in a comprehensive, holistic, and integrated manner.

Contract means a legal document that specifies the rights and obligations of any participant who has been accepted into the program. A CSP contract is an agreement for the transfer of assistance from NRCS to the participant for installing, adopting, improving, managing, and maintaining conservation activities.

Designated conservationist means an NRCS employee whom the State Conservationist has designated as responsible for CSP at the local level.

Effective control means possession of the land by ownership, written lease, or other legal agreement and authority to act as decisionmaker for the day-to-day management of the operation both at the time the applicant enters into a stewardship contract and for the required period of the contract.

Enhancement means a type of conservation activity used to treat natural resources and improve conservation performance. Enhancements are installed at a level of management intensity that exceeds the sustainable level for a given resource concern, and those enhancements directly related to a practice standard are applied in a manner that exceeds the

minimum treatment requirements of the standard.

Enrollment means for the initial sign-up for FY 2009, NRCS will consider a participant "enrolled" in CSP based on the fiscal year the application is submitted, once NRCS approves the participant's contract. For subsequent ranking cut-off periods, NRCS will consider a participant enrolled in CSP based on the fiscal year the contract is approved.

Field office technical guide means the official local NRCS source of resource information and interpretations of guidelines, criteria, and standards for planning and applying conservation practices and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared.

Indian lands means all lands held in trust by the United States for individual Indians or Indian tribes, or all land titles held by individual Indians or tribes, subject to Federal restrictions against alienation or encumbrance, or lands subject to the rights of use, occupancy, or benefit of certain Indian tribes. This term also includes lands for which the title is held in fee status by Indian tribes and the U.S. Government-owned land under the Bureau of Indian Affairs (BIA) jurisdiction.

Indian Tribe means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Joint operation means, as defined in part 1400 of this chapter, a general partnership, joint venture, or other similar business arrangement in which the members are jointly and severally liable for the obligations of the organization.

Legal entity means, as defined in part 1400 of this chapter, an entity created under Federal or State law.

Limited Resource Farmer or Rancher means:

(1) A person with direct or indirect gross farm sales not more than the current indexed value in each of the previous 2 years ($142,000 is the amount for 2010, adjusted for inflation using Prices Paid by Farmer Index as compiled by the National Agricultural Statistical Service); and

(2) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous 2 years (to be determined annually using Department of Commerce Data).

Liquidated damages means a sum of money stipulated in the CSP contract that the participant agrees to pay NRCS if the participant fails to fulfill the terms of the contract. The sum represents an estimate of the technical assistance expenses incurred to service the contract, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

Local working group means the advisory body as described in 7 CFR part 610.

Management measure means one or more specific actions that is not a conservation practice, but has the effect of alleviating problems or improving the treatment of the natural resources.

National Organic Program means the program, administered by the Department of Agriculture (USDA) Agricultural Marketing Service, which regulates the standards for any farm, wild crop harvesting, or handling operation that wants to market an agricultural product as organically produced.

Natural Resources Conservation Service means an agency of USDA which has responsibility for administering CSP using the funds, facilities, and authorities of the CCC.

Nonindustrial private forest land means rural land that has existing tree cover or is suitable for growing trees, and is owned by an individual, group, association, corporation, Indian tribe, or other private legal entity that has definitive decisionmaking authority over the land.

Operation and maintenance means work performed by the participant to maintain existing conservation activities to at least the level of conservation performance identified at the time the application is obligated into a contract, and maintain additional conservation activities installed and adopted over the contract period.

Participant means a person, legal entity, joint operation, or Indian tribe that is receiving payment or is responsible for implementing the terms and conditions of a CSP contract.

Payment means financial assistance provided to the participant under the terms of the CSP contract.

Person means, as defined in part 1400 of this chapter, an individual, natural person and does not include a legal entity.

Priority resource concern means a resource concern that is identified by the State Conservationist, in consultation with the State Technical Committee and local working groups, as a priority for a State, or the specific geographic areas within a State.

Producer means a person, legal entity, joint operation, or Indian tribe who has an interest in the agricultural operation, as defined in part 1400 of this chapter, or who is engaged in agricultural production or forest management.

Resource concern means a specific natural resource problem that is likely to be addressed successfully through the implementation of conservation activities by producers.

Resource-conserving crop means a crop that is one of the following:

(1) A perennial grass;

(2) A legume grown for use as forage, seed for planting, or green manure;

(3) A legume-grass mixture;

(4) A small grain grown in combination with a grass or legume, whether inter-seeded or planted in rotation.

Resource-conserving crop rotation means a crop rotation that:

(1) Includes at least one resource-conserving crop as determined by the State Conservationist;

(2) Reduces erosion;

(3) Improves soil fertility and tilth;

(4) Interrupts pest cycles; and

(5) In applicable areas, reduces depletion of soil moisture or otherwise reduces the need for irrigation.

Secretary means the Secretary of USDA.

Socially disadvantaged farmer or rancher means a producer who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities. A socially disadvantaged group is a group whose members have been subject to racial or ethnic prejudice because of their identity as members of a group, without regard to their individual qualities. These groups consist of American Indians or Alaskan Natives, Asians, Blacks or African Americans, Native Hawaiians or other Pacific Islanders, and Hispanics. A socially disadvantaged applicant is an individual or entity who is a member of a socially disadvantaged group. For an entity, at least 50 percent ownership in the farm business must be held by socially disadvantaged individuals.

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

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

Stewardship threshold means the level of natural resource conservation and environmental management required, as determined by NRCS using the CMT, to conserve and improve the quality and condition of a natural resource.

Technical assistance means technical expertise, information, and tools necessary for the conservation of natural resources on land active in agricultural, forestry, or related uses. The term includes the following:

(1) Technical services provided directly to farmers, ranchers, forest producers, and other eligible entities, such as conservation planning, technical consultation, preparation of forest stewardship management plans, and assistance with the design and implementation of conservation activities; and

(2) Technical infrastructure, including processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

Technical Service Provider means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants in lieu of, or on behalf of, NRCS as referenced in 7 CFR part 652.

§ 1470.4 Allocation and management.

(a) The Chief will allocate acres and associated funds to State Conservationists:

(1) Primarily on each State's proportion of eligible land to the total amount of eligible land in all States; and

(2) On consideration of:

(i) The extent and magnitude of the conservation needs associated with agricultural production in each State based on natural resource factors that consider national, regional, and State-level priority ecosystem areas,

(ii) The degree to which implementation of the program in the State is, or will be, effective in helping producers address those needs, and

(iii) Other considerations determined by the Chief to achieve equitable geographic distribution of program participation.

(b) The State Conservationist will allocate acres to ranking pools, to the extent practicable, based on the same factors the Chief considers in making allocations to States.

(c) Of the acres made available for each of fiscal years 2009 through 2012 to carry out CSP, NRCS will use, as a minimum:

(1) Five percent to assist beginning farmers or ranchers, and

(2) Five percent to assist socially disadvantaged farmers or ranchers.

(d) In any fiscal year, allocated acres that are not enrolled by a date determined by NRCS may be reallocated with associated funds for use in that fiscal year under CSP. As part of the reallocation process, NRCS will consider several factors, including demand from applicants, national and regional conservation priorities, and prior-year CSP performance in States.

(e) Of the CSP funds and acres made available for each fiscal year:

(1) The Chief will reserve 6 percent of funds and acres to ensure an adequate source of funds and acres for the CCPI. Of the funds and acres reserved, the Chief will allocate:

(i) Ninety percent to projects based on the direction of State Conservationists, with the advice of State Technical Committees; and

(ii) Ten percent to projects based on a national competitive process established by the Chief. In determining funding allocation decisions for these projects, NRCS will consider the extent to which they address national and regional conservation priorities.

(2) Any funds and acres reserved for the CCPI in a fiscal year that are not obligated by April 1 of that fiscal year may be used to carry out other CSP activities during the remainder of that fiscal year.

§ 1470.5 Outreach activities.

(a) NRCS will establish program outreach activities at the national, State, and local levels to ensure that potential applicants who control eligible land are aware and informed that they may be eligible to apply for program assistance.

(b) Special outreach will be made to eligible producers with historically low participation rates, including but not restricted to, beginning farmers or ranchers, limited resource farmers or ranchers, and socially disadvantaged farmers or ranchers.

(c) NRCS will ensure that outreach is provided so as not to limit producer participation because of size or type of operation or production system, including specialty crop and organic production.

(d) NRCS will conduct focused outreach in regions of national significance in order to maximize program participation. These areas could include landscapes such as the Chesapeake Bay watershed and Great Lakes basin.

§ 1470.6 Eligibility requirements.

(a) *Eligible applicant.* To be an eligible applicant for CSP, a producer must be the operator in the Farm Service Agency (FSA) farm records management system. Potential applicants that are not in the FSA farm records management system must establish records with FSA. Potential applicants whose records are not current in the FSA farm records management system must update those records prior to the close of the evaluation period to be considered eligible. NRCS may grant exceptions to the "operator of record" requirement for producers, tenants, and owners in the FSA farm records management system that can demonstrate, to the satisfaction of NRCS, they will operate and have effective control of the land. Applicants must also meet all of the following requirements:

(1) Have effective control of the land unless an exception is made by the Chief in the case of land administered by the BIA, Indian lands, or other instances in which the Chief determines that there is sufficient assurance of control;

(2) Be in compliance with the highly erodible land and wetland conservation provisions found at 7 CFR part 12;

(3) Be in compliance with Adjusted Gross Income provisions found at 7 CFR part 1400;

(4) Supply information, as required by NRCS, to determine eligibility for the program, including but not limited to, information related to eligibility requirements and ranking factors; conservation activity and production system records; information to verify the applicant's status as a historically underserved producer, if applicable; and payment eligibility as established by 7 CFR part 1400; and

(5) Provide a list of all members of the legal entity and embedded entities along with members' tax identification numbers and percentage interest in the entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment.

(b) *Eligible land.* A contract application must include all of the eligible land on an applicant's agricultural operation, except as identified in paragraph (b)(3) of this section. A participant may submit an application(s) to enter into an additional contract(s) for newly acquired eligible land, which would then compete with other applications in a subsequent ranking period. The land as described below is part of the agricultural operation and eligible for enrollment in the CSP:

(1) Private agricultural land;

(2) Agricultural Indian lands;

(3) NIPF:

(i) By special rule in the statute, NIPF is eligible land,

(ii) No more than 10 percent of the acres enrolled nationally in any fiscal year may be NIPF,

(iii) The applicant will designate by submitting a separate application if they want to offer NIPF for funding consideration,

(iv) If designated for funding consideration, then the NIPF component of the operation will include all the applicant's NIPF. If not designated for funding consideration, then the applicant's NIPF will not be part of the agricultural operation; and

(4) Other private agricultural land, as determined by the Chief, on which resource concerns related to agricultural production could be addressed by enrolling the land in CSP.

(c) *Ineligible land.* The following ineligible lands are part of the agricultural operation, but ineligible for inclusion in the contract or for payment in CSP:

(1) Land enrolled in the Conservation Reserve Program (CRP), 7 CFR part 1410;

(2) Land enrolled in the Wetlands Reserve Program (WRP), 7 CFR part 1467;

(3) Land enrolled in the Grassland Reserve Program (GRP), 7 CFR part 1415;

(4) Land enrolled in the Conservation Security Program, 7 CFR part 1469;

(5) Public land including land owned by a Federal, State, or local unit of government; and

(6) Land used for crop production after June 18, 2008, that had not been planted, considered to be planted, or devoted to crop production for at least 4 of the 6 years preceding that date, unless that land:

(i) Had previously been enrolled in CRP,

(ii) Has been maintained using long-term crop rotation practices as determined by the designated conservationist, or

(iii) Is incidental land needed for efficient operation of the farm or ranch as determined by the designated conservationist.

§ 1470.7 Enhancements and conservation practices.

(a) Participant decisions describing the additional enhancements and conservation practices to be implemented under the conservation stewardship contract will be recorded in the conservation stewardship plan.

(b) NRCS will make available to the public the list of enhancements and conservation practices available to be installed, adopted, maintained, and managed through the CSP.

(c) NRCS will make available bundled suites of conservation activities for participants to voluntarily select to include as part of their conservation stewardship plans. The bundles will be designed to coordinate the installation and adoption of enhancements with each other to address resource concerns in a more comprehensive and cost-effective manner.

(d) CSP encourages the use of other NRCS programs to install conservation practices that are required to meet agreed-upon stewardship thresholds, but the practices may not be compensated through CSP.

§ 1470.8 Technical and other assistance.

(a) NRCS may provide technical assistance to an eligible applicant or participant either directly or through a technical service provider (TSP) as set forth in 7 CFR part 652.

(b) NRCS retains approval authority over certification of work done by non-NRCS personnel for the purpose of approving CSP payments.

(c) NRCS will ensure that technical assistance is available and program specifications are appropriate so as not to limit producer participation because of size or type or operation or production system, including specialty crop and organic production. In providing technical assistance to specialty crop and organic producers, NRCS will provide appropriate training to field staff to enable them to work with these producers and to utilize cooperative agreements and contracts with nongovernmental organizations with expertise in delivering technical assistance to these producers.

(d) NRCS will assist potential applicants dealing with the requirements of certification under the National Organic Program and CSP requirements concerning how to coordinate and simultaneously meet eligibility standards under each program.

(e) NRCS may utilize the services of State foresters and existing technical assistance programs such as the Forest Stewardship Program of the U.S. Forest Service, in coordinating assistance to NIPF owners.

Subpart B—Contracts and Payments

§ 1470.20 Application for contracts and selecting offers from applicants.

(a) *Submission of contract applications.* Applicants may submit an application to enroll all of their eligible land into CSP on a continuous basis.

(b) *Stewardship threshold requirement.* To be eligible to participate in CSP, an applicant must submit to the designated conservationist for approval, a contract application that:

(1) Indicates the applicant's conservation activities, at the time of application, are meeting the stewardship threshold for at least one resource concern;

(2) Would, at a minimum, meet or exceed the stewardship threshold for at least one priority resource concern in addition to the resource concern described in paragraph (b)(1) of this section by the end of the conservation stewardship contract by:

(i) Installing and adopting additional conservation activities, and

(ii) Improving, maintaining, and managing conservation activities present on the agricultural operation at the time the contract application is accepted by NRCS;

(3) Provides a map, aerial photograph, or overlay that:

(i) Identifies the applicant's agricultural operation and NIPF component of the operation, and

(ii) Delineates eligible land with associated acreage amounts; and

(4) If the applicant is applying for on-farm research and demonstration activities or for pilot testing, describes the nature of the research, demonstration, or pilot testing in a manner consistent with design protocols and application procedures established by NRCS.

(c) *Evaluation of contract applications.* NRCS will conduct one or more ranking periods each fiscal year.

(1) To the extent practicable, one ranking period will occur in the first quarter of the fiscal year;

(2) In evaluating CSP applications, the State Conservationist or designated conservationist will rank applications based on the following factors, using the CMT, to the maximum extent practicable:

(i) Level of conservation treatment on all applicable priority resource concerns at the time of application,

(ii) Degree to which the proposed conservation treatment on applicable priority resource concerns effectively increases conservation performance,

(iii) Number of applicable priority resource concerns proposed to be treated to meet or exceed the stewardship threshold by the end of the contract, and

(iv) Extent to which other resource concerns, in addition to priority resource concerns, will be addressed to meet or exceed the stewardship threshold by the end of the contract period;

(3) In the event that application ranking scores from (2) above are

similar, the application that represents the least cost to the program will be given higher priority; and

(4) The State Conservationist or designated conservationist may not assign a higher priority to any application because the applicant is willing to accept a lower payment than the applicant would otherwise be eligible to receive.

(d) *Weighting of ranking factors.* To the extent the CSP objective of additional conservation is not being achieved, as determined by the Chief, NRCS will adjust the weighting of ranking factors in order to place emphasis on increasing net conservation benefits.

(e) *State and local priorities.* The Chief may develop and use additional criteria for evaluating applications that are determined necessary to ensure that national, State, and local conservation priorities are effectively addressed.

(f) *Ranking pools.* Ranking pools will be established in accordance with § 1470.2(e)(1)(i).

(1) NIPF will compete in ranking pools separate from agricultural land. An applicant with both NIPF and agricultural land will have the options to submit:

(i) One application for NIPF;

(ii) One application for agricultural land; or

(iii) Two applications, one for each land type.

(2) An applicant with an agricultural operation or NIPF component of the operation that crosses ranking pool boundaries will make application and be ranked in the ranking pool where the largest acreage portion of their operation occurs.

(3) Within each State or established ranking pool, the State Conservationist will address conservation access for certain farmers or ranchers, including:

(i) Socially disadvantaged farmers or ranchers; and

(ii) Beginning farmers or ranchers.

(g) *Application pre-approval.* The State Conservationist or designated conservationist will make application pre-approval determinations during established ranking periods based on eligibility and ranking score.

(h) *Field verification.* NRCS will conduct onsite field verification prior to obligation of contract funding to substantiate the accuracy of the information provided by pre-approved applicants during the application process.

§ 1470.21 Contract requirements.

(a) After a determination that the application will be approved and a conservation stewardship plan will be developed in accordance with § 1470.22, the State Conservationist or designee will enter into a conservation stewardship contract with the participant to enroll all of the eligible land on a participant's agricultural operation.

(b) The conservation stewardship contract will:

(1) Provide for payments over a period of 5 years;

(2) Incorporate by reference the conservation stewardship plan;

(3) State the payment amount NRCS agrees to make to the participant annually, subject to the availability of funds;

(4) Incorporate all provisions as required by law or statute, including requirements that the participant will:

(i) Implement the conservation stewardship plan approved by NRCS during the term of the contract,

(ii) Operate and maintain conservation activities on the agricultural operation consistent with § 1470.23,

(iii) Comply with the terms of the contract or documents incorporated by reference into the contract,

(iv) Refund as determined by NRCS, any program payments received with interest, and forfeit any future payments under the program, upon the violation of a term or condition of the contract, consistent with § 1470.27,

(v) Refund as determined by NRCS, all program payments received with interest, upon the transfer of the right and interest of the participant, in land subject to the contract, unless the transferee of the right and interest agrees to assume all obligations of the contract, consistent with § 1470.25,

(vi) Maintain and make available to NRCS upon request, appropriate records documenting applied conservation activity and production system information, and provide evidence of the effective and timely implementation of the conservation stewardship plan and contract, and

(vii) Not engage in any action during the term of the conservation stewardship contract on the eligible land covered by the contract that would interfere with the purposes of the conservation stewardship contract;

(5) Permit all economic uses of the land that:

(i) Maintain the agricultural or forestry nature of the land, and

(ii) Are consistent with the conservation purposes of the contract;

(6) Include a provision to ensure that a participant will not be considered in violation of the contract for failure to comply with the contract due to circumstances beyond the control of the participant, including a disaster or related condition, as determined by the State Conservationist; and

(7) Include such other provisions as NRCS determines necessary to ensure the purposes of the program are achieved.

§ 1470.22 Conservation stewardship plan.

(a) NRCS will use the conservation planning process as outlined in the NPPH to encourage participants to address resource concerns in a comprehensive manner.

(b) The conservation stewardship plan will contain a record of the participant's decisions that describes the schedule of conservation activities to be implemented, managed, or improved under the conservation stewardship contract.

(c) Associated supporting information maintained with the participant's plan will include:

(1) CMT documentation that will be the basis for:

(i) Identifying and inventorying resource concerns,

(ii) Establishing benchmark data on the condition of existing conservation activities, and

(iii) Documenting the participant's conservation objectives to reach and exceed stewardship thresholds;

(2) A plan map delineating enrolled land with associated acreage amounts;

(3) In the case where a participant wishes to initiate or retain organic certification, documentation that will support the participant's transition to or participation in the National Organic Program;

(4) In the case where a participant is approved for the on-farm research and demonstration or pilot testing option, a research, demonstration, or pilot testing plan consistent with design protocols and application procedures established by NRCS; and

(5) Other information as determined appropriate by NRCS.

§ 1470.23 Conservation activity operation and maintenance.

The participant will maintain and manage existing conservation activities on the agricultural operation to at least the level of conservation performance identified at the time the application is obligated into a contract for the conservation stewardship contract period, and additional activities installed and adopted over the term of the conservation stewardship contract.

§ 1470.24 Payments.

(a) *Annual payments.* Subject to the availability of funds, NRCS will provide, as appropriate, annual

payments under the program to compensate a participant for installing and adopting additional conservation activities, and improving, maintaining, and managing existing conservation activities. A split-rate annual payment structure will be used to provide separate payments for additional and existing conservation activities in order to place emphasis on implementing additional conservation.

(1) To receive annual payments, a participant must:

(i) Install and adopt additional conservation activities as scheduled in the conservation stewardship plan. At least one additional enhancement must be scheduled, installed, and adopted in the first fiscal year of the contract. All enhancements must be scheduled, installed, and adopted by the end of the third fiscal year of the contract, and

(ii) As a minimum, maintain existing activities to the level of existing conservation performance identified at the time the application is obligated into a contract for the conservation stewardship contract period;

(2) To earn annual payments for an eligible land use, a participant must schedule, install, and adopt at least one additional conservation activity on that land-use type. Eligible land-use types that fail to have at least one additional conservation activity scheduled, installed, and adopted will not receive annual payments;

(3) A participant's annual payments will be determined using the conservation performance estimated by the CMT and computed by land-use type for eligible land earning payments. Conservation performance is prorated over the contract term so as to accommodate, to the extent practicable, participants earning equal annual payments in each fiscal year;

(4) The annual payment rates will be based to the maximum extent practicable, on the following factors:

(i) Costs incurred by the participant associated with planning, design, materials, installation, labor, management, maintenance, or training,

(ii) Income foregone by the participant, and

(iii) Expected environmental benefits, determined by estimating conservation performance improvement using the CMT;

(5) The annual payment method will accommodate some participant operational adjustments without the need for contract modification.

(i) Enhancements may be replaced with similar enhancements without adjustment of annual payment as long as the conservation performance is determined by NRCS to be equal to or better than the conservation performance of the additional enhancements offered at enrollment. An enhancement replacement that results in a decline below that conservation performance level will not be allowed, and

(ii) Adjustments to existing activities may occur consistent with conservation performance requirements from § 1470.23; and

(6) Enhancements may be applied on other land included in an agricultural operation, as determined by NRCS.

(b) *Supplemental payments.* Subject to the availability of funds, NRCS will provide a supplemental payment to a participant receiving annual payments, who also agrees to adopt a resource-conserving crop rotation.

(1) The State Conservationist will determine whether a resource-conserving crop rotation is eligible for supplemental payments based on whether the resource-conserving crop rotation is designed to provide natural resource conservation and production benefits;

(2) A participant must agree to adopt and maintain a beneficial resource-conserving crop rotation for the term of the contract to be eligible to receive a supplemental payment. A resource-conserving crop rotation is considered adopted when the resource-conserving crop is planted on at least one-third of the rotation acres. The resource-conserving crop must be adopted by the third fiscal year of the contract and planted on all rotation acres by the fifth fiscal year of the contract; and

(3) The supplemental payment is set at a rate needed to encourage a producer to adopt a resource-conserving crop rotation and will be based, to the maximum extent practicable, on costs incurred and income foregone by the participant and expected environmental benefits, determined by estimating conservation performance improvement using the CMT.

(c) *On-farm research and demonstration or pilot testing.* A participant may be compensated through their annual payment for:

(1) On-farm research and demonstration activities; or

(2) Pilot testing of new technologies or innovative conservation activities.

(d) *Minimum contract payment.* NRCS will make a minimum contract payment to participants who are socially disadvantaged farmers or ranchers, beginning farmers or ranchers, or limited resource farmers or ranchers, at a rate determined by the Chief in any fiscal year that a contract's payment amount total is less than $1,000. Definitions of socially disadvantaged farmers or ranchers, beginning farmers or ranchers, and limited resource farmers or ranchers are contained in § 1470.3.

(e) *Timing of payments.* NRCS will make payments as soon as practicable after October 1 of each fiscal year for activities carried out in the previous fiscal year. For newly enrolled contracts, payments will be made as soon as practicable after October 1 following the fiscal year of enrollment.

(f) *Non-compensatory matters.* A CSP payment to a participant will not be provided for:

(1) New conservation practices or enhancements applied with financial assistance through other USDA conservation programs;

(2) The design, construction, or maintenance of animal waste storage or treatment facilities, or associated waste transport or transfer devices for animal feeding operations; or

(3) Conservation activities for which there is no cost incurred or income foregone by the participant.

(g) *Payment limits.* A person or legal entity may not receive, directly or indirectly, payments that, in the aggregate, exceed $40,000 during any fiscal year for all CSP contracts entered into, and $200,000 for all CSP contracts entered into during any 5-year period, excluding funding arrangements with federally recognized Indian tribes or Alaska Native corporations, regardless of the number of contracts entered into under the CSP by the person or legal entity.

(h) *Contract limits.* Payments under a conservation stewardship contract with joint operations will be limited to $80,000 per fiscal year and $400,000 over the term of the initial contract period, excluding funding arrangements with federally recognized Indian tribes or Alaska Native corporations. The payment limits for contracts with persons or legal entities are contained in § 1470.24(g).

(i) *Payment limitation provisions for individual Indians and Indian tribes.* Payment limitations apply to individual tribal member(s) when applying and subsequently being granted a contract as an individual(s). Contracts with Indian tribes or Alaska Native corporations are not subject to payment or contract limitations. Indian tribes and BIA will certify in writing that no one individual, directly or indirectly, will receive more than the payment limitation. Certification provided at the time of contract obligation will cover the entire contract period. The tribal entity must also provide, upon request from NRCS, a listing of individuals and payment made, by Social Security number or

other unique identification number, during the previous year for calculation of overall payment limitations.

(j) *Tax Identification Number.* To be eligible to receive a CSP payment, all legal entities or persons applying, either alone or as part of a joint operation, must provide a tax identification number and percentage interest in the legal entity. In accordance with 7 CFR part 1400, an applicant applying as a joint operation or legal entity must provide a list of all members of the legal entity and joint operation and associated embedded entities, along with the members' Social Security numbers and percentage of interest in the joint operation or legal entity. Payments will be directly attributed to legal entity members for the purpose of complying with § 1470.24(g).

(k) *Unique tax identification numbers.* Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment. Any participant that utilizes a unique identification number as an alternative to a tax identification number will utilize only that identifier for any and all other CSP contracts to which the participant is a party. Violators will be considered to have provided fraudulent representation and be subject to full penalties of § 1470.36.

(l) *Payment data.* NRCS will maintain detailed and segmented data on CSP contracts and payments to allow for quantification of the amount of payments made for:

(1) Installing and adopting additional activities;

(2) Improving, maintaining, and managing existing activities;

(3) Participation in research and demonstration or pilot projects; and

(4) Development and periodic assessment and evaluation of conservation stewardship plans developed under this rule.

§ 1470.25 Contract modifications and transfers of land.

(a) NRCS may allow a participant to modify a conservation stewardship contract if NRCS determines that the modification is consistent with achieving the purposes of the program.

(b) NRCS will allow modification to a conservation stewardship contract to remove contract acres enrolled in the CRP, WRP, or GRP or other Federal or State programs that offer greater natural resource protection. Such modifications are consistent with the purposes of CSP. Participants will not be subject to liquidated damages or refund of payments received for enrolling land in these programs.

(c) NRCS will not allow a participant to modify a conservation stewardship contract to increase the contract obligation beyond the amount of the initial contract, with exception for contracts approved by NRCS for renewal or other exceptional cases as determined by the Chief.

(d) Land under contract will be considered transferred if the participant loses control of the acreage for any reason.

(1) The participant is responsible to notify NRCS prior to any voluntary or involuntary transfer of land under contract;

(2) If all or part of the land under contract is transferred, the contract terminates with respect to the transferred land unless:

(i) The transferee of the land provides written notice within 60 days to NRCS that all duties and rights under the contract have been transferred to, and assumed by, the transferee, and

(ii) The transferee meets the eligibility requirements of the program; and

(e) Contract payment adjustments due to modifications will be reflected in the fiscal year following the modification.

§ 1470.26 Contract renewal.

(a) At the end of an initial conservation stewardship contract, NRCS may allow a participant to renew the contract to receive payments for one additional 5-year period, subject to the availability of funds, if they meet criteria from paragraph (b) of this section.

(b) To be considered for contract renewal, the participant must:

(1) Be in compliance with the terms of their initial contract as determined by NRCS;

(2) Add any newly acquired eligible land that is part of the agricultural operation and meets minimum treatment criteria as established and determined by NRCS;

(3) At a minimum, meet stewardship thresholds for at least two priority resource concerns; and

(4) Agree to adopt additional conservation activities to address at least one additional priority resource concern during the term of the renewed conservation stewardship contract.

§ 1470.27 Contract violations and termination.

(a) The State Conservationist may terminate, or by mutual consent with the participants, terminate a contract where:

(1) The participants are unable to comply with the terms of the contract as the result of conditions beyond their control; or

(2) As determined by the State Conservationist, it is in the public interest.

(b) If a contract is terminated in accordance with the provisions of paragraph (a) of this section, the State Conservationist may allow the participant to retain a portion of any payments received appropriate to the effort the participant has made to comply with the contract, or in cases of hardship, where forces beyond the participant's control prevented compliance with the contract. If a participant claims hardship, such claims must be clearly documented and cannot have existed when the applicant applied for participation in the program.

(c) If NRCS determines that a participant is in violation of the contract terms or documents incorporated therein, NRCS will give the participant a period of time, as determined by NRCS, to correct the violation and comply with the contract terms and attachments thereto. If a participant continues in violation, NRCS may terminate the CSP contract in accordance with paragraph (e) of this section.

(d) Notwithstanding the provisions of paragraph (c) of this section, a contract termination will be effective immediately upon a determination by NRCS that the participant:

(1) Has submitted false information or filed a false claim;

(2) Engaged in any act, scheme, or device for which a finding of ineligibility for payments is permitted under the provisions of § 1470.36; or

(3) Engaged in actions that are deemed to be sufficiently purposeful or negligent to warrant a termination without delay.

(e) If NRCS terminates a contract, the participant will forfeit all rights to future payments under the contract, pay liquidated damages, and refund all or part of the payments received, plus interest. Participants violating CSP contracts may be determined ineligible for future NRCS-administered conservation program funding.

(1) NRCS may require a participant to provide only a partial refund of the payments received if a previously installed conservation activity has achieved the expected conservation performance improvement, is not adversely affected by the violation or the absence of other conservation activities that would have been installed under the contract, and has met the associated operation and maintenance requirement of the activity; and

(2) NRCS will have the option to reduce or waive the liquidated damages,

depending upon the circumstances of the case—

(i) When terminating a contract, NRCS may reduce the amount of money owed by the participant by a proportion that reflects the good faith effort of the participant to comply with the contract or the existence of hardships beyond the participant's control that have prevented compliance with the contract. If a participant claims hardship, that claim must be well documented and cannot have existed when the applicant applied for participation in the program, and

(ii) In carrying out its role in this section, NRCS may consult with the local conservation district.

Subpart C—General Administration

§ 1470.30 Fair treatment of tenants and sharecroppers.

Payments received under this part must be divided in the manner specified in the applicable contract. NRCS will ensure that tenants and sharecroppers who would have an interest in acreage being offered receive treatment which NRCS deems to be equitable, as determined by the Chief. NRCS may refuse to enter into a contract when there is a disagreement among joint applicants seeking enrollment as to an applicant's eligibility to participate in the contract as a tenant.

§ 1470.31 Appeals.

A participant may obtain administrative review of an adverse decision under this part in accordance with 7 CFR parts 11 and 614. Determinations in matters of general applicability, such as payment rates, payment limits, the designation of identified priority resource concerns, and eligible conservation activities are not subject to appeal.

§ 1470.32 Compliance with regulatory measures.

Participants will be responsible for obtaining the authorities, rights, easements, permits, or other approvals or legal compliance necessary for the implementation, operation, and maintenance associated with the conservation stewardship plan. Participants will be responsible for compliance with all laws and for all effects or actions resulting from the implementation of the contract.

§ 1470.33 Access to agricultural operation.

NRCS, or its authorized representative, will have the right to enter an agricultural operation for the purpose of determining eligibility and for ascertaining the accuracy of any representations, including natural resource information provided by an applicant for the purpose of evaluating a contract application. Access will include the right to provide technical assistance, determine eligibility, assess natural resource conditions, inspect any work undertaken under the contract, and collect information necessary to evaluate the implementation of conservation activities in the contract. NRCS, or its authorized representative, will make an effort to contact the participant prior to the exercise of this provision.

§ 1470.34 Equitable relief.

(a) If a participant relied upon the advice or action of NRCS and did not know, or have reason to know, that the action or advice was improper or erroneous, the participant may be eligible for equitable relief under 7 CFR part 635. The financial or technical liability for any action by a participant that was taken based on the advice of a TSP will remain with the TSP and will not be assumed by NRCS.

(b) If a participant has been found in violation of a provision of the conservation stewardship contract or any document incorporated by reference through failure to comply fully with that provision, the participant may be eligible for equitable relief under 7 CFR part 635.

§ 1470.35 Offsets and assignments.

(a) Any payment or portion thereof due to any participant under this part will be allowed without regard to any claim or lien in favor of any creditor, except agencies of the United States Government. The regulations governing offsets and withholdings found at 7 CFR part 1403 will be applicable to contract payments.

(b) Any participant entitled to any payment may assign such payments in accordance with regulations governing assignment of payment found at 7 CFR part 1404.

§ 1470.36 Misrepresentation and scheme or device.

(a) If NRCS determines that an applicant intentionally misrepresented any fact affecting a CSP determination, the application will be determined ineligible immediately.

(b) A participant who is determined to have erroneously represented any fact affecting a program determination made in accordance with this part will not be entitled to contract payments and must refund to NRCS all payments, plus interest determined in accordance with 7 CFR part 1403.

(c) A participant will refund to NRCS all payments, plus interest determined in accordance with 7 CFR part 1403, received by such participant with respect to all CSP contracts if they are determined to have:

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

(2) Made any fraudulent representation;

(3) Adopted any scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program; or

(4) Misrepresented any fact affecting a program determination.

(d) Participants determined to have committed actions identified in paragraph (c) of this section will:

(1) Have their interest in all CSP contracts terminated; and

(2) In accordance with § 1470.27(e), may be determined by NRCS to be ineligible for future NRCS-administered conservation program funding.

§ 1470.37 Environmental credits for conservation improvements.

NRCS believes that environmental benefits will be achieved by implementing conservation activities funded through CSP. These environmental benefits may result in opportunities for the program participant to sell environmental credits. Any requirements related to these environmental credits must be compatible with the purposes of the contract. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure that operation and maintenance (O&M) requirements for CSP-funded improvements are met, consistent with § 1470.21 and § 1470.23. Where actions may impact the land and conservation activities under a CSP contract, NRCS will at the request of the participant, assist with the development of an O&M compatibility assessment prior to the participant entering into any credit agreement.

Signed this 21st day of May in Washington, DC.

Dave White,

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

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H.R. 1121/P.L. 111–167
Blue Ridge Parkway and Town of Blowing Rock Land Exchange Act of 2009 (May 24, 2010; 124 Stat. 1188)

H.R. 1442/P.L. 111–168
To provide for the sale of the Federal Government's reversionary interest in approximately 60 acres of land in Salt Lake City, Utah, originally conveyed to the Mount Olivet Cemetery Association under the Act of January 23, 1909. (May 24, 2010; 124 Stat. 1190)

H.R. 2802/P.L. 111–169
To provide for an extension of the legislative authority of the Adams Memorial Foundation to establish a commemorative work in honor of former President John Adams and his legacy, and for other purposes. (May 24, 2010; 124 Stat. 1192)

H.R. 5148/P.L. 111–170
To amend title 39, United States Code, to clarify the instances in which the term ''census'' may appear on mailable matter. (May 24, 2010; 124 Stat. 1193)

H.R. 5160/P.L. 111–171

Haiti Economic Lift Program Act of 2010 (May 24, 2010; 124 Stat. 1194)

S. 1067/P.L. 111–172

Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009 (May 24, 2010; 124 Stat. 1209)

H.R. 5014/P.L. 111–173

To clarify the health care provided by the Secretary of Veterans Affairs that constitutes minimum essential coverage. (May 27, 2010; 124 Stat. 1215)

S. 1782/P.L. 111–174

Federal Judiciary Administrative Improvements Act of 2010 (May 27, 2010; 124 Stat. 1216)

S. 3333/P.L. 111–175

Satellite Television Extension and Localism Act of 2010 (May 27, 2010; 124 Stat. 1218)

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