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9:00 a.m.–12:30 p.m.

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Washington, DC 20002

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Federal Register

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AL71

Prevailing Rate Systems; Redefinition of the Buffalo, NY, and Pittsburgh, PA, Appropriated Fund Federal Wage System Wage Areas

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management is issuing a final rule to redefine the geographic boundaries of the Buffalo, NY, and Pittsburgh, PA, appropriated fund Federal Wage System (FWS) wage areas. The final rule redefines McKean and Warren Counties, PA, and the Allegheny National Forest portions of Elk and Forest Counties, PA, from the Pittsburgh wage area to the Buffalo wage area. These changes are based on a consensus recommendation of the Federal Prevailing Rate Advisory Committee (FPRAC) to best match the above counties to a nearby FWS survey area. FPRAC recommended no other changes in the geographic definitions of the Buffalo and Pittsburgh wage areas.

DATES: *Effective Date:* This regulation is effective on January 14, 2009. *Applicability date:* The affected employees in Elk, Forest, McKean, and Warren Counties will be placed on the wage schedule for the Buffalo wage area on the first day of the first applicable pay period beginning on or after February 13, 2009.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606–2838; e-mail *pay-performance-policy@opm.gov;* or FAX: (202) 606–4264.

SUPPLEMENTARY INFORMATION: On October 7, 2008, the U.S. Office of Personnel Management (OPM) issued a proposed rule (73 FR 58506) to redefine the Buffalo, NY, and Pittsburgh, PA, appropriated fund Federal Wage System wage areas. This proposed rule would redefine McKean and Warren Counties, PA, and the Allegheny National Forest portions of Elk and Forest Counties, PA, from the Pittsburgh wage area to the Buffalo wage area. The proposed rule had a 30-day comment period, during which OPM received no comments.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Michael W. Hager,

Acting Director.

■ Accordingly, the U.S. Office of Personnel Management is amending 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

■ 1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

■ 2. In appendix C to subpart B, the wage area listing for the State of New York is amended by revising the listing for Buffalo; and for the State of Pennsylvania, by revising the listing for Pittsburgh, to read as follows:

APPENDIX C TO SUBPART B OF PART 532—APPROPRIATED FUND WAGE AND SURVEY AREAS

* * * * *

NEW YORK

* * * * *

Buffalo

Survey Area

New York:
Erie
Niagara

Area of Application. Survey area plus:

New York:
Cattaraugus
Chautauqua

Pennsylvania:
Elk (Only includes the Allegheny National Forest portion)
Forest (Only includes the Allegheny National Forest portion)
McKean
Warren

* * * * *

PENNSYLVANIA

* * * * *

Pittsburgh

Survey Area

Pennsylvania:
Allegheny
Beaver
Butler
Washington
Westmoreland

Area of Application. Survey area plus:

Pennsylvania:
Armstrong
Bedford
Blair
Cambria
Cameron
Centre
Clarion
Clearfield
Clinton
Crawford
Elk (Does not include the Allegheny National Forest portion)
Erie
Fayette
Forest (Does not include the Allegheny National Forest portion)
Greene
Huntingdon
Indiana
Jefferson
Lawrence
Mercer
Potter
Somerset
Venango

Ohio:
Belmont
Carroll
Harrison
Jefferson
Tuscarawas

West Virginia:
Brooke
Hancock
Marshall
Ohio

* * * * *

[FR Doc. E9–554 Filed 1–13–09; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 1980

[FR Doc. E8–25849]

RIN 0575–AC73

Income Limit Modification

AGENCY: Rural Housing Service, USDA.

ACTION: Direct final rule; change in effective date.

SUMMARY: The Rural Housing Service is delaying the effective date of a direct final rule, which was published on November 4, 2008 to amend its existing income limit structure for the Single Family Housing Guaranteed Loan Program.

DATES: The effective date of the direct final rule, published on November 4, 2008 [73 FR 65503–05], is delayed from January 20, 2009, to March 20, 2009.

FOR FURTHER INFORMATION CONTACT: Joaquín Tremols, Acting Director, Single Family Housing Guaranteed Loan Division, USDA, Rural Development, 1400 Independence Avenue, SW., Room 2250, Stop 0784, Washington, DC 20250, telephone (202) 720–1465, E-mail: *joaquin.tremols@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION: After further consultations with Congress and to afford the new administration adequate time for review, RHS is changing the effective date of the direct final rule to March 20, 2009.

Dated: January 8, 2009.

Peter D. Morgan,

Associate Administrator, Rural Housing Service.

[FR Doc. E9–694 Filed 1–13–09; 8:45 am]

BILLING CODE 3410–XV–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 150

[NRC–2007–0002]

RIN 3150–AH85

Regulatory Improvements to the Nuclear Materials Management and Safeguards System; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule; correcting amendment.

SUMMARY: The Nuclear Regulatory Commission (NRC) is correcting a final rule that appeared in the **Federal Register** on June 9, 2008 (73 FR 32453). The final rule amended NRC's regulations related to licensee reporting requirements for source material and special nuclear material to the Nuclear Materials Management and Safeguards System. This document is necessary to correct an erroneous amendatory instruction.

DATES: The correction is effective January 14, 2009, and is applicable to January 1, 2009.

ADDRESSES: You can access publicly available documents related to this document using the following methods:

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2007–0002. Address questions about NRC dockets to Carol Gallagher 301–415–5905; e-mail *Carol.Gallagher@nrc.gov.*

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FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Chief, Rulemaking, Directives, and Editing Branch, Office of Administration, Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–492–3663, e-mail *Michael.Lesar@nrc.gov.*

SUPPLEMENTARY INFORMATION: This document corrects an erroneous amendatory instruction.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendment to 10 CFR Part 150.

List of Subjects in 10 CFR Part 150

Criminal penalties, Hazardous materials transportation, Intergovernmental relations, Nuclear materials, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

■ 1. The authority citation for Part 150 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 274, 73 Stat. 688 (42 U.S.C. 2201, 2021); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Public Law 109–58, 119 Stat. 594 (2005).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under secs. 11e(2), 81, 68 Stat. 923, 935, as amended, secs. 83, 84, 92 Stat. 3033, 3039 (42 U.S.C. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under sec. 53, 68 Stat. 930, as amended (42 U.S.C. 2073).

Section 150.15 also issued under secs. 135, 141, Public Law 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 150.30 also issued under sec. 234, 83 Stat. 444 (42 U.S.C. 2282).

■ 2. On page 32464, in the third column, instruction 18 is corrected to read as follows:

18. In § 150.8, paragraph (c)(1) is revised, paragraph (c)(2) is redesignated as a new paragraph (c)(4), and a new paragraph (c)(2) is added to read as follows:

* * * * *

Dated at Rockville, Maryland, this 8th day of January 2009.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Chief, Rulemaking, Directives, and Editing Branch, Division of Administrative Services, Office of Administration.

[FR Doc. E9–586 Filed 1–13–09; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0997; Airspace Docket No. 08–AAL–28]

Amendment of Class D and E Airspace; Bethel, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class D and E airspace at Bethel, AK to provide

to address magnetic variation changes with the Navigation Aids at the Bethel Airport. This action amends Class D and E airspace upward from the surface, and from 700 feet (ft.) and 1,200 ft. above the surface at Bethel Airport, Bethel, AK.

DATES: *Effective Date:* 0901 UTC, March 12, 2009. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, AAL–538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov*. Internet address: *http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/fs/alaskan/rulemaking/*.

SUPPLEMENTARY INFORMATION:

History

On Tuesday October 28, 2008, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR) part 71 to amend Class D and E airspace upward from the surface, and from 700 ft. and 1,200 ft. above the surface at Bethel, AK (73 FR 63910). The Bethel Airport and its Navigation Aids will be soon undergoing a magnetic variation change. This change will result in the necessity to amend the airspace descriptions. There will be no visible change to the airspace currently depicted on aeronautical charts. Additionally, the present 1,200 foot airspace description is no longer necessary, because Bethel, Alaska lies within a larger section of Class E5 airspace, called Yukon-Kuskokwim Delta, covering the area required for the airport. The Class E4 description has been slightly modified to address small bearing and radial errors listed in the Notice of Proposed Rulemaking. Class D and E controlled airspace extending upward from the surface, and from 700 ft. and 1,200 ft. above the surface in the Bethel Airport area is amended by this action.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class D airspace area designations are published in paragraph 5000 of FAA Order 7400.9S, *Airspace Designations and Reporting Points*, signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace areas designated as surface areas are published in paragraph 6002 and 6004 in FAA Order 7400.9S, *Airspace Designations and Reporting Points*, signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9S, *Airspace Designations and Reporting Points*, signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class D and E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 amends Class D and E airspace at the Bethel Airport, Alaska. This Class D and E airspace is amended to accommodate aircraft executing instrument procedures, and will be depicted on aeronautical charts for pilot reference. The intended effect of this rule is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at the Bethel Airport, Bethel, Alaska.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it amends Class D and E airspace to contain aircraft executing instrument procedures for the Bethel Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, *Airspace Designations and Reporting Points,* signed October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 5000 General.

* * * * *

AAL AK D Bethel, AK [Amended]

Bethel, Bethel Airport, AK
(Lat. 60°46′47″ N., long. 161°50′17″ W.)
Bethel VORTAC
(Lat. 60°47′05″ N., long. 161°49′28″ W.)

That airspace extending upward from the surface to and including 2,600 feet MSL within a 4.1-mile radius of the Bethel Airport, AK, excluding that portion below 1,100 feet MSL between the 058° radial and the 078° radial of the Bethel VORTAC, AK, from 2.9 miles northeast of the Bethel VORTAC, AK. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Paragraph 6002 Class E Airspace Designated as Surface Areas.

* * * * *

AAL AK E2 Bethel, AK [Amended]

Bethel, Bethel Airport, AK
(Lat. 60°46′47″ N., long. 161°50′17″ W.)

Bethel VORTAC
(Lat. 60°47′05″ N., long. 161°49′28″ W.)

Within a 4.1-mile radius of the Bethel Airport, AK, excluding that portion below 1,100 feet MSL between the 058° radial and the 078° radial of the Bethel VORTAC, AK, from 2.9 miles northeast of the Bethel VORTAC, AK. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D Surface Area.

* * * * *

AAL AK E4 Bethel, AK [Amended]

Bethel, Bethel Airport, AK
(Lat. 60°46′47″ N., long. 161°50′17″ W.)
Bethel VORTAC
(Lat. 60°47′05″ N., long. 161°49′28″ W.)

That airspace extending upward from the surface within 3 miles each side of the 019° radial of the Bethel VORTAC, AK, extending from the 4.1-mile radius of the Bethel Airport, AK, to 8.2 miles northeast of the Bethel Airport, AK, excluding that portion below 1,100 feet MSL between the 058° radial and the 078° radial of the Bethel VORTAC, AK, from 2.9 miles northeast of the Bethel VORTAC, AK, and within 3.4 miles each side of the 005° radial of the Bethel VORTAC, AK, extending from the 4.1-mile radius of the Bethel Airport, AK, to 11 miles north of the Bethel VORTAC, AK, and within 3.5 miles each side of the 210° radial of the Bethel VORTAC, AK, extending from the 4.1-mile radius of the Bethel Airport, AK, to 5 miles southwest of the Bethel Airport, AK.

* * * * *

Paragraph 6005 Class E Airspace Extending Upward from 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Bethel, AK [Amended]

Bethel, Bethel Airport, AK
(Lat. 60°46′47″ N., long. 161°50′17″ W.)
Bethel Localizer
(Lat. 60°46′06″ N., long. 161°50′47″ W.)

That airspace extending upward from 700 feet above the surface within a 16.8-mile radius of the Bethel Airport, AK, and within 8 miles west and 4 miles east of the Bethel Localizer front course extending from the 16.8-mile radius of the Bethel Airport, AK, to 22.8 miles north of the Bethel Airport, AK, and within 8 miles east and 4 miles west of the Bethel Localizer back course extending from the 16.8-mile radius of the Bethel Airport, AK, to 21.4 miles south of the Bethel Airport, AK.

* * * * *

Issued in Anchorage, AK, on December 29, 2008.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E9–518 Filed 1–13–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1046; Airspace Docket No. 08–ASW–21]

Amendment of Class E Airspace; Houston, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace at Houston, TX. Additional controlled airspace is necessary to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAP) at Lone Star Executive Airport, Conroe, TX. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at Lone Star Executive Airport.

DATES: *Effective Date:* 0901 UTC, March 12, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Ft. Worth, TX 76193–0530; telephone (817) 222–5582.

SUPPLEMENTARY INFORMATION:

History

On November 17, 2008, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace at Houston, TX, adding additional controlled airspace at Lone Star Executive Airport, Conroe, TX (73 FR 67823, Docket No. FAA–2008–1046). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFRp 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace at Houston, TX, adding additional controlled airspace at Lone Star Executive Airport, Conroe, TX. This rule also updates the geographic coordinates of Chambers County Airport, and changes Sholes Field to Sholes International at Galveston, TX.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it adds additional controlled airspace in the Houston, TX airspace area, at Lone Star Executive Airport, Conroe, TX.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

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

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface.

* * * * *

ASW TX E5 Houston, TX [Amended]

Point of Origin
(Lat. 30°35′01″ N., long. 95°28′01″ W.)
Anahuac, Chambers County Airport, TX
(Lat. 29°46′11″ N., long. 94°39′49″ W.)
Galveston, Scholes International at Galveston, TX
(Lat. 29°15′55″ N., long. 94°51′38″ W.)
Brookshire, Woods No. 2 Airport, TX
(Lat. 29°47′37″ N., long. 95°55′31″ W.)
Fulshear, Covey Trails Airport, TX
(Lat. 29°41′24″ N., long. 95°50′23″ W.)
Conroe, Lone Star Executive Airport, TX
(Lat. 30°21′09″ N., long. 95°24′52″ W.)

That airspace extending upward from 700 feet above the surface within an area bounded by a line beginning at the Point of Origin to lat. 29°45′00″ N., long. 94°44′01″ W.; thence from lat. 29°45′00″ N., long. 94°44′01″ W. to a point of tangency with the east arc of a 7.6-mile radius of Scholes International at Galveston, and within a 7.6-mile radius of Scholes International at Galveston; thence from lat. 29°17′04″ N., long. 95°00′13″ W.; to lat. 29°30′01″ N., long. 95°54′01″ W.; to lat. 30°26′01″ N., long. 95°42′01″ W.; to the point of origin, and within a 6.6-mile radius of Lone Star Executive Airport, and within a 6.5-mile radius of Woods No. 2 Airport, and within a 6.4-mile radius of Covey Trails Airport excluding that airspace within the Anahuac, TX, Class E airspace area.

* * * * *

Issued in Fort Worth, TX, on January 7, 2009.

Walter L. Tweedy,

Acting Manager, Operations Support Group, Central Service Center.

[FR Doc. E9–516 Filed 1–13–09; 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 27P; AG Order No. 3030–2009]

Decision-Making Authority Regarding the Denial, Suspension, or Revocation of a Federal Firearms License, or Imposition of a Civil Fine (2008R–10P)

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

ACTION: Interim final rule with request for comments.

SUMMARY: The Department of Justice is amending 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. The Director will have the flexibility to delegate to another ATF official the authority to decide a revocation or denial matter, or may exercise that authority himself. Such flexibility will allow ATF to more efficiently decide denial, suspension, and revocation hearings and also whether to impose a civil fine, because the Director can redelegate to Headquarters officials, field officials, or some combination thereof, authority to take action as the final agency decision maker. This will give the agency the ability to ensure consistency in decision making and to address any case backlogs that may occur.

The interim rule will remain in effect until superseded by final regulations.

DATES: *Effective Date:* This interim rule is effective January 14, 2009.

Comment date: Written comments must be postmarked and electronic comments must be submitted on or before April 14, 2009. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: Send comments to any of the following addresses—

- James P. Ficaretta, Program Manager, Room 6N–602, Bureau of Alcohol, Tobacco, Firearms, and Explosives, P.O. Box 50221, Washington, DC 20091–0221; *ATTN:* ATF 27P. Written comments must include your mailing address and be signed, and may be of any length.
- 202–648–9741 (facsimile).
- *http://www.regulations.gov.* Federal e-rulemaking portal; follow the instructions for submitting comments.

You may also view an electronic version of this rule at the *http://www.regulations.gov* site.

See the Public Participation section at the end of the **SUPPLEMENTARY INFORMATION** section for instructions and requirements for submitting comments, and for information on how to request a public hearing.

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. Section 478.71 provides that whenever the Director of Industry Operations (''DIO'') has reason to believe that an applicant is not qualified to receive a license under the provisions of § 478.47, he may issue a notice of denial, on ATF Form 4498, to the applicant. The notice will set forth the matters of fact and law relied upon in determining that the application should be denied, and will 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 is filed within such time, the application will be disapproved and a copy, so marked, will be returned to the applicant.

Under § 478.72, an applicant who has been denied an original or renewal license can 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 renders a decision confirming or reversing the denial of the application. If the decision is that the denial should stand, a

certified copy of the DIO's findings and conclusions are furnished to the applicant with a final notice of denial, ATF Form 4501. In addition, a copy of the application, marked ''Disapproved,'' is furnished to the applicant. If the decision is that the license applied for should be issued, the applicant will be so notified, in writing, and the license will be issued.

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

As specified in § 478.74, a licensee who received a notice of suspension or revocation of a license, or imposition of a civil fine, may 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 renders a decision and prepares a brief summary of the findings and conclusions on which the decision was based. If the decision is that the license should be revoked or, in actions under section 922(t)(5), that the license should be revoked or suspended, and/or that a civil fine should be imposed, a certified copy of the summary is furnished to the licensee with the final notice of revocation, suspension, or imposition of a civil fine on ATF Form 4501. If the decision is that the license should not be revoked, or in actions under section 922(t)(5), that the license should not be revoked or suspended, and a civil fine should not be imposed, the licensee will be notified in writing.

Under § 478.76, an applicant or licensee may be represented by an attorney, certified public accountant, or other person recognized to practice before ATF, provided certain requirements are met. The DIO may be represented in proceedings by an attorney in the office of the Assistant Chief Counsel or Division Counsel who is 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 provides that if a licensee is dissatisfied with a post-hearing decision revoking or suspending the license or denying the application or imposing a civil fine, as the case may be, he may file a petition for judicial review of such action. In such case, when the DIO finds that justice so requires, he may postpone the effective date of suspension or revocation of a license or authorize continued operations under the expired license, as applicable, pending judicial review.

II. Interim Rule

As indicated above, at present ATF's regulations name 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. This interim rule amends the regulations to redesignate the Director as the deciding official. ATF believes that delegating the final authority with respect to those matters to the Director is necessary and proper. ATF further believes 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 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).

ATF believes that it is appropriate for the Director to have more flexibility to change the delegation of authority to decide a hearing regarding denial, suspension, or revocation of a federal firearms license, and a hearing regarding imposition of a civil fine, or to exercise that authority himself. Such flexibility will allow ATF to more efficiently decide 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 will give the agency the ability to ensure consistency in decision making and to address any case backlogs that may occur.

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. Administrative Procedure Act (APA)

Notice and comment rulemaking is not required for this interim final rule. Under the APA, ''rules of agency organization, procedure or practice,'' 5 U.S.C. 553(b)(3)(A), that do not ''affect[ ] individual rights and obligations,'' *Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974), are exempt from the general notice and comment requirements of section 553. *See JEM Broadcasting Co.* v. *FCC,* 22 F.3d 320, 326 (D.C. Cir. 1994) (section 553(b)(3)(A) applies to ''agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency''). The revisions to the regulations in §§ 478.71–78 are purely matters of agency organization, procedure, and practice. The interim final rule will not affect substantive rights or interests of federal firearms licensees or applicants for federal firearms licensees. Nevertheless, ATF welcomes public comments on the interim final rule.

Furthermore, there is good cause for finding that the interim final rule is exempt from the effective date

limitation of section 553(d). The interim final rule will grant the Director more flexibility to change the delegation of authority to decide a hearing regarding denial, suspension, or revocation of a federal firearms license, and a hearing regarding imposition of a civil fine, or to exercise that authority himself. Such flexibility will allow ATF to more efficiently decide revocation and denial hearings, because the Director can designate Headquarters officials, field officials, or some combination thereof, as the final agency decision maker. This will enable the Director to ensure consistency in decision making and to address any case backlogs that may occur.

There is no reason to defer these benefits for thirty days. The interim final rule will not alter the rights or obligations of third parties, although it may alter the manner in which those parties present themselves or their viewpoints to the agency. No matter how the Director delegates his authority to revoke or deny federal firearms licenses pursuant to 18 U.S.C. 923(e), persons who apply for or hold federal firearms licenses will still have a right to due process during the agency administrative proceeding, including a right to a hearing (18 U.S.C. 923(f)(2)), a right to a written notice from the agency specifying the grounds for denial or revocation (18 U.S.C. 923(f)(3)), and a right to judicial review (18 U.S.C. 923(f)(3)). Therefore, there is good cause to make the interim final rule effective immediately.

E. 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). As noted above, this rule is not subject to notice and comment rulemaking requirements. *Id.* 553(b)(A). This 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.

F. 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.

G. 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.

H. Paperwork Reduction Act

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

Public Participation

A. Comments Sought

ATF is requesting comments on the interim final rule from all interested persons. ATF is also specifically requesting comments on the clarity of this interim final rule and how it may be made easier to understand.

All comments must reference this document docket number (ATF 27P), be legible, and include your name and mailing address. ATF will treat all comments as originals and will not acknowledge receipt of comments.

Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

B. Confidentiality

Comments, whether submitted electronically or in paper, will be made available for public viewing at ATF, and on the Internet as part of the President's eRulemaking initiative, and are subject to the Freedom of Information Act. Commenters who do not want their name or other personal identifying information posted on the Internet should submit their comment by mail or facsimile, along with a separate cover sheet that contains their personal identifying information. Both the cover sheet and comment must reference this docket number. Information contained in the cover sheet will not be posted on the Internet. Any personal identifying information that appears within the comment will be posted on the Internet and will not be redacted by ATF.

Any material that the commenter considers to be inappropriate for disclosure to the public should not be included in the comment. Any person submitting a comment shall specifically designate that portion (if any) of his comments that contains material that is confidential under law (e.g., trade secrets, processes, etc.). Any portion of a comment that is confidential under law shall be set forth on pages separate from the balance of the comment and shall be prominently marked "confidential" at the top of each page. Confidential information will be included in the rulemaking record but will not be disclosed to the public. Any comments containing material that is not confidential under law may be disclosed to the public. In any event, the name of the person submitting a comment is not exempt from disclosure.

C. Submitting Comments

Comments may be submitted in any of three ways:

• *Mail:* Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments must be signed and may be of any length.

• *Facsimile:* You may submit comments by facsimile transmission to (202) 648–9741. Faxed comments must:

(1) Be legible;

(2) Be on 8½″ x 11″ paper;

(3) Contain a legible, written signature; and

(4) Be no more than five pages long. ATF will not accept faxed comments that exceed five pages.

• *Federal e-Rulemaking Portal:* To submit comments to ATF via the Federal e-rulemaking portal, visit *http://www.regulations.gov* and follow the instructions for submitting comments.

D. Request for Hearing

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director of ATF within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

Disclosure

Copies of this interim rule and the comments received 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

■ Accordingly, for the reasons discussed in the preamble, 27 CFR part 478 is amended as follows:

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 1. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 847, 921–931; 44 U.S.C. 3504(h).

§ 478.71 [Amended]

■ 2. Section 478.71 is amended by removing ''of Industry Operations'' in the first sentence.

§ 478.72 [Amended]

■ 3. Section 478.72 is amended by removing ''of Industry Operations'' in the fifth sentence and by removing ''Director of Industry Operations'' in the sixth sentence and adding in its place ''Director's''.

§ 478.73 [Amended]

■ 4. Section 478.73 is amended by removing ''of Industry Operations'' wherever it appears.

§ 478.74 [Amended]

■ 5. Section 478.74 is amended by removing ''of Industry Operations'' in the fourth sentence.

§ 478.76 [Amended]

■ 6. Section 478.76 is amended by removing ''of Industry Operations'' wherever it appears.

§ 478.78 [Amended]

■ 7. Section 478.78 is amended by removing ''of Industry Operations'' in the last sentence.

Dated: January 7, 2009.

Michael B. Mukasey,

Attorney General.

[FR Doc. E9–527 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 555

[Docket No. ATF 10F; AG Order No. 3032–2009]

RIN 1140–AA24

Commerce in Explosives—Amended Definition of ''Propellant Actuated Device'' (2004R–3P)

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

ACTION: Final rule.

SUMMARY: The Department of Justice is amending the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (''ATF'') to clarify that the term ''propellant actuated device'' does not include hobby rocket motors or rocket-motor reload kits consisting of or containing ammonium perchlorate composite propellant (''APCP''), black powder, or other similar low explosives.

DATES: This rule is effective February 13, 2009.

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

ATF is responsible for implementing Title XI of the Organized Crime Control Act of 1970 (codified at 18 U.S.C. ch. 40) (''Title XI''). One of the stated purposes of that Act is to reduce the hazards to persons and property arising from misuse and unsafe or insecure storage of explosive materials. Under section 847 of title 18, United States Code, the Attorney General ''may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter.'' Regulations that implement the provisions of chapter 40 are contained in 27 CFR part 555 (''Commerce in Explosives'').

Section 841(d) of title 18, United States Code, sets forth the definition of ''explosives.'' ''Propellant actuated devices,'' along with gasoline, fertilizers, and propellant actuated industrial tools manufactured, imported, or distributed for their intended purposes, are exempted from this statutory definition by 27 CFR 555.141(a)(8).

When Title XI was enacted by Congress in 1970, the Judiciary Committee of the United States House of Representatives specifically considered and supported an exception for propellant actuated devices. H.R. Rep. No. 91–1549, at 64 (1970), *as reprinted* in 1970 U.S.C.C.A.N. 4007, 4041. Neither the statute nor the legislative history defines ''propellant actuated device.'' In 1981, however, ATF added the following definition of ''propellant actuated device'' to its regulations: ''[a]ny tool or special mechanized device or gas generator system which is actuated by a propellant or which releases and directs work through a propellant charge.'' 27 CFR 555.11.

In applying the regulatory definition, ATF has classified certain products as propellant actuated devices. These products include aircraft slide inflation cartridges, inflatable automobile occupant restraint systems, nail guns, and diesel and jet engine starter cartridges.

II. Notice of Proposed Rulemaking (''NPRM'')

On August 11, 2006, the Department published in the **Federal Register** a notice proposing to amend the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives to clarify that the term ''propellant actuated device'' does not include hobby rocket motors or rocket-motor reload kits consisting of or containing ammonium perchlorate composite propellant, black powder, or other similar low explosives. See Commerce in Explosives—Amended Definition of ''Propellant Actuated Device,'' 71 FR 46174 (Aug. 11, 2006) (''Notice No. 9P''). ATF engaged in rulemaking with regard to this issue because on March 19, 2004, the United States District Court for the District of Columbia found that ATF has in the past advanced inconsistent positions regarding the application of the propellant actuated device exemption to hobby rocket motors. ATF issued two related letters in 1994 that could be interpreted as taking the position that a fully assembled rocket motor would be considered a propellant actuated device if the rocket motor contained no more than 62.5 grams (2.2 ounces) of propellant material and produced less than 80 newton-seconds (17.92 pound seconds) of total impulse with thrust duration not less than 0.050 second. Prior to assembly, the letters observed, the propellant, irrespective of the quantity, would not be exempt as a propellant actuated device.

The 1994 letters are confusing in that they can be interpreted to intertwine the

separate and distinct issues of the ''propellant actuated device'' exemption found in section 555.141(a)(8) and the long-standing ATF policy exempting rocket motors containing 62.5 grams or less of propellant that has its roots in the exemption then found at 27 CFR 55.141(a)(7). Had these 1994 letters been drafted to reflect accurately ATF's interpretation of the regulations in existence at the time, they would have indicated that sport rocket motors were not propellant actuated devices for purposes of the regulatory exemption found in section 55.141(a)(8), but instead that motors containing 62.5 grams or less of propellant were exempt from regulation pursuant to the exemption for ''toy propellant devices'' then found at section 55.141(a)(7). Although the ''toy propellant device'' exemption was removed from the regulations and, due to administrative error, was not replaced as intended with a specific reference to the 62.5-gram threshold, ATF continued to treat hobby rocket motors containing 62.5 grams or less of propellant as exempt from regulation as clearly set forth in a 2000 letter to counsel for the National Association of Rocketry and the Tripoli Rocketry Association, Inc. The Department notes that the administrative error mentioned above, relating to the 62.5-gram exemption threshold for hobby rocket motors, has been corrected and was the subject of another rulemaking proceeding. See Commerce in Explosives—Hobby Rocket Motors, 71 FR 46079 (Aug. 11, 2006). That final rule specifically provided an exemption for model rocket motors that: (1) Consist of ammonium perchlorate composite propellant, black powder, or other similar low explosives; (2) contain no more than 62.5 grams of total propellant weight; and (3) are designed as single-use motors or as reload kits capable of reloading no more than 62.5 grams of propellant into a reusable motor casing. 27 CFR 555.141(a)(10).

To remedy any perceived inconsistency and to clarify ATF's policy, the proposed rule set forth an amended regulatory definition specifically stating that hobby rocket motors and rocket-motor reload kits consisting of or containing APCP, black powder, or other similar low explosives, regardless of amount, do not fall within the ''propellant actuated device'' exception and are subject to all applicable federal explosives controls pursuant to 18 U.S.C. 841 *et seq.*, the regulations in 27 CFR part 555, and applicable ATF policy. As proposed, the term ''propellant actuated device'' read as follows:

> Propellant actuated device. (a) Any tool or special mechanized device or gas generator system that is actuated by a propellant or which releases and directs work through a propellant charge.
>
> (b) The term does not include—
>
> (1) Hobby rocket motors consisting of ammonium perchlorate composite propellant, black powder, or other similar low explosives, regardless of amount; and
>
> (2) Rocket-motor reload kits that can be used to assemble hobby rocket motors containing ammonium perchlorate composite propellant, black powder, or other similar low explosives, regardless of amount.

The Department noted in Notice No. 9P that implementation of the proposed amendment is important to public safety and consistent regulatory enforcement efforts. In addition, the proposed rule confirmed the position that hobby rocket motors are not exempt from federal explosives regulation, pursuant to the propellant actuated device exception. The proposed rule also clarified that hobby rocket motors cannot legally be classified as propellant actuated devices due to the nature of their design and function.

The comment period for Notice No. 9P closed on November 9, 2006.

III. Analysis of Comments and Final Rule

ATF received 275 comments in response to Notice No. 9P. Comments were submitted by sport rocketry hobbyists, permittees, one hobby shop owner, two sport rocketry organizations (the National Association of Rocketry and Tripoli Rocketry Association), and others.

In its comment (Comment No. 261), the National Association of Rocketry (''NAR'') stated that it is a non-profit scientific organization dedicated to safety, education, and the advancement of technology in the hobby of sport rocketry in the United States. The commenter further stated that, founded in 1957, it is the oldest and largest sport rocketry organization in the world, with over 4,700 members and 110 affiliated clubs. According to the commenter, it is the recognized national testing authority for safety certification of rocket motors in the United States, and it is the author of safety codes for the hobby that are recognized and accepted by manufacturers and public safety officials nationwide. Ninety-eight comments expressed specific support for NAR's position as set forth in its comments in response to Notice No. 9P.

According to its Web site *(http://www.tripoli.org/),* the Tripoli Rocketry Association (''TRA'') (Comment No. 219) is an organization dedicated to the advancement and operation of amateur high-power rocketry. Its members are drawn from the United States and 22 other countries.

In general, the commenters expressed opposition to the proposed definition of ''propellant actuated device'' (''PAD''), arguing that hobby rocket motors are PADs. Their reasons for objecting to the proposed rule are discussed below.

1. Rocket Motors and Rocket Propellants Are Not Explosives

Under the law, the term ''explosives'' is defined as ''any chemical compound[,] mixture, or device, the primary or common purpose of which is to function by explosion.'' The definition states that ''the term includes, but is not limited to, dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters.'' *See* 18 U.S.C. 841(d). ''Propellant actuated devices,'' along with gasoline, fertilizers, and propellant actuated industrial tools manufactured, imported, or distributed for their intended purposes, are exempted from this statutory definition by 27 CFR 555.141(a)(8). Approximately 40 comments contended that rocket motors and rocket propellants (including APCP) are not explosives. These commenters also contended that, even if rocket motors and rocket propellants are explosives, they are propellant actuated devices and exempt from regulation. Some of the arguments raised by the commenters to support their position include the following:

- [APCP] only burns at a rate which is[,] in mm/second, far below that which is even considered deflagration. (Comment No. 54)
- Hobby rocket motors and reloadable motor propellant grains are not designed to explode. Scientific and engineering tests and references confirm that the propellants do not detonate or have a burn rate consistent with explosives. (Comment No. 82)
- Ammonium perchlorate/hydroxy-terminated polybutene propellant does not function via explosion but rather by burning at a rate of ~ 0.1″/second and therefore does not meet the definition of an explosive. Explosives have much higher burn rates. (Comment No. 203)
- APCP does not function by explosion, but by the generation of gases through controlled burning. Recent tests by the BATFE [Bureau of Alcohol, Tobacco, Firearms, and Explosives, or ATF] have indicated that the burn rate of APCP is approximately 36–143 mm/sec, though its testing should

concentrate on the actual formulation of APCP used in hobby rocketry, which burns at a much slower rate. The actual burn rate of APCP used in hobby and high-powered rocketry would more closely resemble that of a road flare and is similar to that of common bond paper (4–56 mm/sec). (Comment No. 257)

Department Response

As stated above, the federal explosives laws define the term ''explosives'' as ''any chemical compound[,] mixture, or device, the primary or common purpose of which is to function by explosion; the term includes, but is not limited to, dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters.'' In order to provide guidance to the public, and in compliance with 27 CFR 555.23, ATF maintains and publishes a list of explosive materials classified in accordance with the statutory definition. Rocket motors generally contain the explosive materials APCP, black powder and/or other similar low explosives. These materials are on the ''List of Explosive Materials.'' However, there has been some debate regarding the validity of including APCP on the list. Beginning in 2000, the issue of classifying APCP as an explosive material has been litigated in the United States District Court for the District of Columbia. *See Tripoli Rocketry Ass'n, Inc.* v. *Bureau of Alcohol, Tobacco, Firearms and Explosives,* 337 F. Supp. 2d 1 (D.D.C. 2004). The district court held that ATF's decision to classify APCP as a deflagrating explosive was permissible. *Id.* at 9. In February 2006, the District of Columbia Circuit Court of Appeals disagreed with the district court on this issue, because in its view ATF failed to provide sufficient justification to support its classification with a specific, articulated standard for deflagration. *Tripoli Rocketry Ass'n, Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, and Explosives,* 437 F. 3d 75 (D.C. Cir. 2006). The circuit court declined to set aside the classification, and APCP thus remains on the ''List of Explosive Materials'' that ATF is obligated to maintain. *Id.* at 84. The case was remanded to the district court so that ATF may reconsider the matter and offer an explanation for whatever conclusion it ultimately reaches. ATF submitted the requested information, including test data results, to the United States District Court for review. Pending the outcome of this case, APCP remains an explosive and continues to be regulated as such.

2. The Proposed Rule Holds Hobby Rocket Motors to a Different Standard than Other Products Classified as PADs by ATF

Approximately 40 commenters indicated that ATF's assertion that hobby rocket motors should not be classified as PADs is arbitrary. Some commenters contended that the same arguments used by ATF to disqualify hobby rocket motors as PADs can apply to other products that ATF has classified as propellant actuated devices. Other commenters noted that the proposed rule failed to explain ATF's process by which devices such as nail guns, aircraft slide inflation cartridges, etc., warranted classification as PADs. The following excerpts represent the views of most of the commenters:

By BATFE's rationale that the ''rocket motor itself'' is not a device because it cannot perform its function until installed, the propellant charges for a nail gun, (or for that matter, an air bag or aircraft escape slide inflator), prior to their installation in the nail gun (or air bag or aircraft slide), would likewise not be PADs. Yet they are exempt as PADs. BATFE's determination that a nail gun reload is exempt, but a rocket motor is not, is therefore arbitrary and capricious. (Comment No. 70)

The [NPRM] further mischaracterizes a rocket motor and confuses the definition of a PAD. By the convoluted logic of the [NPRM], accepted propellant actuated devices like ''nail guns'' used to drive concrete anchors, diesel and jet engine starter cartridges, and aircraft slide inflation cartridges would not meet the definition either. In those ''tools,'' the ''propellant'' portion of the tool is even simpler than a rocket engine. If you consider the whole tool, i.e. the propellant containing device and the ''tool'' * * * you must consider the whole of the rocket as the tool and not just the propellant containing element. (Comment No. 182)

You then state * * * ''the hobby rocket motor is little more than propellant in a casing, incapable of performing its intended function until full installed (along with an ignition system).'' I wish to point out that this statement is also true for aircraft slide inflation cartridges and diesel and jet engine starter cartridges as they are also incapable of performing their intended function until fully installed in a diesel or jet engine or aircraft slide. So are these items not PADs, if we apply the same strictures that have been applied to model rocket motors? (Comment No. 199)

Part of the argument used in the proposed rule states that ''the hobby rocket motor is, in essence, simply the propellant that actuates the hobby rocket, and * * * cannot be construed to constitute a propellant actuated device.'' The same line of reasoning can easily be applied to any item in which the object containing the propellant is separate from the rest of the device, such as a nail gun cartridge or an automotive airbag deployment device. Therefore, the agency's assertion that hobby rocket motors should not be considered as PADs is arbitrary and inconsistent with other devices that operate in a similar fashion but are so considered. (Comment No. 219)

Consider the following examples, where BATFE's reasoning outlined in the NPRM for hobby rocket motors is applied to other devices cited by BATFE as qualifying as PAD[s].

The automobile airbag [aircraft slide inflation cartridge, jet engine starter cartridge] cannot be brought within the regulatory definition of propellant actuated device as a ''tool'' because it is neither ''handheld'' nor a complete ''device'' and because it is not a metal-shaping machine or a part thereof.

BATFE cannot simultaneously rule hobby rocket motors are not PADS yet declare other devices which function in exactly the same underlying manner as hobby rocket motors to be PADS. Any such attempt would be arbitrary, capricious or otherwise contrary to the statue [sic] underlying the PADS exemption mandated by Congress. (Comment No. 261)

A search of the **Federal Register** * * * found no instances of notice and comment rulemaking regarding any propellant actuated device determinations. Specific searches for aircraft slide inflation cartridges, inflatable automobile occupant restraint systems, nail guns and diesel and jet engine starter cartridges, devices listed as meeting the PADS definition, returned no results. The NPRM is silent about how such devices warranted a PADS determination or how BATFE reached those conclusion[s.] However * * * it appears that BATFE's PAD classification is completely arbitrary and results driven * * * (Comment No. 261)

Department Response

The Department's position has been and continues to be that the term ''propellant actuated device'' does not include rocket motors or rocket-reload kits containing APCP, black powder, or other similar low explosives. The definition of ''propellant actuated device'' in section 555.11 is ''[a]ny tool or special mechanized device or gas generator system which is actuated by a propellant or which releases and directs work through a propellant charge.'' It is not the intention of this rulemaking to evaluate other items that have been classified as propellant actuated devices. The intention of the rulemaking is to clarify the Department's position that rocket motors and rocket motor kits are not exempt as propellant actuated devices.

ATF individually reviews each request for a propellant actuated device determination, and the final decision is then relayed in written form to the requestor specifying the reasons for approval or denial. Each submission and response contains detailed and proprietary information on chemical

compositions, system designs, and functionality, most of which may not be disclosed to outside entities.

By way of illustration, an airbag inflation module is an example of an item that would fit the description of a propellant actuated device. ATF has exempted airbag modules as propellant actuated devices but has not exempted the propellant inside the gas-generation canister. The airbag module is a self-contained unit that is deployed by an internal initiator or micro gas generator that receives an electronic pulse from a crash sensor. The propellant charge inside the unit is converted into a gas, which is then released to inflate the airbag cushion. ATF ruled that these fully assembled airbag modules constitute a gas-generating system. Other examples of items that would fit the description of propellant actuated devices would be assembled seatbelt pretensioner units and the aircraft parachute deployment devices referenced elsewhere in this rulemaking.

3. Hobby Rocket Motors Meet the Current Definition of a PAD

As defined in the current regulations, the term ''propellant actuated device'' means ''[a]ny tool or special mechanized device or gas generator system which is actuated by a propellant or which releases and directs work through a propellant charge.'' As several commenters pointed out, there are six possible combinations that would meet the definition of a PAD:

a. A tool which is actuated by a propellant;

b. A tool which releases and directs work through a propellant charge;

c. A special mechanized device which is actuated by a propellant;

d. A special mechanized device which releases and directs work through a propellant charge;

e. A gas generator system which is actuated by a propellant; or

f. A gas generator system which releases and directs work through a propellant charge.

In the proposed rule, ATF stated that the hobby rocket motor cannot be brought within the regulatory definition of propellant actuated device as a ''tool'' because it is neither ''handheld'' nor a complete ''device'' and because it is not a metal-shaping machine or a part thereof. Further, it cannot be considered to be a ''special mechanized device'' because, although clearly designed to serve a special purpose, it in no way functions as a mechanism. Finally, because it has no interacting mechanical or electrical components, the hobby rocket motor cannot be deemed to be a gas generator system. Therefore, a rocket motor does not meet the first prong of the definition of a PAD. It is noteworthy that a rocket's flight is powered by a propellant, and in a sense, work is produced through a propellant charge. However, a rocket motor by itself accomplishes neither of these actions. Therefore, a rocket motor does not fit either of the descriptions in the second prong of the definition.

In general, the commenters disagreed with ATF's determination that hobby rocket motors are not PADs. Many commenters were critical of ATF's use of a dictionary to define technical terms (e.g., ''gas generator system''), while other commenters criticized ATF for what they considered the agency's selective use of the dictionary to define certain terms. Two commenters expressed concerns regarding ATF's use of one dictionary (Merriam-Webster's Collegiate Dictionary) as the sole source in defining terms. Following are excerpts from some of the comments:

I was struck by the use of the Merriam-Webster's Collegiate Dictionary as the source for the definitions of ''gas generator.'' It is inappropriate to use a dictionary to define terms commonly used in a specialist field such as rocketry. A much better source is the 7th edition of Rocket Propulsion Elements by George P. Sutton (the standard University propulsion course textbook) where you will see in the index ''Gas generator; see also Liquid propellant rocket engine; Solid propellant rocket motor.'' Without a doubt hobby rocket motors meet the definition of gas generators. (Comment No. 77)

A common dictionary is insufficient to define the technical terms involved here; a science textbook would be more appropriate. (Comment No. 212)

The definitions you employ are not wrong, but they are incomplete and therefore misleading because you ignore other equally valid definitions. (Comment No. 66)

[T]he ATF has contrived to select the least pertinent part of Webster's definition of ''tool.'' It is utterly obvious that a ''tool'' [need] not necessarily be handheld; a Bridgeport Mill is a ''tool,'' but I defy any member of the ATF to ''hold'' one. Likewise ''cutting or shaping'' and ''machine for shaping metal'' are ridiculously limiting statements; the large majority of tools do none of these tasks. Webster's offers the synonym ''implement'' which is more appropriate, as ''a device used in the performance of a task.'' This definition encompasses all of the devices that the ATF has listed above as ''propellant actuated devices.'' None of those same devices, with the single exception of a handheld nailgun, would conform to any part of the ATF's * * * definition of ''tool.'' (Comment No. 60)

The primary definition of a tool in the Encarta dictionary is ''a device for doing work.'' Work by definition is the application of force through a distance. Force is in turn defined as the product of mass and acceleration. A rocket motor does work by accelerating the gases it generates through its nozzle, and it generates thrust whether or not it is installed in a rocket. (Comment No. 205)

In the Supplemental Information listed in the **Federal Register** , there were a variety of definitions listed which seem to imply that rocket engines are not special mechanized devices, tools, or gas generators. The conclusion stated * * * is incorrect. Per Merriam-Webster's On-Line Dictionary, Definition 2a clearly indicates that rocket motors can be considered tools.

Definition 2A: ''2a: something (as an instrument or apparatus) used in performing an operation or necessary in the practice of a vocation or profession.''

Obviously, a rocket engine is an ''apparatus'' (Webster definition: ''1a: a set of materials or equipment designed for a particular use'') It is used to perform the ''operation'' (Webster definitions: ''1: performance of a practical work or of something involving the practical application of principles or processes 2a: an exertion of power or influence'') of lofting a rocket into the air and it is necessary for the practice of this ''vocation'' (model rocketry). (Comment No. 233)

There is not, as far as I know, one particular dictionary that has been designated as the final arbiter on the meaning of all words in the English language. Over the years, many groups of learned scholars have labored long and hard to produce many fine dictionaries and associated references. These scholars recognize that, as a result of years of usage, many words have acquired a broad range of meanings, all of which must be considered when interpreting these words. (Comment No. 254)

Many commenters argued that the hobby rocket motor meets at least one of the combinations of the PAD definition. The NAR (Comment No. 261) maintained that the hobby rocket motor meets all of the combinations of the PAD definition:

The [PAD] definition consists of two parts, first a description of the kind of device employed [tool, special mechanized device, gas generator system] and secondly, a description of the means by which work is done by that device [actuated by a propellant; releases and directs work through a propellant charge]. Using these elements, there are six possible combinations which would meet the legal definition of a PAD. A rocket motor meets not one, but all three device definitions in the regulation. It is a tool because its sole purpose is to provide power for rockets. It's a specialized mechanized device because it cannot be used for any purpose other than to propel rockets. It is a gas generator system because an exhaust gas is generated by all rocket motors. A rocket motor meets both types of motive work used in the regulatory definition. Clearly, rocket motors are actuated by propellant, and certainly release and direct work through a propellant charge.

Following are excerpts from other comments:

[T]he devices in question [hobby rocket motors] clearly do meet several and perhaps

all of these six definitions. The point is made most clearly with respect to #5 and #6 [e and f, above]: A * * * rocket motor clearly is a gas generator system, it clearly is actuated by a propellant, and it clearly releases and directs work through a propellant charge. ATF's argument to the contrary is simply false: ''Finally, because it has no interacting mechanical or electrical components, the hobby rocket motor cannot be deemed to be a 'gas generator system.' '' A hobby rocket motor does have interacting mechanical components, including a carefully chosen nozzle, liners and often o-rings and washers to contain the pressure and protect outer casings, and various components designed to actuate the rocket's recovery system safely * * * [O]ne cannot simply stuff propellant into a cylinder, as the ATF suggests, ignite it, and expect it to perform as a model rocket motor. Hence the devices in question do meet the fifth and sixth of the parts of the definition of ''propellant actuated device.'' (Comment No. 17)

Without resorting to selective use of dictionary definitions, one can certainly argue that hobby rocket motors ''generate gas.'' That is in fact their main purpose. The propellant in the device generates gas, which is directed through a nozzle to release the energy (work) of the expanding gas in a specific direction to thrust the rocket forward. (Comment No. 24)

The argument that a hobby rocket motor is not a ''gas generator system which * * * releases and directs work through a propellant charge'' is also patently false. A solid-propellant rocket motor is one of the simplest machines known to science, and it operates by burning its propellant charge to generate copious quantities of gas under pressure, which the other parts of the mechanism (such as the combustion chamber and nozzle) work on to produce mechanical energy of motion by confining, directing, and accelerating the gas flow. The solid propellant rocket motor is the simplest, most straightforward example of a device that directs work derived from the burning of a propellant charge. (Comment No. 28)

A rocket motor is precisely a ''group of interacting or interdependent mechanical and/or electrical components that generates gas,'' which is the very definition of ''gas generator system'' developed in the BATFE NPRM. A rocket motor has at least two and often three interacting components: (1) The combustion or pressure chamber in which the propellant charge is contained and within which it burns, generating gas; (2) the deLaval converging-diverging nozzle assembly which converts the thermal energy of the propellant gas that the combustion chamber generates into directed kinetic energy; and (3) in most motor designs, a mechanical-pyrotechnic system of the opposite end of the pressure chamber that actuates a recovery device. The rocket motor ''releases and directs work'' (BATFE definition of a PAD) in its normal operation: the precise technical definition of work is the application of force across distance, and the rocket motor delivers force (propulsive thrust) to an object (the rocket airframe) which is directed along and travels across a distance (in flight, directed by its aerodynamic stabilization system). Thus a rocket motor is a gas generator system that directs work. Therefore, it is by BATFE's own definitions, a propellant actuated device. (Comment No. 63)

Department Response

The Department acknowledges that words have numerous definitions, many of which vary between dictionaries. The argument that ATF selectively used Merriam-Webster's Collegiate Dictionary to better fit its interpretation of propellant actuated device is not valid. The Department's use of a universally accepted publication such as Merriam-Webster's Collegiate Dictionary has been common practice upon which the Department has relied to make past decisions and interpretations. The Department continues in part to rely upon the previously mentioned definitions to determine that rocket motors are not propellant actuated devices. Because regulations should be understandable by all members of the public, the Department does not believe it appropriate to rely upon scientific and technical publications to define terms, as suggested by some commenters. This would result in definitions understood only by scientists and specialists in a particular field. The Department believes this final rule adopts a definition that is technically accurate, clear, and capable of being understood by all interested parties.

Agencies are provided broad latitude to incorporate definitions into the regulations. Several commenters have applied broader definitions to illustrate that a rocket motor should be considered a propellant actuated device. Unfortunately, these definitions are sometimes practically inconsistent with the subject matter. For example, one commenter cites definition 2(a) from Merriam-Webster's On-Line Dictionary of ''tool'': ''something (as an instrument or apparatus) used in performing an operation or necessary in the practice of a vocation or profession.'' The usage example in this definition is ''a scholar's books are his tools.'' Outside of rocketry context, such a definition could mean almost any physical item or abstract concept. These comments certainly illustrate that words have multiple definitions. However, the definitions of the words chosen by the commenters are not particularly helpful in defining ''propellant actuated device'' within the context of the federal explosives laws. Applying the reasoning of these commenters to the definition of a propellant actuated device would result in a definition under which virtually any item containing a propellant would qualify as a PAD. While not specifically addressing PADs in the law, Congress clearly did not mean for ATF to apply definitions so broadly as to render the term ''propellant actuated device'' meaningless. Exceptions to statutory prohibitions should be narrowly construed. The Department believes that construing the term ''propellant actuated device'' to include any item containing a propellant would be inconsistent with its mission to reduce the hazards to the public arising from misuse and unsafe or insecure storage of explosive materials. Exempting all propellants from the permit, licensing, prohibited person provisions, and storage requirements of the law would be irresponsible, particularly in light of potential criminal and terrorist use of such items.

Many of the comments describe certain characteristics of rocket-motor function and state that the definition of propellant actuated device, specifically gas generator systems, speaks to these. These comments are unpersuasive in their argument, as they fail to specify that rocket motors function in the manner described largely due to their interaction with other components of a rocket.

It is undisputed that rocket motors produce a large volume of gas when ignited. Further, it is clear that the gas is forced through a nozzle designed to produce thrust. However, the motor alone does not constitute a system, or a ''regularly interacting or interdependent group of items forming a unified whole.'' It is apparent that the motor relies upon other items and parts, such as the rocket body, fins, nosecone, and others, to function properly, and to therefore perform as designed. However, this final rule is not intended to govern fully assembled rockets.

Because the rocket motor does not constitute a system, and because the successful direction of energy produced by a rocket motor requires that the motor be integrated into a rocket, complete with other system components, the Department finds that a rocket motor does not constitute a gas generator system that releases and directs work.

4. Hobby Rocket Motors Are No Different From Other Approved PADs

Many commenters argued that a hobby rocket motor should be classified as a PAD because it functions in a manner similar to other products classified as PADs by ATF. Following are some of the arguments presented by the commenters:

By using a chemical reaction that creates gasses exiting the nozz[le] of the hobby rocket motor, the [resulting] thrust created

performs the task of lifting the hobby rocket off the ground. This is the same reaction used to inflate aircraft safety slides, automobile airbags and other PADS that enjoy the same exemption. The inner workings of all of these PADS is the same. (Comment No. 112)

The purpose of the other propellant actuated devices that ATF recognizes * * * [is] to convert chemical potential energy into useful mechanical work—i.e., a nail gun, inflatable automobile occupant restraint systems, etc. A rocket motor and the reload kit that can be assembled to create the rocket motor clearly do the same. (Comment No. 123)

It is not shown why it is valid that only hobby rocket motors are proposed to lose this PAD status. Other devices still classified as PADs, i.e., car air bag[,] gas generators and aircraft safety systems, have very similar function, extremely similar mechanical configuration, and contain very similar chemical compositions to hobby rocket motors. Many of these devices classified as PADs contain chemical compositions designed to be much more energetic than the compositions used for hobby rocket motors. (Comment No. 212)

Devices that operate in a very similar function and contain many of the same basic materials as hobby rocket motors are allowed by BATFE to utilize the PAD exemption (including devices that function as part of a larger overall device and that operate in conjunction with other components, just like hobby rocket motors). For example, BATFE has specifically exempted rocket motors of equivalent design and size utilized in aircraft safety systems. (Comment No. 230)

There is regulatory inconsistency present in this NPRM as the proposed regulation fails to address how and the basis for regulating an identical rocket motor (the Industrial Solid Propulsion line throwing rocket motor and the Aerotech 1200) differently. The use in both applications is similar. The line throwing motor delivers a payload to the intended area, and if flown by a conventional rocket it can loft instrumentation for the collection of scientific data or evaluate upper air wind speed and direction during the descent phase. (Comment No. 232)

Rockets use the gas generating properties of burning propellant to generate motion, in this case, to loft satellites, scientific payloads, and even humans to high altitude and into space. This is the exact same concept used by a cartridge in a nail gun, or the propellant which enables an airbag to rapidly deploy. A rocket motor, a nail gun cartridge, an airbag, and numerous similar devices all work by the same princip[les], and should all be categorized and regulated as such. They are all the working portions of large systems which operate in concert to perform specific tasks and functions. (Comment No. 257)

Rocket motors, as used in practice, have parallel operation similar to other devices, listed by BATFE as PADS. The devices cited by BATFE as PADS function as part of a larger whole, and rely on other interacting components, just as rocket motors do. (Comment No. 261)

Department Response

Several commenters argue that rocket motors are similar in function, construction and composition to other devices previously exempted as PADs and therefore should be exempted as such.

ATF has historically granted propellant actuated device exemptions to devices that are generally aimed at increasing personal safety or enhancing the efficiency of mechanical operations. Each device must contain and be actuated by a propellant, and also must be a complete device, tool component, or mechanism that requires no other parts to perform its intended function, including to whatever degree it may operate within a larger or more complex system. Any such device must not permit ready access to the propellant charge as manufactured.

For example, ATF has exempted airbag modules as propellant actuated devices but has not exempted the propellant inside the unit. The airbag module is a self-contained unit that is deployed by an internal initiator or micro gas generator that receives an electronic pulse from a crash sensor. The propellant charge inside the gas-generation canister is converted into a gas, which is then released to inflate the airbag cushion. ATF ruled that these fully assembled airbag modules constitute a gas-generating system. As demonstrated by this analysis, each item being considered for classification as a PAD is individually assessed based upon design and usage characteristics.

5. There Are No Clear Technical Standards for Previous PADs Classifications Listed in the Proposed Rule

In the proposed rule, ATF stated that in applying the regulatory definition of a PAD it has classified certain products as propellant actuated devices: Aircraft slide inflation cartridges, inflatable automobile occupant restraint systems, nail guns, and diesel and jet engine starter cartridges. Approximately 150 commenters argued that the proposed rule provides no technical standards for those products previously classified by ATF as PADs. According to the NAR,

One device listed is hand held, but others are not. One device is whole and stands unto itself, the others are incorporated into larger machines or devices. The NPRM is silent on the size, shape, functions or other measurable specification[s] associated with listed PADs. Nowhere are clear, measurable standards for PADs outline[d] in any detail. Unless and until BATFE can provide potential PADs applicants such specification, there is no consistent basis on which applicants could determine whether their devices would qualify as PADs. (Comment No. 261)

Another commenter expressed similar concerns:

Although the proposed rule claims that the ATF has classified certain products as PADs, there is no reference provided to support that such judgments were ever shared with the public, or that they exist anywhere for that matter. If they do exist, what are the standards by which such classifications were made? (Comment No. 255)

Department Response

The commenters expressed concern about the lack of specific technical standards to be used in making propellant actuated device determinations. They suggest that a person would be at a loss to make their own determination regarding a particular item that may be a propellant actuated device.

Congress did not provide extensive guidance as to what size, shape, or specific functions should be taken into account with respect to propellant actuated device determinations. In fact, a description of items determined by the Department to be propellant actuated devices would include a wide variety of explosive weights, various shapes, and a number of work functions to be performed. This great variation in the types, sizes, and functions of devices makes it difficult to specify technical standards for such classifications. Moreover, the law clearly distinguishes between a federal agency's general interpretations of the laws it enforces, which cannot be changed without the notice-and-comment process, and federal agency opinions applying that law to the facts of a particular case, which are not subject to notice-and-comment requirements. *York* v. *Secretary of Treasury*, 774 F.2d 417, 420 (10th Cir. 1985) (classification of firearm as machine gun is ''not a rulemaking of any stripe''). ATF classification decisions related to particular items fall squarely in the latter category. *Id.; Gun South, Inc.* v. *Brady,* 877 F.2d 858, 865 (11th Cir. 1989) (''[A]ctivities which involve applying the law to the facts of an individual case, do not approach the function of rulemaking.'') The Department is not required to disclose the internal deliberative process used in making PAD classifications and wishes to maintain the flexibility to modify evaluation criteria as products and the market evolve. Any person wishing a classification of an explosive device may request one, free of charge, at any time by contacting ATF.

6. Congress Did Not Specify That Mechanism, Metal Work, or Inclusion in, Exclusion From, or Stand Alone Was a Requirement for a PAD Determination

In the proposed rule, ATF stated that the hobby rocket motor cannot be brought within the regulatory definition

of propellant actuated device as a ''tool'' because it is neither ''handheld'' nor a complete ''device'' and because it is not a metal-shaping machine or a part thereof. Further, it cannot be considered to be a ''special mechanized device'' because, although clearly designed to serve a special purpose, it in no way functions as a mechanism. Finally, because it has no interacting mechanical or electrical components, the hobby rocket motor cannot be deemed to be a gas-generator system.

Approximately 130 commenters indicated that Congress intended a broad definition be applied to PADs and they argued that the proposed rule set forth a narrow interpretation of the term. As one commenter stated, ''Congress did not specify any particular type of device to be excluded from the definition. Nothing about the size, complexity, work product produced, whether or not a PAD might be used in or with other components was specified in [the] statu[te].'' (Comment No. 163)

Department Response

Congress did not define the term ''propellant actuated device,'' nor did it provide significant criteria for use in determining which devices should be PADs. The commenter suggested that Congress did not focus on the nature of the explosive materials in question. The Department disagrees with this contention. By the very nature of the term ''propellant'' it is clear that Congress did not intend for devices actuated by other types of materials (*e.g.*, high explosives) to be considered propellant actuated devices.

In addition, a review of the Congressional testimony provides insights as to what Congress may have considered as propellant actuated devices. Frederick B. Lee from Olin Corporation provided testimony, *see* H.R. Rep. No. 91–1549, at 64 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4041., on smokeless propellants and various Olin smokeless propellant devices that he felt should be exempted. When describing these devices, Mr. Lee stated, ''these devices are all aimed at increasing personal safety or enhancing the efficiency of mechanical operations.'' Although Congress did not define the term ''propellant actuated device,'' and did not exempt these devices from the explosives controls in the final legislation, this excerpt provides some indication of the types of devices contemplated by Congress in their deliberations related to propellant actuated devices.

The Department agrees that Congress intended the use of discretion and judgment in determining which devices should be exempted as propellant actuated devices. Further, the Department believes that Congress intended for this term to include devices designed to perform some type of work. However, the Department believes that Congress did not intend for ATF to disregard considerations such as public safety and the potential for misuse of materials under consideration. Rather, Congress intended for ATF to judiciously apply this term to avoid exempting items that could pose a significant danger to the public if left unregulated. Therefore, the Department disagrees with the commenter's conclusion that ATF is precluded from considering factors other than the purpose for which the device is used.

7. ATF Has Not Established a Clear Process for Application, Review, Adjudication, and Appeal for Parties Seeking a PADs Definition for Their Devices

Many commenters (approximately 145) stated that the proposed rule failed to provide for any form of due process regarding the application, review, adjudication, and appeal of organizations or individuals seeking PADs exemptions. According to the NAR, ATF ''does not appear to have any such mechanisms as regards PADS but merely pronounces selected devices as receiving PADS classification. There is no transparency around PADS determinations or their denial.'' Another commenter noted that ''[a] clear process is needed to apply a clear standard rather than arbitrary decision making of an arbitrary standard. This allows one rocket motor to be denied PAD status as a hobby rocket while another similar rocket motor could be granted PAD status due to an arbitrary process.'' (Comment No. 249)

Department Response

The NPRM does not provide specific guidance regarding the application, review, adjudication, and appeal process for propellant actuated device determinations. Moreover, as stated previously, the law clearly distinguishes between a federal agency's general interpretations of the laws it enforces, which cannot be changed without the notice-and-comment process, and federal agency opinions applying that law to the facts of a particular case, which are not subject to notice-and-comment requirements. However, procedures for those seeking review of a PAD determination are standardized in the Administrative Procedure Act, and information regarding past determinations can generally be obtained through Freedom of Information Act requests.

Accordingly, the Department disagrees with the contention that there is any inconsistency or arbitrary application of the PAD exemption. Specifically, 5 U.S.C. 702 *et seq.* provides for judicial review of an agency action, when a person is adversely affected or aggrieved by the action. Therefore, the judicial system is available to review the agency's actions when an item is submitted for classification under the federal explosives laws. Furthermore, except for confidential, proprietary, or statutorily protected information, copies of classification and exemption letters can be obtained from the Department through the Freedom of Information Act. These letters often contain a description of the submitted item and an analysis applied to the item in order to determine whether it meets the regulatory definition of a propellant actuated device. Finally, classification letters contain the name and phone number of an ATF officer who can be contacted to answer any questions or concerns regarding the classification. It is the Department's position that information regarding PAD classifications is readily and openly available and review of classifications can be addressed through the judicial system.

8. ATF Has Granted PADs Status to Aircraft Safety Systems That Use the Same Technical Approach as Hobby Rocket Motors

Approximately 155 commenters noted that ATF failed to list in the proposed rule a product that it has classified as a PAD that is functionally equivalent to a hobby rocket motor—an aircraft safety system rocket motor. The following comment represents the views of most of the commenters:

> BATFE failed to list aircraft safety system rocket motors in their listing of PADS, even though such systems have been granted PADS status. Details on these systems can be found at *http://brsparachutes.com/default.aspx.* These parachute deployment devices are installed in approximately 1,000 FAA certificated airplanes and 18,000 ultralight aircraft. These devices are exactly functionally equivalent to hobby rocket motors. Either both hobby rocket motors and parachute deployment devices are ''propellant actuated devices,'' or neither is a PAD. Both systems use PADS involving airframes with parachutes, not operating explosive devices. Any attempt to deny PADS classification to hobby rocket motors while simultaneously exempting parachute deployment devices would be arbitrary. (Comment No. 163)

Department Response

The purpose of the NPRM was not to invite review of, and solicit comments on, propellant actuated device determinations with respect to a broad range or complete list of items. Rather, the purpose of the notice was to propose amendment to the regulations at 27 CFR part 555 to clarify that the term ''propellant actuated device'' does not apply to rocket motors or rocket-motor reload kits consisting of or containing ammonium perchlorate composite propellant, black powder, or other similar low explosives, and to invite comment on this specific issue. However, the item detailed in the comments (parachute deployment devices) was not determined to be a propellant actuated device. Rather, it was exempted by ATF as a special explosive device under the provisions of 27 CFR 555.32, which contains criteria for exemption different from that used for propellant actuated device determinations. Apart from this difference, it is incorrect to categorize ''parachute deployment systems'' as similar to rocket motors. The explosives contained in these systems, although critical to their function, are only a small part of the overall product. These parachute deployment systems are sold and have been exempted as complete systems. The described parachute deployment system is a multi-component system that includes, but is not limited to, an activation handle, rocket-motor igniter, propellant rocket motor, parachute harness, canister, and bag. Individual rocket motors apart from the final assembly on the aircraft must still comply with all applicable ATF explosive laws and regulations. This is consistent with the final rule on rocket-motor propellant actuated device status.

9. The Proposed Rule Is a Major Rule Pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996

In Notice No. 9P, ATF stated that the proposed 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, because it would 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. Approximately 125 commenters disagreed with ATF's assertion. In its comment (Comment No. 261), the NAR noted the following:

U.S. manufacturers currently dominate the export market for rocket motors. Denial of a PADS exemption for hobby rocket motors will adversely affect U.S. rocket motor manufacturers' ability to attract investment, innovate and compete due to the far higher costs of regulatory compliance, and a shrinking market for hobby rocket motors. BATF[E] cannot publish a final rule simply by asserting the rule would not have adverse impacts under the Small Business Regulatory Enforcement Fairness Act of 1996. BATFE must provide the means and economic analysis by which it determined the proposed rule would not have adverse impacts for public comment.

Another commenter stated the following:

The model rocket hobby is interdependent with a number of small businesses engaged in the manufacture, resale, and support of model rocket engines. In further complicating consumer purchase of these engines, this proposal will have serious negative impacts in terms of the Small Business Enforcement Fairness Act of 1996. It will interfere with both domestic and foreign business, putting these U.S. companies at competitive disadvantage. (Comment No. 39)

A hobby shop owner provided the following comments:

The proposed regulations have already had and will have further negative impact on my small business. My ability to compete globally will literally be eliminated as a result of this rule. (Comment No. 260)

Department Response

The commenters' contentions rest on an inaccurate portrayal of this rulemaking and Department policy. Specifically, the commenters suggest that if the proposed rule were adopted, it would significantly change the classification of rocket motors and the Department's regulation of these materials. This is not the case. For many years, ATF has regulated low explosives, including rocket motors not exempted as toy propellant devices (those containing 62.5 grams or less of propellant material). This rulemaking is simply a clarification of a long-standing position. If adopted, this proposed rule will not affect the current and past classification of rocket motors or the determination that they are not propellant actuated devices. The Department's regulatory requirements and enforcement program regarding rocket motors will remain unchanged. Therefore, the Department can assert with confidence that the costs associated with doing business in the United States and abroad, for rocket motor-related businesses, will not be significantly affected by this rulemaking. The commenters have not provided any substantive support for the assertion that the international rocket-motor industry will be adversely affected.

10. The Proposed Rule, if Adopted, Will Have a Negative Effect on the Sport Rocketry Hobby and Small Businesses

Approximately 70 commenters argued that the proposed rule will have a negative effect on the sport rocketry hobby and on small businesses. Some commenters believe that many individuals currently participating in the hobby will stop doing so and many more potential new participants will decline to participate in the hobby. The commenters contend that reduced participation in the hobby will result in reduced sales of model rocket motors. Some commenters disagreed with the Department's determination that the proposed rule is not an ''economically significant'' rulemaking as defined by Executive Order 12866. Following are excerpts from some of the comments:

If this rule is enforced most adults participating in the hobby will drop out. Few parents will want to be subjected to paying for an explosive permit fee, background checks, fingerprinting, and ATF inspections. (Comment No. 96)

Every entity that participates in this market is a small entity as defined by statute. ATF should undertake a rigorous assessment of the economic impact of this effectively new regulation. ATF's assertion that everyone involved in the market is already regulated is false; this rule effectively eliminates a means by which a significant number of users were able to participate in this market. A large number of these users may not be able, or elect not to, obtain the requisite permits, thus significantly reducing the market for these products. (Comment No. 205)

I participated in a club buy of a magazine and an associated purchase of primary insurance. The cost of this worked out to be $100 per person up front plus $100 per year per person for liability insurance. Even this relatively cost effective method of meeting onerous BATFE expectations would have a major impact on the small rocketry community. In particular, if NAR's 2000 Sport Rocketry flyers were to engage in a similar strategy, they would pay in the aggregate approximately $200,000 (one time buy of the magazine) plus $267,000 per year to sustain the cost of principle insurance and the recurring cost of the [low explosives user permit] (LEUP). Add in the Tripoli Rocketry Association's 3000 members who are high-power certified and this only exacerbates the staggering cost. A conservative estimate of the total real cost of this unneeded regulation is as follows:

$500,000 one-time cost upon implementation of the NPRM

$665,000 sustained yearly average cost (insurance and LEUP) (Comment No. 255)

Obtaining an LEUP requires the ability to store APCP and most people in urban and

suburban environments aren't able to get permission from local authorities to do so. The net effect of this rulemaking will be to force a large percentage of the rocket enthusiasts out of the hobby and to shut down a 100 million dollar industry. (Comment No. 257)

The proposed regulations have already had and will have further negative impact on my small business. My ability to compete globally will literally be eliminated as a result of this rule. (Comment No. 260)

Department Response

This rulemaking is simply a clarification of a long-standing position. If adopted, the proposed rule will not affect the current and past classification of rocket motors, or the Department's regulatory requirements and enforcement program regarding rocket motors.

One commenter provided estimated costs associated with the proposed rulemaking. The commenter mistakenly suggests that all rocket members of NAR and Tripoli will require storage in approved storage magazines when in fact only those individuals who purchase, store, and use rocket motors that contain more than 62.5 grams of propellant will require access to approved storage magazines. Ninety percent of rocket motors sold in the United States contain 62.5 grams or less of propellant, therefore, this storage requirement only applies to 10 percent of the rocket market. Those individuals who currently purchase and use rockets that contain more than 62.5 grams of propellant should have already obtained the necessary ATF permit and complied with storage requirements, and this proposal should not affect the storage requirements applicable to their rockets. Aside from the renewal fees, these individuals should not incur any additional fees associated with these requirements.

One commenter suggests that the rulemaking will force individuals to stop using hobby rockets due to fees associated with explosive permits, background checks, fingerprinting, and ATF inspections. ATF does not and has never charged fees for inspections. The rulemaking does not affect the permit fees associated with obtaining a federal explosives permit. Current permit fees will remain at $100.00 for the first three years (less than $34.00 a year) and $50 for every subsequent three-year period (less than $17.00 a year). The background checks and processing of required fingerprint cards are included in the price of the ATF permit.

Therefore, the Department is confident that the costs associated with doing business in the United States and abroad, for rocket motor-related businesses, will not be significantly affected by this rulemaking.

11. ATF's Statement That ''the Hobby Rocket Motor Is Little More Than Propellant in a Casing'' Is Factually Incorrect

Eleven commenters disagreed with ATF's description of a hobby rocket motor as being ''little more than propellant in a casing.'' Following are excerpts from some of the comments:

A hobby rocket motor must be considered to be the entire construction of the motor including all components such as but not limited to nozzle, retaining cap, delay grain, ejection charge, and any other components necessary for the proper mechanical operation of the motor. A hobby rocket motor cannot be reduced to ''little more than propellant in a casing.'' (Comment No. 124)

The assertion that [the] hobby rocket [is] ''little more than propellant in a casing'' is incorrect. Key components of a hobby rocket motor are:

a. Nozzle
b. Pressure vessel (with an aft nozzle retaining system and a forward pressure/delay bulkhead)
c. Propellant grain(s)
d. Case liner/insulator
e. Delay grain
f. Ejection charge
g. Ejection charge holder

To use the phrase ''little more than propellant in a casing'' is an oversimplification and demonstrates very little understanding of the overall complexity of the system. (Comment No. 133)

This * * * statement is incorrect because the fundamentals of rocket propulsion require the acceleration of the exhaust gases in a particular direction in order to perform work. A road flare is little more than a combustible mixture and a casing. It has no nozzle by design and is not designed to generate thrust. A rocket motor is at least three components: Propellant, a casing, and an exhaust nozzle. Without a nozzle a rocket motor is functionally just a road flare. (Comment No. 228)

The typical reloadable HP model rocket motor I use(d) is the Aerotech H128. It employs a precisely designed and engineered case (like the smaller motors), and a reload that includes carefully formulated and manufactured propellant, sealing disks and O-rings, liners and a specifically engineered nozzle. This is a patented reloadable rocket motor system. The case is designed for re-use, with engineered tolerances for the various reloads and well established internal pressures they can create. The reloads themselves are basically non-reusable items, each component engineered for specific purposes in the motor's operation. These motor systems are far more complex than the term ''propellant in a case'' implies. (Comment No. 258)

Department Response

The statement ''the hobby rocket motor is little more than propellant in a casing'' was taken from a previous rulemaking regarding rocket motors. The comments failed to address the rest of the statement in the previous rulemaking, which stated that ''the hobby rocket motor is little more than propellant in a casing, incapable of performing its intended function until fully installed, along with an ignition system, within a rocket.'' This statement, taken in context, implied that rocket motors in no way function as a mechanism because they lack the necessary indicia of a mechanized device. The Department previously acknowledged that rocket motors typically include a nozzle, retaining cap, delay grain, and ejection charge. The Department also acknowledges that variations exist among types of rocket motors available for purchase by the general public. The Department maintains its view that rocket motors are in no way analogous to a special mechanized device, because they consist essentially only of propellant encased by a cardboard, plastic, or metallic cylinder.

12. Model Rocket Motors Are Not a Threat to Homeland Security

Approximately 40 commenters argued that model rocket motors do not pose a threat to homeland security, should not be regulated, and should be classified as PADs. Some of the arguments raised by the commenters are as follows:

The rockets we fly would make terrible weapons, [and] therefore pose no risk to national security. The fuel used in them (APCP) burns far too slow to be used for any other purpose than rocket fuel. (Comment No. 32)

BATFE's concern that a hobby rocket motor could be used to launch terror weapons against targets is unfounded. Terrorists have already developed techniques for smuggling their weapons into crowded areas without attracting attention, and therefore have no need of a rocket, which would attract attention toward its launch site when launched. Thus imposing this regulatory burden on the law abiding rocketry community would have no benefit to the common defense and security and is therefore not justified. (Comment No. 70)

I don't believe there has been a single recorded incident of a terrorist action against the public using hobby rocketry motors of any size. (Comment No. 215)

One hypothetical reason for a desire on the part of [the] administration to regulate hobby rocket motors might be the perception of a threat to security. But such a threat is indeed perception and not reality. The Tripoli Rocketry Association is not aware of any specific use of hobby rocket PADs in any security threat, and BATFE does not appear to have made public any such incident. (Comment No. 219)

Department Response

The Department is aware that hobbyists have a legitimate and lawful desire to acquire explosive materials in pursuit of their recreational activities. In keeping with Congress's intention, ATF has maintained a long-standing exemption from the federal explosives controls for hobby rocket motors containing 62.5 grams or less of low explosive materials. This exemption covers 90 percent of all rocket motors that are sold to hobby rocketry enthusiasts.

The Department disagrees, however, with the suggestion that ammonium perchlorate composite propellant rocket motors could not be used for criminal or terrorist purposes. While it is true that APCP in a rocket motor usually burns in a controlled manner, it can react much more violently when more strictly confined. APCP can be used to make an effective pipe bomb or other improvised explosive device. Criminal and terrorist elements do not always focus on precise strikes against specific or small targets. Terrorists have demonstrated in recent international events the effectiveness of indiscriminately firing improvised rockets into civilian areas. Terrorists could effectively accomplish their goals of instilling fear and disrupting our economy through the similar utilization of a large rocket within the United States, regardless of whether they targeted a building or other structure with great accuracy. Terrorism will exploit any vulnerability. Allowing unfettered access to large rocket motors would create opportunities for terrorists and criminals, and could make the United States more vulnerable to the consequences of their activities in many ways.

13. Historically, ATF Has Considered Hobby Rocket Motors To Be PADs

Several commenters maintained that historically ATF has considered hobby rocket motors to be PADs, regardless of the propellant weight. Following are some of the arguments raised by the commenters:

The BATFE exempted all APCP rocket motors regardless of propellant weight up until the mid 1990's. They considered all rocket motors propellant activated devices, which were exempt from BATFE permits. Current APCP rocket motors use the same propellant as before. Since Congress has not changed the definition of an explosive during this time, it is illogical to now start regulating rocket motors, nor within the powers of the BATFE to change. (Comment No. 65)

Furthermore, the ''confusing'' letters from 1994 are rather clear: ''An ATF manufacturer's license would be required to manufacture ammonium perchlorate composite explosives. The exemption at 27 CRF Part 55, section 141(a)(8) includes propellant-actuated 'devices.' The term 'device' is interpreted to mean a contrivance manufactured for a specific purpose. Under this definition, a fully assembled rocket motor would be exempt.'' That does not appear to be the least bit confusing. (Comment No. 194)

Department Response

The comments that contend ATF has historically considered hobby rocket motors to be propellant actuated devices are inaccurate. Among industry members and in the rocketry community, there has been some confusion regarding the status of rocket motors as PADs. This confusion may be partially attributable to a classification letter drafted by ATF in 1994 that incorrectly stated that rocket motors containing 62.5 grams or less of propellant were exempt from federal regulation as PADs. A superseding 2000 letter more accurately and clearly stated that rocket motors did not meet the regulatory definition of a PAD. The intention of this rulemaking is to clarify ATF's position that rocket motors are not and have not been exempted from federal explosive regulation as propellant actuated devices.

14. Certain Terms Defined in the Proposed Rule (e.g., ''Tool'' and ''Device'') Were Not Included in the Initial Rulemaking That Defined the Term ''Propellant Actuated Device''

As explained in the proposed rule, in 1981 ATF added the current definition of a PAD to its regulations. Two commenters questioned whether certain terms defined in the proposed rule, e.g., ''tool,'' ''mechanized device,'' etc., were similarly defined during the rulemaking proceeding that resulted in the 1981 regulation. According to the commenters:

You do not say that the terms used (''tool'', ''mechanized device,'' etc.) were themselves carefully defined as a part of the 1981 regulation. Therefore, it appears you are trying to narrowly define them now, after the fact, in order to support your current proposed rulemaking. (Comment Nos. 66 and 254)

Department Response

The Department has been charged with enforcing the federal explosive regulations and applying them as Congress directed. In order to work within the statutory language provided by Congress and the resultant regulatory provisions, ATF analyzed and referenced certain terms such as ''tool'' and ''special mechanized device'' in order to give meaning to the technical term ''propellant actuated device.'' Therefore, the Department is not representing these words to be terms of art that are specific to propellant actuated devices. Instead, these terms are being used to further illustrate and articulate the concept of a ''device.''

15. Implementation of the Proposed Rule Is Not Necessary for Correction of a Demonstrated Public Safety Issue

ATF stated in the proposed rule that implementation of the proposed definition of a PAD is important to public safety. Approximately 15 commenters argued that model rocketry is a safe hobby and that hobby rocket motors should be exempt from regulation as PADs. Following are excerpts taken from some of the comments:

I have been unable to find any reports of deaths, or even serious injuries, related to hobby rocketry in this country. This is due, in part at least, to the fact that the rocket motors you are most concerned with in this proposed rulemaking (those containing over 62.5 grams of propellant) are not available to the general public * * *. [I]t is necessary that one be certified through, and under the rules of, the NAR or TRA in order to purchase and use these high-power motors. (Comment No. 66)

No example, case, documentation, or threat has been demonstrated or presented to amend the regulation to exclude the devices in question. No reason has been presented as to why this change is ''important to public safety.'' In my extensive professional experience, I am not aware of any case where public safety was jeopardized to the point that would warrant such an expansion of the regulation. (Comment No. 133)

If the purpose [of the proposed rule] is public and personal safety, I would point out that sport rocketry is already one of the safest (if not the safest) outdoor hobbies today. (Comment No. 149)

Department Response

The Department acknowledges that the hobby rocket community, in general, has demonstrated its ability to maintain a safe and functioning hobby for thousands of individuals. However, APCP, a common ingredient in hobby rocket motors, is an explosive material. By nature, explosive materials present unique public safety hazards. Congress determined that these types of materials should be subject to regulation even though they are usually used in a lawful, utilitarian manner. Accordingly, these explosives are regulated by law.

One commenter suggested that one of the reasons that there are few injuries or deaths associated with high-power rocket use is that these items are not available to the general public. Rather, a person must be certified by a rocketry association in order to purchase motors of a certain size. The Department agrees

that the purchase of large motors should be restricted, and it applauds the rocket industry for setting standards to ensure that rockets are not readily available to all members of the general public. Exempting high power rocket motors as PADs would be inconsistent with the above concerns, and with the Congressional mandate that the Department set standards to ensure that only qualified persons receive explosives.

Another commenter states that ''[n]o reason has been presented as to why this change is 'important to public safety.' '' The same commenter states that rocket motors should be excluded from regulation because no reasons have been provided where public safety was jeopardized.

The proposed rulemaking makes no change to the current explosive regulations but rather clarifies existing policies regarding rocket motors. Moreover, explosives of all types provide the means for individuals with nefarious objectives or goals to cause significant damage to life or property. Congressional mandate requires oversight and regulation of these materials.

16. The Proposed Rule Violates the Federal Explosives Law and Fails To Meet the Statutory Intent of the PADs Exemption

ATF is responsible for implementing Title XI of the Organized Crime Control Act of 1970. One of the stated purposes of the federal explosives law is to avoid placing any undue or unnecessary federal restrictions or burdens on law-abiding citizens with respect to the use of explosives for lawful purposes.

Propellant actuated devices, along with gasoline, fertilizers, and propellant actuated industrial tools manufactured, imported, or distributed for their intended purposes, are exempted from the statutory definition of ''explosives'' in section 841(d) of title 18, United States Code, by 27 CFR 555.141(a)(8). In 1970, when Title XI was enacted by Congress, the Judiciary Committee of the United States House of Representatives specifically considered and supported an exception for propellant actuated devices:

> It should be noted that the term ''explosives'' does not include fertilizer and gasoline, nor is the definition intended to include propellant actuated devices or propellant actuated industrial tools used for their intended purpose.

H.R. Rep. No. 91–1549, at 64 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4041.

Several commenters argued that the proposed rule either violates the law because it places an undue burden on the lawful use of explosives or it fails to meet the statutory intent of the PADs exemption. Following are excerpts from some of the comments:

> The statute clearly states that its purpose is not to impose an undue burden on the lawful, peaceful uses of explosives. The statutory PAD exemption is clearly and obviously intended to permit use of materials classified as explosives without the burden of permitting, when the explosive action is so limited and directed by design as to be non destructive * * * i.e., when the explosive force is so applied by design of the explosive and its containing device that it does not destroy its container nor other nearby materials, but performs otherwise useful work such as driving a nail, or inflating an aircraft escape slide or automobile air bag, then the explosive falls under the PAD exemption. A rocket (and its fuel) clearly falls within this intent and is therefore entitled to the PAD exemption. (Comment No. 70)

> ATF's proposed rule is contrary to the intent of the enabling law * * * in that it will place any undue and unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, storage, or use of explosive materials for lawful purposes, and in that it seeks to impose Federal regulations, procedures, and requirements that are not reasonably necessary to implement and effectuate the provisions of Title XI. (Comment No. 205)

> In light of this legislative history, as well as the purpose of the Act to avoid placing ''any undue or unnecessary Federal restrictions or burdens on law abiding citizens'' * * * it is quite clear Congress intended a broad definition, not a narrow one, be applied to PADS * * *. BATFE's proposed rule ignores completely the broad intent of the Congress relative to the nature and usage of PADS by generating an artificially narrow interpretation of Congressional intent. (Comment No. 261)

Department Response

The primary purpose of the federal explosives law, as expressed by Congress, is to protect interstate and foreign commerce and to reduce the hazards associated with the misuse and unsafe or insecure storage of explosive materials. Therefore, this goal is the basis for all regulatory action undertaken by the Department. Regulation is imposed only to the extent that it is ''reasonably necessary to implement and effectuate the provisions of this title.''

The Department believes that protecting the general public from the potential for criminal or terrorist misuse of rocket motors greatly outweighs any limited burden placed on individuals acquiring, using, storing or selling these items.

17. The Proposed Rule Is Unreasonable

Several commenters contended that the proposed rule excluding hobby rocket motors from the PAD exemption is unreasonable because it makes no allowance for a ''responsible adult'' category of use between what is safe enough for minors, e.g., the Consumer Product Safety Commission-based 62.5 gram limit, and what is dangerous enough to require special training, permitting, regulation, etc. The commenters argued that this ''responsible adult'' category exists in most other human endeavors. For example, children may ride bicycles and adults may drive automobiles, but a Commercial Driver's License is only required for people who drive tractor trailers and buses, not private automobiles.

Department Response

The Department disagrees that persons deemed to be ''responsible adults'' should be exempt from regulation of rocket motors. First and foremost, Congress specifically addressed age standards for persons by prohibiting distribution of explosive materials to anyone under the age of 21. *See* 18 U.S.C. 842(d)(1). In doing so, Congress established a statutory criterion for the age a person should be in order to receive explosive materials. To deviate from that standard specifically for rocket motors would be inconsistent with the statutory scheme. Likewise, there is no basis within the statutory language to create an exemption based upon age.

Although not relevant to the PAD determination, the regulatory exemption set forth in 27 CFR 555.141(a)(10), which exempts rocket motors that contain no more than 62.5 grams of propellant, did take into consideration the Consumer Product Safety Commission standards. This standard did not result in an age limitation, but instead is based upon the safety and potential hazards associated with the motor. ATF's explosives regulation, section 555.141(a)(10), applies an exemption to rocket motors that are most commonly used by hobbyists, Boy Scouts, and rocketry club members for learning and experimentation, i.e., those with 62.5 grams or less of propellant. In effect, the exemption allows for less-powerful rocket motors to be used by all age groups without regulation, while leaving intact regulatory standards for more-powerful rocket motors. An exemption based solely on age, however, would not be grounded in any statutory provision and would be

inconsistent with the 62.5-gram threshold.

18. Hobby Rocket Motors Meet the Definition of a PAD According to the Department of Commerce and Other Sources

Approximately 15 commenters cited various references to show that the standard usage of the terminology ''propellant actuated devices'' specifically includes rocket motors. Following are some of the references presented in the comments:

- A document entitled, ''National Security Assessment of the U.S. Cartridge and Propellant Actuated Device Industry Third Review,'' published in August 2006 by the U.S. Department of Commerce, Bureau of Industry and Security, Office of Strategic Industries and Economic Security.
- A study released in 1963 by Frankford Arsenal, ''Propellant Actuated Device (PAD) Assisted Parachute System for Aerial Delivery of Cargo.''
- A test conducted in 1971 by the Aberdeen Proving Ground MD Material Testing Directorate, ''Engineering Test of Rocket, Compensating, Tip-Off for the OV–1 Mohawk Escape System'' (Report Number APG–MT–3858).
- A file entitled, ''Ordnance Technology,'' authored at the Naval Surface Warfare Center, Indian Head Division.
- The U.S. Army Project Manager Close Combat Systems.
- The Army Materiel Command publication, ''Propellant Actuated Devices'' (AMCP 706–270, 1963).
- ''Rocket Basics, A Guide to Solid Propellant Rocketry,'' published by Thiokol Propulsion (now ATK).

Department Response

The Department's purposes for and methods of classifying propellant actuated devices under the federal explosives laws may vary from those of other government agencies. Each government entity is charged with fulfilling its own unique mission and interpreting its own unique statutory authorities, as reflected in their corresponding regulations, rulings, and policies. The Department's classification of these items and its definition of ''propellant actuated device'' may vary from other organizations' definitions of the same term. ATF must define the term PAD and determine its application with reference to the statutory mandates of title 18 U.S.C. chapter 40, ATF's specific mission, and the goal of public safety; other agencies' interpretations of terms applicable to their mission should have no effect on the Department's deliberations in this regard.

The Department rejects the argument that because other entities identify certain devices, some of which contain substantial explosives weight, as propellant actuated devices, then the Department should follow suit. Nonetheless, the Department has reviewed the aforementioned documents and rejects the inference that these documents identify a rocket motor alone as a propellant actuated device. The Army Materiel Command Publication, ''Propellant Actuated Devices,'' was replaced in 1975 by an updated version, which has since been rescinded. The PADs referred to in the Army publication are complex systems involving multiple components, designed for use in military vehicles. Furthermore, the definition in the Army publication specifically states that a PAD must accomplish or initiate a mechanical action. The rocket motors in this final rule do not initiate or accomplish a mechanical action.

The study by Frankford Arsenal, ''Propellant Actuated Device Assisted Parachute System for Aerial Delivery of Cargo,'' was initiated to study the feasibility of using PAD-type rockets to reduce the ground contact velocity of air-delivered cargo.

The Department's review of ''Ordnance Technology'' from the Naval Surface Warfare Center revealed no reference suggesting that rocket motors alone are considered propellant actuated devices. This file made no attempt to define propellant actuated device, nor did it establish any criteria for such a designation.

The U.S. Department of Commerce's ''National Security Assessment of the U.S. Cartridge and Propellant Actuated Device Industry'' was initiated to analyze the current and long-term health and economic competitiveness of the cartridge actuated device/propellant actuated device industry and to develop recommendations for the Navy to ensure the continued ability of the industry to support defense missions and programs. The document was not intended to define ''propellant actuated device,'' nor did it define or provide criteria to determine what a PAD is. The Department questions the relevancy of this document to this rulemaking proceeding.

The U.S. Army Project Manager Close Combat Systems manages over 190 separate programs that meet Army transformation goals of providing smaller, lighter, more-lethal munitions over the next 20 years. The Department found no reference to propellant actuated devices in their publications and questions the relevancy of this program to the question of whether rocket motors should be classified as PADs.

19. ATF's Statement That ''the Hobby Rocket Motor Is, in Essence, Simply the Propellant That Actuates the Hobby Rocket'' Is Incorrect

Three commenters disagreed with ATF's statement that because the hobby rocket motor is, in essence, simply the propellant that actuates the hobby rocket, the motor itself cannot be construed to constitute a propellant actuated device. Following are excerpts from the comments:

> The ATF suggests ''the hobby rocket motor is, in essence, simply the propellant that actuates the hobby rocket.'' No, the propellant is the material (e.g., APCP) inside the motor. What is actuated is the conversion of this propellant into a gas inside the motor. The gas exiting the motor's nozzle moves the rocket motor in the opposite direction. Used as intended in a rocket airframe (typically nosecone, body and fins designed so as to be stable in flight) the rocket motor moves the rocket upward. (Comment No. 152)
>
> [T]he propellant alone cannot make a rocket motor function, but the mechanical interaction of all the components does constitute a propellant actuated device. (Comment No. 174)
>
> The premise, that a motor is propellant, (in essence or otherwise) is flatly, provably, wrong. If I put propellant in my rocket, I will burn up my rocket. I need to load that propellant into a motor in order to create thrust. Since the premise is wrong, the conclusion can not follow. (Comment No. 205)

Department Response

The Department considers APCP, whether in powder form or fabricated into propellant grains, an explosive. The Department is required under the federal explosives laws to publish an annual list of explosives. Since publication of the first ''Explosives List'' in 1971, ammonium perchlorate composite propellant, the propellant used in many high-powered rocket motors, has been classified as an explosive.

One commenter implies that rocket motors are not propellants. The Department disagrees with this suggestion. Rocket motors, consisting principally of propellant grains, are manufactured with APCP, which is a regulated explosive.

Each of the above comments makes the distinction between APCP propellant and a rocket motor containing APCP. Also, each suggests that the rocket motor performs a function beyond what the APCP alone can accomplish. The Department finds these to be reasonable assertions.

However, it is unclear how this differentiation between the rocket motor and the APCP propellant makes more convincing the argument that rocket motors are propellant actuated devices. The rocket motor has no self-contained igniter, nor is it by itself serving any intended, ''actuated'' purpose. Therefore, rocket motors do not fall within the definition of a PAD.

20. The Proposed Rule Will Have an Effect on the States (Executive Order 13132)

In the NPRM, the Department stated that the proposed rule would 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. Accordingly, in accordance with section 6 of Executive Order 13132, the Attorney General determined that the proposed regulation did not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Two commenters, including the NAR, raised similar concerns regarding the Department's determination that the preparation of a federalism summary impact statement was not warranted. The NAR stated the following in its comment:

> First, the NPRM is silent about how this conclusion was reached. There is no analysis or rational[e] provided for this conclusion. BATFE fails to comment on the types, number and work of state agencies who might be forced [to] change procedures by the proposed rule. There is no qualification given to the size, duration or nature of potential economic or regulatory impacts on state governments. Secondly, state regulators who currently do not license hobby rocket motors users, would face a great increase in licensed explosive users should a PADS exemption not apply to hobby rocket motors. Workloads for these state regulators will increase dramatically, both as regards licensing and inspection without any corresponding staff or funding increase. BATF[E] must address these potential state impacts prior to publication of any final rule. (Comment No. 261)

Department Response

The commenters' contentions appear to rest on inaccurate assumptions regarding the relationship between state requirements and the federal explosives regulations as well as a misunderstanding of this rulemaking. Title XI of the Organized Crime Control Act of 1970 and its implementing regulations make clear that this law and the regulations are not intended to affect state or other law. A license or permit issued under the federal explosives requirements confers no right or privilege to conduct business contrary to state or other law. Similarly, compliance with state law affords no immunity from the consequences of violation of the federal law and regulations. Finally, the federal explosives laws under title XI of the Organized Crime Control Act of 1970 place no enforcement burden or expectation on state or other nonfederal authorities.

21. ATF Does Not Need To Regulate Model/Sport Rocketry

Three commenters argued that ATF's regulation of the model/sport rocketry hobby is unnecessary. Following are some of the commenters' reasons given to support their position:

> [W]e have a safety record that is better than any other hobby or sport; including baseball, swimming, or riding a bicycle. This incredible safety record is a result of a safety code originally developed by a former White Sands Range Safety Officer that is always followed when our rockets are flown. We're a self-policing hobby that needs no Federal intervention. (Comment No. 189)
>
> The sport and high power rocketry community is fully able to regulate itself without further intrusion of the United States government. (Comment No. 223)
>
> Hobbyists who wish to use large hobby rocket PADs for their intended purpose must first gain permission from the Federal Aviation Administration * * * to use the motors in U.S. airspace. To require permission from yet another agency to purchase the motors is redundant, an unnecessary duplication of effort to no logical purpose. (Comment No. 219)

Department Response

The Department acknowledges that rocketry clubs and organizations have implemented self-regulating procedures and policies that are commendable. Voluntary club regulation and certification provide some oversight of club members, but this final rule clarifies existing policy that governs all persons, including potential terrorists, felons, or illegal aliens.

One commenter incorrectly implies that ATF and the Federal Aviation Administration (''FAA'') have duplicative roles in the regulation of explosives. While it is true that FAA permission is necessary for certain activities, ATF is the Federal agency primarily responsible for regulating the purchase and storage of, and interstate commerce (with the exception of transportation) in, these explosive materials.

Government agencies tailor their regulations to facilitate their specific mission. For instance, Department of Transportation (''DOT'') regulations are primarily designed to ensure the safe transportation of explosive materials. The Department's regulations, on the other hand, are designed to prevent the diversion and criminal misuse of explosives and also to ensure that explosives are safely and securely stored. Therefore, although there are numerous agencies and organizations involved in the regulation of explosives, the Department's regulations are necessary to accomplish its specific mission.

In addition to Government agencies, the Department is aware of the self-regulation efforts of rocketry clubs and organizations. This self-regulation is laudable. However, it does not, nor can it, provide a mechanism to ensure that persons prohibited under federal law from acquiring explosives are denied access to large rocket motors. Voluntary club regulation and certification provide some oversight of club members, but this final rule governs all persons, including potential terrorists, felons, or illegal aliens. Moreover, it applies to all sellers of rocket motors containing more than 62.5 grams of explosive material, as well as to sellers of reload kits designed to enable the assembly of motors containing more than 62.5 grams of explosive material.

22. Removal of Hobby Rocket Motors From Their Current Classification as PADs Will Increase ATF's Work Load

One commenter, the Tripoli Rocketry Association (Comment No. 219), contended that adoption of the proposed rule would place a burden on ATF's resources. According to the commenter:

> Currently, the classification of hobby rocket motors as PADs eliminates or reduces the time-consuming and unnecessary inspections by BATFE employees of records and storage of these harmless and educational PADs by hobbyists. If the proposed rulemaking is imposed, inspection of records and storage of such devices must be resumed. The BATFE may have to provide further training to those field operatives unfamiliar with rocket motors. The BATFE will also have to deal with the applications for user's permits from hobbyists who wish to use these devices. All such additional effort would be unnecessary if the current classification of hobby rocket motors as PADs is retained.

Department Response

The commenter has misinterpreted the Department's position on rocket motors. It is and has been the Department's position that all rocket motors and kits containing explosive materials such as APCP and black powder are subject to the provisions of 27 CFR part 555. One of these provisions provides an exemption for

motors and kits containing 62.5 grams or less of explosive material. However, with respect to rocket motors and kits containing more than 62.5 grams of explosive material, ATF has been processing applications from rocketry enthusiasts and conducting inspections as a regular course of business. Therefore, the Department does not anticipate an increased workload due to this rulemaking. Further, the Department's field personnel have been regularly exposed to training and field activities regarding rocket motors.

IV. Request for Hearings

Two comments requested that ATF hold public hearings on the proposed definition of a PAD set forth in Notice No. 9P. According to one commenter (Comment No. 247), the proposed rule ''is arbitrary and capricious in many ways and violates a recent court decision of which the ATF must be well aware. On this basis the proposed rule should not be enacted. * * * The issuance of an arbitrary and capricious rule change through a process that violates a recent DC Circuit of Appeals decision must surely be an action that the Director should not take solely on his own discretion.''

After careful consideration, the Director has determined that the holding of public hearings with respect to the proposed definition of a propellant actuated device is unnecessary and unwarranted. First, issuance of this final rule complies in all respects with the Administrative Procedure Act. Any party who believes the rule to be arbitrary, capricious, or in excess of statutory authority may challenge it in federal court. In addition, ATF's public hearings are generally conducted to permit the public to participate in rulemaking by affording interested parties the chance to present oral presentation of data, views, or arguments. Most commenters who addressed the proposed definition of a PAD expressed similar views and raised similar objections and concerns. As such, the Director believes that the holding of public hearings would not produce any new information on this issue.

V. Final Rule

After careful consideration of the comments received in response to Notice No. 9P, this final rule adopts the definition of a propellant actuated device as proposed, and confirms the Department's position that hobby rocket motors are not exempt from federal explosives regulation, pursuant to the propellant actuated device exception.

How This Document Complies With the Federal Administrative Requirements for Rulemaking

A. Executive Order 12866

This rule has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866 (''Regulatory Planning and Review''). The Department of Justice has determined that this rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866, and accordingly this rule has been reviewed by the Office of Management and Budget. However, 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, safety, or State, local, or tribal governments or communities. Accordingly, this rule is not an ''economically significant'' rulemaking as defined by Executive Order 12866.

This rule merely clarifies ATF's long-held position that hobby rocket motors and rocket-motor reload kits consisting of or containing APCP, black powder, or other similar low explosives, regardless of amount, do not fall within the ''propellant actuated device'' exception. The rule does not in any way expand the universe of rocket motors and rocket-motor reload kits that will remain subject to ATF regulation. Accordingly, unless they fall within ATF's exemption for rocket motors containing 62.5 grams or less of propellant, rocket motors will remain subject to all applicable federal explosives controls pursuant to 18 U.S.C. 841 *et seq.*, the regulations in part 555 of title 27 of the CFR, and applicable ATF policy.

Rocketry hobbyists who acquire and use motors containing 62.5 grams of propellant or less, however, may continue to enjoy their hobby on an exempt basis, i.e., without regard to the requirements of part 555. Without the 62.5 gram exemption, a typical rocket motor would be required to be stored in a type-4 magazine (costing approximately $400) because of the explosives contained in the motor. ATF has published a rule that incorporates its existing 62.5-gram exemption threshold into its explosives regulations. *See* 27 CFR 555.141(a)(10); Commerce in Explosives—Hobby Rocket Motors (2004R–7P); 71 FR 46079 (Aug. 11, 2006).

As noted above, rocket motors containing more than 62.5 grams of propellant will continue to be regulated by ATF. In 2002, Congress enacted the Safe Explosives Act (''SEA'') which, in part, imposed new licensing and permitting requirements on the intrastate possession of explosives. Under the SEA, all persons who wish to receive explosive materials must hold a Federal explosives license or permit. Prior to its enactment, only persons who transported, shipped, or received explosive materials in interstate commerce were required to obtain a license or permit. Now, intrastate receipt, shipment, and transportation also are covered. ATF recognizes that some rocketry hobbyists may have been operating under the false assumption that all rocket motors, regardless of size, were exempted from regulation under the ''propellant actuated device'' exception. However, rocketry hobbyists wishing to utilize rocket motors containing more than 62.5 grams of propellant must comply with the existing requirements in order to obtain such rocket motors. See also infra section V.D (discussing cost analysis pursuant to the Regulatory Flexibility Act).

B. Executive Order 13132

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

C. Executive Order 12988: Civil Justice Reform

This rule 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. 605(b), 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. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. The Attorney General has reviewed this rule and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. As indicated, the rule merely clarifies ATF's long-held position that hobby rocket motors and rocket-motor reload

kits consisting of or containing APCP, black powder, or other similar low explosives, regardless of amount, do not fall within the ''propellant actuated device'' exception and are subject to all applicable Federal explosives controls pursuant to 18 U.S.C. 841 *et seq.*, the regulations in part 555 of title 27 of the CFR, and applicable ATF policy. The Department believes that the rule will not have a significant impact on small businesses. Under the law and its implementing regulations, persons engaging in the business of manufacturing, importing, or dealing in explosive materials are required to be licensed (e.g., an initial fee of $200 for obtaining a dealer's license for a 3-year period; $100 renewal fee for a 3-year period). Other persons who acquire or receive explosive materials are required to obtain a permit. Licensees and permittees must comply with the provisions of part 555, including those relating to storage and other safety requirements, as well as recordkeeping and theft-reporting requirements. This will not change upon the effective date of this rule.

Rocket motors containing 62.5 grams or less of explosive propellants (*e.g.*, APCP) and reload kits that can be used only in the assembly of a rocket motor containing a total of no more than 62.5 grams of propellant are exempt from regulation, including permitting and storage requirements. Typically, rocket motors containing more than 62.5 grams of explosive propellant would be required to be stored in a type-4 magazine that costs approximately $400; however, this rule does not impact ATF's storage requirements, nor does it affect the applicability of ATF's 62.5-gram exemption.

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 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 of 1995

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

Disclosure

Copies of the notice of proposed rulemaking, all comments received in response to the NPRM, and this 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 555

Administrative practice and procedure, Authority delegations, Customs duties and inspection, Explosives, Hazardous materials, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, and Warehouses.

Authority and Issuance

■ Accordingly, for the reasons discussed in the preamble, 27 CFR part 555 is amended as follows:

PART 555—COMMERCE IN EXPLOSIVES

■ 1. The authority citation for 27 CFR part 555 continues to read as follows:

Authority: 18 U.S.C. 847.

■ 2. Section 555.11 is amended by revising the definition for ''Propellant actuated device'' to read as follows:

§ 555.11 Meaning of terms.

* * * * *

Propellant actuated device. (a) Any tool or special mechanized device or gas generator system that is actuated by a propellant or which releases and directs work through a propellant charge.

(b) The term does not include—

(1) Hobby rocket motors consisting of ammonium perchlorate composite propellant, black powder, or other similar low explosives, regardless of amount; and

(2) Rocket-motor reload kits that can be used to assemble hobby rocket motors containing ammonium perchlorate composite propellant, black powder, or other similar low explosives, regardless of amount.

* * * * *

Dated: January 7, 2009.

Michael B. Mukasey,

Attorney General.

[FR Doc. E9–578 Filed 1–13–09; 8:45 am]

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Parts 545 and 550

[Docket Nos. BOP–1093–F; BOP–1109–F; BOP–1139–F]

RIN 1120–AA88; RIN 1120–AB07; RIN 1120–AB41

Drug Abuse Treatment Program: Subpart Revision and Clarification and Eligibility of D.C. Code Felony Offenders for Early Release Consideration

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) finalizes three proposed rules on the drug abuse treatment program. Finalizing all three proposed rules together results in a more uniform and comprehensive revision of our drug abuse treatment program (DATP) regulations. Specifically, this amendment will streamline and clarify these regulations, eliminating unnecessary text and obsolete language, and removing internal agency procedures that need not be in rules text.

This rule clarifies the distinction between mandatory and voluntary participation in the drug abuse education course, removes eligibility limitations pertaining to cognitive impairments and learning disabilities, and addresses the effects of non-participation both in the drug abuse education course and in the residential drug abuse treatment program (RDAP). In this rule, we also add escape and attempted escape to the list of reasons an inmate may be expelled from the RDAP. Furthermore, in our regulation on considering inmates for early release, we remove obsolete language, add as ineligible for early release inmates with a prior felony or misdemeanor conviction for arson or kidnapping, and clarify that inmates cannot earn early release twice.

DATES: This rule is effective on March 16, 2009.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307–2105, e-mail *BOPRULES@BOP.GOV.*

SUPPLEMENTARY INFORMATION: In this document, the Bureau of Prisons (Bureau) finalizes three proposed rules. The first was published on September 20, 2000 (65 FR 56840) (the 2000 proposed rule), and the second was published on July 1, 2004 (69 FR 39887) (the 2004 proposed rule). The third, published on November 2, 2006, proposed to revise 28 CFR 550.55(a) of the 2004 proposed rule to extend early release consideration to D.C. Code felony offenders pursuant to D.C. Code § 24–403.01 (71 FR 64507) (the 2006 proposed rule).

In this rule, we merge the three proposed rules, which will result in a more uniform and comprehensive revision of our DATP regulations. We discuss our responses to comments received for the three proposed rules separately.

The 2000 Proposed Rule

The 2000 rule proposed amendments to requirements for the drug abuse education course and participation in the RDAP. In these rules, we finalize the changes we proposed with regard to the regulations on the Drug Abuse Education Course (new § 550.51), the institution RDAP (new § 550.53), eligibility for performance pay (new § 545.25), and incentives for participation (new § 550.54).

This rule clarifies the distinction between mandatory and voluntary participation in the drug abuse education course, removes eligibility limitations pertaining to cognitive impairments and learning disabilities, and addresses the effects of non-participation both in the drug abuse education course and in the institution RDAP.

For consistency, we also revise the consequences pertaining to work assignment pay in the provisions which pertain to the drug abuse education course. We amend our regulations on inmate work and performance pay (28 CFR 545, subpart C) to conform with these requirements.

Comments on the 2000 Proposed Rule

Non-U.S. citizen inmates. One commenter was concerned that we routinely deny access to the Drug Abuse Treatment Program (DATP) to ''non-U.S. citizens.'' The Bureau does not deny drug abuse treatment to inmates based on their citizenship. Instead, we offer several program options, such as a drug abuse education course or non-residential drug abuse treatment to inmates who have drug problems but who do not otherwise meet the admission criteria for the RDAP. These options are currently available for ''non-U.S. citizen'' inmates.

However, in light of the commenter's misunderstanding of our proposed rule, we do make a revision to clarify our intent. Section 550.53(b) stated that, ''[u]pon the expiration of their sentence, inmates are eligible to be transported only to the place of conviction or legal residence within the United States or its territories.'' We do not intend this section to be understood to exclude non-U.S. citizens. We intended only that participants must be capable of completing each of the three components of the RDAP program (the unit-based component, follow-up services, and the transitional drug abuse treatment component) when they begin the program. We have therefore clarified this language in the regulation.

Treatment for inmates who voluntarily participate. A commenter believed that the DATP incentives and program are limited to ''individuals who may not seek therapy otherwise,'' and asks us to ''include those inmates who have taken it up on [sic] themselves to seek therapy.''

This commenter mistakenly believes that we routinely deny participation to certain inmates. However, inmates who volunteer for the drug program and otherwise meet the admission requirements can enter the DATP. The program is not limited to only those inmates whom staff designate for treatment.

Delay in getting inmates into DATP. A commenter complained that inmates who wish to participate remain too long on waiting lists.

Currently, the Bureau has over 7000 inmates waiting for residential treatment that is provided with limited Bureau resources. Also, inmates are selected for admission based on their proximity to release. Unfortunately, these two factors result in some inmates being on the waiting list for a long time.

Drug abuse documentation. One commenter complained that it is unfair for inmates who want to participate in the drug abuse program to be rejected because ''drug abuse was not in their PSI or * * * they did not have documentation from a doctor.''

Because the early release is such a powerful incentive, as evidenced by over 7000 inmates waiting to enter treatment, the Bureau must take appropriate measures to ensure that inmates requesting treatment actually have a substance abuse problem that can be verified with documentation. For those inmates who want treatment but do not have the requisite documentation to enter the RDAP, non-residential counseling services are available and encouraged. However, because we find it necessary to require documentation of drug abuse problems as a criterion for RDAP participation, we are not altering this requirement in the final rule.

Adding other incentives. Finally, with regard to a regulation on incentives for program participation, which was proposed in the 2000 rule, two commenters requested that we add other possible incentives, such as vocational training. However, residential drug program completers are always encouraged to improve their educational and vocational training when possible. Vocational training, as an incentive, and enhancing skills in a trade are covered by other Bureau policies and regulations.

The commenters suggested possible ''incentives'' that are already part of other regulations which have other benefits for participation, such as the Bureau's Good Conduct Time regulations (28 CFR part 523), the Education regulations (28 CFR part 544), and Federal Prison Industries Inmate Work Programs (28 CFR part 345). Because we already provide these benefits in other regulations, we need not reiterate them or use them as incentives for drug abuse treatment.

Also, the commenters recommended that, if we were not going to provide the enhanced incentives they recommended, that the incentives proposed in the regulation should be eliminated. The commenters suggested that the incentives we proposed were essentially meaningless and did not provide real motivation to voluntarily participate in the program.

In anticipation of the incentives program, the Bureau conducted pilot programs to determine the usefulness of the enhanced incentives. As a follow up, we conducted focus groups of inmates at several institutions. The results of the pilot programs and the focus groups showed that the majority of inmates considered the enhanced incentives to be motivational. After internal deliberation, we have determined that the proposed incentives will encourage further inmate participation in the drug abuse treatment programs, contrary to the commenters' suggestions. We therefore retain the proposed new incentives in the final rule.

Further, these incentives work in tandem with new § 550.53(h)(1), which provides disincentives for non-completion. This section states that if

inmates refuse to participate in RDAP, withdraw, or are otherwise removed from RDAP, they are not eligible for furloughs (other than possibly an emergency furlough); performance pay above maintenance pay level, bonus pay, or vacation pay; and/or Federal Prison Industries work program assignments (unless the Warden makes an exception on the basis of work program labor needs).

Each of these three privileges are available for inmates to earn through various forms of good behavior, including participation in RDAP. It would be inconsistent to award an inmate a privilege in one area, such as a furlough, special pay, or special work assignment, if the inmate has demonstrated poor behavior in other areas, such as refusal, withdrawal, or removal from RDAP. The Bureau's furlough regulations state that an inmate is only eligible for a furlough if, among other things, the inmate ''has demonstrated sufficient responsibility to provide reasonable assurance that furlough requirements will be met'' (§ 570.34(d)). If an inmate refuses to participate in drug treatment, withdraws, or is removed from drug treatment, the inmate does not demonstrate the level of responsibility necessary to qualify for a furlough.

Additionally, the Bureau has similar disincentives in the literacy program: § 544.74 provides that inmates who do not participate as required in the literacy program may not earn incentive pay or receive special work assignments. Similarly, the disincentives provided in § 550.53(h)(1), work with the incentives described above to maximize encouragement of inmates to participate in drug abuse treatment as necessary.

The 2004 Proposed Rule

The 2004 proposed rule streamlined and clarified the regulations on the drug abuse treatment program, eliminating unnecessary text and obsolete language and removing internal agency procedures that need not be in rules text.

In this rule, we added escape and attempted escape to the list of reasons an inmate may be expelled from the Residential Drug Abuse Treatment Program (RDAP). We also clarified language describing ''withdrawal/expulsion'' by reorganizing and breaking block paragraphs into smaller subdivisions. Essentially, inmates will be removed from RDAP for the reasons given in § 550.53(g) because allowing the participation of inmates who commit serious prohibited acts involving the use of alcohol or drugs, violence or threats of violence, escape or attempted escape, or any of the highest severity (100-level series) prohibited acts, would undermine the spirit and intent of the Bureau's drug abuse treatment programs, minimize the seriousness of these offenses, and threaten the safety, security, and good order of the institution.

Further, the commission of these types of prohibited acts is a violation of the trust given to inmates who are admitted into RDAP. An inmate who is found to have committed any of these prohibited acts demonstrates a propensity to impede or disrupt not only his/her own progress in overcoming a drug abuse problem, but, potentially, the progress of other inmates who are making a true effort to succeed in the program. Providing such consequences for these types of prohibited acts would be greater disincentive to commit such acts.

Also in the 2004 proposed rule, we (1) deleted obsolete language, (2) added as ineligible for early release inmates with a prior felony or misdemeanor conviction for arson or kidnaping, and (3) clarified that inmates cannot earn an early release twice.

Title 18 U.S.C. 3621(e) provides the Director of the Bureau of Prisons the discretion to grant an early release of up to one year upon the successful completion of a residential drug abuse treatment program. The regulation [550.55(b)(4)(i)–(vii)] provides that an inmate who has a prior misdemeanor or felony conviction for homicide, forcible rape, robbery, aggravated assault, arson, kidnaping, or child sexual abuse will not be eligible for early release.

In exercising the Director's statutory discretion, we considered the crimes of homicide, forcible rape, robbery, aggravated assault, arson, and kidnaping, as identified in the FBI's Uniform Crime Reporting Program (UCR), which is a collective effort of city, county, state, tribal, and federal law enforcement agencies to present a nationwide view on crime. The definitions of these terms were developed for the National Incident-Based Reporting System and are identified in the UCR due to their inherently violent nature and particular dangerousness to the public.

The Director of the Bureau exercises discretion to deny early release eligibility to inmates who have a prior felony or misdemeanor conviction for these offenses because commission of such offenses rationally reflects the view that such inmates displayed readiness to endanger the public.

Likewise, we also deny early release eligibility to inmates who have a prior felony or misdemeanor conviction for an offense that involves sexual abuse committed against minors. Like the offenses identified in the UCR, sexual abuse offenses committed against minors exhibit a particular dangerousness to the public and often entail violent or threatening elements that resonate with victims and the community as a whole. Because of this, the Director has chosen to use his discretion to exclude offenders of these offenses from early release consideration.

The Director's rationale was mirrored by the enactment of the Adam Walsh Child Protection and Safety Act of 2006 (Walsh Act). The Walsh Act specifically expanded the definition of ''sex offense'' to include ''a criminal offense that is a specified offense against a minor'' and to include all offenses by ''child predators.'' Public Law 109–248, section 111, 120 Stat. 587, 591–92 (2006). The Walsh Act also expanded the National Sex Offender Registry by integrating the information in state sex offender registry systems to ensure that law enforcement has access to the same information across the United States. Section 113, 120 Stat. at 593–94; *see also* 2006 U.S.C.C.A.N. S35, S36. This evidences the intent of Congress to encompass any offense relating to minors that involves sexual conduct, and to limit public exposure, including early release opportunities, to inmates found to have these types of offenses in their backgrounds. We therefore deny early release eligibility to such inmates in conformance with Congressional intent and recognition of the seriousness of such offenses.

Also, in the new rule, we added language to exempt from early release consideration inmates who previously earned early release under 18 U.S.C. 3621(e) for the following reasons: As we stated in the preamble to the 2004 rule, Congress created the early release incentive to motivate drug-addicted inmates to enter residential drug abuse treatment who would not do so without this incentive. However, in our discretion, it is not appropriate to provide this incentive for inmates who completed RDAP, gained early release, but failed to remain drug and crime free. To provide this incentive to the same inmate twice would be counter to our drug treatment philosophy that inmates must be held accountable for their actions when released to the community. Allowing inmates the opportunity to receive early release twice would undermine the seriousness of the inmate's offense, and essentially benefit recidivists.

It is arguable that recidivists have additional needs for drug abuse treatment programming. We therefore note that such inmates may still receive drug treatment, even if they have already been through the Bureau's programs and received early release. This provision does not prevent an inmate from receiving further treatment programming. It simply removes early release as an incentive for further treatment.

Comments on the 2004 Proposed Rule

Award time off up to a year. One commenter recommended that the Bureau should, instead of giving a year off, award time off up to a year based on the inmate's level of dedication to their sobriety, as determined by a council consisting of the local DAP Coordinator and specialists.

In fact, we award time off of ''up to'' a year, based on several factors, including the inmate's level of dedication to sobriety. Title 18 U.S.C. 3621(e)(2)(B) gives the Bureau the discretion to reduce the period of incarceration for an inmate who successfully completes the drug abuse treatment program, but ''such reduction may not be more than one year.'' In § 550.55(c), we have chosen to exercise this discretion by awarding early release based on successful completion of the program, the length of sentence imposed by the Court, and fulfillment of the inmate's community-based treatment obligations by the presumptive release date.

In § 550.55(c)(2), we add language explaining that, under the Director's discretion allowed by 18 U.S.C. 3621(e), we may limit early release based upon the length of sentence imposed by the Court. We add this provision to adhere to the Court's intent in determining the length of the sentence. An early release of a substantial period of time (e.g., twelve months) for relatively short sentences would diminish the seriousness of the offense and unduly undercut the sentencing court's punitive intent, as manifested in the length of the sentence imposed.

Also, as part of a general review undertaken to measure successful completion of the treatment program, the Bureau takes into consideration the inmate's ''level of dedication to their sobriety,'' and the determination of successful completion of the treatment program is made by the local DAP coordinator and other specialists, just as the commenter recommends.

Allowing all inmates to participate in drug treatment. The second commenter recommended that all inmates, not just those qualifying under our early release regulation, be allowed to participate in the drug abuse treatment program and be eligible for and receive a year off.

Title 18 U.S.C. 3621(e) only authorizes the Bureau to extend drug abuse treatment participation and eligibility for early release to inmates with ''a substance abuse problem,'' not to all inmates. Although, by statute, inmates without a substance abuse problem may not have the opportunity for early release consideration, § 550.52 allows all inmates to participate in non-residential drug abuse treatment services. In the new rule, we remove several pre-existing eligibility requirements for the program to make it more inclusive.

Early release eligibility of inmates convicted of an offense involving a firearm. The second commenter also recommended that § 550.55(b)(5)(ii) be altered so that inmates convicted of an offense that involved the carrying or possession (but not use) of a firearm or other dangerous weapon or explosives would be eligible for early release consideration. The commenter further recommended that § 550.55(b)(5)(iii) be deleted, granting eligibility for early release consideration to inmates convicted of an offense that, by its nature or conduct, presents a serious potential risk of physical force against the person or property of another.

Under 18 U.S.C. 3621(e), the Bureau has the discretion to determine eligibility for early release consideration (*See Lopez* v. *Davis,* 531 U.S. 230 (2001)). The Director of the Bureau exercises discretion to deny early release eligibility to inmates who have a felony conviction for the offenses listed in § 550.55(b)(5)(i)–(iv) because commission of such offenses illustrates a readiness to endanger the public. Denial of early release to all inmates convicted of these offenses rationally reflects the view that, in committing such offenses, these inmates displayed a readiness to endanger another's life.

The Director of the Bureau, in his discretion, chooses to preclude from early release consideration inmates convicted of offenses involving carrying, possession or use of a firearm and offenses that present a serious risk of physical force against person or property, as described in § 550.55(b)(5)(ii) and (iii). Further, in the correctional experience of the Bureau, the offense conduct of both armed offenders and certain recidivists suggests that they pose a particular risk to the public. There is a significant potential for violence from criminals who carry, possess or use firearms. As the Supreme Court noted in *Lopez* v. *Davis,* ''denial of early release to all inmates who possessed a firearm in connection with their current offense rationally reflects the view that such inmates displayed a readiness to endanger another's life.'' *Id.* at 240. The Bureau adopts this reasoning. The Bureau recognizes that there is a significant potential for violence from criminals who carry, possess or use firearms while engaged in felonious activity. Thus, in the interest of public safety, these inmates should not be released months in advance of completing their sentences.

It is important to note that these inmates are not precluded from participating in the drug abuse treatment program. However, these inmates are not eligible for early release consideration because the specified elements of these offenses pose a significant threat of dangerousness or violent behavior to the public. This threat presents a potential safety risk to the public if inmates who have demonstrated such behavior are released to the community prematurely. Also, early release would undermine the seriousness of these offenses as reflected by the length of the sentence which the court deemed appropriate to impose.

The 2006 proposed rule. The proposed rule published in 2006 modified § 550.55(a) from the 2004 proposed rule to state that inmates may be eligible for early release by a period not to exceed twelve months if they were sentenced to a term of imprisonment under either 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense, or D.C. Code § 24–403.01 for a nonviolent offense, meaning an offense other than those in D.C. Code § 23–1331(4). There was no further change to the provisions in the 2004 rule.

The National Capital Revitalization and Self-Government Improvement Act of 1997, approved August 5, 1997, (Pub. L. 105–33; 111 Stat. 740) (''Revitalization Act'') dictates that D.C. Code felony offenders ''shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed, and the Bureau of Prisons shall be responsible for the custody, care, subsistence, education, treatment and training of such persons.'' D.C. Code § 24–101(b). Therefore, as with federal offenders, it is also within the Director's discretion, as provided by 18 U.S.C. 3621(e), to determine D.C. Code felony offenders' eligibility for early release according to the same criteria used for federal offenders.

Comments on the 2006 Proposed Rule

We received three comments to the 2006 proposed rule. One was in support of the regulation. We address issues raised by the other two commenters below.

One commenter was concerned that there existed ''literal disparity between the regulation as proposed and the plain language'' of the D.C. Code, suggesting that § 550.55(a)(1)(ii) ''track the statutory language of D.C. Code section 24–403.01(d)(2) so as to prevent any current and more likely future conflict and confusion.''

Section 550.55(a)(1)(ii) states that inmates may be eligible for early release by a period not to exceed twelve months if they were sentenced to a term of imprisonment ''under D.C. Code § 24–403.01 for a nonviolent offense, meaning an offense other than those in D.C. Code § 23–1331(4).'' D.C. Code § 23–1331(4) begins with the phrase ''(4) The term 'crime of violence' means'' and then lists crimes that would constitute crimes of violence.

The Bureau's regulation language at § 550.55(a)(1)(ii) is ''offense other than those in D.C. Code § 23–1331(4).'' The commenter wishes us to change this to ''offense other than those included within the definition of 'crime of violence' in D.C. Code § 23–1331(4),'' to more closely track the language of D.C. Code § 24–403.01. We have changed this language accordingly.

The second commenter was concerned that ''[a]llowing the DC [sic] Superior Court inmates to get time off will only increase the number of serious attitude inmates in the program. These will be additional inmates who will not be expelled from the program for misconduct or lack of programming because it will mess up the statistics.''

While the Revitalization Act authorizes the Bureau to expand the early release option to include D.C. Code felony offenders in Bureau custody, eligibility for participation in the Bureau's drug abuse treatment programs remains the same. In other words, any inmate with a verified substance use disorder (§ 550.53(b)(1)) can be placed on the waiting list to receive drug treatment, but they will not receive early release unless they are eligible for that incentive. D.C. Code felony offenders are now eligible under the statute to receive early release for participation in drug treatment. Therefore, this regulation will result in D.C. Code felony offenders having a greater incentive for participation because of the new applicability of the early release option. For that reason, the number of D.C. Code felony offenders eligible for participation in the program may increase, but despite that, the Bureau does not anticipate significant change to any misconduct in the program or increase in other issues related to the program.

The Revitalization Act dictates that D.C. Code felony offenders ''shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed, and the Bureau of Prisons shall be responsible for the custody, care, subsistence, education, treatment and training of such persons.'' D.C. Code section 24–101(b).

D.C. Code § 24–403.01(d-1), amended on May 24, 2005, states that D.C. Code felony offenders sentenced under D.C. Code § 24–403.01 for a nonviolent offense are eligible for early release consideration in accordance with 18 U.S.C. 3621(e)(2). Accordingly, the Director now extends early release eligibility pursuant to 18 U.S.C. 3621(e)(2) to D.C. Code felony offenders for successful completion of the RDAP.

Second Chance Act Changes

The Second Chance Act of 2007, approved April 9, 2008, (Pub. L. 110–199; 122 Stat. 657) (''Second Chance Act''), section 231(a)(2)(A), states that, ''incentives for a prisoner who participates in reentry and skills development programs * * * may, at the discretion of the Director, include * * * the maximum allowable period in a community confinement facility.'' Further, section 251 of the Second Chance Act amends 18 U.S.C. 3624(c) to require that the Director must, ''to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed twelve months), under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.''

The Second Chance Act, section 251, also amends 18 U.S.C. 3624(c)(6) to require the Bureau to issue regulations reflecting these provisions ''not later than 90 days after the date of the enactment of the Second Chance Act of 2007 * * *.'' In compliance with the Second Chance Act requirement regarding the timely issuance of revised regulations, we make the following two changes to the final regulation text. Both of these changes will be beneficial to inmates, as they will allow the Bureau to consider potentially longer periods of community confinement than previously contemplated by these regulations.

First, we remove a reference in § 550.53(h)(1)(ii) which stated that an inmate who is expelled from the RDAP, withdraws from the RDAP, or refuses to participate, is not eligible for ''[m]ore than 90 days community-based program placement.'' Because section 251 of the Second Chance Act contemplates a maximum allowable time of up to twelve months, we add a new provision (subparagraph (2)) which states that refusal, withdrawal, and/or expulsion will be a factor to consider in determining length of community confinement. This conforms with the Second Chance Act, section 231 (a)(2)(A). We also make a conforming change to remove § 550.51(e)(1)(iii), which lists ineligibility for ''community programs'' as a consequence of non-participation in the drug abuse treatment course. The possibility of community confinement is a strong motivation for inmates to participate in drug treatment programs, as emphasized by several inmate comments to the previous proposed rules. Conversely, having a limitation imposed on community confinement as a possible consequence would strongly deter inmates from negative behavior which could jeopardize the effectiveness of their drug treatment.

Second, we remove a parenthetical reference in § 550.54(a)(1)(ii) which states that the ''maximum period of time'' allowable ''in a community-based treatment program'' is 180 days. This reference also conflicted with section 251 of the Second Chance Act, as explained above.

Additionally, section 252 of the Second Chance Act amended 18 U.S.C. 3621(e)(5)(A) to describe residential drug abuse treatment as ''a course of individual and group activities and treatment, lasting at least 6 months * * *.'' Section 252 therefore authorizes the Bureau to offer a residential drug abuse treatment course lasting ''at least six months,'' but leaves it in the discretion of the Director whether to expand it beyond six months. We therefore alter § 550.53 (a)(1) to conform to the specific language of the Second Chance Act. That regulation will reflect that the unit-based component of the residential drug abuse treatment program should last for ''at least six months.''

Technical Change

We make one minor change to § 550.51, regarding drug abuse education course placement. In § 550.51(b)(3)(iii), we previously indicated that inmates may not be considered for course placement if they complete a structured drug abuse

treatment program at one of the Bureau's Intensive Confinement Centers (ICC). However, we published a final rule on July 11, 2008 (73 FR 39863) which removed Bureau rules on the intensive confinement center program (ICC). The ICC was a specialized program for non-violent offenders combining features of a military boot camp with traditional Bureau correctional values. Discontinuing this program was a decision made as part of an overall strategy to eliminate programs that do not reduce recidivism. Because the Bureau is no longer offering the ICC program (also known as Shock Incarceration or Boot Camp) to inmates as a program option, we remove it from the list of reasons that render inmates ineligible for the drug abuse treatment course.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review,'' section 1(b), Principles of Regulation. The Director, Bureau of Prisons has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this rule does not have sufficient federalism implications for which we would prepare a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation. By approving it, the Director certifies that it will not have a significant economic impact upon a substantial number of small entities because: This rule is about the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not cause State, local and tribal governments, or the private sector, to spend $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. We do not need to take action under the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 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.

List of Subjects

28 CFR Part 545

Employment, Prisoners.

28 CFR Part 550

Prisoners.

Harley G. Lappin,
Director, Bureau of Prisons.

■ Under the rulemaking authority vested in the Attorney General in 5 U.S.C. 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we amend 28 CFR parts 545 and 550 as follows:

PART 545—WORK AND COMPENSATION

■ 1. The authority citation for 28 CFR part 545 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3013, 3571, 3572, 3621, 3622, 3624, 3663, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4126, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

■ 2. In § 545.25, revise paragraph (d) to read as follows:

§ 545.25 Eligibility for performance pay.

* * * * *

(d) An inmate who refuses participation, withdraws, is expelled, or otherwise fails attendance requirements of the drug abuse education course or the RDAP is subject to the limitations specified in § 550.51(e) or § 550.53(g) of this chapter.

* * * * *

PART 550—DRUG PROGRAMS

■ 3. The authority citation for part 550 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3521–3528, 3621, 3622, 3624, 4001, 4042, 4046, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 21 U.S.C. 848; 28 U.S.C. 509, 510; Title V, Pub. L. 91–452, 84 Stat. 933 (18 U.S.C. Chapter 223).

Subpart F—Drug Abuse Treatment Program

■ 4. Revise Subpart F to read as follows:

Sec.
550.50 Purpose and scope.
550.51 Drug abuse education course.
550.52 Non-residential drug abuse treatment services.
550.53 Residential Drug Abuse Treatment Program (RDAP).
550.54 Incentives for RDAP participation.
550.55 Eligibility for early release.
550.56 Community Transitional Drug Abuse Treatment Program (TDAT).
550.57 Inmate appeals.

§ 550.50 Purpose and scope.

The purpose of this subpart is to describe the Bureau's drug abuse treatment programs. All Bureau institutions have a drug abuse treatment specialist who, under the Drug Abuse Program Coordinator's supervision, provides drug abuse education and non-residential drug abuse treatment services to the inmate population. Institutions with residential drug abuse treatment programs (RDAP) should have additional drug abuse treatment specialists to provide treatment services in the RDAP unit.

§ 550.51 Drug abuse education course.

(a) *Purpose of the drug abuse education course.* All institutions provide a drug abuse education course to:

(1) Inform inmates of the consequences of drug/alcohol abuse and addiction; and

(2) Motivate inmates needing drug abuse treatment to apply for further drug abuse treatment, both while incarcerated and after release.

(b) *Course placement.* (1) Inmates will get primary consideration for course placement if they were sentenced or returned to custody as a violator after September 30, 1991, when unit and/or drug abuse treatment staff determine, through interviews and file review that:

(i) There is evidence that alcohol or other drug use contributed to the commission of the offense;

(ii) Alcohol or other drug use was a reason for violation either of supervised release (including parole) or Bureau community status;

(iii) There was a recommendation (or evaluation) for drug programming during incarceration by the sentencing judge; or

(iv) There is evidence of a history of alcohol or other drug use.

(2) Inmates may also be considered for course placement if they request to participate in the drug abuse education program but do not meet the criteria of paragraph (b)(1) of this section.

(3) Inmates may not be considered for course placement if they:

(i) Do not have enough time remaining to serve to complete the course; or

(ii) Volunteer for, enter or otherwise complete a RDAP.

(c) *Consent.* Inmates will only be admitted to the drug abuse education course if they agree to comply with all Bureau requirements for the program.

(d) *Completion.* To complete the drug abuse education course, inmates must attend and participate during course sessions and pass a final course exam. Inmates will ordinarily have at least three chances to pass the final course exam before they lose privileges or the effects of non-participation occur (see paragraph (e) of this section).

(e) *Effects of non-participation.* (1) If inmates considered for placement under paragraph (b)(1) of this section refuse participation, withdraw, are expelled, or otherwise fail to meet attendance and examination requirements, such inmates:

(i) Are not eligible for performance pay above maintenance pay level, or for bonus pay, or vacation pay; and

(ii) Are not eligible for a Federal Prison Industries work program assignment (unless the Warden makes an exception on the basis of work program labor needs).

(2) The Warden may make exceptions to the provisions of this section for good cause.

§ 550.52 Non-residential drug abuse treatment services.

All institutions must have non-residential drug abuse treatment services, provided through the institution's Psychology Services department. These services are available to inmates who voluntarily decide to participate.

§ 550.53 Residential Drug Abuse Treatment Program (RDAP).

(a) *RDAP.* To successfully complete the RDAP, inmates must complete each of the following components:

(1) *Unit-based component.* Inmates must complete a course of activities provided by drug abuse treatment specialists and the Drug Abuse Program Coordinator in a treatment unit set apart from the general prison population. This component must last at least six months.

(2) *Follow-up services.* If time allows between completion of the unit-based component of the RDAP and transfer to a community-based program, inmates must participate in the follow-up services to the unit-based component of the RDAP.

(3) *Transitional drug abuse treatment (TDAT) component.* Inmates who have completed the unit-based program and (when appropriate) the follow-up treatment and are transferred to community confinement must successfully complete community-based drug abuse treatment in a community-based program to have successfully completed RDAP. The Warden, on the basis of his or her discretion, may find an inmate ineligible for participation in a community-based program.

(b) *Admission criteria.* Inmates must meet all of the following criteria to be admitted into RDAP.

(1) Inmates must have a verifiable substance use disorder.

(2) Inmates must sign an agreement acknowledging program responsibility.

(3) When beginning the program, the inmate must be able to complete all three components described in paragraph (a) of this section.

(c) *Application to RDAP.* Inmates may apply for the RDAP by submitting requests to a staff member (ordinarily, a member of the unit team or the Drug Abuse Program Coordinator).

(d) *Referral to RDAP.* Inmates will be identified for referral and evaluation for RDAP by unit or drug treatment staff.

(e) *Placement in RDAP.* The Drug Abuse Program Coordinator decides whether to place inmates in RDAP based on the criteria set forth in paragraph (b) of this section.

(f) *Completing the unit-based component of RDAP.* To complete the unit-based component of RDAP, inmates must:

(1) Have satisfactory attendance and participation in all RDAP activities; and

(2) Pass each RDAP testing procedure. Ordinarily, we will allow inmates who fail any RDAP exam to retest one time.

(g) *Expulsion from RDAP.* (1) Inmates may be removed from the program by the Drug Abuse Program Coordinator because of disruptive behavior related to the program or unsatisfactory progress in treatment.

(2) Ordinarily, inmates must be given at least one formal warning before removal from RDAP. A formal warning is not necessary when the documented lack of compliance with program standards is of such magnitude that an inmate's continued presence would create an immediate and ongoing problem for staff and other inmates.

(3) Inmates will be removed from RDAP immediately if the Discipline Hearing Officer (DHO) finds that they have committed a prohibited act involving:

(i) Alcohol or drugs;

(ii) Violence or threats of violence;

(iii) Escape or attempted escape; or

(iv) Any 100-level series incident.

(4) We may return an inmate who withdraws or is removed from RDAP to his/her prior institution (if we had transferred the inmate specifically to participate in RDAP).

(h) *Effects of non-participation.* (1) If inmates refuse to participate in RDAP, withdraw, or are otherwise removed, they are not eligible for:

(i) A furlough (other than possibly an emergency furlough);

(ii) Performance pay above maintenance pay level, bonus pay, or vacation pay; and/or

(iii) A Federal Prison Industries work program assignment (unless the Warden makes an exception on the basis of work program labor needs).

(2) Refusal, withdrawal, and/or expulsion will be a factor to consider in determining length of community confinement.

(3) Where applicable, staff will notify the United States Parole Commission of inmates' needs for treatment and any failure to participate in the RDAP.

§ 550.54 Incentives for RDAP participation.

(a) An inmate may receive incentives for his or her satisfactory participation in the RDAP. Institutions may offer the basic incentives described in paragraph (a)(1) of this section. Bureau-authorized institutions may also offer enhanced incentives as described in paragraph (a)(2) of this section.

(1) *Basic incentives.* (i) Limited financial awards, based upon the inmate's achievement/completion of program phases.

(ii) Consideration for the maximum period of time in a community-based treatment program, if the inmate is otherwise eligible.

(iii) Local institution incentives such as preferred living quarters or special recognition privileges.

(iv) Early release, if eligible under § 550.55.

(2) *Enhanced incentives.* (i) Tangible achievement awards as permitted by the Warden and allowed by the regulations governing personal property (see 28 CFR part 553).

(ii) Photographs of treatment ceremonies may be sent to the inmate's family.

(iii) Formal consideration for a nearer release transfer for medium and low security inmates.

(b) An inmate must meet his/her financial program responsibility obligations (see 28 CFR part 545) and GED responsibilities (see 28 CFR part 544) before being able to receive an incentive for his/her RDAP participation.

(c) If an inmate withdraws from or is otherwise removed from RDAP, that inmate may lose incentives he/she previously achieved.

§ 550.55 Eligibility for early release.

(a) *Eligibility.* Inmates may be eligible for early release by a period not to exceed twelve months if they:

(1) Were sentenced to a term of imprisonment under either:

(i) 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense; or

(ii) D.C. Code § 24–403.01 for a nonviolent offense, meaning an offense other than those included within the definition of ''crime of violence'' in D.C. Code § 23–1331(4); and

(2) Successfully complete a RDAP, as described in § 550.53, during their current commitment.

(b) *Inmates not eligible for early release.* As an exercise of the Director's discretion, the following categories of inmates are not eligible for early release:

(1) Immigration and Customs Enforcement detainees;

(2) Pretrial inmates;

(3) Contractual boarders (for example, State or military inmates);

(4) Inmates who have a prior felony or misdemeanor conviction for:

(i) Homicide (including deaths caused by recklessness, but not including deaths caused by negligence or justifiable homicide);

(ii) Forcible rape;

(iii) Robbery;

(iv) Aggravated assault;

(v) Arson;

(vi) Kidnaping; or

(vii) An offense that by its nature or conduct involves sexual abuse offenses committed upon minors;

(5) Inmates who have a current felony conviction for:

(i) An offense that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another;

(ii) An offense that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device);

(iii) An offense that, by its nature or conduct, presents a serious potential risk of physical force against the person or property of another; or

(iv) An offense that, by its nature or conduct, involves sexual abuse offenses committed upon minors;

(6) Inmates who have been convicted of an attempt, conspiracy, or other offense which involved an underlying offense listed in paragraph (b)(4) and/or (b)(5) of this section; or

(7) Inmates who previously received an early release under 18 U.S.C. 3621(e).

(c) *Early release time-frame.* (1) Inmates so approved may receive early release up to twelve months prior to the expiration of the term of incarceration, except as provided in paragraphs (c)(2) and (3) of this section.

(2) Under the Director's discretion allowed by 18 U.S.C. 3621(e), we may limit the time-frame of early release based upon the length of sentence imposed by the Court.

(3) If inmates cannot fulfill their community-based treatment obligations by the presumptive release date, we may adjust provisional release dates by the least amount of time necessary to allow inmates to fulfill their treatment obligations.

§ 550.56 Community Transitional Drug Abuse Treatment Program (TDAT).

(a) For inmates to successfully complete all components of RDAP, they must participate in TDAT in the community. If inmates refuse or fail to complete TDAT, they fail the RDAP and are disqualified for any additional incentives.

(b) Inmates with a documented drug abuse problem who did not choose to volunteer for RDAP may be required to participate in TDAT as a condition of participation in a community-based program, with the approval of the Transitional Drug Abuse Program Coordinator.

(c) Inmates who successfully complete RDAP and who participate in transitional treatment programming at an institution must participate in such programming for at least one hour per month.

§ 550.57 Inmate appeals.

Inmates may seek formal review of complaints regarding the operation of the drug abuse treatment program by using administrative remedy procedures in 28 CFR part 542.

[FR Doc. E9–593 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–05–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–1031; FRL–8754–7]

Approval and Promulgation of Air Quality Implementation Plans; Utah's Emission Inventory Reporting Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving State Implementation Plan (SIP) revisions submitted by the State of Utah on September 7, 1999, and December 1, 2003. The revisions add the requirements of EPA's Consolidated Emission Reporting Rule (CERR) to the State's SIP.

Utah has submitted four SIPs that relate to today's action on the CERR requirements. The State of Utah submitted a SIP revision on September 20, 1999, which did not make any substantive changes, but adopted a re-organization and renumbering of the air quality regulations. Although EPA is not acting on this particular submittal, EPA is approving and incorporating by reference rules using this new numbering scheme. Approving these rules rather than the earlier version will avoid confusion to the public and will obviate the need for future SIP revisions merely to renumber the SIP. In the remainder of this notice, we will refer to the rules by their current numbers, as reflected in the September 20, 1999 submittal, unless the context dictates otherwise.

EPA is acting on the submittal of September 7, 1999, which addresses inventory requirements for emissions from landfills. EPA is approving only the emission inventory requirement for larger landfills, located at Utah Rule R307–221–1 under the State's new numbering system. As emissions from these larger landfills may exceed the emission reporting thresholds addressed in the CERR, Utah must include this information in its emission inventory report to EPA. The remainder of the September 7, 1999 revisions do not affect the State's ability to comply with the CERR; therefore, EPA is not acting on them.

The Governor submitted additional revisions to their air quality emission inventory rules on October 23, 2000, which addressed inventory requirements for ammonia emissions. These revisions are contrary to the CERR issued on June 10, 2002 and,

therefore, EPA is not acting on the October 23, 2000 SIP.

The December 1, 2003 submittal adopted the requirements of the CERR by way of revisions to Utah Rule R307–150. In this action, we are approving and incorporating by reference Utah Rule R307–150, with the exception of two of its subparts, R307–150–4 and R308–150–8. EPA is *not* approving and incorporating R307–150–4 because it addresses inventory requirements for the Regional Haze State Implementation Plan and the Regional Haze regulatory requirements have changed since the 2003 submission. EPA is also not approving R307–150–8, which exempts specific Hazardous Air Pollutants (HAPs) from being reported in emission inventories if the amount of the emissions falls below a specific limit. EPA is not acting on this part of the submittal because the CERR does not require that HAPs emissions be reported to EPA.

The intended effect of today's action is to approve only those portions from the State's submittals that add CERR requirements. This action is being taken under section 110 of the Clean Air Act.

DATES: This rule is effective on March 16, 2009 without further notice, unless EPA receives adverse comment by February 13, 2009. If adverse comment is received, EPA will publish a timely withdrawal of this direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2007–1031, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: videtich.callie@epa.gov* and *komp.mark@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** section if you are faxing comments).
- *Mail:* Callie Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Callie Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2007–1031. 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. For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at 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:
Mark Komp, Air Program, 1595 Wynkoop Street, Mailcode: 8P-AR, Denver, Colorado 80202–1129, (303) 312–6022, *komp.mark@epa.gov.*

SUPPLEMENTARY INFORMATION:

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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 *Utah* mean the State of Utah, unless the context indicates otherwise.

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Background of State's Submittals

The Consolidated Emission Reporting Rule (CERR), 40 CFR 51, simplifies and consolidates emission inventory reporting requirements for the statewide reporting of ammonia (NH_3), carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO_X), particulate matter (PM_{10} and $PM_{2.5}$), sulfur dioxide (SO_2) and volatile organic compounds (VOC) for point, nonpoint and mobile source emissions. Many State and local agencies asked EPA to develop the CERR in an effort to consolidate reporting requirements, increase the efficiency of emission inventory programs, and provide for more consistent and uniform data. The CERR was published on June 10, 2002 (67 FR 39602). States were required to begin reporting emissions released during calendar year 2002. Thereafter, States are required to report large point source emissions annually and small point, nonpoint and mobile emissions every three years.

We asked the State of Utah in our letter dated October 15, 2002 to update its emission reporting requirements to meet those specified in the CERR. We also asked the State to withdraw earlier SIP submittals regarding emission reporting requirements because the earlier submittals may have had conflicting requirements compared to those found in the CERR. The State complied with our request by using parts of earlier submittals and a subsequent SIP revision submittal in order to comply with the CERR. It is these submittals that EPA is acting on today.

III. EPA Analysis of State's Submittals

We address four Utah SIP submittals in today's action:

- September 7, 1999 submittal, which consists of Utah's original revisions to the rules for collecting inventories of air pollution emissions prior to the issuance of the CERR;
- September 20, 1999 submittal, which consists of a reorganization of all Utah's air quality rules and represents no substantive change in Utah's regulations with regard to the CERR;
- October 23, 2000 submittal, which deleted Utah's required reporting of NH_3 emissions; and
- December 1, 2003 submittal, which consists of Utah's revisions to its rule for emission inventories incorporating the requirements of the CERR.

We note that in this action we are approving and incorporating by reference rules that were re-numbered and re-titled in the Governor's reorganization submittal of September 20, 1999 as these represent the current version of the State rule. The air program regulations were previously numbered R307–1 through R307–410 are now located at Rules R307–100 through R307–800. Approving these rules rather than the earlier version will avoid confusion to the public and will obviate the need for a future SIP revision merely to re-number the regulations. Though we are not acting on the submittal itself, in this notice we will refer to the rule by its current numbers as reflected in the September 20, 1999 SIP submittal, unless the context dictates otherwise.

On September 7, 1999, the State of Utah submitted Utah Air Quality Emission Inventory Rules R307–150, R307–155, R307–158 and R307–221, which address emissions from landfills and together comprise a re-numbered and re-titled version of Rules R307–1–2, R307–1–3 and R307–21. The State's September 20, 1999 submittal showed Rules R307–150, R307–155, R307–158 and R307–221 are identical to the text of the re-titled and re-numbered version of Rule R307–1–2, R307–1–3 and R307–21. The State submitted additional revisions to their air quality emission inventory rules on October 23, 2000, which deleted the requirement for emissions reporting of ammonia, located at Utah Rule 307–150–1, –3, and –4. In light of the CERR, the State replaced these revisions with its December 1, 2003 submittal. The December 1, 2003 submittal repealed rules R307–155 and R307–158 and amended Rule 307–150. Of these submittals, we are approving and incorporating by reference only Rules 307–150–1,–2,–3,–5,–6, and –7 (general emission inventory requirements) and R307–221–1 (emission inventory requirements for larger landfills) because they comprise the current version of the State rules that address the CERR requirements.

On September 7, 1999, the State of Utah submitted to EPA a revision to Utah Rule R307–150 (originally Utah Rule R307–1–2 and R307–1–3) which included changes regarding the general applicability, reporting, timing of submittals and recordkeeping requirements for emission inventories as required by federal rule under 40 CFR 51. In the same submittal, Utah revised its rules regarding emission inventory preparation and reporting for hazardous air pollutants (Rule R307–155 and R307–158). The revisions required that all sources of VOC that emit 10 tons per year or more and sources that emit 25 tons per year or more of NO_X in Utah and Weber counties must report to the State. Utah also revised Rule R307–221–1 regarding emission inventories for municipal solid waste landfills requiring that inventories be prepared for landfills with a design capacity greater than or equal to 2,755,750 tons in accordance with the general emission inventory requirements of Utah Rule R307–150.

Within the September 7, 1999 submittal, EPA is approving only the emission inventory requirement for landfills located at Utah Rule R307–221–1 under the State's new numbering system since emissions from larger landfills may exceed the reporting thresholds addressed in the CERR and, therefore, require their inclusion in Utah's emission inventory report to EPA. EPA is not acting on the remainder of the September 7, 1999 revision since they do not affect the State's ability to comply with the CERR, the purpose of today's action.

On October 23, 2000, Utah submitted another revision to Utah Rule 307–150, which governs emission inventories. The State deleted all provisions that required the reporting of NH_3 emissions, which were located in Utah Rule 307–150–1, –3, and –4. The State's reasoning at the time was that NH_3 emissions amounted to less than two percent of total emissions from industrial sources and, thus, there was no need to require point sources to submit the information.

EPA never took action on the October 23, 2000 submittal from the State due to the fact that the May 23, 2000 proposed rule for the CERR (65 FR 33268) specified that all states must document NH_3 emissions as part of their emission inventory.

EPA waited for the CERR to become final before taking action on Utah's October 23, 2000 submittal. On June 10, 2002, EPA published the final rule for the CERR (67 FR 39602). In our letter dated October 15, 2002, we advised Utah of its need to update its emission inventory reporting requirements to meet those specified in the CERR. We asked the State to withdraw the October

23, 2000 submittal because it was now contrary to the CERR.

Before EPA could take action on the October 23, 2000 submittal, the State submitted on December 1, 2003 a revision to its State SIP that changed its emission inventory requirements. This submittal replaced the emission inventory requirements in the October 20, 2000 submittal and it is for this reason that we are acting only on the December 1, 2003 submittal. In this revision, the State rewrote Utah Rule R307–150 to incorporate CERR requirements. The State also consolidated all inventory collection requirements into Utah Rule R307–150 and, as a result, repealed Utah Rules R307–155 and R307–158, where the prior inventory requirements were located. EPA is approving the version of Utah Rule R307–150–1,–2,–3,–5,–6, and –7, (but not –4 and –8) and the repeal of Utah R307–155 and Utah R307–158 as they appear in the State's December 1, 2003 submittal as meeting the requirements of the CERR.

The December 1, 2003 revision also included inventory requirements for the Regional Haze State Implementation Plan, which we are not acting on in this action. Specifically, Utah Rule R307–150–4 adopts reporting requirements for stationary sources in Utah to determine whether sulfur dioxide emissions remain below the SO_2 milestones established in the State Implementation Plan for Regional Haze. EPA is *not* acting on the provisions described in Utah Rule R307–150–4 in the December 1, 2003 submittal, as the Regional Haze regulatory requirements have changed since the 2003 submission. We promulgated revisions to the Regional Haze Rule in response to the court's opinion in *Center for Energy and Economic Development (CEED)* v. *EPA*, 398 F. 3d 653 (DC Cir. 2005). Those revisions impacted the method for Section 309 States to use to demonstrate that the milestones in their alternative program provide for better reasonable progress than best available retrofit technology (BART). Rather than act on the 2003 submittal, EPA will wait for Utah's regulations that address the revisions to the Regional Haze Rule.

Utah Rule R307–150–8 exempts specific Hazardous Air Pollutants (HAPs) emissions from being reported to the State if the HAPs emissions were emitted in amounts less than a specific amount. EPA is *not* acting on this section of Utah Rule R307–150 since the CERR does not require that HAPs emissions be reported to EPA.

Finally, Utah in its December 1, 2003 submittal moved its definition of ''chargeable pollutant'' from Utah Rule R307–415–9 to Utah Rule R307–101–2. The State's reasoning was to apply the definition to all sources subject to emission inventory requirements rather than limit the definition applicability to sources subject to the Title V Operating Permit program, described in Utah Rule R307–415–9. Moving the definition to Utah Rule R307–101–2 would provide for its application to all sources. EPA is not acting on this because EPA's approval is not needed and the revision does not affect the State's ability to comply with the CERR.

IV. Consideration of Section 110(l) of the CAA

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 toward attainment of the National Ambient Air Quality Standards (NAAQS) or any other applicable requirement of the Act. The Utah SIP revisions that are subjects of this document do not interfere with attainment of the NAAQS or any other applicable requirement of the Act. The September 7, 1999, and December 1, 2003 submittals EPA is acting on revise requirements for developing and submitting emission inventories by the State to EPA. As a result, they provide the ability to better explain to the public and regulated community the positive aspects of a consistent inventory program. It also provides public documentation of a source's emissions. Disclosure of emissions will provide sources with significant incentives to minimize their emissions, comply with their emission limits, and protect the NAAQS and increments. Therefore, section 110(l) requirements are satisfied.

V. Final Action

For the reasons expressed above, we are approving the following portions of Utah's submittals outlined in this action.

• Utah's Rule R307–221–1 as submitted to EPA on September 7, 1999

• Utah's Rule R307–150–1,–2,–3,–5,–6, and –7 (but not –4 and –8) and the repeal of Utah Rule R307–155 and Utah Rule R307–158 in their entirety as submitted December 1, 2003.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the ''Proposed Rules'' section of today's **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective March 16, 2009 without further notice unless the Agency receives adverse comments by February 13, 2009. If the EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

VI. Statutory and Executive Order Reviews

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

• Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide EPA with the discretionary authority to address, 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 March 16, 2009. 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 monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting, Emission inventory and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 24, 2008.

Stephen S. Tuber,

Acting Regional Administrator, Region 8.

PART 52—[AMENDED]

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

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

Subpart TT—Utah

■ 2. Section 52.2320 is amended by adding paragraph (c)(68) to read as follows:

§ 52.2320 Identification of plan.

* * * * *

(c) * * *

(68) On September 7, 1999 and December 1, 2003 the State of Utah submitted revisions to its State Implementation Plan (SIP) to incorporate the requirements of the Consolidated Emission Reporting Rule (CERR). The revisions update the State's emission reporting rules so that they are consistent with the revisions EPA made to the CERR on June 10, 2002.

(i) Incorporation by reference.

(A). Title R307 of the Utah Administrative Code, Rule 307–221 EMISSION STANDARDS: EMISSION CONTROLS FOR EXISTING MUNICIPAL SOLID WASTE LANDFILLS, Rule 307–221–1, Purpose and Applicability. Effective January 7, 1999. Published in the Utah State Bulletin, Volume 98, Number 22, November 15, 1998.

(B). Title R307 of the Utah Administrative Code, Rule 307–150 EMISSION INVENTORIES, Rule 150–1, Purpose and General Requirements; Rule 150–2 Definitions; Rule 150–3 Applicability; Rule 307–150–5 Sources Identified in R307–150–3(2); Rule 307–150–6 Sources Identified in R307–150–3(3); Rule 307–150–7 Sources Identified in R307–150–3(4). Effective December 31, 2003. Published in the Utah State Bulletin, Volume 23, Number 23, December 1, 2003.

(ii) Additional Material.

(A) October 15, 2002 letter from Richard Long, EPA Region VIII to Rick Sprott, Director, Utah Division of Air Quality (UDAQ) notifying UDAQ of the June 10, 2002 publication of the Consolidated Emission Reporting Rule (40 CFR Part 51, Subpart A) and the need for the State to update its emission inventory reporting requirements.

[FR Doc. E9–520 Filed 1–13–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2007–0524; FRL–8758–7]

Approval and Promulgation of Air Quality Implementation Plans; Texas; Attainment Demonstration for the Dallas/Fort Worth 1997 8-Hour Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; conditional approval and full approval.

SUMMARY: The EPA is conditionally approving the Dallas/Fort Worth (DFW) 1997 8-hour ozone State Implementation Plan (SIP) revisions submitted on May 30, 2007 and November 7, 2008, as supplemented on April 23, 2008. This final conditional approval action is for the attainment demonstration SIP, which includes the 2009 attainment Motor Vehicle Emissions Budgets (MVEBs), the Reasonably Available Control Measures (RACM) demonstration, and the failure-to-attain contingency measures plan. The approval is conditioned upon Texas adopting and submitting to EPA prior to March 1, 2009, a complete SIP revision to limit the use of Discrete Emission Reduction Credits (DERCs), beginning in March 2009. If the State meets its commitment to submit the DERC SIP revision, EPA will undertake additional rulemaking action on the approvability of the DERC SIP revision and, if EPA approves that SIP revision, the conditional approval of the attainment demonstration will be converted to a full approval at that time.

We are fully approving two local control measures relied upon in the attainment demonstration, the Voluntary Mobile Source Emission Reduction Plan (VMEP) and Transportation Control Measures (TCMs). We are also fully approving the DFW area SIP as meeting the Reasonably Available Control Technology (RACT) requirement for volatile organic compounds (VOCs) for both the 1-hour and 1997 8-hour ozone standards. These actions will result in emissions reductions in the DFW 8-hour ozone nonattainment area and meet section 110 and part D of the Act and EPA's regulations.

DATES: This final rule is effective on *February 13, 2009.*

ADDRESSES: EPA has established a docket for this action under Docket No. EPA–R06–OAR–2007–0524. 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.*, 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 Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal, which is part of the EPA record, is also available for public inspection at the State Air Agency listed below during official business hours by appointment: Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Paige, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6521; fax number 214–665–7263; e-mail address *paige.carrie@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' means EPA.

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I. Background

On July 14, 2008, 73 FR 40203, EPA proposed conditional approval of the DFW area's 1997 8-hour ozone attainment demonstration SIP revision, including the attainment MVEBs, RACM demonstration, and failure-to-attain contingency measures plan. We proposed to fully approve two local control measures relied upon in the attainment demonstration—the VMEP and TCMs. We also proposed to fully approve the DFW area SIP as meeting the RACT requirement for VOCs for both the 1-hour ozone standard and the 1997 8-hour ozone standard.

The proposed approval of the attainment demonstration SIP is conditioned upon Texas adopting and submitting to EPA by March 1, 2009, a complete SIP revision that includes an enforceable mechanism that would allow no more than 3.2 tons per day (tpd) of DERCs to be used in 2009 in the DFW area. If Texas intends to allow for more than 3.2 tpd of DERCs to be used beginning January 1, 2010, then the SIP revision must also provide appropriate limits on the use of DERCs and a detailed justification explaining how the future adjustments to the allowed DERC usage will be consistent with continued attainment of the 8-hour ozone standard. The justification must provide sufficient detail such that the public can be assured that attainment will continue to be projected in future years. If Texas meets the commitment to submit the DERC SIP revision, EPA will undertake rulemaking to determine whether to approve the revision and, if approved, EPA would convert the conditional approval of the attainment demonstration to a full approval.

We also proposed that final conditional approval of the attainment demonstration SIP was contingent upon Texas submitting to EPA a complete and approvable SIP revision for the attainment demonstration SIP's failure-to-attain contingency measures plan that meets section 172(c)(9) of the Act. EPA specifically identified in the proposal the elements such submission must contain. The failure-to-attain contingency measures plan was submitted to EPA on November 7, 2008, and we have determined that the plan is consistent with the elements established in our proposed rule (73 FR 40203) and meets section 172(c)(9) of the Act. Because the State submitted a complete failure-to-attain contingency measures plan that relies upon three VOC SIP rules for Offset Lithographic Printing, Degassing or Cleaning of Stationary, Marine, and Transport Vessels, and Petroleum Dry Cleaning, as well as fleet turnover from mobile sources after 2009, EPA can proceed with a final conditional approval. (See page 40205, third column, of the proposed action.)

Our July 14, 2008, proposal provides a detailed description of the revisions and the rationale for EPA's proposed actions, together with a discussion of the opportunity to comment. The public comment period for these actions closed on August 13, 2008. See the Technical Support Documents (TSDs) and our proposed rulemaking at 73 FR 40203 for more information.

II. What Action Is EPA Taking?

A. What Is EPA Conditionally Approving in This Action?

EPA is conditionally approving the DFW 1997 8-hour ozone attainment demonstration SIP and, as part of this attainment demonstration SIP, the 2009 attainment MVEBs, RACM demonstration, and failure-to-attain contingency measures plan, submitted to EPA on May 30, 2007 and November 7, 2008, as supplemented on April 23, 2008.

Our conditional approval is based on our determination that, the modeling and weight-of-evidence show that the DFW area will attain the 8-hour ozone standard by its attainment date, as a result of the control strategies relied upon in this plan. In making this determination, we have considered the comments that we have received on our proposal. We have also considered the air quality monitoring information gathered since the proposal, the impact of the Clean Air Interstate rule (CAIR) vacatur, and the progress in implementing control measures. As the area approaches the attainment date, recent monitoring data becomes more important as an indicator of potential success. The preliminary data from 2008 shows 18 of the 20 monitors had fourth highs at 84 ppb or below and only two

monitors were slightly above attainment levels at 85 ppb.

With more emissions reductions to occur before the beginning of the 2009 attainment year ozone season, we believe these data provide strong support that the area will attain the standard by its attainment date of June 2010.

As described in the proposed rule, the condition that must be met for EPA to fully approve the attainment demonstration is that the TCEQ must adopt and submit to EPA a complete SIP revision by March 1, 2009, that includes an enforceable mechanism that provides a 3.2 tpd restriction on the amount of DERCs available for use in DFW beginning March 1, 2009. The SIP revision may provide that the amount of DERCs available for use beginning January 1, 2010, could increase above 3.2 tpd if the revision provides an enforceable mechanism and a justification that the increase is consistent with attainment and maintenance of the 1997 8-hour ozone standard. In a letter dated June 13, 2008, TCEQ committed to meeting this condition (the letter is in the docket for this rulemaking).

If Texas intends to allow for more than 3.2 tpd of DERCs to be used beginning January 1, 2010, then the SIP revision must also provide appropriate limits on the use of DERCs and a detailed justification explaining how the future adjustments to the allowed DERC usage will be consistent with continued attainment of the 8-hour ozone standard. The justification must provide sufficient detail such that the EPA and the public can be assured that attainment will continue to be projected in future years. The justification and methodology for any increase in allowable DERC usage must be fully identified in the TCEQ rulemaking and SIP submittal process.

The SIP revision submitted by March 1, 2009, must adequately provide for continued attainment, and include the justification and/or methodology used by TCEQ to increase the amount of DERCs allowed for use in DFW starting in calendar year 2010. The justification provided by TCEQ must satisfy section 110(l) of the Act by demonstrating that the increase will not interfere with attainment or any other applicable measure of the Act. The analysis to satisfy section 110(l) will need to address both quantity and spatial allocation impacts of increased DERC usage on ozone levels.

B. What Is EPA Fully Approving in This Action?

EPA is fully approving two local control measures relied upon in the attainment demonstration: The VMEP and TCMs. We are also fully approving the DFW area SIP as meeting the RACT requirement for VOCs for both the 1-hour ozone standard and the 1997 8-hour ozone standard.

III. What Happens if the State Fails To Meet the Condition?

If Texas fails to adopt and submit to the EPA a complete DERC SIP revision by March 1, 2009, EPA will issue a letter to the State converting the conditional approval of the 1997 8-hour ozone DFW attainment demonstration SIP to disapproval. Such disapproval will start the 18-month clock for sanctions in accordance with section 179(b) and 40 CFR 52.31 and the 2-year clock for a Federal Implementation Plan (FIP) under section 110(c). EPA would publish in the FR a notice announcing the disapproval of the SIP and the start of sanctions and FIP clocks for the DFW area, and would revise the provisions in the Code of Federal Regulation (CFR) to reflect the disapproval of the SIP.

The State proposed the DERC SIP revision for public review on August 6, 2008 and the comment period closed September 12, 2008; final adoption of the revision was on December 10, 2008, in order to meet the condition to submit a complete DERC SIP revision to EPA by March 1, 2009, and implement the DERC SIP revision by March 1, 2009. As described in the proposed rule (73 FR 40203), if the State adopts and submits to EPA by March 1, 2009, a complete DERC SIP revision, and EPA determines through rulemaking that the submitted DERC SIP revision is approvable, we will simultaneously convert the conditional approval of the attainment demonstration SIP to a full approval. If EPA cannot fully approve the SIP revision concerning the use of DERCs in the DFW area, EPA will undertake rulemaking to disapprove the submitted DERC SIP revision and to convert the conditional approval of the attainment demonstration SIP for the DFW area to a disapproval. In such case, the 18-month clock for sanctions and the 2-year clock for a FIP would start on the effective date of final disapproval.

Today's final conditional approval of the attainment demonstration SIP remains in effect until EPA either determines that the State has not submitted a complete DERC SIP revision by March 1, 2009 or EPA completes rulemaking action either approving or disapproving a complete submitted DERC SIP submission and simultaneous with action on the DERC SIP submission takes final action to convert the conditional approval to a full approval or disapproval of the attainment demonstration.

IV. What Other Elements Must Be Approved To Allow This Final Conditional Approval of the Attainment Demonstration SIP?

In our proposal, we discussed the elements that must be approved if we are to finalize the conditional approval of the attainment demonstration. In order to finalize conditional approval of the DFW 1997 8-hour ozone attainment demonstration SIP, EPA must fully approve all of the control measures relied upon in the attainment demonstration and the DFW RFP Plan with the RFP MVEBs and RFP contingency measures. We approved the DFW RFP Plan with the RFP MVEBs and RFP contingency measures on October 7, 2008 at 73 FR 58475.

The State committed to submit a rule restricting DERC usage by March 1, 2009. In addition, EPA reviewed all DERC Notice of Intent to Use Forms that the TCEQ Executive Director approved as of November 30 for use in 2009, to ensure that the total amount of DERCs approved for use beginning on March 1, 2009 does not exceed 3.2 tpd.

Table 1 below lists the status of EPA action on the control measures relied upon in the attainment demonstration. The Table documents that, as of this final action, all control measures and reductions relied upon to demonstrate attainment have been reviewed and approved by EPA in this or other **Federal Register** Actions.

TABLE 1—STATUS OF EPA REQUIRED ACTION ON CONTROL STRATEGIES BEFORE FINALIZING CONDITIONAL APPROVAL OF THE ATTAINMENT DEMONSTRATION SIP

Measure	Status
The April 9, 2003 Alcoa Federal Consent Decree	Approved August 15, 2008 (73 FR 47835).
The DFW Energy Efficiency Measures Program	Approved August 15, 2008 (73 FR 47835).
NO_X rules for IC engines in DFW	Approved August 15, 2008 (73 FR 47835).

TABLE 1—STATUS OF EPA REQUIRED ACTION ON CONTROL STRATEGIES BEFORE FINALIZING CONDITIONAL APPROVAL OF THE ATTAINMENT DEMONSTRATION SIP—Continued

Measure	Status
2002 Base Year Emissions Inventory	Approved August 15, 2008 (73 FR 47835).
The VOC rules adopted by Texas on 11/15/06	Approved July 17, 2008 (73 FR 40972).
1-hour attainment determination	Approved October 16, 2008 (73 FR 61357).
East Texas Combustion Sources (*i.e.*, the rich burn gas-fired engine rule in the 33 counties east of DFW).	Approved December 3, 2008 (73 FR 73562).
The DFW major source rule	Approved December 3, 2008 (73 FR 73562).
The DFW minor source rule	Approved December 3, 2008 (73 FR 73562).
The DFW gas-fired engine rule	Approved December 3, 2008 (73 FR 73562).
The DFW EGUs rule	Approved December 3, 2008 (73 FR 73562).
The DFW non-EGUs rule	Approved December 3, 2008 (73 FR 73562).
The Auxiliary steam boilers rule in the 5 counties	Approved December 3, 2008 (73 FR 73562).
The Stationary gas turbines rule in the 5 counties	Approved December 3, 2008 (73 FR 73562).
The Cement kiln rules	Approved simultaneously in today's **Federal Register**.
The VMEP and its emission reductions	Approved in this rulemaking.
The TCMs and the associated emission reductions	Approved in this rulemaking.
The TERP emission reductions	Approved in this rulemaking as submitted in the DFW 5% IOP Plan and the DFW 1997 8-hour ozone attainment demonstration SIP.

V. Comments

A. What Comments Did EPA Receive on the July 14, 2008 Proposed Rulemaking for DFW?

We received 26 comment letters on the proposed rulemaking. These comments are available for review in the docket for this rulemaking. The comment letters came from the following sources:

1. August 6, 2008 letter from Linda Koop, City of Dallas Councilmember, District 11, Chair of the Transportation and Environment Committee.
2. August 12, 2008 letter from Ramon Alvarez, PhD, for Environmental Defense Fund.
3. August 12, 2008 letter from Bill Cox, citizen.
4. August 12, 2008 letter from Margaret DeMoss, public health consultant and citizen.
5. August 12, 2008 letter from Ed Soph, citizen.
6. August 12, 2008 letter from Bob Fusinato, citizen.
7. August 12, 2008 letter from Ramsey Sprague, citizen.
8. August 13, 2008 letter from Jon Mamula, citizen.
9. August 13, 2008 letter from Kerrie Kimberling, citizen.
10. August 13, 2008 letter from Cindy Crutch, citizen.
11. August 13, 2008 letter from Becky Bornhorst, clean air advocate.
12. August 13, 2008 letter from Barbara Downey, citizen.
13. August 13, 2008 letter from Ricky Pearce, Ryan Whaley Coldiron Shandy PC, for Holcim LP.
14. August 13, 2008 letter from Neil Carman, for Sierra Club, Lone Star Chapter.
15. August 13, 2008 letter from Gina Hall, citizen.
16. August 13, 2008 letter from Molly Rooke, citizen.
17. August 13, 2008 letter from Marc Chytilo, for Downwinders At Risk and the Lone Star Chapter of the Sierra Club.
18. August 13, 2008 letter from April Johnson, citizen.
19. August 13, 2008 letter from Wendi Hammond, for KIDS 4 Clean Air and Clean Air Institute of Texas.
20. August 13, 2008 letter from Willem and Paula Noteboom, citizens.
21. August 13, 2008 letter from Susan Waskey, citizen.
22. August 13, 2008 letter from Matthew Kuryla, Baker and Botts for the BCCA Appeal Group.
23. August 13, 2008 letter from Matthew Kuryla, Baker and Botts for the 8-Hour Ozone SIP Coalition.
24. August 13, 2008 letter from Lon Burnham, State Representative, District 90, Fort Worth, Texas.
25. August 14, 2008 letter from Anna Albers, citizen.
26. August 14, 2008 letter from Sandra Soria, citizen.

B. General Comments

Comment: Several commenters urge EPA to finalize conditional approval of the attainment demonstration SIP. One supports EPA's proposed rule, recognizes the efforts of the local community, and lists some of the clean air initiatives implemented by the City of Dallas.

Response: We appreciate the support expressed in these comment letters. We applaud the actions taken by the local community and commend the local leaders and implementation staff; their work has and will continue to assist the area in reducing NO_X and VOCs, the precursors for ambient ozone pollution. EPA encourages local governments to continue to be involved in these and future local emissions reductions programs.

Comment: Two commenters disagree with EPA's position taken in the proposal that because the DFW area has an attainment deadline of June 15, 2010, air quality monitoring data for the years 2007, 2008, and 2009 would be used to make an attainment determination. Rather, using the years 2008, 2009, and 2010 would be most consistent with the Act's requirements for attainment determination. They note that the Act mandates the attainment determination be made within 6 months after the attainment date, including any extensions thereof, and be based on the area's design value as of the attainment date. Although the Phase 1 Rule defines the ''attainment year ozone season'' as the ozone season immediately preceding the attainment date, they contend that that regulatory definition can be read as requiring controls timely for attainment in the attainment year, as required by the statute. They do not see the definition as relevant to the timing or content of an attainment determination. EPA's regulations do not specify that the attainment determination is to be conducted using data from the years prior to the attainment date, without considering data from the ozone season that includes the attainment date. They believe such a determination would be inconsistent with the statutory directive that the attainment determination be ''based on the area's design value (as of the attainment date).''

Response: As an initial matter, EPA set forth its interpretation on this issue in the preambles to the proposed and final Phase 1 Rule. See 68 FR 32802, at 32817 (June 2, 2003) (In ''determining whether an area actually attains the NAAQS at the time of the attainment date, EPA would use the ambient air quality data for the three ozone seasons prior to the attainment date. As an example, if the effective date of the

nonattainment designations is May 15, 2004, the maximum attainment date for an area classified marginal would be May 15, 2007. In this example, EPA would consider the 8-hour ozone data for the three previous ozone seasons—2004, 2005 and 2006.''); 69 FR 23951, at 23989 (Apr. 30, 2004) (noting that the ozone seasons from 2007, 2008 and 2009 would be considered for an attainment date in May 2010). However, as noted by the commenter, the statute clearly specifies that a determination of attainment must be ''based on the area's design value (as of the attainment date). The attainment date for the DFW area is June 15, 2010 and the design value ''as of the attainment date'' must be determined using the last three full years of ozone data, *i.e.*, 2007, 2008 and 2009. We see no argument that the design value ''as of the attainment date'' could be determined based on air quality data that would not represent a complete ozone season and thus be incomplete as of June 15, 2010.

Comment: We received many comment letters stating that the plan does not reflect recommendations made by the North Texas Clean Air Steering Committee.

Response: We agree that the plan submitted by the State does not reflect all of these recommendations. The resolutions were submitted to the State and addressed by the TCEQ in the SIP package adopted on May 23, 2007, which is in the docket for this rulemaking. The U.S. Supreme Court has consistently held that under the Act, initial and primary responsibility for deciding what emissions reductions will be required from which sources is left to the discretion of the States. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Train* v. *NRDC*, 421 U.S. 60 (1975). The State has discretion under the Act to determine the emissions reductions measures to be included in its attainment demonstration and exercised this authority for this plan. The State's role is to determine which particular emissions reductions measures are appropriate for the nonattainment area in order to comply with the requirements of the Act. As a matter of law, EPA is required to approve a SIP revision if it meets the Act's requirements, regardless of the State's choices. It is not EPA's role to rule out the State's choice of components of its SIP submittal so long as the plan is adequate to meet the standards mandated by EPA. See *Train* at 79–80 and *Union Electric* v. *EPA*, 427 U.S. 246 (1976). The EPA's role in reviewing SIP submittals is to approve state choices, if they meet the criteria of the Act. EPA disapproves a SIP submittal only if it fails to meet the statutory requirements. *Seabrook* v. *Costle*, 659 F.2d 1349 (5th Cir. 1981). Federal inquiry into the reasonableness of state action is not allowed under the Act (*see, Union Electric Co.* v. *EPA*, 427 U.S. 246, 255–266 (1976); 42 U.S.C. 7410(a)(2)). As provided in the analyses accompanying this rulemaking, we have explained why we believe the submitted plan meets the requirements of the CAA.

Comment: Many commenters claimed that the SIP sanctions ozone pollution levels above the 1997 standard yet this standard has been determined not to be protective of human health by the EPA and is being replaced.

Response: The Act contemplates the possibility that scientific advances would require amending the ozone NAAQS. As such, Section 109(d)(1) of the Act *requires* EPA to review the ozone standard every five years based on the current science, and make any revisions that are appropriate in light of the current science. Today's actions are being taken in the context of the ozone standard that was promulgated on July 18, 1997, based on the best available scientific evidence at the time.

The 2008 revised 8-hour ozone standard does not replace the requirements for ozone nonattainment areas to meet the 1997 8-hour ozone standard by their applicable attainment date. The measures implemented in this attainment demonstration SIP will assist the DFW area in progressing toward the 2008 revised 8-hour ozone standard, ensuring progress continues during the time between the designations for the 2008 standard and the submission date for the associated SIP revisions. These measures cannot be removed from the SIP. *South Coast Air Quality Management Dist.* v. *EPA*, 472 F.3d 882 (DC Cir. 2006).

Comment: A commenter stated that TCEQ approved a permit revision allowing TXI cement kilns in Ellis County to burn tires as fuel, questioned whether the change would result in a decrease in NO_X emissions, and expressed concerns about other pollutants, which result from tire burning. TXI said there would be NO_X reductions but they based this by comparing kilns that were not similar to the ones TXI would use. TCEQ allows TXI to self-report, but the checks on the reporting are poor, and TXI also knows when the inspectors are coming.

Response: Each cement plant in Ellis County must comply with both its permits' limits and the State's revised chapter 117 rules for cement kilns relied upon in the DFW attainment demonstration, whichever is stricter. In a related rulemaking in today's **Federal Register**, EPA is concurrently approving the revised chapter 117 rules for cement kilns. The revised cement kiln rules establish a NO_X source cap for each of the three cement plants in Ellis County. We disagree that there will be no decreases in NO_X emissions. The revised NO_X rules for cement kilns should result in at least 9.7 tpd of reduction in NO_X emissions for the DFW area regardless of the fuel used including tires. We note also that all of the cement plants are required to operate continuous emissions monitors for NO_X that must meet rigorous quality assurance and quality control criteria. Because these stack monitors must operate continuously, compliance does not rely solely on periodic inspections. As a consequence, EPA is confident that compliance with the NO_X limits in these rules will be well monitored.

The commenter's concerns regarding increases of other pollutants besides NO_X, TXI's reliance upon non-similar kilns to claim NO_X reductions, self-reporting, and TCEQ's inspection program are not pertinent to today's action; the issue in this action is whether the State has shown that the DFW area will attain the 1997 standard by June 15, 2010.

Comment: The public is disadvantaged by ''conditional approval'' comment periods. Comments concerning the adequacy of Texas' plan depend upon how Texas fulfills the requisite conditions, but the public will not know this information until sometime in the future after the current comment period has passed. After Texas adopts and submits its final plans concerning DERCs and the other ''conditions'' to EPA, EPA should allow additional public comment regarding the adequacy of the DFW SIP attainment demonstration.

Response: Congress provided for conditional approval as a type of SIP processing. The Congress added section 110(k)(4) to the Act in the 1990 amendments to codify the EPA's authority to conditionally approve SIPs. Section 110(k)(4) provides that EPA may conditionally approve a plan based on a commitment from the State to adopt specific enforceable measures by a date certain, but not later than one year after the date of the final conditional approval action. In this case, if the State submits by March 1, 2009 (the date certain), a complete DERC SIP revision submittal (the specific enforceable measures), EPA must reevaluate the approvability of the DFW attainment demonstration SIP, as revised by this DERC SIP revision submittal. EPA will perform such an evaluation through

notice-and-comment rulemaking and the public will have another opportunity to comment upon the adequacy of the DFW plan as affected by the DERC changes.

Comment: A number of commenters are concerned that cities within the DFW nonattainment area continue to be given more time to attain the standard instead of requiring them to clean the air now. If the State had met its responsibilities to submit a timely and approvable 1-hour attainment demonstration SIP, then this SIP would be incrementally stronger and have been submitted and implemented sooner. There is a contention that Texas has not submitted a complete approvable attainment demonstration SIP for the DFW area for over thirty years. Moreover, monitoring began in the early 1970's and the DFW area has never attained the 84 parts per billion (ppb) standard and remains years from doing so.

Response: The lack of approvability of past SIP submittals for the DFW area is not relevant to the requirement for an area to submit a 1997 8-hour ozone attainment demonstration. The State submitted this SIP revision on May 30, 2007, fifteen days before the June 15, 2007 required submission date. The State was on schedule to submit this SIP revision even earlier, but received requests from several stakeholders for an expanded timeline that would allow for a more robust stakeholder discussion and development of additional technical support.[1]

This 8-hour ozone attainment demonstration was submitted on time and deemed complete by operation of law (40 CFR part 51, Appendix V). Moreover, the attainment date for the 1997 8-hour ozone standard for the DFW area is June 15, 2010. The State has not requested additional time for the area to attain this standard, nor has additional time been granted. EPA is finding today that the control measures relied upon in this plan, in combination with Federal Measures, and building on measures already approved in the SIP will ensure that the DFW area attains the 1997 8-hour ozone standard by the applicable attainment date of June 15, 2010.

While past efforts to comply with CAA requirements have not been without flaws, we note that there have been extensive efforts and significant progress made over the years in the fast growing DFW area. These past efforts have built the foundation for the plan being approved today. They include the 15% Rate of Progress (ROP) plan, the post-1996 ROP plan, the MVEBs, and the extensive control measures adopted by the State and approved by EPA into the Texas SIP for the DFW area to meet the 1-hour ozone standard. The control measures in these approved plans included among other things: Reformulated gasoline, enhanced I/M, and controls on power plants locally and in the Central and East Texas Region.

Moreover, we note that the area is continuing to look for further ways to address ozone levels and may submit additional revisions to the SIP in the future. Three of the largest cities (Arlington, Dallas and Fort Worth) have passed ordinances addressing the purchase of green cement, which may yield an additional 1 tpd of NO_X reductions; and local city and county officials have increased their enforcement of Inspection and Maintenance rules by performing site inspections, which will yield additional reductions through 2009.

The measures discussed above have resulted in significant improvements in air quality. The DFW area now is meeting the 1-hour standard and has made significant progress toward meeting the 1997 8-hour ozone standard. As a moderate nonattainment area, the attainment date for the DFW area is June 15, 2010 and we believe the area will meet the attainment date.

Comment: The plan should require more mass transit and industry to install the latest in air pollution reduction equipment. Airplane engines and related equipment should be less polluting.

Response: As explained in an earlier response, the CAA places responsibility on the State to determine the mix of controls that will bring an area into attainment with a particular standard and EPA is delegated to reviewing whether the State's plan will meet the statutory attainment requirement. Therefore, EPA does not have the authority to require the State of Texas to submit a plan for the DFW area that requires more mass transit or imposes the latest in pollution control equipment on industry.

We note, however, the expansion of mass transit is ongoing in the DFW area and can be viewed at *http://www.DART.org.* Appendix H of the DFW SIP submittal identifies emission reduction measures for airplanes and related equipment, which are part of the Voluntary Mobile Source Emission Reduction Program (VMEP) we are approving today. These include: Additional electrification of ground support equipment; gate electrification to eliminate use of aircraft auxiliary power units; ground tugs for pushback to minimize use of reverse thrust from main aircraft engines; de-peaking of airline flight schedules; and implementation of airport surface detection equipment to improve efficiency during taxi. Furthermore, the local community has implemented clean air initiatives that include: Outreach for the TERP and AirCheckTexas programs; reducing environmental impacts by purchasing hybrids and alternative fueled vehicles when possible; purchasing 40% of their electric power from renewable resources; green building policies; development of sustainability policies; developing purchasing policies for cleaner cement; and passing an ordinance prohibiting vehicles over 14,000 pounds from idling for more than 5 minutes.

In addition to the measures in Appendix H, TCEQ submitted a Supplement with more accurate and updated data for Love Field and the DFW International Airport, including data on activities and fleet mix. There were more new aircraft engines and the related equipment was less polluting than previously recognized. This information is provided in the docket for this rulemaking.

C. Comments on the Texas Emissions Reduction Plan (TERP)

Comment: Commenters express significant concerns about whether the projected emissions reductions from TERP will occur, as predicted. They believe that the projections are overly optimistic. They provide the following reasons for their concern about the projections being too optimistic: 1. Actual TERP reductions have not met previous projected reductions, and the methodology for calculating the projected TERP reductions may not take into account that in the future, there will be fewer emissions reductions per dollar spent (cost-effectiveness assumption). 2. Although it is clear that TERP emissions reductions occur, there does not seem to be a satisfactory way to confirm the projected reductions will actually occur or not. 3. EPA relies upon the State's assumption that 70% of TERP funds will be used in the DFW area, but since there is no mechanism for ensuring the specified percentage of funding will be met, the projections are not enforceable; the projections should not be relied upon in the attainment demonstration; the 70% assumption should be reduced; and the SIP should include a contingency component to address a potential shortfall.

[1] See the Settlement Agreement and letters dated March 22, 2006, March 24, 2006 and April 6, 2006 in the docket for this rulemaking.

Response: We agree that for the Increment of Progress SIP revision, the amount of actual TERP reductions was less than the projections. Because of this experience, we worked with the State to revise the methodology for estimating emission reductions in this attainment demonstration SIP. The revised methodology uses assumptions that are more conservative. Specifically, the average project life was increased by 40% and the cost effectiveness was reduced by slightly more than 51%. The formula now relies upon the following assumptions: $6000/ton, 250 days/yr operation and a 7-year project life. Using these revised assumptions, the TERP emission reduction projections relied upon in the demonstration modeling and the WOE are greatly reduced. Increasing the project life has the effect of reducing the emission reductions assumed in any given year. The cut in the revised cost-effectiveness assumption is intended to address, among other things, the commenters' concerns about there being fewer reductions per dollar spent each succeeding year.

For comparison, on January 26, 2007, the cost effectiveness of TERP projects completed in DFW averaged $3730.24/ton; by September 23, 2007, DFW projects averaged $3743.59/ton; and by April 2, 2008, DFW projects averaged $3959/ton. California's experience with the Carl Moyer program [2] has achieved emissions reductions at an average cost of $3900/ton through October 2006. We believe the revised cost effectiveness of $6000/ton provides room for the increase in cost/ton that we are seeing in the DFW area.

In its May 2007 SIP revision, TCEQ indicated as a weight of evidence (WOE) measure that additional TERP reductions were possible if additional monies were appropriated by the legislature for the 2008/2009 legislature. House Bill 1 signed by the Governor on July 15, 2007, appropriated to TCEQ, TERP funds of $297,144,243 for fiscal years (FYs) 2008/2009. In the April 23, 2008 submittal, relying upon these additional appropriated monies, TCEQ projected that the TERP could potentially achieve an additional 14.2 tpd of NO_X emissions reductions. Since these emissions reductions were not available early enough to include as control measures in the modeling, their impact on the DFW area's air quality was instead predicted by EPA, using sensitivity modeling runs, to estimate the ppb change on the monitors in the modeling-based weight of evidence (WOE) analysis.

To achieve the projected additional 14.2 tpd of NO_X emissions reductions from TERP, using the revised TERP methodology, the Texas legislature needed to appropriate to the TCEQ, sufficient FY2008 and FY2009 [3] TERP funds for the TCEQ to allocate a total of $149,100,000 [4] to the DFW area for TERP Emission Reduction Incentive Grant (ERIG) projects; this amount does not include the funds required to achieve the IOP shortfall.[5] TCEQ received a sufficient amount of TERP monies to have available $188,475,000 to achieve the IOP SIP shortfall ($39,375,000) and achieve an additional 14.2 tpd ($149,100,000) in 2008 and 2009.

In the April 2008 submittal, the TCEQ posited that it could achieve the additional 14.2 tpd of TERP NO_X reductions by spending in the DFW area 50% of the FY2008 TERP funds and 70% of the FY2009 TERP funds. Whether funds are spent in exactly these percentages each year however, is not the issue; the essential point is that TCEQ enters into TERP grant contracts worth at least $149,100,000 in the DFW area for projects to achieve 14.2 tpd in calendar years 2008 and early 2009.

TCEQ roughly split in half for each fiscal year, the $297,144,243 appropriated TERP funds—$148,572,121.50. Of this $148,572,121.50 ''split,'' TCEQ used approximately $40 million for other TERP programs, including rebate grants and FY2007 unfunded TERP applications, including the IOP SIP shortfall. EPA notes that the IOP shortfall has now been met. Considering the factors meant that TCEQ had approximately $106,000,000 FY2008 TERP monies for the FY2008 to achieve additional reductions beyond those considered in the May 2007 SIP submission through ERIG projects in TERP-eligible counties. Applications submitted to TCEQ during the FY2008 round of project applications totaled approximately $94.5 million for the DFW area. Of these applications however, it appears from the draft September Report that $51,532,511.79 have been selected for funding.[6]

As a result, to achieve the 14.2 tpd projection, TCEQ needs to enter into FY2009 TERP grant contracts worth $97,567,488.21 ($149,100,000 − 51,532,511.79 = $97,567,488.21). In summary, after accounting for the tpd of TERP NO_X emissions reductions obtained by the FY2008 grant contracts, to obtain the remaining tpd of TERP NO_X emissions reductions to achieve a total of 14.2 tpd as projected as part of the WOE, the TCEQ would need to enter into TERP grant contracts with DFW-area applicants worth $149,100,000 for projects to be completed as early as possible in calendar 2009. Due to a number of factors, including Hurricane Ike, the TCEQ will begin its first round of requests for funding from FY2009 TERP grant monies in December 2008. For more information concerning the timing of FY2009 TERP projects due to Hurricane Ike, please see the Supplemental TSD dated December 2008.

TERP has safeguards to ensure that when funds are provided to grantees, they must achieve the associated reductions. Grantees are required to track usage and report to the TCEQ every six months; they must meet the reporting requirements delineated in their specific grant contract. TERP is enforceable against the grant recipient. Over the activity life of each TERP grant-funded activity, the grant recipient commits the generated emissions reductions to the SIP. The recipient is responsible for achieving the annual and total NO_X emissions reductions within the eligible areas as defined in the contract. Recipients will be required to return all or a pro rata share of the grant funds to the TCEQ if the emissions reductions are not achieved.

EPA continues to carefully review the biennial reports that TCEQ is required to submit to the Legislature pursuant to Texas Health and Safety Code, 386.057 and 386.116(d). The draft September TERP Biennial Report to the Texas Legislature indicates that 488 projects have been selected for funding in the DFW area, totaling $51,532,511.79 to reduce an estimated 3.72 tpd in NO_X emissions beyond what was included in the May 2007 modeling. Based upon the draft September Report, the average cost/ton for these projects increased to $6710.13, versus the revised methodology of $6000/ton. At this rate, to achieve the 14.2 tpd in NO_X emissions reductions, the TCEQ must be

[2] The Carl Moyer Program 2006 Status Report is in the docket for this rulemaking and can be viewed at *http://www.arb.ca.gov/msprog/moyer/status/2006status_report.pdf.*

[3] The TCEQ fiscal year runs from September 1 through August 31.

[4] Using the revised SIP credit methodology, each ton costs ($6000 \times 250 \times 7$) = $10,500,000. Therefore, $14.2 \times 10,500,000$ = $149,100,000.

[5] Using the revised SIP credit methodology: 3.75 tpd × $10,500,000 = $39,375,000 to correct the IOP SIP shortfall.

[6] Per the TERP Biennial Report to the Texas Legislature December 2008 draft, dated September 22, 2008. This draft was prepared using data from mid-summer. The final report, due in December 2008, will incorporate all of the contracts awarded or pending to date. See the docket for this rulemaking.

able to allocate at least $123 million [7] to the DFW area for TERP projects early in calendar 2009. As this report is in draft, these numbers are subject to change but it now seems likely that approximately 70% of these TERP emission reductions will occur before the core ozone season of 2009. We have evaluated the impact of this change on the attainment demonstration modeling and WOE; this evaluation is in Subsection D, below.

In summary, EPA believes that the TERP program is achieving significant reductions in NO_X. Consistent with its experience in implementing the program, the State has adjusted its assumptions used in projecting emission reductions to be more conservative. EPA believes these revised assumptions begin to address many of the commenters concerns. Although delays in opening the request for applications mean the reductions based on FY2009 funds will be delayed, many reductions can still occur before the peak of the ozone season. Achieving the 14.2 tpd of reductions from TERP will require substantial continued efforts. See also Subsection D below, in particular the last Response, Comment MC–15.

D. Comments on Photochemical Modeling, Weight of Evidence Analyses, and Assessment of Demonstration of Attainment

EPA received a number of comments about the photochemical modeling, the Weight of Evidence Analyses, and our proposed determination that the area would attain the standard by its attainment date of June 15, 2010. EPA has reviewed all the comments on these topics and provided responses below.

The discussion below summarizes our evaluation of the modeling and evidence, the comments we received, and other factors such as the State's progress in implementing control strategies, and recent air quality trends. EPA believes that as the attainment date becomes closer, measured air quality and planned additional emission reductions become more important as a predictive tool (compared to modeling) and the monitoring data should be given additional weight, more so than in situations where the attainment date is still years away. In 2008, the preliminary data shows 18 of the 20 monitors have measured attainment levels with fourth high 8-hour values of 84 ppb or less. The remaining two monitors were only slightly higher than an attainment level measuring fourth high values of 85 ppb. EPA believes additional significant reductions in emissions will occur before the 2009 ozone season such that the area can attain the standard based on 2007–2009 ambient data or at least qualify for a 1-year extension of the attainment date by having each monitor's 4th high ozone concentration in 2009 below 85 ppb.

We evaluated many factors in our WOE evaluation. These items included reductions not included in the modeling based projections (energy efficiencies), unquantifiable measures (AirCheckTexas, Dallas Sustainable Skyline Initiative, etc.), meteorological analyses of severity of ozone seasons (both the base period and recent years including 2007), most recent monitoring in 2007 (a 4th high of 89 ppb at two monitors and the other 18 monitors had 4th high values of 87 ppb or less), the court's vacatur of CAIR, progress in implementing the TERP program, and progress in implementing the early compliance incentive on natural gas compressor engines outside the DFW area. EPA has also considered preliminary 2008 ozone monitoring data (4th high values of 85 ppb at two monitors and at the other 18 monitors the value was 84 ppb or less) and whether that data supports a trend toward attainment for the area. We considered that over half of the NO_X estimated emissions reductions between 2007 and 2009 that are estimated to yield a 3–4 ppb drop in ozone levels in the DFW area, are slated to occur between the 2008 ozone season and the 2009 ozone season. We also expect further ozone reductions in 2009 and beyond.

After consideration of all of these analyses, EPA has determined that the State has demonstrated that the DFW nonattainment area will attain the 1997 8-hour ozone standard by its attainment date.

Comment (MC–1): A commenter states that the WOE analysis underestimates the impact of emission increases from facilities outside the DFW nonattainment area, upon the DFW area. This underestimate occurs because the TCEQ issues PSD permits to facilities outside the DFW area that will affect the ozone concentration level in the DFW area and says they should address these ozone impacts in the DFW attainment demonstration SIP. The commenter does not believe that this DFW attainment demonstration accounts for the impacts from these sources that have been and will be permitted outside of the DFW area. There also appears to be no correlation or tracking of these permitted emission increases in relation to the projected point source emissions inventories in this DFW attainment demonstration.

Response (MC–1): The Texas SIP at Section 166.160 (a) (which incorporates 40 CFR 52.21(k) by reference) requires a new source or modification subject to PSD to demonstrate that emissions from the facility will not cause or contribute to a violation of any NAAQS. The Texas PSD SIP permitting program also provides for an opportunity for notice and comment, as well as state court judicial review, of each permitting action.

EPA disagrees with the commenter that this SIP revision does not account for the impact of potential emissions increases. In this final action on the DFW attainment demonstration, we reviewed the analysis to insure that sources impacting the DFW nonattainment area were included in the baseline and future case modeling demonstrations. EPA's modeling guidance (''Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, PM2.5, and Regional Haze'', EPA–454/B–07–002, April 2007; and earlier modeling guidance) and emission inventory guidance (''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'', EPA–454/R–05–001, August, 2005, updated November 2005) indicate that a combination of specific projections and general growth estimates should be utilized to attempt to obtain a best estimate for the future year inventory. Future case emissions must be projected to account for growth and control throughout the modeling domain, which includes states outside of Texas and the attainment areas of Texas (including the new proposed sources raised by the commenter). EPA's guidance has been that new permitted sources, including likely to be permitted sources based on applications that have been received when the future year EI is being generated, should be included in the future year modeling if they are expected to be emitting in the future attainment year. As a practical matter, the focus has usually been to include expected new very large sources (such as electric generating units (EGUs)) and use economic based growth factors to account for growth in emissions from other industrial source categories. Overall, EPA's guidance is to provide the best estimate of the future year emission inventory given the limitations with estimating emissions several years in the future. Texas' emission projections to the future years are very

[7] (6710.13 × 250 × 7) = $11,742,727.50 × 10.4786 = $123,047,344.38.

detailed and the methods utilized are discussed in the MOAAD TSD and in TCEQ's DFW SIP submittal, including Appendix B. In nonattainment areas, major new sources are required to obtain offsets larger than the proposed source so there is a net decrease in emissions, so no growth is estimated for these sources in nonattainment areas. Therefore, within Texas the only areas that point source growth is estimated is in the areas that are in attainment and our discussion will briefly explain the methodology for future year estimates of major point sources in attainment areas of Texas.

For existing EGUs in Texas, the State used 2005 continuous emission monitoring data and assumed that there would be no emissions changes. Texas projected increases in emissions because of new EGUs that were expected to be emitting in 2009 (these were included in Table 2–8 of Appendix B of TCEQ's submittal). For all other industrial point source emissions (non-EGUs) in Texas' attainment areas, TCEQ started with the 1999 reported emission inventory and projected growth in point source emissions using point source growth projections derived from the Emissions Growth Analysis System version 4.0 (EGAS 4.0), an EPA-approved methodology. It is worth noting that the EGAS system for projecting emissions tends to overstate future emissions since the system relies principally on economic growth for the projections, and does not include reductions from regulatory or permit controls.

In conclusion, we have reviewed the methodologies that TCEQ utilized to grow EGUs and non-EGUs outside of the DFW area and conclude that the 2009 level emissions of these sources have been appropriately estimated using acceptable methods and contrary to the commenter's concerns the attainment demonstration appropriately accounts for the potential for new source growth by 2009.

Comment (MC–2): Commenters state that ozone exceedances continue to occur in the DFW area and show there still is a serious problem. Specifically, 14 exceedances have been measured at eight of the monitors through August 12, 2008 and eight of which are 90 to 99 ppb. The commenter concluded that this 2008 monitoring data does not seem to support the WOE.

Response (MC–2): EPA has reviewed the ozone monitoring data through November 1, 2008 in response to this comment. While a number of exceedances of the 1997 8-hour ozone standard occurred during the 2008 ozone season by August 12, 2008, it is very important to note that the standard is a statistically based standard. The statistical nature of the standard allows each monitor to have up to 3 days with exceedance levels at each monitor (with potentially multiple 8-hour exceedances for each of the three days) and all the monitors in the area could still have a 4th high value less than 85 ppb (attainment level). The standard is an average of the daily 4th high value at a monitor for each year of a consecutive 3-year period. Therefore, it is even possible to have a 4th high value for one or even two years at a specific monitor be above the standard, but the 3-year average value to be below 85 ppb and thus, in attainment.[8] Furthermore, each monitor in the area could have up to 3 exceedances at each monitor on differing days. Given 20 monitors in the DFW area, a total of 60 exceedances could theoretically occur in the DFW area with all 4th high values at each monitor still less than 85 ppb. This is a theoretical worse-case situation but this demonstrates that having several exceedances does not automatically yield a nonattainment determination.

Since the standard is statistically based, the relevant metric to examine for determining compliance with the NAAQS is the annual 4th high values at each monitor. We therefore evaluated the recent 4th high values for the DFW area 8–Hour Ozone Season (March 1–October 31 for the 85 ppb standard). The 4th high monitoring data from 2008 indicates that the area is near attainment levels (2008 monitoring data is preliminary and awaiting QA/QC[9]). The 2008 preliminary data shows the DFW area had 4th high values of 85 ppb at two monitors and at the other 18 monitors the value was 84 ppb or less. The 2008 preliminary data indicates the 2006–2008 DV is 91 ppb (down from 95 ppb using 2005–2007 data). For the monitor that has the highest average 2007 and 2008 4th high values and is likely to be the controlling monitor (or one of the highest monitors) for determining if the area reaches attainment based on 2007–2009 data, the monitor's DV for the 2007–2009 period would have to be less than 85 ppb. For this to occur the monitor (Denton monitor) would have to have a 4th high value of 82 ppb or less to reach attainment in 2009. It is important to note that this monitor had a preliminary 4th high value in 2008 of only 84 ppb.

In comparison with ozone monitoring levels in 2007, the preliminary 2008 monitoring data is lower than the 2007 data. Contrary to the commenters concerns, EPA believes that the 2008 preliminary data is consistent with achieving attainment, especially considering that much of the DFW SIP reductions are still to occur and another year of fleet turnover will happen. EPA also believes that even if the area does not attain the standard based on 2007–2009 data, it is very likely to qualify for a one year extension under sections 172(a)(2)(C) and 181(a)(5) of the Act (*see* 40 CFR 51.907) by having fourth high at 84 ppb or below at every monitor.

Comment (MC–3): Commenters believe that we should impose a 2009 mid-course review (MCR) obligation upon the State, triggered by exceedances at the monitors or a violation of the standard in 2009.

Response (MC–3): There is no MCR requirement at this time for the 8-hour ozone SIP. In our Phase 2 Implementation Rule, we provided that we would assess the need for MCR for areas with an attainment date beyond 6 years after the effective date of the area's designation (Final Rule To Implement the 8–Hour Ozone National Ambient Air Quality Standard, Phase 2 (70 FR 71612, 71629). The attainment date for DFW is June 15, 2010, which is not more than 6 years beyond the effective date of the area's designation. A mid-course review is for the purpose of assessing whether an area is on-track for attainment and would typically be performed several years before the attainment year. This is because a MCR performed several years before the attainment year would give the area sufficient time to make corrections to the plan if it was not performing as anticipated. A review as suggested by the commenter would not be ''mid-course'' because it would be performed in the middle of the attainment year ozone season. At that point in time, there would be no steps that the DFW area could take to move the area back on track to achieve attainment by the required date.

Comment (MC–4): Commenters stated that in the DFW area, there are two monitors critical to the attainment demonstration, one in Frisco and one in Denton. The commenters, relying upon a February 22, 2006 Memorandum from ENVIRON, state that there is no measurable impact on these two critical monitors from the TCEQ's chosen controls for the Ellis County cement plants. The commenters contend that TCEQ has not performed any analysis showing that the chosen level of

[8] For example, if the 4th high value for each of three years was as follows: 2006—87 ppb; 2007—85 ppb; 2008—81 ppb, the average over the three year period would be 84 ppb, which is below the level of the standard.

[9] 2008 preliminary monitoring data is from EPA's AQS and AirNow databases and has to undergo final Quality Assurance and Quality Control.

controls on the Ellis County cement plants would assist the DFW area into coming into compliance with the ozone standard.

Response (MC–4): As noted in a previous response, the Act gives the State the primary authority to determine the mix of control measures necessary to demonstrate attainment. One of the measures that TCEQ selected in support of its attainment demonstration is controls at cement plants in Ellis County. EPA evaluated the plan, as a whole, and agrees that the State has demonstrated that the area will attain the standard by its attainment date. Thus, EPA does not have authority to second-guess the mix of controls selected by the State and, in this case, its decision to further control the cement kilns in Ellis County.

Although we cannot second-guess the controls selected by the State, we note that we agree with TCEQ that cement kiln NO_X reductions are an important element of the reductions necessary to bring the entire DFW area into attainment and the reductions are expected to reduce high ozone levels and the frequency of ozone exceedances in the DFW area. The record for this action includes the information that was evaluated by the State and EPA and that supports the conclusion that additional NO_X controls on cement kilns are a critical component to reducing ozone exceedance levels in the DFW area so that the area can timely attain the 1997 8-hour ozone standard. It is clear from evaluating the SIP, its reports and appendices that TCEQ has performed numerous analyses concerning the impact of the cement kilns NO_X and VOC emissions on the ozone concentrations levels of the DFW area. Moreover, contrary to the commenters' assertion, the chosen strategy has an impact on the Frisco and Denton monitors, as well as a significant benefit to the western portion of the nonattainment area, especially in Tarrant County. For further details, see the TCEQ's Response to Comments document, the MOAAD TSD, and the Supplemental TSD.

For the other comments specific to the cement kiln NO_X rule itself, not the attainment demonstration SIP, we provide the comments and our responses in our final rule for the Control of Emissions of Nitrogen Oxides from Cement Kilns, concurrently published in today's **Federal Register**.

Comment (MC–5): The commenter asserted that EPA should not accept TCEQ's revised Relative Response Factor (RRF) calculation.[10] The commenter indicated that contrary to the proposal, a 1 ppb difference between EPA's RRF guidance and TCEQ's revised RRF is significant. The commenter referred to 73 FR 40211, stating that TCEQ RRF calculation did not make significant differences in the future design values (FDVs) with truncation. The commenter wrote that TCEQ's methodology is merely a paper exercise to obtain additional emission credits, and EPA should not approve of such tactics.

Response (MC–5): We recognize the TCEQ's method of projecting the future design value differs from the method provided for in EPA's guidance. EPA's guidance for projecting the future design value is not a legally binding substantive rule. Therefore, other methods of design value projections may be evaluated on a case-by-case basis and used to determine whether an area will meet the standard. Whatever method is used for a specific demonstration—either that from EPA's Guidance or another method—is subject to comment during the State and EPA public participation processes and all substantive concerns about the method would be addressed in responding to any comments.

TCEQ shared their RRF method with EPA during their SIP development process. EPA reviewed the alternate RRF method at the time and indicated to TCEQ that we would utilize both EPA's method and TCEQ's method and weigh the results in our review of the modeling projections. We have continued to follow this approach in our review of this SIP. For details on how both the TCEQ and EPA RRF methods are calculated and results from the two methods, please see the MOAAD TSD starting in Chapter 4.

In this specific case, TCEQ's method yields projected values that when compared to values with EPA's method are more conservative at some monitors and less conservative at other monitors. EPA does not consider the TCEQ RRF method to be superior to EPA's method, just a different way to perform the calculation and yield another set of projected results to consider in our review. We do not believe that either method is biased towards a particular result. As described below, and documented in our MOAAD TSD for this action, we have reviewed projections using both RRF techniques. Both the TCEQ projection and the EPA projection are consistent with the conclusion that the area will meet the standard in 2009.

The results for both RRF (EPA and TCEQ) methods are contained in tables of the MOAAD TSD that have FDV projections, including Tables in Chapter 6 (the Summary Chapter). EPA reviewed the FDVs for all modeling based projections using both RRF techniques and for most monitors, the TCEQ RRF based FDV calculations make minor differences of only one or two tenths of a ppb (compared to EPA's RRF method) and generally do not change the final modeling projected value. Specifically, for the nine monitors that are assessed, the difference between the two RRF techniques ranges from minus 0.22 ppb to +0.19 ppb for 8 of the 9 monitors and is +0.59 ppb for the other monitor. See Table 5 of the proposal notice. As the final step of calculating modeling projections, EPA guidance recommends truncating the tenths digit and only reporting integer ppb values to match with the monitored attainment demonstration procedures that truncate to integer ppb levels. Due to this truncation procedure, modeling projection changes of a few tenths do not generally impact the final FDV value. There were a few cases where the different RRF methods yielded a 1 ppb difference in the final FDV value due to this truncation process (for the Midlothian monitor's data, the different RRF methods yield modeling values of 82.83 ppb and 83.05 ppb and truncation yields final FDVs of 82 ppb and 83 ppb).

We continue to believe that the difference in the results of these two techniques is small overall. As discussed in another response below, we considered the results of both RRF methods (including the few times that the truncated FDV differed by 1 ppb) and determined that both the TCEQ projection and the EPA projection are consistent with the conclusion that the area will meet the standard in 2009.

Comment (MC–6): The commenter indicated it is unclear whether the Photochemical Dispersion Modeling Reanalysis 2009 (PDMR 2009) evaluation uses TCEQ's revised RRF or EPA's guidance. The commenter indicated that it appears as though it uses only TCEQ's RRF and the public should be afforded an opportunity to know the PDMR 2009 FDV under EPA's guidance. The commenter asserted that considering that even with the more lenient TCEQ revised RRF, the modeling still projects a worse air quality picture, and thus the EPA guidance projection

[10] The RRF is used to calculate the change in model projected values between the basecase and future case modeling projections and determine if modeling is projecting attainment in the future. For further explanations of both the EPA guidance method for calculating RRFs and TCEQ's RRF calculation method see Section 4.11 of the MOAAD TSD.

will most likely be even worse. The commenter indicated that without this information, the public is unable to meaningfully review and comment not only on the overall demonstration, but also on whether using the TCEQ revised RRF is even proper.

Response (MC–6): There were five tables that included modeling projections in the proposal notice. Tables 2, 3, and 5 had projections for the PDMR 2009 modeling scenario and were marked as TCEQ RRF in the FDV columns. The proposal notice included calculations of modeling projections using both the TCEQ's RRF method and the RRF method from EPA's guidance for the modeling run Combo 10 in Table 1. In referring to values in Table 1 of the proposal notice, EPA stated on page 40211 ''Since the TCEQ RRF calculation method did not make significant differences in the FDVs and with the truncation to whole numbers, we have used the TCEQ RRFs for the final assessment with consideration of the FDVs using EPA's RRF method. The results of EPA's RRF method are contained in the MOAAD TSD.'' From that point forward in the proposal notice, EPA did not include the results from EPA's RRF method in the **Federal Register** notice. Tables 2, 3, and 5, including the analyses of PDMR 2009 only include the TCEQ RRFs as the commenter indicates. This was done to try to minimize confusion in the notice. EPA did note in the proposed notice that the results from the EPA RRF method are contained in the MOAAD TSD. The results for both RRF (EPA and TCEQ) methods were contained in tables of the MOAAD TSD that had Future Design Value projections, including Tables in Chapter 6 (the Summary Chapter). EPA reviewed the FDVs for all modeling based projections using both RRF techniques. Examination of the modeling results, which include some WOE adjustments contained in Table 6–3 of the MOAAD TSD, reveals that the TCEQ RRF based FDV calculation makes only minor differences of only one or two tenths of a ppb (compared to EPA's RRF method) for most monitors and did not change the final modeling projected value except for one monitor.

Comment (MC–7): A commenter asserted that full credit for the NO_X reductions from gas compressors in 33 East Texas counties seems overly optimistic. The commenter indicated that their understanding is that owners or operators of compressor engines requested a small portion of the $4 million in incentives. The commenter remains skeptical that the full reductions assumed in Combo 10 will be achieved by 2009. The commenter asserted that the attainment modeling thus overstates the ozone reductions from the control strategy and indicated that EPA should consider this effect as part of the Weight of Evidence analysis, and should give more weight to the PDMR 2009.

Several commenters indicated that the 2.4 tpd of NO_X reductions from point sources in the DFW area that have 2010 compliance dates are not likely to be in place by the beginning of the 2009 ozone season. These commenters also indicated that EPA assumes too much by relying on the predictions that early compliance will occur for certain control measures with 2010 implementation dates. They claim that because of this reliance, the attainment modeling overstates the ozone reductions from the control strategy. The commenters indicated that EPA should consider this effect as part of the WOE analysis, and should give more weight to the PDMR 2009. Furthermore, a commenter wrote that if any control measure emission reduction will not be enforceable until after the 2009 compliance date, then those emission reductions cannot be used to justify EPA's approval.

Response (MC–7): Combo 10 modeling run was the official attainment demonstration modeling run submitted by TCEQ to EPA in the SIP revision submittal. Because of our concerns stemming from the inclusion of reductions from measures with 2010 compliance dates, it was not the only modeling run considered by EPA in our evaluation of whether the DFW area would attain the standard by the deadline. There was another modeling run available in the TCEQ's public record on its proposed action for EPA to review; in the proposal and TSDs, we label this additional modeling scenario the PDMR 2009. We evaluated this PDMR 2009 modeling run as a worst-case projection of the 2009 modeling picture because it did not project any reductions from the rules with 2010 compliance dates. For example, it did not include the 2.4 tpd of NO_X reductions projected from the major and minor Point Source rules in the DFW area and any projected reductions from the East Texas Compressor Engines rules that have 2010 compliance dates. Thus, PDMR 2009 provides an upper boundary of projected ozone FDVs in the attainment year.

The Texas legislature made available to compressor engine owner and operators $4 million to assist in early compliance. As the commenter points out, however, the full $4 million was not requested by owners and operators of compressor engines. Since some requests were made, some early compliance should occur, but the commenter is correct that the level of reductions in East Texas by the 2009 ozone season is probably closer to the PDMR 2009 emission reduction level than the Combo 10 emission reduction level. As a result of this information, EPA is putting more weight on the PDMR 2009 results than on Combo 10.

We have evaluated the modeling outputs based on an approach that looks at the PDMR 2009 outputs, which predict ozone levels that are slightly worse than what is likely to occur, as well as the Combo 10 outputs, which predict ozone levels that are more optimistic. This evaluation of PDMR 2009 sets the upper bound of model predictions for the FDV in 2009 and the Combo 10 run sets the lower bound. In making our determination that the State had demonstrated that the DFW area would attain the 1997 ozone NAAQS by its attainment date, we consider the TCEQ's official attainment demonstration modeling run (Combo 10), the results from the PDMR 2009 modeling, and information that some early compliance would occur by the 2009 ozone season as well as other weight of evidence analyses. The model projections in Table 6.3 of the MOAAD TSD give the non-truncated values for the final modeling with some WOE adjustments for both the modeling runs and both RRF techniques. The difference between the PDMR 2009 and the Combo 10 run for each monitor is 0.30 ppb or less when using either the TCEQ or EPA RRF technique. EPA's modeling guidance recommends the truncation of the decimal places and reporting of only integer values for the final modeling based projection values. When the truncation is done to the MOAAD TSD Table 6.3 values (Modeling-based assessment with some WOE elements included), the results are identical for both the PDMR 2009 and the Combo 10 modeling runs. Using the EPA RRF procedure, both runs result with 7 monitors attaining, one monitor at 87 ppb, and one monitor at 88 ppb. Using the TCEQ RRF procedure, both runs result with 7 monitors attaining, one monitor at 87 ppb, and one monitor at 88 ppb.

We have considered both the PDMR 2009 and Combo 10 modeling results and put less weight on the Combo 10 projections because of concerns over the inclusion of measures with 2010 compliance dates. As discussed above, however, when EPA's procedures for projecting the future design value are followed, there is little difference in the results particularly if one considers that

a small amount of early compliance will occur. Therefore, as further discussed in response to other comments, the combination of the Modeling projections and other WOE elements were considered and support the conclusion that the area will attain by the area's attainment date.

Comment (MC–8): The commenter indicated that TCEQ intends to reduce the amount of DERC values included in the modeling because using the entire balance of the DERC bank is ''overly conservative based on past usage of DERCs.'' The commenter asserted that DFW's past air quality violations occurred under scenarios of less DERC usage. The commenter concluded that this belies a Weight of Evidence (WOE) ''trend'' of improving air quality because in the future projection nothing is really changing from the past when violations occurred.

Response (MC–8): DERCs are banked emission credits generated by reducing emissions beyond required levels that sources can use to exceed certain emission limits on a temporary basis. EPA guidance discusses why emission credits that are being carried in an emissions bank ought to be included in modeled projections. It can be important because these banked emissions come back in to the air if the banked credits are used. As a result, if these banked emissions are not accounted for in the future projections, the modeling would under-predict future ozone levels if some or all of the banked credits are used. EPA guidance advises a conservative approach in which all banked emissions are included in the modeled future projections. This conservative approach assumes that the entire bank would be depleted during the attainment year. The TCEQ Bank held 20.4 tpd of NO_X DERCs when TCEQ reviewed the level of credits in the bank and included the banked DERCs in their future year modeling. After finalizing the future year modeling, TCEQ reevaluated the inclusion of all of the banked DERCs in the future projections. TCEQ believed that the inclusion of the entire balance of the DERC bank was overly conservative based on past usage of DERCs. They wished to include 3.2 tpd, rather than 20.4 tpd, of banked DERCs in the future projections. As discussed previously, Texas committed to adopt a restriction on DERC usage to ensure that no more than 3.2 tpd of banked DERCs will be used in 2009 and as a result preventing 17.2 tpd of potential emissions growth. This approval is conditioned on TCEQ's adoption and submittal of a complete SIP revision. Consequently, in order for EPA to fully approve the SIP, the State will need to have an enforceable rule in place that would not allow 17.2 tpd of the 20.4 tpd banked DERCs currently modeled in the state's 2009 Combo 10 and PDMR 2009 modeling, to be used beginning March 1, 2009.

The modeling submitted May 30, 2007 did include 20.4 tpd of banked DERCs in the 2009 future projections. Relying upon the State's commitment to revise the DERC rule to limit the use of banked credits to 3.2 tpd in 2009, it is appropriate to reduce the 2009 future modeling projections to 3.2 tpd in 2009. (For the calendar years after 2009, there will be an enforceable mechanism to equate to the limit of 3.2 tpd.) EPA therefore adjusted the modeling projections in Table 3 of the proposal (also included in the MOAAD TSD) to assess the impacts of the revised future projections. This was done to provide a modeling projection that reflected the inclusion of banked DERCs of 3.2 tpd in 2009. This approach is consistent with what would have been projected if TCEQ had redone the SIP modeling with 3.2 tpd for the banked DERCs instead of the 20.4 tpd that was included in the Combo 10 and PDMR 2009 modeling. EPA then used the revised 2009 modeling projections in conjunction with other modeling based analysis and WOE considerations in our review of the entire attainment demonstration.

The commenter is correct in the assessment that DERCs have not been used in the past and past air quality exceedances did not include any impact from DERC usage (since DERCs have not been used in the DFW area). Now, with the commitment to adopt a restriction on DERC use, it is not appropriate to continue with the assumption that all of the DERCs in the bank will be used in the attainment year in the future year modeling.

Because DERC use did not impact past exceedances (again because DERCs have not been used in the past), EPA did not consider the banked DERCs 2009 usage restriction, as part of our emissions and ambient trends analysis that we performed in our WOE evaluation; rather, it is only in the modeling where it was considered. Consistent with the commenters concerns, EPA was careful in our WOE evaluations and review to not consider the revised 2009-banked DERCs usage restriction in our emission trends analysis and monitoring trends analysis. For example in Table 5–11 of the MOAAD TSD, estimating the actual emission reductions between 2007 and 2009, EPA did not include any reductions due to the restriction on DERC usage. Therefore, EPA believes that we have appropriately considered the revised banked DERCs tpd usage restriction in adjusting assumptions about possible future emissions growth in the modeling but consistent with the commenter's concerns, we have not considered it in evaluating emissions and monitoring trends (analysis included in the WOE analysis). For a full discussion of DERCs and conditional approval, see the DERCs comments section below.

Comment (MC–9): The commenter indicated that EPA's reliance upon the low 2007 monitor readings is misplaced since extremely unusual weather, rain and low temperatures, dominated the 2007 DFW ozone season. The commenter continued that the first 100+ °F temperature day was not reached until late August. The commenter concluded that EPA should not give TCEQ credit for something achieved only by the grace of God.

Response (MC–9): We rely on the 2007 monitored air quality levels as part of our Weight of Evidence analysis. We investigated the 2007 meteorology to determine how it compared with the DFW normal ozone season meteorology. To help account for all the different variables that impact the frequency of ozone we utilized a Meteorological Adjusted Trends analysis that was done by EPA personnel at Office of Air Quality Planning and Standards (OAQPS) for the DFW area to assess the ozone conduciveness of the 2007 ozone season. OAQPS's analysis utilizes temperature and precipitation data in addition to several other factors. The results of this analysis were included in our proposal, and indicated that overall 2007 was near the normal meteorology for DFW's ozone season. See Chapter 5, section 5.15 and Chapter 6, section 6.3 in the MOAAD TSD.

The commenter asserts that the 2007 ozone season was biased low due to the influence of more rain than normal and less 100 °F days than normal. EPA reviewed monthly meteorological National Climatic Data Center 2007 data for DFW International Airport (for the DFW ozone season months of March 1–October 31). We evaluated average monthly temperature, monthly average maximum temperature, and monthly precipitation. Looking at this temperature information and precipitation data, EPA's assessment is that, while for several months the precipitation was above average, the ozone season and the core ozone months (June–September) were near normal overall. For more information, see the Supplemental TSD. Ozone formation is affected by a number of

meteorological parameters and just looking at these three parameters does not give a complete evaluation of the ozone conduciveness of the 2007 ozone season.

The commenter was concerned that the meteorology was unusually nonconductive for generation of ozone exceedances in 2007. In light of this, EPA also reviewed ozone exceedance data for 2007, and found that the first exceedance occurred April 28th, and a number of exceedance days occurred starting in late July (7/24) and the last exceedance occurred on October 4th. In all, there were 12 days with exceedances at one or more monitors in the DFW area in 2007. This is below the long-term normal trend of approximately 30 exceedance days per year. The limitation of just evaluating the number of exceedance days to determine if meteorology was normal or below normal is that exceedance days are a combination of meteorology and emissions. Emissions decreases due to fleet turnover among other things could also explain part or all of a lower than normal number of exceedance days in 2007.

Finally, we note that one reason we evaluate attainment of a NAAQS based on three years of data is that use of several years tends to mitigate any unusual meteorology that occurs during a specific year. The year 2007 is the first of the three years of data (2007–2009) that will be used for determining if the DFW area reaches attainment in 2009. The 2007 4th high maximums were all in the 80s ppb range or less for monitors that are typically near the area's design value. This is significantly lower than other recent years. Meteorological Trends analysis indicates that 2007 was closer to normal than 2005 and 2006. Therefore, the 2007 data is important from both a trends perspective as well as being the first of three years utilized in determining if the area reaches attainment in 2009.

Comment (MC–10): The commenter indicated the DFW emissions inventory has gaps and that EPA knows that there are hundreds of industrial sources involved in the gas well drilling and gas pipeline operations that were not modeled by the TCEQ and which TCEQ assumed to be insignificant. The commenter asserted that without modeling these significant sources of NO_X emissions, the attainment demonstration may be in greater jeopardy than EPA or TCEQ admits.

Response (MC–10): The TCEQ projected the future emissions inventory for the industrial sources involved in the gas well drilling and gas pipeline operations with the most recent information available at the time of the emissions inventory development. Photochemical modeling is a very complex process and the emissions from natural gas production in the DFW area were rapidly changing during the last two years of modeling and SIP development and continue to do so. Improving emission estimates and projections is one of the elements of photochemical modeling that always requires an agency to balance the need to incorporate new information with the time available to complete the photochemical modeling tool for SIP development, and still meet the submittal deadline.

TCEQ's basecase and future year (2009) SIP modeling did include estimates for emissions from industrial sources involved in gas well drilling and pipeline operations. During the commissioners meeting when the TCEQ adopted the DFW attainment demonstration SIP in May 2007, there were industry comments indicating emission estimates from natural gas compressor engines should be higher than were in the current modeling. Although the commissioners moved forward to adopt and timely submit the DFW 8-Hour Ozone attainment demonstration SIP, they also directed TCEQ staff to research the accuracy of the emissions inventories for these sources that were relied on in the attainment demonstration modeling. TCEQ staff subsequently conducted an additional survey to re-evaluate the number of stationary, gas-fired engines and other NO_X emission sources that are common at natural gas production and gathering (P&G) facilities, in the nine-county DFW area. TCEQ provided that information to EPA as supplemental WOE in a letter dated April 23, 2008, which EPA has considered in its decision on whether to approve the attainment demonstration SIP. Details of this survey, the results, and explanation of how this information was utilized in EPA's review were included in the proposal package (Proposal FRN, MOAAD TSD, etc.).

The survey collected data on existing NO_X sources and expected additional installations by 2009 so that a comparison to estimated levels in the 2009 SIP modeling could be conducted. The survey also collected data on when the NO_X emitting sources were installed. The survey indicated that P&G operations grew much more rapidly than projected in the SIP. Based on the survey results, TCEQ concluded that the majority of emissions growth would come from the increase in compressor engines and not from other facets of P&G operations. TCEQ therefore provided new estimates for the compressor engines' emissions growth.

The survey indicated that almost all of the rapid growth that created the underestimation of additional engines and other related NO_X sources from natural gas P&G emission sources had occurred after the 1999 base year. Fortunately, TCEQ put in place regulations that will control rich and lean burn natural gas fired compressor engines in the DFW area. TCEQ also controlled some engines involved with drilling operations in the Increment of Progress SIP.

From the modeling perspective, using the new survey's results, the underestimation in the growth of emissions is greatly mitigated by TCEQ's implementation of NO_X controls on emission sources in this industry group in Chapter 117 rules adopted as part of the May 30, 2007 SIP submission. While mitigated to a large extent, the new survey data indicate that emissions in the demonstration modeling, *i.e.*, the 2009 Combo 10 modeling, from these natural gas P&G sources would add 3.3 tpd based on our analysis of the TCEQ survey data. Using modeling sensitivity runs, we accounted for this approximate increase of 3.3 tpd in the projected emissions inventory, and we were able to estimate the effect on the modeled ozone levels. See Table 4 in the proposal. In considering the underestimation from a 'real world' standpoint, it is important to note that due to TCEQ's adopted regulations, a much larger amount of actual reductions of NO_X emissions (estimated as 35.7 tpd) will occur between 2007 and 2009 from the regulations on compressor engines and these extra reductions will help reduce DFW area ozone levels.

While these emissions were not fully accounted for in the initial photochemical modeling, TCEQ had developed the emission inventory for this industry group consistent with EPA's guidance. EPA appreciates the additional survey information that TCEQ provided and, EPA considered the emissions in reviewing the attainment demonstration and found that TCEQ's revised emission estimates were acceptable. This information was clearly presented as part of the proposed rulemaking action and the commenter has not identified any substantive flaws with that analysis.

Comment (MC–11): The commenter indicated that the emissions inventory appears flawed, in part from the observation that the latest VOC area source emissions inventory was unaffected despite the substantial revisions to the gas drilling/compressor engine count, as reflected in revised

NO_X area source inventory revisions. The commenter further indicated that VOC emissions from the engine stacks, and fugitive emissions from the piping and valves that connect the engines, appear not to have been incorporated into the emissions inventory, and more importantly, not to have been considered in the photochemical modeling. The commenter asserted that the absence of these emissions in the revised inventory placed additional doubt on to the accuracy of the photochemical modeling to predict ozone levels in the western part of the nonattainment area.

Response (MC–11): The commenter is correct that the VOCs from P&G facilities in the DFW area may be underestimated, since the number of P&G facilities and related NO_X sources had a large underestimation. As provided above, there are inherent uncertainties with emissions inventories. Unlike the NO_X emission discussed previously, however, the VOC emissions from natural gas production are largely compounds that are not significantly reactive in the formation of ozone. EPA defines ''Volatile Organic Compounds'' (VOCs) per 40 CFR Part 51.100(s) (as amended through January 18, 2007) and specifically lists Methane and Ethane as organic compounds that have been determined to have negligible photochemical reactivity. Methane and ethane are typically 85–90% or more of the compounds present in natural gas from gas wells so emissions from natural gas production would be expected to have a small impact on ozone production. In addition, modeling sensitivity analyses have shown that large reductions in all VOC emissions in the DFW area result in only very small changes in the area's ozone concentration level. Therefore, an underestimation of P&G VOC emissions would not change the Combo 10 and PDMR 2009 modeling projections significantly. See Section 4.2 of ENVIRON's ''Ozone Benefits in DFW from Emission Controls in the 2009 and 2012 Future Years,'' September 2006, included as a reference to Chapter 2 of the TCEQ TSD.

TCEQ did not collect data on VOC sources in the 2007 survey that they conducted of natural gas P&G facilities in the DFW area. TCEQ focused on NO_X emission sources in their survey since numerous photochemical modeling analyses had shown that elevated ozone levels in the DFW area were much more sensitive to changes in NO_X emissions than VOC emissions. For these same reasons, EPA does not believe that uncertainty in the natural gas P&G VOC emissions would result in a significant change in modeling projections or change our conclusion that the DFW area will attain the 1997 ozone standard by its attainment date.

Comment (MC–12): The commenter indicated that the Base Case Monitoring Data is skewed because it relies on the 1999 episode and, focusing on the Frisco Monitor, misrepresents the greater and more current problems associated with monitoring data from monitoring stations to the northwest and west. The commenter continued that the use of this 10-year old base case set results in under-emphasis of the effect of the numerous sources, including the Ellis County cement kilns, Barnett Shale natural gas and oil drilling, and EGU's to the south of the metroplex which often have their plume carried in southeasterly winds into Tarrant County. The commenter asserted that the 1999 data set is flawed due to the unusual meteorological conditions as well as its overall lack of representativeness and that Texas must be directed to develop additional base case data sets for SIP planning efforts.

Response (MC–12): EPA does not agree with the commenters' assertions for several reasons. As discussed in Section 2.3 of EPA's MOAAD TSD, EPA reviewed this 1999 episode and found it to be acceptable and representative of the combination of meteorology and emissions that generate ozone exceedance levels near the DV of the area at the time episodes were being selected for development of this SIP. The 2009 modeling projections evaluate ozone levels at all the monitors in the DFW area and, for this episode, both the Denton and Frisco monitors had the highest FDVs; therefore, the emphasis was not just on the Frisco monitor as the commenter asserts.

Photochemical grid modeling takes several years to develop and thus, at the time of submittal of a SIP, the episodes are typically several years old. Selection of episodes to model for SIP planning is a balance of finding historical periods with several days of exceedances that are representative of the conditions that generate ozone near the design value for the area and developing acceptable base case modeling in time to allow for a timely submittal of an attainment demonstration. At the time that TCEQ proposed the DFW attainment demonstration SIP in December 2006, the episode was just over 7 years old, not 10 years old as the commenter indicated.

Chapter 2 of the MOAAD TSD included sections that detailed EPA's guidance on episode selection, how the episode was originally chosen and further discussion and review that occurred in 2005 about the adequacy of this episode and the potential benefits of other episodes The DFW area monitors that have been DV monitors or had values near the area's DV for the period 1999–2005 (the period that was reviewed for potential episodes was 1998–2004) indicates that all of these monitors have been either north of the DFW area (Frisco monitor) or in the northwest sector (Tarrant and Denton Counties monitors). EPA has done a detailed review of both TCEQ's analyses and EPA's analyses of the conceptual model for high ozone in DFW and what monitors are the DV monitors. In years when light winds are more predominantly from the south, the northern monitors (Denton and Frisco) are the DV monitors. Other years, the winds and frequency of light winds are predominantly from the southeast, resulting in the Tarrant and Denton Counties monitors becoming the DV monitors. The location of the DFW area's DV monitor depends on the distribution of the frequency of wind directions during ozone conducive meteorology, but it is consistently on the downwind side of the DFW area. In fact, assuming the preliminary monitoring data through October 31, 2008 does not change, the Denton monitor will be the DV monitor for the 2006–2008 period. Preliminary data also indicate that the Denton monitor may be the DV monitor for the period 2007–2009 (based on 2007 and 2008 monitoring data). Approximately 70% of the local NO_X emissions that lead to high ozone levels are emitted from mobile (On-Road and Nonroad emission sources) and the highest ozone levels typically occur downwind of the core DFW emissions area. Figures 3 & 5 of TCEQ's Appendix B of their SIP submittal illustrate the distribution of NO_X emissions from On-Road and Nonroad emissions. Modeling, monitoring, and aircraft flights confirm that the highest levels of ozone occur downwind of the core DFW emissions area. As discussed above, the Frisco and Denton monitors are often downwind of the core DFW emissions area. Therefore, EPA does not agree that this episode, the control strategy, and the SIP overall are biased by the Frisco monitor being one of the highest ozone monitors in the base year.

The commenter asserted that using the 1999 episode results in under-emphasis of the effect of the numerous sources, including the Ellis County cement kilns, Barnett Shale natural gas and oil drilling, and EGU's to the south of the DFW metroplex which often have their plume carried in southeasterly

winds into Tarrant County. As discussed elsewhere in this response and in EPA's MOAAD TSD, EPA conducted a thorough review of EPA's episode selection guidance, conceptual model for high ozone events in DFW, and episodes available for modeling at the time of episode selection and EPA determined that this episode was appropriate and acceptable. EPA does not recommend episode selection be based on trying to target specific industry/emission sources but should weigh a number of factors in selecting episodes for photochemical grid modeling to be utilized for SIP development as was done in this situation.

Afternoon wind from the southeast is one of the more prevalent wind directions for high ozone in the DFW area. In TCEQ's conceptual model description for high ozone events in the DFW area, morning winds out of the south or southwest often occur and then transition to out of the southeast or east in the afternoon. Therefore, the sources mentioned can impact the Denton and Frisco monitors for some of the hours of the day (that contribute to a high 8-hour ozone value). This episode has two days with winds from the southeast in the afternoon (8/17 and 8/22). August 17th had winds out of the southwest in the morning that transitioned to winds out of the southeast in the afternoon. Forward wind trajectories for the 17th indicate the emissions from the Ellis County cement kilns were carried over the Frisco and Denton monitors. On the 17th, it is also likely that emissions from the other sources mentioned would also be carried over the Denton and potentially Frisco monitors. Even on days that the winds do not take emissions from these sources over the Frisco and Denton monitors, the modeling still utilizes these emissions (and changes in these emissions) in projecting ozone levels in the modeling domain. Among modeling analyses that can be impacted by emission reductions at these sources are changes in ozone exceedance metrics, such as number of grid cell 8-hour ozone exceedances predicted and other metrics that consider the level of exceedances predicted for each grid cell.

In summary, EPA has reviewed the episode and determined that the episode is representative of the conditions most often associated with high eight-hour ozone in the DFW area.

Comment (MC–13): Commenters indicated that the future case attainment demonstration modeling included NO_X reductions from Phase I Clean Air Interstate Rule (CAIR) controls for EGUs outside of Texas. Commenters indicated that since these reductions are now unlikely to occur, at least on the original timeframe, the anticipated ozone air quality benefits will be reduced. Commenters asserted that EPA should consider this effect on the modeling and the WOE analysis.

Response (MC–13): The EPA has considered the impact of a CAIR vacatur and determined that even an immediate vacatur of CAIR would not change our conclusion that the modeling and weight of evidence show that the DFW area will attain the 1997 8-hour ozone standard by the deadline. The principal reasons for this conclusion are: (1) Chapter 117 rules in the Texas SIP implemented in the entire eastern half of Texas are equivalent to the Phase I rules of CAIR; (2) evaluation of controls already installed in the nearest States impacted by CAIR, Arkansas and Louisiana, show that significant reductions will still be implemented; (3) many of the more distant states impacted by the CAIR vacatur are also subject to the NO_X SIP call so much of CAIR Phase I NO_X reductions will remain in place; and (4) available modeling shows that loss of CAIR only has a small impact on the DFW area.

Texas implemented NO_X controls on EGUs in the entire eastern half of Texas that are approved into the Texas SIP, are enforceable, and are equivalent to reductions from CAIR Phase I for East Texas EGUs. The rules can be found in Texas Administrative Code Title 30 Part 1 Chapter 117 Subchapter E Division 1 (117.3000–117.3056). Therefore, the level of NO_X reductions from EGUs within the entire eastern half of Texas for the 2009 period is not related to the status of the CAIR rules. With regard to EGU emissions in the western half of Texas, EPA has concluded that emissions from these sources would rarely be transported to the DFW area during periods of high ozone in DFW. Thus, any changes in emissions from Texas EGUs related to a vacatur of CAIR are not expected to impact DFW ozone exceedance levels prior to the attainment date.

In fact, the main change in emissions in the DFW photochemical modeling domain due to a CAIR vacatur is for CAIR states that were not part of the NO_X SIP call and were outside of Texas. Of these states, Louisiana and Arkansas are the closest upwind states to DFW and would be expected to have the largest potential impact on ozone level changes in DFW due to the CAIR vacatur. We have reviewed EPA's Clean Air Market's Division National Electric Energy Data System database (July 2008 version) that tracks equipment that has been installed to meet the CAIR requirements for the EGUs in these two states. Our evaluation of controls installed at facilities in Arkansas and Louisiana considered whether installed controls were integral to operation of the unit (example: Low NO_X Burners), or if the controls could be shut-off (Example: Over-fire Air) or potentially bypassed (SCR). We have also conferred with Louisiana and Arkansas Departments of Environmental Quality in an attempt to confirm the information in the database.

Our analysis of Louisiana major EGU's indicates that most controls are based on Over-Fire Air or SCR (based on discussions with LDEQ (September/October 2008)). However, the Dolette Hills is the closest large Louisiana coal-fired EGU that is outside Texas and has the highest potential to impact DFW area ozone levels of any coal-fired EGU outside of Texas. It is often upwind of the DFW area when the DFW area has elevated ozone levels. Low NO_X burners and Over-Fire air have been installed at the Dolette Hills unit to reduce NO_X emissions. In the absence of CAIR, it is possible that the utilization of Over-Fire air could cease, but the Low NO_X burners are integral to the boiler operation and cannot be bypassed. Therefore, even if the Over-Fire Air were not operated there would still be permanent large NO_X reductions on the order of 2000 to 3000 tpy of NO_X (based on Discussions with LDEQ) compared to 4000 to 5000 tpy of NO_X with Over-Fire Air and Low NO_X Burners.

Our analysis of EGUs in Arkansas indicates that for the coal-fired EGU's, most are being controlled with Over-Fire Air, but one 523 MW unit is being controlled with Low NO_X burners that have been installed and should remain installed. For the gas-fired EGUs, most are being controlled with Dry Low NO_X burners in combination with SCR. The Low NO_X Burners are integral to the operation. The SCR, however, conceivably could be turned off. Dry Low NO_X burners can achieve up to a 30% reduction by themselves so significant reductions will still occur.

Therefore, even with a vacatur of CAIR, significant reductions will still occur in Arkansas and Louisiana including at the closest, upwind plant, Dolette Hills. As for the reductions in other States impacted by a CAIR vacatur, many of these States were part of the NO_X SIP call. The NO_X SIP call reduction requirements remain in place. States affected by the NO_X SIP call include: Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Maryland, Maine, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode

Island, South Carolina, Tennessee, Virginia, West Virginia and the District of Columbia. While some states' rules implementing the NO_X Budget Trading Program (established by the NO_X SIP call) have a sunset provision in anticipation of being replaced by the CAIR ozone-season trading program, EPA expects the majority of controls to remain in place. EPA has asked States with sunset provisions to move quickly to address this concern.

We believe that it is reasonable to consider that the reductions identified above will occur because the previously installed controls are integral to the operation of the EGUs and are not likely to be bypassed or circumvented or are required to comply with regulations implementing the NO_X SIP call.

EPA also considered available modeling evidence in considering the impact of a CAIR vacatur. First, the photochemical modeling upon which the CAIR rule itself was based did not result in any other State being included in the CAIR rules because of its impact on the DFW area. In other words, no state was included in CAIR because of its impact on the DFW area.

No modeling exists that directly evaluates the impact of a CAIR vacatur on the modeling episodes used in the final DFW SIP modeling so it is not possible to directly evaluate the impact on Combo 10 or PDMR 2009 control strategy runs. EPA has found two modeling analyses that help to evaluate the potential impact of the CAIR vacatur on DFW ozone levels.

We also have reviewed sensitivity modeling that evaluated potential CAIR impacts conducted on an earlier version of DFW modeling. This modeling was included in the HARC 35 Project Phase II Report (''Dallas/Fort Worth CAMx Modeling: Improved Model Performance and Transport Assessment Project H35, Phase 2''; ENVIRON; August 2005). The H35 Phase II report evaluated the impact of the CAIR emission reductions throughout the Eastern U.S. on DFW ozone levels in 2010. The report included a bar chart (Figure 10–4), showing episode average contributions to high 8-hour ozone in the DFW 9-county NAA by source region and emissions group. Side-by-side bars show the subtle changes due to the CAIR EGU controls. Controls expected from CAIR reduced episode average high ozone in the DFW NAA by 0.3 ppb. The episode peak ozone was also lowered 0.3 ppb over DFW from the CAIR controls. This early modeling did not include some of the later emission inventory and meteorological refinements, but a new evaluation with the modeling submitted with the attainment demonstration would not be expected to yield significantly differing results.

We also looked at some earlier modeling that was included in Table 4–1 of the H35 Phase I Report (HARC Project H35, Transport Contributions From Out-of-State Sources to East Texas Ozone, February 2005). The H35 Phase I report indicated that controlling a 25% NO_X reduction on all EGUs in Arkansas, Louisiana, Mississippi, Missouri (NO_X SIP call state), Oklahoma (non-CAIR state), Tennessee (NO_X SIP call state), and the Gulf of Mexico (non-CAIR area) yielded a 0.1 ppb reduction in ozone on average 2007 elevated ozone levels (evaluated levels above 75 ppb and 85 ppb) in DFW area for the DFW's SIP episode. While this analysis is for 2007 and conservatively includes 25% NO_X reductions in two NO_X SIP call states, 25% reductions in Oklahoma (non-CAIR state), and 25% reductions in Gulf of Mexico EGUs; all of which are additional reductions not related to the CAIR Phase I rule. The 2007 modeling analysis is further evidence that the DFW area is not influenced by out-of-state EGU emissions at times when elevated ozone levels occur in DFW.

Both of these modeling analyses consistently show a picture that out of state reductions only have a small impact of 0.1 to 0.3 ppb or less on model projected design values in the DFW area. The two CAIR assessment analyses (EPA—Fall 2008 and H35 Phase II) are conservative because they remove all CAIR reductions from the modeling. This does not take into account that for non-NO_X SIP call states, some CAIR controls will generate reductions because the controls are integral to the combustion process and will not likely be removed (Low NO_X Burners, etc.). These two CAIR modeling analyses also rely on 2010 EGU projections, which include an additional year of EGU growth, compared to the growth that would be included for a 2009 evaluation. These modeling evaluations over predict for NO_X during the 2009 ozone season because many states will still have in place NO_X controls required by the NO_X SIP call.

The worst-case assessment of a 0.1 to 0.3 ppb increase on model projected FDVs, in itself, is small enough that for most model projections, no change in the truncated ppb value would occur. Given that the actual impact of a vacatur on emissions would be smaller than in these worst case analyses, EPA believes that the status of the CAIR rules should not impact our decision to approve the DFW attainment plan.

We have included further discussions of a vacatur of CAIR on the modeling and WOE analysis in a separate response to comment that addresses comments on the adequacy of the WOE analysis and the conclusion of whether the DFW NAA will reach attainment.

Comment (MC–14): The commenter indicated that the DFW attainment demonstration model has considerable challenges as detailed in the Notice of Proposed Rulemaking. The commenter noted that model development is a resource intensive process and the state simply needs to apply additional resources to this process. The commenter stated that throughout the development of the May 2007 SIP revision, the State indicated that it had insufficient resources to improve the attainment demonstration and incorporate alternative and more recent ozone episodes. The commenter concluded that the State has not allocated adequate resources to SIP development, including model development, to develop models robust enough to accurately predict ozone concentrations in the attainment year and beyond. The commenter then concluded that as part of any final action, EPA should advise the state that failures to program sufficient resources to meet CAA requirements in the future will not be accepted as justification of inadequate or incomplete demonstrations of attainment.

Response (MC–14): All states and other entities that conduct photochemical modeling must address competing priorities and determine whether additional work will provide significant additional value. They must consider several factors including the time available for completion of modeling of episode(s), updating of emissions inventories, the resources needed to conduct further refinements or additional episodes, and the overall benefit of delaying the project to conduct additional modeling work.

The commenter is correct that modeling is a very resource intensive process. Photochemical modeling requires creation of very detailed emission inventories and meteorological modeling to be used in photochemical modeling in an attempt to replicate a historical event when ozone exceedances have occurred. Once photochemical modeling has been created that performs sufficiently well, the basecase modeling can then be used in conjunction with future case modeling of the same meteorological conditions to test attainment demonstration strategies. It often takes many iterations of refinement of emissions and/or meteorological fields to result in basecase photochemical modeling that performs sufficiently in

accordance with TCEQ's meteorological performance metrics and EPA model performance metrics.

As discussed in the proposal and the MOAAD TSD, TCEQ did consider and complete exploratory work on other episodes. But initial analyses indicated that the additional episodes would not give significantly different results compared to the existing episode. As we explain in Section 2.3 of the TSD, we believe in this case, the one episode is acceptable for control strategy development. EPA evaluated the preliminary analyses of other episodes and concurred that it did not appear that the additional episodes would alter the model projections on what was needed to reach attainment.

EPA believes that the episode selection is appropriate, and that the modeling was sufficiently robust. The demonstration modeling combined with the WOE analyses are sufficient to show that the DFW area will attain by the deadline.

Comment (MC–15): Commenters indicated that the DFW 8-hr ozone SIP proposal by TCEQ is significantly flawed and fails to support the required attainment demonstration by 2010. Commenters continued that the DFW modeling by TCEQ shows that several ozone monitors in 2010 will still exceed the rounded-up standard of 84 ppb. A commenter asserts that the CAA requires that SIPs show clear attainment for all ozone monitors in a nonattainment area and the reason that the air modeling shows exceedances in 2010 is because the proposed reductions by TCEQ are inadequate.

Commenters also indicated that according to Table 5 of the **Federal Register** notice, TCEQ's plan predicts that 2 monitors in the region would not meet the 8-hour ozone NAAQS after implementation of the control strategy (PDMR 2009) and consideration of TCEQ's Weight of Evidence. Commenters continued that they are aware that EPA's ozone implementation guidance allows a ''Weight of Evidence'' demonstration to supplement the modeling analysis required by the CAA but assert that this analysis fails to overcome the inadequacy of the TCEQ's proposed control strategy to bring the DFW area into attainment.

Commenters indicated that the proposal establishes repeatedly that ambient air quality is likely to remain above the artificial rounded-up standard of 84 ppb (Tables 2, 3 and 5). The commenters went on to assert that after disclosing that state WOE calculations fall short of meeting the attainment goal, EPA ultimately relies on their ''simplistic'' analysis concluding that 15% of the NO_X emissions inventory will be reduced by existing measures not present in 2007. The commenters continued that given the degree to which design values have to fall, from 95 ppb to 84 ppb, and in light of the 2010 attainment date, EPA should consider that the drop in the NO_X and VOC emissions inventories from 2007 to 2009 are completely insufficient, according to EPA's own studies and guidance, to bring about the drop in DVs needed to reach attainment. The commenters further continued that EPA's own analysis of the most recent TCEQ modeling shows that the State was only able to get all the area's predicted DVs below 88 ppb with a non-standard and non-approved calculation of RRF factors and EPA's own analysis with the proper RRF procedure showed that monitors were still above the 88 ppb threshold.

A commenter indicated that the WOE approach by the TCEQ is flawed since it fails to show attainment by 2010 and EPA needs to reject it as bad science.

Response (MC–15): We responded to comments on the TCEQ and EPA RRF methods in a separate response to comments above. Overall, EPA considered both RRF methods and the results of those methods in our review. Also, as explained in previous responses, we considered the results of modeling from both Combo 10 and PDMR 2009 modeling runs.

EPA disagrees with the commenter that the modeling alone must demonstrate attainment in order for EPA to approve the attainment demonstration. EPA discussed both in the DFW MOAAD TSD and the proposal, EPA's guidance on modeling and WOE usage. As with any predictive tool, there are inherent uncertainties associated with photochemical modeling (emission estimates, emission projections, meteorological modeling, chemical reaction equations and simplifications, etc.). EPA's guidance recognizes these limitations and provides approaches for considering other analytical evidence to help assess whether attainment of the NAAQS is likely. This process is called a WOE determination. EPA's modeling guidance (updated in 1996, 1999, and 2002) discusses various WOE approaches. This was further updated in 2005 and 2007 for the 1997 8-hour ozone attainment demonstration procedures to include a WOE analysis as an integral part of any attainment demonstration due to concerns of modeling uncertainties. This guidance strongly recommends that all attainment demonstrations include supplemental analyses beyond the recommended modeling. These supplemental analyses should provide additional information such as monitoring data analyses, and emissions and air quality trends, which help corroborate the overall conclusion from the photochemical modeling. EPA's modeling guidance specifically recommends that a WOE analysis be included as part of any attainment demonstration SIP where the modeling results predict FDVs ranging from 82 to less than 88 ppb (EPA's 2005 and 2007 A.D. guidance documents). It is important to note that EPA recommends a WOE analysis even if the modeling is demonstrating attainment at *all* the monitors. EPA's interpretation of the Act to allow a WOE analysis has been upheld. See *1000 Friends of Maryland* v. *Browner,* 265 F. 3d 216 (4th Cir. 2001) and *BCCA Appeal Group* v. *EPA,* 355 F.3d 817 (5th Cir. 2003).

In this case, the commenters are correct that the final modeling based projections show two monitors above attainment levels. Prior to conducting the model based projections, the highest modeling values were 88/89 ppb (TCEQ/EPA RRF method), but after modeling based adjustments were conducted to account for reduced airport emissions, DERC usage limitations, and back-up generator reductions, the highest value using either RRF was 88 ppb. EPA specifically recommends a WOE analysis be performed when modeling values are within the range indicated by the DFW analysis.[11]

EPA's guidance (2005 A.D. Guidance) does indicate that a local 30% NO_X reduction may only yield a 3–4 ppb change in modeling values. That assessment was based on coarser resolution photochemical modeling that is typically less responsive to emission changes than the finer grid modeling that was used in DFW. Here, EPA is relying on analyses that were done employing the DFW modeling to determine the potential change in ozone due to the additional NO_X reductions that are estimated to occur by 2009. Relying on these DFW analyses, EPA estimates that the 25.4% local DFW area NO_X reductions occurring between 2007 and 2009 would reduce ozone concentrations by approximately 3–4 ppb. As discussed in detail below, EPA is considering much more than just the modeling in making our conclusions on the adequacy of the attainment demonstration and determining that the 2005–2007 DV of 95 ppb will drop to attainment levels (84 ppb) in 2009.

[11] The modeling guidance does not specifically preclude the use of WOE when the modeled values are higher than the recommended WOE range.

EPA evaluated many factors in the WOE. These items include reductions not included in the modeling based projections (energy efficiencies), unquantifiable measures (AirCheckTexas, Dallas Sustainable Skyline Initiative, etc.), meteorological analyses of severity of ozone seasons (the base period and recent years, including 2007), most recent monitoring in 2007 (a 4th high of 89 ppb at two monitors and the other 18 monitors had 4th high values of 87 ppb or less), the court's vacatur of CAIR, progress in implementing the TERP program, and progress in implementing the early compliance incentive on natural gas compressor engines outside the DFW area. The amount of NO_X reductions quantified in the SIP from the 2007 period that are estimated to occur by 2009 are approximately 15% of the estimated 2007 EI; these reductions will come from the existing federal, state, and local measures. When one includes the additional reductions due to the underestimation of emission reductions from compressor engines, the backup generators, and the State's progress in implementing TERP, there would be a 25.4% reduction in NO_X emissions between 2007 and 2009, which could yield approximately a 3–4 ppb drop in ozone based on modeling projections.

In a response above, we concluded that 2007 had meteorology similar to normal meteorology. We also examined whether the 2008 data indicates a trend toward attainment for the area. We examined the 2008 preliminary data, which is awaiting QA/QC. The 2008 preliminary data show that the DFW area had 4th high values of 85 ppb at two monitors and at the other 18 monitors, the value was 84 ppb or less. The 2008 preliminary data indicate the 2006–2008 DV is 91 ppb (down from 95 ppb in using 2005–2007 monitoring data). For the monitor that has the highest average 4th high values in 2007 and 2008 and is likely to be the controlling monitor (or one of the highest monitors) for determining if the area reaches attainment based on 2007–2009 data, the monitor's DV for the 2007–2009 period would have to be less than 85 ppb. It is important to note that this monitor (Denton) had a preliminary 4th high value in 2008 of 84 ppb. Considering the 2008 preliminary data with most of the 4th highs of 84 ppb or less, and that much of the DFW SIP reductions and another year of fleet turnover are still to occur, the ambient air quality trend strongly supports that the DFW monitors will reach attainment in 2009. EPA believes that the closer an area is to its attainment date, the more weight should be given to the actual ambient data and the expected additional reductions in considering whether an area will reach attainment.

We have considered modeling using two emission reduction scenarios (Combo 10 and PDMR 2009), recognizing that the actual emission control level would be somewhere in between, and two types of RRF calculations. We have also considered the impact of additional measures and reductions documented in the April 23, 2008 letter. With these adjustments, the modeling is demonstrating significant reductions of 7–13 ppb in ozone from the base period, but is still slightly short of attainment. The modeling predicts values greater than 84 ppb at two of the nine monitors, but we believe, after evaluating additional evidence in a WOE analysis, that the area will attain by its attainment date. Specifically, we considered that the model's under-prediction of high ozone levels may be biasing the model predictions, and therefore potentially underestimating the ozone reduction that could occur due to the emission reductions achieved by local and regional rules. We considered the impact of meteorological adjustments to the design value projection, which would further indicate the future projections may be too high. We have recognized emission reduction efforts that have not been quantified and included in the modeling and model-based WOE estimates. We also considered and gave significant weight to non-modeling evidence of recent monitoring and projected NO_X emission changes between 2007 and 2009.

We have also considered ambient data in 2008 and progress in implementing control measures in making our final conclusion on the DFW area's 8-hour Ozone SIP's Attainment Demonstration adequacy. For example, we weighed a vacatur of the CAIR rules and its potential impact on the DFW area. As discussed in detail in a response above, we concluded that the removal of CAIR may result in a change in 8-hour ozone modeling values of 0.1–0.3 ppb. We also considered that fewer engine controls were installed using the early compliance incentive money that was available.

We have also considered the progress in implementing the TERP program. This program has achieved all of the reductions that were projected in the May 30, 2007 submissions. These reductions were included in the modeling. In its April 2008 letter, Texas indicated that an additional 14.2 tpd of emission reductions could be achieved through the additional funding made available by the legislature. EPA relied on this projection as part of our weight of evidence evaluation in our proposal. As discussed in the response to comments on the TERP reductions, since our proposal notice, additional information has become available on the status of TERP projects and the State's progress in meeting its WOE projection of 14.2 tpd of NO_X emissions reductions in 2008 and early 2009. Recently TCEQ announced they would be delaying the 2009 TERP grant application cycle, due to Hurricane Ike. Due to this unfortunate delay (the grant application cycle opened December 1, 2008), FY2009 grant money will be issued later than originally thought. Approval of grants will not likely occur by the beginning of the DFW ozone season (March 1, 2009), but approval of grants should start in the May to early June timeframe. While this is not by the beginning of the ozone season, it is soon enough that reductions could start occurring before the core ozone season and therefore additional reductions can be considered as weight of evidence.

This is confirmed by an examination of 2004–2007 and preliminary 2008 monitoring values for the typical design value monitors (north and northwest sides of the DFW area) which is included in the supplemental TSD. It shows that the 1st to 4th high 8-hour ozone values (values that are utilized in setting the area's DV) are usually set in the June through September timeframe.

Since the approval of FY2009 grants should start before or during the beginning of the core ozone period for the DFW area, some additional reductions can be considered as WOE. At this point, it seems unlikely that the full 14.2 tpd will be achieved even by the core ozone season. To evaluate the impact, we assumed that TCEQ would achieve approximately 70% of the originally projected 14.2 tpd; consequently, there might be a loss in reductions of approximately 4.2 tpd. See the Supplemental TSD. Then in looking at the modeling based WOE, the increase in projected NO_X would yield approximately an additional 0.10 to 0.22 ppb at the monitors with the highest FDVs. We have also revised our estimate of actual reductions between 2007 and 2009 to consider this potential loss in TERP emission reductions. Rather than the 26% we considered at proposal, our new estimate is a 25.4% reduction of the estimated 2007 emission levels.

Finally, over half of the previously discussed 25.4% reductions of NO_X emissions (between 2007 and 2009) in the DFW area are slated to occur between the 2008 and 2009 ozone seasons. Due to these large local

reductions, we expect the 2009 ozone levels to be lower than 2008 levels.

In summary, EPA has considered a number of factors. As pointed out by commenters, some control strategies, notably CAIR and TERP, are likely not going to achieve the reductions originally expected. As discussed above, we considered the impact of these factors to be relatively small. We believe that at this time, with the attainment date only months away, we should give considerable weight to the recent air quality trends and to expected further reductions that will occur before the 2009 core ozone season. Therefore, considering all of the factors discussed above with the elements we considered in the proposal (available modeling, evidence, analyses, and adopted control strategies) and the comments we received, EPA believes the DFW area will reach attainment of the 1997 8-hour ozone standard by its attainment date.

E. Comments on Discrete Emission Reduction Credits (DERCs)

Comment: A commenter states that EPA's conditional approval of the DFW attainment demonstration does not provide for adequate public review and comment on the measures TCEQ has committed to implement. The commenter is concerned that the public will not have the opportunity to review and comment on the DERC flow control limit.

Response: Section 110(k)(4) of the Act authorizes conditional approval of ''a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision.'' Conditional approval is authorized when a SIP contains substantive, but not fully satisfactory, provisions, and the State commits to submit specific enforceable measures to cure the deficiencies. We have proposed to conditionally approve the DFW attainment demonstration conditioned on the TCEQ submitting a complete SIP revision by March 1, 2009, that includes an enforceable mechanism providing a 3.2 tpd restriction on the amount of DERCs available for use in the DFW area starting March 1, 2009. If the State wishes to use more than 3.2 tpd of DERCs in the DFW area after 2009, there must be an enforceable mechanism that provides for increases above 3.2 tpd beginning January 1, 2010 as long as this increase is consistent with attainment and maintenance of the standard.

Section 110(a)(2) of the Act and 40 CFR Part 51 require the State to conduct a 30-day public comment period and hold a public hearing on a proposed SIP revision submittal. Further, the State must include in the adopted SIP revision submittal a response to all the received comments. The TCEQ has proceeded with a proposed rulemaking and held a public comment period, pursuant to the requirements of the Act and 40 CFR Part 51, from August 6 through September 12, 2008, on the proposed DERC SIP revision to meet the condition. Additionally, the State published the proposal in the Texas Register and held public hearings on September 9, 2008, in Dallas, Texas and on September 10, 2008, in Arlington, Texas. EPA and others provided comments.

Upon receipt from the TCEQ of a complete DERC SIP revision, EPA will review it and propose action in the **Federal Register**. In this notice, we will provide, as required by the Act, an opportunity for a 30-day public comment period.

The public is provided with three separate opportunities to review and comment on the DERC SIP revision—during (1) the comment period for EPA's proposed conditional approval of the DFW attainment demonstration; (2) the comment period for the State's proposed rulemaking; and (3) the comment period for EPA's proposed action on the DERC SIP revision. Thus, EPA finds that there are ample opportunities for public review and comment on the DERC SIP revision.

Comment: A commenter states that EPA's conditional approval of the DFW attainment demonstration relies upon the DERC rule; yet EPA has only conditionally approved the DERC rule into the Texas SIP. The commenter states that emission credits subject to the DERC rule should not be relied upon as part of the attainment demonstration SIP until EPA fully approves the DERC rule.

Response: As noted in the previous response, the Act authorizes conditional approval based on a State's commitment to adopt specific enforceable measures by a date certain. If the State fulfills its commitment with respect to the DERC flow control limit and EPA approves the submission, we believe the attainment demonstration will include all enforceable measures necessary to attain by the attainment date. The attainment demonstration cannot be fully approved until the State submits and EPA approves the revision to the DERC rule providing for the 3.2 TPD flow control limit. In the interim, as provided in the Act, the plan may be conditionally approved with a commitment to submit the necessary DERC rule revision.

As the commenter notes, the DERC rule is already conditionally approved (see 71 FR 52703, September 6, 2006). In our final conditional approval of the DERC rule, we stated that a conditional approval is treated as a full approval until such time that EPA takes action to disapprove the rule. Therefore, it is acceptable for TCEQ to continue allowing DERCs to be used within the DFW nonattainment area.

Further, the terms of the 2006 DERC conditional approval do not directly impact the DFW attainment demonstration and its DERC flow control condition. TCEQ committed to making the following revisions to the DERC rule in their September 8, 2005, commitment letter and to comply with these commitments during the 2006 DERCs conditional approval period:

1. Revise Title 30 Texas Administrative Code (30 TAC) § 101.373 to prohibit the future generation of DERCs from permanent shutdowns and to allow DERCs generated and banked from permanent shutdowns prior to September 30, 2002, to remain available for use for no more than five years from the date of this letter.

2. The TCEQ will perform a credit audit to remove from the emissions bank all DERCs generated from permanent shutdowns after September 30, 2002. Even if the shutdown itself occurred before September 30, 2002, no DERCs can be generated from that event after September 30, 2002.

3. Revise 30 TAC §§ 101.302(f), 101.372(f)(7) and 101.372(f)(8) to clarify that EPA approval is required for individual transactions involving emission reductions generated in another state or nation, as well as those transactions from one nonattainment area to another, or from attainment counties into nonattainment areas. The TCEQ further understands that the EPA would require a SIP revision prior to approving a transaction between another state or nation, as well as those transactions between counties not located within the same nonattainment area.

4. The TCEQ will revise Form DEC–1, Notice of Generation and Generator Certification of Discrete Emission Credits; Form MDEC–1, Notice of Generation and Generator Certification of Mobile Discrete Emission Credits; and Form DEC–2, Notice of Intent to Use Discrete Emission Credits, to include a waiver to the federal statute of limitations defense for generators, and users of DERCs and mobile discrete emission reduction credits (MDERCs). Please be reminded that there is currently no applicable state statute of limitations in the State of Texas. In addition, the TCEQ will maintain its current policy of preserving all records relating to DERC and MDERC generation

and use for a minimum of five years after the use strategy has ended.

5. Revise 30 TAC §§ 101.302 and 101.372 to clarify that a proposed quantification protocol may not be used if the TCEQ Executive Director receives a letter from the EPA objecting to the use of the protocol during the 45-day adequacy review period or if the EPA proposes disapproval of the protocol in the **Federal Register**.

6. Revise 30 TAC § 101.306 to specify that Emission Reduction Credits may be used within the highly reactive volatile organic compounds Emissions Cap and Trade program as an annual allocation of allowances as provided under 30 TAC § 101.399.

TCEQ submitted revisions to the DERC program on October 24, 2006 to address the 2006 condition. EPA is currently reviewing this SIP revision submittal and will take action at a later date and in a separate rulemaking on whether TCEQ's revisions to the DERC program adequately satisfied the terms of the 2006 DERC conditional approval. In the meantime, the DERC program can continue to be used in Texas, including the DFW area. Conditions 1 and 2 pertain to DERCs generated through permanent shutdowns and provide that any shutdown DERCs generated prior to September 30, 2002, in the DFW area would be available for use until September 8, 2010. Projected uses of these pre-September 30, 2002 shutdown DERCs were appropriately modeled and accounted for by TCEQ as part of the overall DERC usage projections in DFW. Emission reductions subject to condition 3 do not impact the DFW attainment demonstration since EPA has not been contacted about using discrete emission reductions in the DFW area that have been generated in another state, nation, nonattainment area, or surrounding attainment counties. Conditions 4 and 5 modify the DERC rule to align the DERC generation and use procedures with EPA's Economic Incentive Program Guidance. These conditions do not negatively impact the projected uses of DERCs that were accounted for in the DFW attainment demonstration. Condition 6 only applies to DERCs used in the Houston/Galveston/Brazoria ozone nonattainment area and is therefore not applicable to the DFW attainment demonstration.

As discussed previously, TCEQ submitted revisions to the DERC program on October 24, 2006 to meet the 2006 DERC condition. EPA is currently reviewing these revisions to the Texas SIP and will take action in a separate rulemaking. These revisions, as noted above, have no impact upon the DFW area's attainment demonstration SIP and its reliance upon DERCs.

Comment: Commenters believe that the DERC usage limitation should be required every year rather than allowing a different approach after 2009. Commenters also believe that the enforceable flow control mechanism lacks specificity, may be backsliding (contrary to the Act's requirements) and may not demonstrate continued attainment of the 1997 ozone standard in the DFW area.

Response: Commenters will be able to address the substance of the DERC flow control SIP revision and its effect on the attainment demonstration once it is submitted to EPA. Until the State adopts and submits this revision to the DERC rule, it is premature to speculate about what the State might choose to do. However, we note that so long as the State demonstrates that the adopted rule will not interfere with attainment by June 2010 and maintenance of the NAAQS in the following years, EPA cannot mandate that the State apply the same approach in subsequent years that it chooses to apply in 2009.

In our proposed conditional approval of the DFW attainment demonstration, we described the requirements of the 2009 DERC flow control condition and the enforceable mechanism that must relate it to the DFW attainment demonstration. We specifically recognized that the DERC usage limitation did not need to be required every year after 2009. For all years after 2009, the TCEQ will have the option to retain the 3.2 tpd DERCs usage restriction or choose to increase the amount of tpd of DERCs usage, as long as there is an enforceable and replicable mechanism in place to ensure the increase in tpd of DERCs usage as offset by other measures, continues to ensure attainment in the area by having the same impact as if the 3.2 tpd DERCs usage restriction remained in effect. This includes the quantity and spatial allocation impacts of increased tpd of DERCs usage on the ozone levels. Therefore there would be no backsliding, even if the amount of tpd of DERC usage increased.

In our proposal, we described a specific enforceable mechanism that would be acceptable concerning the substitution of other measures beginning January 1, 2010, allowing more than 3.2 tpd of DERCs usage in a year. As discussed in our DERC response to comments number 1, the public will receive three opportunities to review and comment on the merits and nature of the 2009 DERCs limit and the after-2009 enforceable mechanism in the DFW area—during (1) the comment period for EPA's proposed conditional approval of the DFW attainment demonstration, (2) the comment period for the State's proposed rulemaking, and (3) the comment period for EPA's proposed action on whether the condition has been met.

EPA believes that with the public review and comment opportunities provided, as well as the specifications outlined in our proposed conditional approval rulemaking, there will be sufficient opportunities to ensure that EPA has received relevant comments and information to allow EPA to make an informed decision on the acceptability and enforceability of the TCEQ's DERCs SIP revision submittal.

Comment: Commenter states that the DERC emission reductions relied on in the DFW attainment demonstration are inadequate.

Response: While EPA appreciates the effort and time of the commenter, the commenter has not provided any substantive description of why the DERC emission reductions relied on are inadequate for attainment.

F. Comments on Reasonably Available Control Measures (RACM)

Comment: Numerous commenters note that the cement plants in the DFW area are the largest source of industrial NO_X emissions in the DFW area. They claim there is available technology that would reduce NO_X emissions by 90% and the companies should be required to install Selective Catalytic Reduction (SCR) as NO_X RACM. They also note that the cement kilns are a large source of VOC emissions in the area but only one of ten kilns in Midlothian uses modern controls to reduce VOC emissions by 90%. Further, they claim that all Midlothian kilns should be required to install this technology, *i.e.*, Regenerative Thermal Oxidizers (RTOs), as VOC RACM. Moreover, EPA needs to conduct an independent RACM analysis.

Response: EPA interprets the Act's RACM requirement to mean that a measure is not RACM if it would not advance the attainment date (57 FR 13498, 13560).[12] This interpretation has been upheld. See *Sierra Club* v. *EPA*, 294 F.3d 155 (DC Cir. 2002) and *Sierra Club* v. *United States EPA*, 314 F.3d 735 (5th Cir. 2002). A state must consider all potentially available measures to determine whether they are reasonably available for implementation in the area,

[12] See also EPA's ''Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas,'' John S. Seitz, Director, Office of Air Quality Planning and Standards, November 30, 1999.

and whether they would advance the area's attainment date. The state may reject measures as not meeting RACM, however, if they would not advance the attainment date, would cause substantial widespread and long-term adverse impacts, or would be economically or technologically infeasible. Additionally, potential measures requiring intensive and costly implementation efforts are not RACM. *Sierra Club* v. *EPA* at 162–163 (DC Cir. 2002); *Sierra Club* v. *EPA*, 314 F.3d 735 (5th Cir. 2002); *BCCA Appeal Group* v. *EPA*, 355 F.3d 817 (5th Cir. 2003). To demonstrate measures that advance attainment of the ozone standard, the emission reductions from the measures must occur no later than the start of the 2008 ozone season—*i.e.*, by March 1, 2008, in order to advance attainment. Because there are no measures that could have been adopted and implemented by a date that has now passed, we believe it is appropriate to conclude that additional measures are not RACM.

EPA expects States to prepare a reasoned justification for rejection of any available control measure. The resulting available control measures should then be evaluated for reasonableness considering their technological and economical feasibility, and whether they will advance attainment. In the case of the DFW SIP, TCEQ performed an analysis to determine whether all RACM were included in the SIP.

To evaluate RACM for VOC measures, the State looked to all available RACM analyses and guidance for all the types of source categories in the DFW area and their potential controls. The State's analysis included evaluation of the potential RACM RTO control technology for cement kilns in the DFW area as VOC RACM. The State's photochemical modeling, however, indicated that the implementation of RTO technology on cement kilns in the DFW area would not advance attainment. The State's analyses indicated that it would take extremely large reductions of VOC emissions, over 100 tpd, to reduce the ozone level at the Denton monitor [13] in the DFW area by 1 ppb. Thus only measures that will provide approximately 100 tpd of VOC emissions reductions will timely advance attainment. We were unable to identify any potential RACM measures in the State's submittal that would provide 100 tpd or more of VOC reductions; this review also examined the use of RTO in cement kilns.

In addition to reviewing the State's submittal, EPA reviewed the State's 2005 and 2007 Emissions Inventories for Point Sources. This review showed that the cement kilns do not emit sufficient amounts of VOCs to achieve 100 tpd in emissions reductions. See the Supplemental TSD for more details. Consequently, EPA agrees with the State that there are no additional RACM for stationary source VOC emissions in the DFW area. Based upon this review, EPA concludes that the use of RTO on cement kilns would not advance timely attainment.

While we agree that one of the sources in the cement kiln source category uses the RTO technology—TXI #5 (Kiln 5), we do not extrapolate from this that use of the RTO technology on the other cement kilns in the DFW area will advance attainment of the 1997 ozone standard. See our previous comments and the Supplemental TSD for additional information.

To evaluate RACM for NO_X measures, the TCEQ looked to all available RACM analyses and guidance for all the types of source categories in the DFW area and their potential controls. The State's analysis also included evaluation of Low Temperature Oxidation Technology (LoTOx), SCR and Selective Non-Catalytic Reduction (SNCR) as potential NO_X RACM for cement kilns. The State's modeling analyses indicate that reducing on-road mobile and area/non-road sources of NO_X is most effective in reducing ozone levels at the Denton and Frisco monitors. Our evaluation of the State's analyses found that reductions of NO_X emissions of at least 40 tpd would have the potential to advance the attainment date. *See* pages 2–29 to 2–30 of the TCEQ SIP Narrative. Thus, only measures that will provide approximately 40 tpd of NO_X emissions reductions will timely advance attainment. Neither the State nor EPA was able to identify any potential RACM measures that would provide 40 tpd or more in NO_X emissions reductions. TCEQ had additional sensitivity modeling performed for cement kilns, which showed that the most stringent controls on the kilns would not advance the attainment date. See the Supplemental TSD for more detail.

The Fifth Circuit in *Sierra Club* v. *EPA*, 314 F.3d 735, 745 (5th Cir. 2002) impressed upon EPA the duty to (1) demonstrate that it has examined relevant data, and (2) provide a satisfactory explanation for its rejection of a proposed RACM and why the proposed RACM, individually and in combination, would not advance the area's attainment date. *See Ober,* 243 F.3d at 1195 (quoting *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 392–93 (DC Cir. 1998)). We reviewed the State's analysis and discussed our evaluation of it in the July 2008 TSD and the December 2008 Supplemental TSD for this rulemaking; both TSDs are in the docket for this rulemaking. EPA evaluated the State's analysis and explained in the TSDs why we agree with the State that no additional measures are RACM for the DFW area and therefore the RACM requirement of the Act is met. We performed an independent analysis by reviewing all available data to determine whether RTO and NO_X controls achieving 80–90% reduction are RACM for cement kilns in the DFW area; we agree with the State that additional control measures would not advance the attainment date.

G. Comments on the Failure-To-Attain Contingency Measures Plan

Comment: Some commenters merely state that the contingency measures are insufficient without providing any support. Others comment that the four failure-to-attain contingency measures are insufficient because they will not result in demonstrative, verifiable, and enforceable emission reductions.

Response: Some of the comments simply allege that the contingency measures are insufficient and the commenters provide no support, rationale or data for their claim. EPA explained why we believe the contingency measures are sufficient in the proposed rule and the commenters have not substantively questioned EPA's rationale. Therefore, no further response is necessary.

Other commenters claim that the contingency measures will not result in demonstrative, verifiable and enforceable emission reductions. EPA interpreted sections 172 and 182 of the Act in the General Preamble (57 FR 13498, 13510) to require States with moderate or above ozone nonattainment areas to include contingency measures to implement additional emission reductions of 3% of the adjusted base year inventory in the year following the year in which the failure has been identified. The state must specify the

[13] To determine whether a measure would be reasonable to require for implementation, we calculated the magnitude of emissions reductions that would advance the attainment date at the monitors with the highest future design values (DVs), which are the Denton and Frisco monitors. Of these two monitors, the Denton monitor has the higher DV (2005–2007) of 94 ppb, although it should be noted that the DV for the DFW area for 2005–2007 is 95 ppb. However, considering the Denton monitor, if implementation of a particular measure would result in a decrease of 1 ppb at the Denton monitor in 2008, we would consider such a measure as having the potential to advance the attainment date in the DFW area.

type of contingency measures and the quantity of emissions reductions.

Quantifiable contingency measures are ones that are demonstrative and verifiable. An EPA-approved methodology can be used to calculate projected emissions reductions. The three VOC control measures in the contingency plan (Offset Lithographic Printing; Degassing or Cleaning of Stationary, Marine, and Transport Vessels; and Petroleum Dry Cleaning) rely upon long-established methodologies for calculation of their projected emissions reductions. *See* EPA's ''Introduction to Area Source Emission Inventory Development'' (Emission Inventory Improvement Program (EIIP), Volume III, January 2001). The EIIP was developed to estimate the effect of controls and acknowledges that regulatory programs are less than 100 percent effective for most source categories in most areas of the country. Specifically, Chapter 4 of the EIIP document describes the methodology for calculating an emission estimate for an area source with regulations in place that affect any of the individual sources within the source category using three factors: control efficiency, rule effectiveness, and rule penetration. These factors are used to develop more accurate emissions estimates and are defined as follows:

(a) Control efficiency (CE) is the emission reduction efficiency, and is a percentage value representing the amount of a source category's emissions that are controlled. These numbers are often obtained from EPA's Control Technique Guidance documents.

(b) Rule effectiveness (RE) is an adjustment to account for failures and uncertainties that affect the actual performance of the control. A default value of 0.80 is recommended unless better information is available for a particular source category.

(c) Rule penetration (RP) is the percentage of the area source category that is covered by the applicable regulation or is expected to be complying with the regulation. The RP is calculated by taking the uncontrolled emissions covered by regulation and dividing by the total uncontrolled emissions. Default values are not feasible for RP because it is highly category- and location-dependent.

These three factors are multiplied together to estimate the Controlled Area source Emissions (CAE).[14]

For the DFW contingency measures plan, Texas estimated emissions for each source category using EPA's EIIP methodology. For Offset Lithographic Printing, the contingency measures plan applies to those sources with emissions below 50 tpy; for Degassing or Cleaning of Stationary, Marine, and Transport Vessels, the plan covers sources which are currently exempt from the State's VOC rules for degassing, including tanks smaller than 1 million gallons; and for Petroleum Dry Cleaning, the plan applies to sources using less than 2,000 gallons of solvent per year. These three contingency measures address sources that have emissions lower than the exemptions in the State's existing VOC RACT rules approved today as meeting RACT for both the standards.

The fourth measure relied on is fleet turnover. Fleet turnover occurs each year—the model year composition of the local motor vehicle fleet changes as new vehicles are purchased and enter the fleet and old vehicles are scrapped. This results in a decrease in fleet average NO_X and VOC emissions each year as older model year vehicles, certified to less stringent emission standards, leave the fleet and are replaced by newer vehicles certified to more stringent standards. The emission impacts of fleet turnover are calculated using EPA's MOBILE6.2 emission factor model. MOBILE6.2 calculates emission factors based on the standards that were in effect in each of the model years in the fleet and the relative fraction of each model year expected in the fleet in a specific calendar year. The relative fraction of each model year in the fleet is based on the local age distribution of the vehicle fleet, which is a specific input in MOBILE6.2 supplied by the state or local agency running the model, which in this SIP revision is the NCTCOG.

EPA requires that states use MOBILE6.2 to estimate motor vehicle emissions in a SIP or conformity determination. EPA also specifies in guidance what types of local inputs are appropriate for use in a SIP. For example, EPA does not allow a state or local agency to project that the motor vehicle fleet will be newer in the future than it currently is. In SIPs, EPA accepts projections of future emissions, including the benefits of fleet turnover, calculated using MOBILE6.2 using inputs that conform to our guidance. The NCTCOG used the State vehicle registration database from July 2005; this conforms to EPA's guidance, is the latest available information and provides a more accurate estimation of future emissions levels.

The three VOC measures have been approved into the SIP and therefore are enforceable by the EPA, the State and the public. The fleet turnover measure is a Federal rule and as such is enforceable by the EPA, the State and the public. Today's action makes the fleet turnover measure's projected SIP credits enforceable by the EPA and the public. The measures are surplus because they are not substitutes for mandatory, required emissions reductions and they are not being counted in any other control strategy.[15] Finally, the measures are considered permanent because they continue for as long as the period in which they are used in the failure-to-attain contingency measures plan.

Comment: A commenter states that EPA may not approve contingency measures into the SIP that are already scheduled for implementation and are mandatory federal measures. Moreover, the attainment demonstration SIP relies upon these projected emissions reductions from fleet turnover. The emissions factors models used for projecting the future year's controlled emissions inventory include the improved tailpipe emission. The emissions reductions will occur passively and are not available ''to be undertaken'' in the likely event of a failure to attain. Accepting these as contingency measures violates the letter of the Act and the intended function of contingency measures—to step in when the SIP's primary control strategy fails. Texas may not rely on tailpipe emissions reductions as a contingency measure.

Response: EPA's position is that the Act allows mandatory federal measures that are already scheduled for implementation to be used as contingency measures, as long as their emission reductions are beyond those needed for attainment or to meet reasonable further progress. The following are some of EPA's actions on the 1-hour ozone SIPs, approving the use of mandatory federal measures as part of the contingency measures plan: 62 FR 15844, (April 3, 1997); 62 FR 66279, (December 18, 1997); 66 FR 30811 (June 8, 2001); 66 FR 586 and 66 FR 634, (January 3, 2001). In the preambles for the proposed and final Phase 2 Rule, we state that Federal

[14] If an area source is controlled, emissions are calculated by the following equation: CAE = UAE [1 − (CE) (RP) (RE)], where UAE = Uncontrolled Area Emissions estimate, and each of the other terms is defined above.

[15] EPA approved these three Chapter 115 measures into the DFW 1-hour ozone SIP as part of the failure-to-attain contingency measures plan. EPA never triggered them to be implemented upon a finding of failure to attain the 1-hour standard. They remain in the DFW SIP and now the State is relying upon them as part of the 8-hour ozone failure-to-attain contingency measures plan. They are not required to meet the VOC RACT requirement for either standard.

measures that result in additional emission reductions beyond those needed for attainment or ROP in an area could serve as contingency measures for a failure to attain or meet the ROP requirements. (*See* Phase 2 Rule, proposed in 68 FR 32802 at 32837 (June 2, 2003), and final in 70 FR 71612 at 71651 (November 29, 2005)). Therefore, the State's inclusion of the Federal Motor Vehicle Control programs (FMVCP) occurring after the 2009 ozone season, is acceptable.

The Federal measure in the failure-to-attain contingency measures plan is the projected emissions reductions from the FMVCP occurring *after* the 2009 ozone season, in addition to the already-identified VOC rules described above. The FMVCP requires controls on both on- and non-road motor vehicles, providing emissions reductions as the fleet is replaced with newer vehicles (turns over). Only the emissions reductions projected to occur after 2009 from the FMVCP are relied upon to meet the 3% of the emissions in the adjusted 1999 base year emissions inventory.

The modeling relies upon emissions reductions from the FMVCP that will become effective during the modeling period from 1999 to 2009. EPA disagrees that the attainment demonstration SIP relies upon the projected emissions reductions from fleet turnover occurring after 2009. Said another way, we disagree that the reductions from fleet turnover used as contingency measures were relied upon in the demonstration that the area would attain by 2009.

H. Comments on the Attainment Motor Vehicle Emission Budgets (MVEBs)

Comment: Commenters state that the MVEBs are flawed and are flawed for multiple reasons. In addition, in the absence of a competent attainment demonstration, the MVEBs are not approvable or adequate.

Response: EPA disagrees with the commenters that the MVEBs are flawed. The Commenters provided no data or rationale for their comments. This statement, without any further explanation does not give EPA any guidance on the alleged inadequacy nor how the commenter would have EPA improve upon it. EPA, however, refers the Commenters to our detailed response, below.

As discussed elsewhere, we believe that the plan provides for attainment of the ozone standard. For further explanation of how the attainment demonstration SIP provides for attainment, please see our responses in Section V–D above. Furthermore, we believe the budgets in the plan are consistent with the attainment plan and therefore should be approved.

Further, the budgets in the SIP were established consistent with the process in 40 CFR 93.118(e). Under 40 CFR 93.118, budgets cannot be used for conformity until EPA has either found the budgets ''adequate'' or approved the SIP in which they are contained. On June 28, 2007, the availability of the budgets was posted on EPA's Web site for public comment. The comment period closed on July 30, 2007, and we received no comments. On March 21, 2008, we published a Notice of Adequacy Determination for the attainment MVEBs (73 FR 15152) where we announced that we found the 2009 attainment MVEBs ''adequate.'' In that notice we stated that the attainment MVEBs must be used in future DFW transportation conformity determinations.

I. Voluntary Mobile Source Emission Reduction Programs (VMEP)

Comment: Commenters state that the Transportation Emission Reduction Measure (TERM) projects are inadequate.

Response: The comment letter provides no support, rationale or data for its claim that the TERM projects are inadequate. EPA explained its rationale for proposing approval of the VMEP program in the proposed rule and the commenter fails to identify any defect in EPA's analysis. Therefore, no further response is required.

Comment: A commenter states that EPA proposes to accept a series of capacity-increasing traffic projects as substitute control measures in the event that the VMEP NO_X emissions are not achieved. The commenter states that the proposed TERMs involve roadway and highway capacity expansion to allow higher vehicle speeds in congested areas. The commenter further states that higher vehicle speeds result in increased NO_X emissions and are counter productive to the stated purpose of supplying emissions reductions when VMEP reductions fail, and EPA should reject the TERM control measures' inclusion into the SIP.

Response: EPA finds that the State, through the North Central Texas Council of Governments (NCTCOG), has committed to and is responsible for emissions reductions measures that are permanent, quantifiable, surplus, adequately supported, consistent, enforceable and in accordance with the Act and EPA guidance. The state, through the NCTCOG, also commits to monitor, assess, report, and, in the event that the NO_X reductions are not achieved, remedy any shortfall in emissions reductions.

It should be noted that EPA is not approving any TERMs, which would serve as the remedy to a shortfall of the VMEP at this time. The types of TERMs the state *may* use in the case of a shortfall are traffic signal improvements, Intelligent Transportation Systems (ITS), and/or freeway and/or arterial bottleneck removal. Because the State did not specifically identify or commit to using these additional measures, we did not review them for approvability. In the event of a shortfall, EPA will review the additional measures provided by the State for inclusion into the SIP. If EPA finds, at that time, that the measures would cause an increase in NO_X emissions, we would not find them suitable for use to make up for an emissions reduction shortfall.

Finally, the State must account for any such shortfall either by modifying implementation of the existing program to address the shortfall, adopting new measures, or revising the VMEP's emissions credits to reflect actual emissions reductions achieved, provided overall SIP commitments are met.[16] Additions to the VMEP and changes to the VMEP credit in an effort to remedy any shortfall would be made in the form of a SIP revision. If TCMs are used to remedy the shortfall, a SIP revision may not be necessary.[17]

[16] See Richard D. Wilson, Acting Assistant Administrator for Air and Radiation, dated October 24, 1997, entitled *''Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (SIPs).''*

[17] The state may submit TCMs to EPA under CAA 176(c)(8). The provision states that TCMs that are specified in an approved implementation plan may be replaced in the plan with alternate TCMs if the substitute measures achieve equivalent or greater emissions reductions than the TCM to be replaced. The provision also allows new TCMs to be added to an approved SIP. In order to substitute TCMs the CAA requires that the substitute TCM provide equivalent emissions reductions as the TCM that is being replaced in the approved SIP. The CAA also requires that, if the time for implementing the substitute TCM has not passed, the substitute measures must be implemented in accordance with a schedule that is consistent with the schedule that provided for the control measures in the implementation plan. Substitute and additional TCMs must be accompanied by evidence of adequate personnel and funding and authority under state/local law to implement, monitor and enforce the control measure; the measures must be developed in a collaborative process that includes participation by representatives of all affected jurisdictions, state agency and state/local transportation agencies and consultation with the EPA; there must be reasonable public notice and opportunity to comment; and the metropolitan planning organization, State air pollution control agency and the EPA concur with the equivalency of the substitute TCMs and on the additional TCM. Concurrence by the above agencies is required by the CAA and once the substitute is adopted, the TCM becomes, by operation of law, a part of the SIP

Continued

VI. Final Action

EPA is conditionally approving the DFW 1997 8-hour ozone attainment demonstration SIP and its 2009 attainment MVEBs, RACM determination, and failure-to-attain contingency measures plan, submitted by the State of Texas on May 30, 2007 and November 7, 2008, as supplemented on April 23, 2008. EPA is fully approving two local control measures relied upon in the attainment demonstration, the VMEP and TCMs. We are also fully approving the DFW area SIP as meeting the RACT requirement for VOCs for the 1-hour ozone standard and the 1997 8-hour ozone standard. These revisions meet the requirements of the Act and EPA's regulations, and are consistent with EPA's guidance and policy. We are taking this action pursuant to section 110 and part D of the Act and EPA's regulations.

VII. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, 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 March 16, 2009. 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 40 CFR Part 52

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

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

Dated: December 17, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

Subpart SS—Texas

■ 2. In Section 52.2270, the second table in paragraph (e) entitled ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP'' is amended by adding four new entries at the end.

The revisions and additions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(e) * * *

* * * * *

and federally enforceable. It should be noted that consultation with the EPA regional offices serves to fulfill the requirement for consultation with the EPA Administrator and concurrence on both TCM substitutions and additions has been delegated to the EPA Regional Administrators. (Delegation of Authority 7–158: Transportation Control Measure Substitutions and Additions).

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/ effective date	EPA approval date	Comments
* *	*	* *	*	*
Dallas-Fort Worth 1997 8-hour ozone Attainment Demonstration SIP and its 2009 attainment MVEBs, RACM demonstration, and Failure-to-Attain Contingency Measures Plan.	Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall and Tarrant Counties, TX.	May 23, 2007, November 7, 2008.	January 14, 2009 [Insert *FR* page number where document begins].	Conditional Approval.
Transportation Control Measures	Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall and Tarrant Counties, TX.	May 23, 2007	January 14, 2009 [Insert *FR* page number where document begins].	
VMEP	Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall and Tarrant Counties, TX.	May 23, 2007	January 14, 2009 [Insert *FR* page number where document begins].	
VOC RACT finding for the 1-hour ozone NAAQS and the 1997 8-hour ozone NAAQS.	Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall and Tarrant Counties, TX.	May 23, 2007	January 14, 2009 [Insert *FR* page number where document begins].	

[FR Doc. E9–118 Filed 1–13–09; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2007–1147; FRL–8758–8]

Approval and Promulgation of Implementation Plans; Texas; Control of Emissions of Nitrogen Oxides (NO_X) From Cement Kilns

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is finalizing approval of revisions to the Texas State Implementation Plan (SIP). We are approving the rules in 30 TAC Chapter 117 that the State submitted on May 30, 2007, concerning control of emissions of NO_X from cement kilns operating in Bexar, Comal, Ellis, Hays, and McLennan Counties. We are approving the nonsubstantive renumbering of the rules for all five counties. We also are approving the substantive changes to the rules for Ellis County, based on a determination that the rules for Ellis County meet the NO_X Reasonably Available Control Technology (RACT) requirements for cement kilns operating in the Dallas Fort Worth (D/FW) 1997 8-hour ozone nonattainment area. We are taking this action under section 110 and part D of the Federal Clean Air Act (the Act, or CAA).

DATES: This rule will be effective on February 13, 2009.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2007–0523. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6691, fax (214) 665–7263, e-mail address *shar.alan@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," and "our" refer to EPA.

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I. Background

A. What are we approving?

The EPA approved 30 TAC, Chapter 117, NO_X cement kilns rules at 69 FR 15681 published on March 26, 2004, as NO_X control emissions requirements for Texas under the 1-hour ozone SIP. On May 30, 2007, TCEQ submitted rule revisions to 30 TAC, Chapter 117, "Control of Air Pollution from Nitrogen Compounds," as a revision to the Texas SIP. On July 11, 2008 (73 FR 39911), we proposed approval of the May 30, 2007

submittal. Today, we are finalizing our July 11, 2008, proposed approval.

In this rulemaking, we are approving the nonsubstantive renumbering of the rules for cement kilns operating in Bexar, Comal, Ellis, Hays, and McLennan Counties. We are approving the substantive changes to the rules for cement kilns operating in Ellis County as meeting the Act's RACT requirements for NO_X emissions for the cement kiln source category in the D/FW 1997 8-hour ozone nonattainment area.

The State's adopted source cap calculation for the cement plants in Ellis County includes all kilns in operation at the three impacted accounts, *i.e.*, Ash Grove, Texas, L.P. (AG); TXI Operations, L.P. (TXI); and Holcim, L.P. (Holcim). No operating kiln in Ellis County is exempt from the source cap. The State chose 1.7 lb NO_X/ton of clinker for dry preheater-precalciner or precalciner kilns and 3.4 lb NO_X/ton of clinker for wet kilns, as the emission factors for calculating the source cap for the RACT rule. The NO_X source cap for cement manufacturing plants in Ellis County, Texas is calculated by (a) multiplying the average annual production rate in tons plus one standard deviation for the calendar years 2003, 2004, and 2005 from all wet kilns by 3.4 pound NO_X/ton, (b) multiplying the average annual production rate in tons plus one standard deviation for the calendar years 2003, 2004, and 2005 from all dry kilns by 1.7 pound NO_X/ton, and (c) adding the computed products in ''a'' and ''b'' together and dividing the sum by ((2000 (pounds/ton) x (365 (days/year)). Thus, producing a total allowable NO_X limit, in tons per day, on a 30-day rolling average basis as a cap not to be exceeded. The source cap only applies during the D/FW ozone season (March 1–October 31). See 117.3123(b).

The rule provides multiple layers of flexibility by: (i) Providing for one NO_X limit during the ozone season (March 1 through October 31), and another NO_X limit during the non-ozone season (November 1 through end-of February) within the D/FW area; (ii) incorporating actual production rates that were provided by the affected companies to the State, then adding one standard deviation to the production rates as a part of rule development, for source cap allowance determination to account for production variability; (iii) not mandating a specific post combustion control technology; (iv) allowing the source to decide its method of compliance with the source cap; (v) determining compliance with the source cap on a 30-day rolling average basis; and (vi) including all types of existing kilns. Therefore, multiple layers of flexibility have been built into the rule for compliance purposes.

As stated in our proposal, EPA has defined RACT as the lowest emission limitation that a particular source can meet by applying a control technique that is reasonably available considering technological and economic feasibility. See 44 FR 53761, September 17, 1979. Ozone nonattainment areas classified as moderate or above must meet RACT requirements as provided in sections 182(b)(2) and 182(f) of the Act. These two sections, taken together, establish the requirements for Texas to submit a NO_X RACT regulation for cement kilns (a major source of NO_X) in ozone nonattainment areas classified as moderate (such as D/FW) and above. Section 183(c) of the Act provides that we will issue technical documents, which identify alternative controls for stationary sources of NO_X. The EPA publishes the NO_X related Alternative Control Techniques (ACTs) documents for this purpose. The information in the ACT documents is generated from literature sources and contacts, control equipment vendors, EPA papers, engineering firms, and Federal, State, and local regulatory agencies. States can use information in the EPA ACTs to develop their RACT regulations. For a listing of EPA's ACT-related documents, including the ACT document for Cement Manufacturing, see *http://www.epa.gov/ttn/naaqs/ozone/ctg_act/index.htm* (URL dated April 22, 2008).

The public comment period for our 73 FR 39911 proposal expired on August 11, 2008. We received written comments during the public comment period and we respond to those comments below.

B. Who submitted written comments to us?

We received written comments on our July 11, 2008 (73 FR 39911) proposal from AG, TXI, and Holcim during the public comment period. Holcim's comments were submitted on this proposed action and on the proposed action to conditionally approve the D/FW area's 1997 8-hour ozone attainment demonstration SIP.

C. How are we responding to those written comments?

Our responses to those written comments received are as follows:

Comment #1: AG indicated that the applicable source cap in the rule for Ellis County is achievable, AG intends to comply with the source cap limit, and supports its approval by EPA.

Response to Comment #1: We appreciate the AG's statement that it intends to comply with the source cap limit in the rule.

Comment #2: AG, TXI, and Holcim claim that the rule for Ellis County exceeds RACT and has negligible value to air quality planning. The State's photochemical modeling demonstrates that NO_X reductions from the cement plants would not have a measurable impact on the critical ozone monitors in the D/FW area. Thus, the stringent emission limitation is not a necessary component of the Texas SIP. TCEQ has not performed any analysis indicating that a high level of reduction of NO_X emissions from the Ellis County cement kilns would result in the D/FW area coming into compliance with the 1997 8-hour ozone standard.

Response to Comment #2: As discussed previously, RACT is a requirement of section 182 of the Act, and, regardless of whether the controls are necessary for attainment of the 1997 8-hour ozone NAAQS in the D/FW ozone nonattainment area, the SIP must include rules that meet the VOC and NO_X RACT requirements of the Act. In Appendix J of the D/FW attainment demonstration SIP submission, entitled ''RACT Analysis,'' Texas identifies (1) all Control Techniques Guidelines (CTG) source categories of VOC and NO_X emissions within the D/FW area; (2) all non-CTG major sources of VOC and NO_X emissions; (3) the state regulation that implements or exceeds RACT for each applicable CTG source category or non-CTG major emission source; and describes the basis for concluding that these regulations fulfill RACT. TCEQ in Appendix J, pages J–3 to J–5 and Table J–1, specifically says that State rules that were consistent with *or more stringent* than the current control technologies and methodologies implemented in other moderate nonattainment areas *were also determined to fulfill RACT requirements for the D/FW area.* Texas views the cement kiln rules to be RACT for the D/FW area. It is not appropriate for EPA to question a State's choice of RACT control, as long as the statutory requirements of the Act are met. *Florida Power & Light Co.* v. *EPA,* 650 F.2d 570 (5th Cir. 1981). Moreover, States may adopt regulations that are more stringent than those required under the Act. See section 116 of the Act. To meet the statutory requirements, states are to look at available controls to conclude whether they are reasonably available for a specific source or source category. Furthermore, a State is to evaluate RACT for a source or source category by examining existing EPA guidance documents as well as other available information, *e.g.*, EPA's BACT/RACT/

LAER Clearinghouse, ACTs. RACT can change over time as new technology becomes available or the cost of existing technology adjusts. Today's RACT determination for a source category can be more stringent than a previous determination and thus controls previously considered ''beyond RACT'' could be considered RACT for sources now.

We disagree that the rules for cement kilns in the D/FW area will have a negligible value to the area's air quality planning. The rules should result in 9.7 tons per day (TPD) of reduction in NO_X emissions for the D/FW area, which is a significant improvement. See section 9 at 73 FR 39914 of our proposal. The EPA has reviewed the impact of emission reductions at the cement kilns in the D/FW area and determined that such reductions are beneficial to reducing ozone levels in the D/FW nonattainment area especially in much of Tarrant and Parker Counties.

Today's action only concerns approving the nonsubstantive renumbering of the NO_X cement kiln rules into the Texas SIP, and approving the substantive changes to the NO_X cement kiln rules for Ellis County as meeting the Act's NO_X RACT requirement. Therefore, any comments on the State's choices of control strategies in the D/FW area's attainment demonstration SIP are not relevant. In a separate proposed action published on July 14, 2008 at 73 FR 40203, EPA has taken comment on whether the cement kilns rule, in combination with the other State and Federal Measures, will result in attainment of the 1997 8-hour ozone NAAQS, and we will respond to Holcim's comments on these issues in a final action on that proposal. Additionally, we note that EPA is required to approve a SIP revision if it meets the Act's requirements, and cannot second guess the State's choices if the plan meets the minimum requirements of the Act. The Act assigns to the states initial and primary responsibility for formulating a plan to achieve the NAAQS. It is up to the State to prepare SIPs, which contain specific pollution control measures. The EPA is charged with evaluating the SIP revision submittal, and if it meets the minimum statutory criteria, the EPA must approve it. *Train* v. *NRDC*, 421 U.S. 60 (1975). It is not EPA's role to rule out the State's choice of components of its SIP submittal so long as the plan is adequate to meet the standards mandated by EPA. *See Train* v. *NRDC* at 79–80, and see *Union Electric* v. *EPA*, 427 U.S. 246 (1976). The EPA disapproves a SIP submittal only if it fails to meet the minimum statutory requirements. *Seabrook* v. *Costle*, 659 F.2d 1349 (5th Cir. 1981). A state may impose stricter limitations than the Act requires. See section 116 of the Act; Union Electric at 265.

Comment #3: TXI states that Table 5, section 9 of EPA's proposal fails to mention the alternative NO_X control options allowed under the Texas 1-hour ozone NO_X SIP will be available to Ellis County cement kilns during the non-ozone season.

Response to Comment #3: While Table 5, section 9 of EPA's proposal is factually correct, it does not specifically mention the alternative NO_X control option. TCEQ removed these options for cement kilns in Ellis County during the D/FW area's ozone season; EPA recognizes these compliance options are available during the non-ozone season (November 1st through the end of February). For the other four counties, which are not a part of the D/FW 8-hour ozone nonattainment area, cement kilns' NO_X alternative control options continue to remain in effect year round. See section 117.3110.

Comment #4: TXI and Holcim commented that improvement in the D/FW ozone situation should come from mobile sources, not the cement kilns.

Response to Comment #4: This comment is not relevant to today's action because this action solely reviews the Ellis County cement kiln rules for purposes of the NO_X RACT requirement of the Act. Holcim provided the same comment, however, on our proposed action to conditionally approve the D/FW 1997 8-hour ozone attainment demonstration SIP. We will address this comment in the final rulemaking action on that SIP. See the response to comment #2 of this document for more detail.

Comment #5: TXI and Holcim expressed support for TCEQ not adopting the ''high control'' option for the Ellis County kilns, due to technical issues associated with the Selective Catalytic Reduction (SCR), and Low Temperature Oxidation (LoTOx) technologies. They further claim that neither SCR nor LoTOx technology constitutes RACT for the control of NO_X from the Midlothian Cement kilns.

Response to Comment #5: We agree that the current State-adopted level of NO_X control for cement kilns in the D/FW area meets the RACT requirement for these sources at this time. We note, however, that air pollution control technology continues to advance and the State may need to consider additional NO_X controls at cement plants as it develops the SIP required for the 2008-revised ozone standard.

Comment #6: TXI commented that the NO_X emission factors used in the source cap equation are possibly the lowest specifications adopted by a state agency in the United States because the selected emission specification for the preheater/precalciner kilns of 1.7 lb NO_X/ton of clinker represents a significant reduction from NO_X specification of 1.95 lb NO_X/ton of clinker that has been selected as BACT in recent permitting actions for new PH/PC kilns. Adoption of these very low NO_X emission specifications in the source cap equation is extremely aggressive.

Response to Comment #6: We agree that these levels are more aggressive than levels previously included in certain permits issued by the State. We have concluded that, at a minimum, these levels are consistent with RACT. While the commenter implies (but does not directly allege) that the levels are beyond RACT, the Act does not preclude the State from adopting controls that are more stringent than the minimum level required.

We note that this is not the first time TCEQ has adopted a rule in Chapter 117 to meet RACT that is more stringent than past permits' BACT decisions. We recognize that compliance with the levels in the Texas rules will require significant effort from the cement plant owners and operators.

Comment #7: TXI and Holcim state that adoption of the source cap equation is inequitable and does not allow them to have a significant production increase. Holcim claims that over 60% of the total NO_X reductions anticipated from the source cap requirement will be from Holcim's two kilns, despite the fact that there are eight other cement kilns operating in Ellis County. Holcim comments that TCEQ has unfairly targeted Holcim as a source of emission reductions in Ellis County. TXI finds the rule to be retroactive because the source cap is based upon the average production for 2003, 2004, and 2005. This figure allegedly does not include the increase in production allowed by a permit issued in late 2005. To meet the source cap, TXI may have to shutdown its wet kilns while operating its dry kiln.

Response to Comment #7: The primary role of the statutory RACT requirement is to impose controls upon existing facilities and equipment. RACT has been a requirement of the Act since 1977. Congress through the 1977 Clean Air Act Amendments imposed stricter minimum requirements by placing RACT limitations on nonattainment areas. CAA Section 172(b)(3), 42 U.S.C. 7502(b)(3) (1977). The use of the term

''retroactive'' by TXI is misleading in that the RACT controls will apply to TXI's existing sources, but TXI is provided sufficient time to install the controls by a date well after TCEQ has promulgated the RACT regulations.

As discussed previously in response to comment #2 of this document, EPA cannot reject the State regulations because they may apply in an inequitable manner. While TXI alleges it may have to shut down some of its units to operate others, the Act does not preclude the State from adopting controls that are more stringent than the minimum level required. The Act gives the States exclusive control in selecting which sources to regulate and to what degree, and EPA does not have authority to second guess the State's choices so long as the programs adopted meet the minimum statutory requirements. See *Union Electric* v. *EPA*, 427 U.S. 246 (1976).

Comment #8: Holcim commented that the ERG cement kiln study cannot be relied upon by TCEQ to establish the NO_X controls imposed on the Ellis County cement kilns in the source cap rule. Holcim contends that the ERG cement kiln study is internally inconsistent, inaccurate in its assessment of available NO_X control technologies for the Ellis County cement kilns, incomplete in that it did not fully analyze the impacts of kiln feedstocks on the viability of add-on NO_X control technologies or address other tasks included in the Scope of Work, and is unreliable as a basis for NO_X controls for the Ellis County kilns. It inaccurately estimates the level of reductions achievable using SNCR on some of the Ellis County kilns. Holcim commented that the ERG Final Report fails to include retrofitting costs such as new ID fans for all kilns necessary for utilizing SCR and LoTOx systems. Holcim further claims that the limestone and raw materials used in Ellis County kilns are different from the limestone, and raw materials used by other plants in the world, and deficiencies in the ERG Report is not scientifically or factually valid, and is not a reliable basis for TCEQ's adoption of the Source Cap Rule or EPA's approval of TCEQ's SIP. Holcim also incorporates by reference the comments on the ERG Final Report that were submitted to the State.

Response to Comment #8: As an initial matter, we note that we cannot second guess the State's conclusions, so long as our review determines that the rules developed meet the minimum statutory requirements. Holcim appears to be claiming that the rules are too stringent because they are based on a study with which Holcim finds fault. However, even if such claim were true, we cannot disapprove the rules when they meet the minimum statutory requirements for RACT. Any requirement beyond the basic RACT level of control is not a basis for EPA to disapprove the rule, as the CAA leaves the choice to the State to determine whether to go beyond the minimum statutory requirements of the Act.

The referenced study can be found in Appendix I of the D/FW 1997 8-hour ozone attainment demonstration SIP revision submittal and is available on the TCEQ's Web site at *www.tceq.state.tx.us/implementation/air/sip/BSA_settle.html*. The ERG, Inc. prepared the Report, and it is entitled ''Assessment of NO_X Emissions Reduction Strategies for Cement Kilns—Ellis County: Final Report,'' dated July 14, 2006. The State relied upon it as well as all other available documentation to determine what should be RACT for the cement kilns.

This Report was prepared because of a study conducted on behalf of TCEQ pursuant to an April 22, 2005, settlement agreement in a lawsuit brought against EPA by Blue Skies Alliance and others. The TCEQ, the Portland Cement Association, several counties, and others were permitted by the Court to intervene. The Portland Cement Association represented Holcim's interests in the lawsuit. The Settlement Agreement was filed with the Federal District Court for the Northern District of Texas in June 2005.

Pursuant to paragraph A.3.b. of the Settlement Agreement entitled, ''Cement Kiln Control Technology Study,'' TCEQ was required to meet with Plaintiffs, EPA, and the Portland Cement Association to review and comment upon the proposed scope of work to contract with a consultant to perform a cement kiln study to evaluate the potential availability of new air pollution control technologies for cement kilns in the D/FW area. The proposed scope of work also was to include consideration of SCR and to evaluate and establish what type of controls may be technically and economically applied to the three cement plants in Ellis County. Holcim participated in the meetings on the proposed scope of work. The TCEQ's choice of a contractor was required to be made with consultation with the Plaintiffs, EPA, and the Portland Cement Association. Holcim participated in the choice of contractor. Midway through the study's progress, the contractor was required to identify to the Plaintiffs, EPA, and the Portland Cement Association, a list of cement kilns with advanced NO_X emission reduction technologies being analyzed as part of the study. Holcim received this information. TCEQ was required to establish channels of communication with the Parties for technical air quality issues and make a good faith effort to address problems identified by the Parties. TCEQ also was required to meet with the Parties on other issues of interest and concern in the cement kiln matter. Holcim was involved in the communications and meetings with TCEQ and provided comments on the Draft Report and the final. The EPA has not been provided with any legal document filed with the Federal District Court asserting that TCEQ failed to meet its legal obligations under the Settlement Agreement of making a good faith effort to address any problems identified by Holcim.

The ERG Report evaluated the applicability, availability, technical feasibility, and cost-effectiveness of NO_X control technologies for cement kilns located in the D/FW area beyond the requirements of the NO_X rules in the SIP at the time of the Report (*i.e.*, rules adopted by the State in 2003 and approved by EPA at 69 FR 15681 (March 24, 2004)). The Report is consistent with EPA's ACT (2000) document, proposed New Source Performance Standard (NSPS) for Portland cement plants at 73 FR 34072 (June 16, 2008), and the BACT/RACT/LAER Clearinghouse.

Comment #9: Holcim commented that for its two PH/PC kilns, the TCEQ proposed equation at section 117.3123(b) for calculating a NO_X source cap would establish an emission rate of 2.84 TPD of NO_X emissions per PH/PC kiln, with a plant-wide NO_X emission limit of 5.68 TPD (2.84 TPD × 2 kilns). In its comments to the State, Holcim alternatively proposed a plant-wide NO_X limit of 8.5 tons per day to be applied during the ozone season only. The TCEQ, however, adopted the equation at section 117.3123(b) for calculating a NO_X source cap that establishes a more stringent emission rate than Holcim had requested, without going through another round of public comment and hearing.

Response to Comment #9: Courts have consistently held that an agency is not required to start over with a new notice of proposed rulemaking, if the final rule is a ''logical outgrowth'' of the proposed rule. It is an established administrative law principle that after hearing all public comments, the agency may end up substantially revising the original proposed rule. What is required is that the proposal notice should be sufficiently descriptive of the 'subjects and issues involved' so that interested parties may offer informed criticism and

comments. See *Ethyl Corp.* v. *EPA,* 541 F.2d 1, 48 (DC Cir. 1976). If the final rule is logically connected to the proposed rule, the public is considered to have had an adequate opportunity to make its views known. The State's proposal was clear that the issues were an appropriate emissions limitation, and a corresponding source cap equation. After the close of the public comment period, and upon review and evaluation of the submitted comments, the State merely expanded on prior information, and addressed alleged deficiencies in the pre-existing data. See *Rybachek* v. *EPA,* 904 F.2d 1276, 1286 (9th. Cir. 1990).

The resultant equation is in a format consistent with other equations in Chapter 117. The public was provided an ample opportunity to provide comments on the appropriateness of NO_X emissions limitations, and what would be the appropriate corresponding equation. An integral part of rulemaking is for the State to have the authority and discretion to revise its initial version of a proposed rule, consistent with the terms of its proposal, based on relevant information it receives during public comment period. It is not an uncommon practice for a state to issue a final rule that differs from the proposal based on the receipt of relevant information during its public comment period.

Comment #10: TXI and Holcim comment that neither SCR nor $LoTO_X$ technology constitutes RACT for the control of NO_X from the Ellis County cement kilns, and refer to their comments on the draft and final Report.

Response to Comment #10: We believe that these requirements in the State's rules meet the minimum level of control required for RACT rules and, as discussed previously, the issue of whether the rules are more stringent than what is necessary to meet RACT is not pertinent for our review of the rules.

Comment #11: Holcim commented that according to a ''New Source Analysis and Technical Review'' (Technical Review) in conjunction with Holcim's PSD Permit No. 8996/PSD–TX–454M3, issued in 2005, the TCEQ technical staff stated that NO_X reductions using SNCR are ''typically 20–40%.'' Holcim continues that the Technical Review cited above; however, mentions that a kiln in Sweden, with a high baseline, had demonstrated 83% NO_X reduction. Therefore, the State's NO_X cement kiln rule for Ellis County is too stringent because it assumes a control level greater than what was in the 2005 permit.

Response to Comment #11: While Holcim accurately describes the conclusion reached as part of the 2005 permitting determination, additional information has become available since that time, as described in the 2006 Report, the documents supporting the EPA's proposed NSPS, etc. This additional information illustrates that using SNCR with well-designed and properly operated process design, *e.g.*, low-NO_X burners, Staged Combustion in the Calciner (SCC) mechanism, can achieve as high as 70% reductions. Air pollution control equipment can often achieve greater percent reduction with higher uncontrolled emission rates (high baseline). This means that if a kiln is already controlled with low-NO_X burners and SCC mechanism, then the percent reduction of NO_X with the addition of the SNCR from that kiln will be less.

Comment #12: Holcim contends that it cannot meet the ozone season emission factor of 1.7 pounds of NO_X per ton of clinker produced. This emission factor is used by the TCEQ in the equation to establish a plant-wide NO_X emission source cap for each of the three cement kiln companies in Ellis County. 30 TAC 117.3123(b). Because it allegedly cannot meet this emission factor, Holcim claims it cannot meet the plant-wide NO_X emission source cap for its PH/PC kilns. Holcim states that it repeatedly commented on the proposed emission factor to TCEQ during the rulemaking process, claiming that it cannot achieve this emission factor, despite its recent installation of SNCR and based upon testing of the SNCR. According to Holcim, testing for its kiln #2 showed it did not meet the 1.7 pounds NO_X/ton of clinker emission factor, but rather it met 1.95 lb NO_X/ton of clinker. Holcim claims the 1.95 emission factor was determined to be BACT in a recent air permit for kiln #2, and that TCEQ adopted the 1.7 pounds NO_X per ton of clinker emission factor without adequate justification. TCEQ did not adequately consider the technical practicability, and economic reasonableness of the limitations contained in the source cap rule. TCEQ did not adequately consider the reasonable availability of control technology for Holcim's kilns, and the emission limitations are not practically achievable using SNCR.

Response to Comment #12: We believe that the State's rules meet the minimum level of control required for RACT rules and, as discussed previously, the issue of whether the rules are more stringent than what is necessary to meet RACT is not pertinent for our review of the rules. Further, the source cap does rule not mandate the type of control that a source must use.

The source cap includes a NO_X emission factor of 1.7 pounds per ton of clinker for dry preheater-precalciner or precalciner kilns, and a NO_X emission factor of 3.4 pounds per ton of clinker for wet kilns. According to TCEQ, emission levels of 1.7 pounds per ton of clinker have been demonstrated on a dry preheater-precalciner or precalciner kiln in Ellis County without the addition of the SNCR or other controls considered as part of the cement kiln study. The commenter has two kilns, one of which is a dry preheater-precalciner kiln.

The information in EPA's proposed NSPS (73 FR 34072) indicates that an emission factor of 1.5 pound NO_X per ton of clinker produced is achievable and cost effective. In fact, NO_X emission factors of 1.62 to 1.97 pound NO_X per ton of clinker produced have been demonstrated without adding SNCR.

The information in EPA's proposed NSPS (73 FR 34072) indicates that an emission factor of 1.95 pound NO_X per ton of clinker produced can be achieved on average for approximately $2,000 per ton of NO_X reduced, and at the 1.5 lb/ton of clinker level for approximately $2,100 per ton of NO_X reduced.

The State estimated the cost effectiveness for SNCR presented in the cement kiln study to be $1,400 to $2,300 per ton on NO_X.

We reviewed TCEQ's evaluation and find it to be sufficient to support a finding that the cement kiln requirements of 30 TAC Chapter 117 constitute RACT for the D/FW area.

Comment #13: Holcim states that neither TCEQ nor EPA has conducted a proper source-specific RACT analysis for Holcim's cement kilns in Ellis County.

Response to Comment #13: While a State can consider source-specific considerations when setting RACT levels of control, it is not obligated to do so. RACT is most often implemented through source category rules. In setting a source category rule for cement plants, TCEQ set a limit it believes, and EPA agrees, meets the statutory minimum for a RACT level of control at all of the affected cement manufacturers.

Comment #14: Holcim asserts that there are other problems with the source cap provision of the rule which should prevent it from being used to set the NO_X emission limitations: a) TCEQ's selection of the 2003–2005 time period to calculate a source's actual production is without any basis; b) TCEQ's source cap equation fails to take into account facility downtime; and c) TCEQ's source cap equation fails to take into account the need for alkali bypass at the Holcim facility.

Response to Comment #14: As discussed previously, the comments are not relevant to determining that the rule at a minimum meets the RACT requirement of the Act.

This is not the first time TCEQ has used the three most recent year production or capacity data for equations in other parts of Chapter 117, and EPA has approved that approach as a part of the Texas SIP. The production information is the actual data reported by the sources to the TCEQ. The source cap equation takes into account facility downtime and operation by using the three years of actual production rate data reported to TCEQ. With regard to the alkali bypass issue; this comment is not relevant to our RACT review because, as noted previously, EPA cannot second guess the State's choices of control level as long as it meets the minimum level required to satisfy RACT.

This concludes our responses to the written comments we received during public comment period.

D. What sections of the May 30, 2007 submittal will become part of Texas SIP?

Table 1 below contains a summary list of the sections of 30 TAC, Chapter 117 that EPA is approving into the Texas SIP.

TABLE 1—SECTION NUMBERS AND SECTION DESCRIPTIONS OF 30 TAC, CHAPTER 117 AFFECTED BY THE CEMENT KILNS RULE

Section No.	Description
Section 117.3100	Applicability.
Section 117.3101	Cement Kilns Definitions.
Section 117.3103	Exemptions.
Section 117.3110	Emission Specifications.
Section 117.3120	Source Cap.
Section 117.3123	Dallas-Fort Worth Eight-Hour Ozone Attainment Demonstration Control Requirements.
Section 117.3140	Continuous Demonstration of Compliance.
Section 117.3142	Emission Testing and Monitoring for Eight-Hour Attainment Demonstration.
Section 117.3145	Notification, Recordkeeping, and Reporting Requirements.
Section 117.9320	Compliance Schedule for Cement Kilns.

You can find complete TCEQ's rules and regulations at *http://www.tceq.state.tx.us/rules/indxpdf.html.*

E. What sections of the May 30, 2007 submittal will not become a part of Texas SIP?

Per TCEQ's request the following sections, listed in Table 2 below, of the cement kilns rule will not become a part of EPA-approved Texas SIP. These sections mainly pertain to the control of ammonia, that is not a precursor to ozone, and are not required to be a part of the SIP.

TABLE 2—SECTIONS OF CHAPTER 117 NOT IN EPA-APPROVED TEXAS SIP

Section No.	Explanation
117.3123(f), and 117.3125	Not a part of EPA-approved Texas SIP.

Although the above sections of 30 TAC Chapter 117 are not to become a part of Texas SIP, they will continue to remain enforceable at the State level.

F. What Texas Counties will this rulemaking affect?

Table 3 below lists the five Texas Counties that will be affected by the cement kilns rule.

TABLE 3—TEXAS COUNTIES AFFECTED BY CEMENT KILN RULEMAKING OF 2007

Texas counties	Explanation
Bexar, Comal, Ellis, Hays, and McLennan	See section 117.3101.

G. What are the NO_X control emissions requirements that we approved for Texas under the 1-hour ozone SIP?

We approved the NO_X control emission requirements for cement kilns at 69 FR 15681 published on March 26, 2004. See Table III of that document. We included that Table in the TSD prepared for our proposal.

H. What are the NO_X control emissions requirements that we are approving for Texas under the 8-hour ozone SIP?

Ellis County is located within the D/FW 8-hour ozone nonattainment area. The ozone season for the D/FW area is March 1 through October 31 of each calendar year. See 40 CFR part 58, Appendix D, Table D–3, and 40 CFR 81.39. For Ellis County, during the non-ozone season (November 1 through end-of-February of each calendar year), the cement kilns NO_X control requirements that we approved at 69 FR 15681 will continue to remain in effect. However, during the ozone season, March 1 through October 31 of each calendar year, the cement kilns in Ellis County must comply with a source cap formula calculated and expressed in TPD of

actual NO_X emissions, per site, on a 30-day rolling average basis. See equation 117.3123(b). The following Table 4 contains a summary list of NO_X control requirements for cement kilns under the 8-hour ozone SIP.

TABLE 4—NO_X CONTROL REQUIREMENTS FOR CEMENT KILNS UNDER THE 8-HOUR OZONE SIP

Source	County	NO_X emission requirement	Citation
Long wet kiln	Bexar, Comal, Hays, McLennan.	6.0 lb NO_X/ton of clinker produced	117.3110(a)(1)(A).
Long dry kiln	Bexar, Comal, Hays, McLennan.	5.1 lb NO_X/ton clinker of produced	117. 3110(a)(2).
Preheater kiln	Bexar, Comal, Hays, McLennan.	3.8 lb NO_X/ton of clinker produced	117. 3110(a)(3).
Precalciner or preheater-precalciner kiln.	Bexar, Comal, Hays, McLennan.	2.8 lb NO_X/ton of clinker produced	117.3110(a)(4).
Long wet kiln	Ellis	4.0 lb NO_X/ton of clinker produced, outside D/FW ozone season.	117.3110(a)(1)(B).
Preheater kiln	Ellis	3.8 lb NO_X/ton of clinker produced, outside D/FW ozone season.	117.3110(a)(3).
Long dry kiln	Ellis	5.1 lb NO_X/ton of clinker produced, outside D/FW ozone season.	117.3110(a)(2).
Precalciner or preheater-precalciner kiln.	Ellis	2.8 lb NO_X/ton of clinker produced, outside D/FW ozone season.	117.3110(a)(4).
Portland cement kiln	Ellis	During D/FW ozone season, 30-day rolling average, source cap equation 117.3123(b), with the 2003–2005 reported average annual clinker production, limit is equivalent to 1.7 lb NO_X/ton of clinker produced for dry preheater-precalciner or precalciner kilns, or 3.4 lb NO_X/ton of clinker produced for long wet kilns.	117.3123(b).

The cement kilns rule does not require or endorse a specific postcombustion NO_X control technology, and allows the owners or operators to choose their preferred method of compliance as long as the source cap limit, per site, is being met. These NO_X control requirements will result in a 9.7 TPD of NO_X reduction from cement kilns in Ellis County. We have determined the above NO_X control requirements for existing cement kilns in the D/FW area are consistent with the RACT requirements of the Act. Therefore, we are approving them into the Texas SIP as meeting the RACT requirement for the D/FW 8-hour ozone nonattainment area. See our TSD prepared in conjunction with this rulemaking action for more information.

I. What are the compliance schedules for NO_X emissions from cement kilns that we are approving?

The compliance schedule for cement kilns located in Texas Counties of Bexar, Comal, Hays, and McLennan will continue to remain in effect as we approved it at 69 FR 15681. See Table IV of that document. We included that Table in our TSD prepared for the proposal.

The following Table 5 contains a summary of the NO_X compliance schedule-related information for cement kilns in Ellis County. See section 117.9320(c) for more information.

TABLE 5—NO_X COMPLIANCE SCHEDULES FOR CEMENT KILNS IN ELLIS COUNTY UNDER THE 8-HOUR OZONE SIP

Source	Compliance date	Additional information	Citation
Cement Kilns—Ellis County	Comply with testing, monitoring, notification, recordkeeping, and reporting requirements as soon as practicable but no later than March 1st, 2009.	8-hour attainment demonstration requirement.	117.9320

We believe that including the compliance dates in the rule provides for enforceability and practicability of the NO_X rule, and enhances the Texas SIP. The March 1, 2009 compliance date for cement kilns in Ellis County is consistent with the implementation requirement set forth in 40 CFR 51.912(a)(3). Therefore, we are approving them into Texas SIP, and as meeting the RACT requirement for the D/FW 8-hour ozone nonattainment area.

II. Final Action

Today, we are approving revisions to the 30 TAC Chapter 117 into the Texas SIP. In this rulemaking, we are approving the nonsubstantive renumbering of the cement kilns provisions of the May 30, 2007 submittal for cement kilns operating in Bexar, Comal, Ellis, Hays, and McLennan Counties of Texas. We are approving the substantive cement kilns provisions of the May 30, 2007 submittal for cement kilns operating in Ellis County as meeting the Act's RACT requirement for NO_X emissions from cement kilns operating in the D/FW 8-hour ozone nonattainment area. We are also making ministerial corrections to the table in 40 CFR 52.2270(c) entitled ''EPA-Approved Regulations in the Texas SIP'' to reflect our approval of certain revisions to 30 TAC 117 on December 3, 2008 (73 FR 73562). The ministerial corrections apply to table headings and entries for sections 117.323, 117.1110, 117.1205, 117.1210 and 117.2135 under Chapter 117—Control of Air Pollution from Nitrogen Compounds.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act;
- 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); and
- Does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 16, 2009. 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, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen oxide, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 17, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

■ Part 52, 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 SS—Texas

■ 2. In § 52.2270 the entry for Chapter 117—Control of Air Pollution from Nitrogen Compounds in the table in paragraph (c) is revised by:

■ a. Removing the entry for the Section 117.223 under Subchapter B, Division 3.

■ b. Adding the entry for Section 117.323 under Subchapter B, Division 3.

■ c. Revising the entry for Section 117.1110 under Subchapter C, Division 2.

■ d. Revising the entries for Sections 117.1205 and 117.1210 under Subchapter C, Division 3.

■ e. Revising the entry for Section 117.2135 under Subchapter D, Division 2.

■ f. Removing the entries for Sections 117.260, 117.261, 117.265, 117.273, 117.279, 117.283, and 117.524 under Subchapter E, Division 2.

■ g. Adding the entries for Sections 117.3100, 117.3101, 117.3103, 117.3110, 117.3120, 117.3123, 117.3140, 117.3142, and 117.3145 under Subchapter E, Division 2.

■ h. Revising the heading above Section 117.4200 entitled ''Division 2—Nitric Acid Manufacturing—Ozone Nonattainment Areas'' under Subchapter F to read ''Division 3—Nitric Acid Manufacturing—General''.

■ i. Adding the entry for Section 117.9320 under Subchapter H, Division 1, in numerical order.

■ j. Removing the heading entitled ''Subchapter H—Administrative Provisions,'' above Division 2.

The removals and additions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 117—Control of Air Pollution from Nitrogen Compounds				
*	*	*	*	*
Subchapter B—Combustion Control at Major Industrial, Commercial, and Institutional Sources in Ozone Nonattainment Areas				
*	*	*	*	*
Division 3—Houston-Galveston-Brazoria Ozone Nonattainment Area Major Sources				
*	*	*	*	*
Section 117.323	Source cap	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	
*	*	*	*	*
Subchapter C—Combustion Control at Major Utility Electric Generation Sources in Ozone Nonattainment Areas				
*	*	*	*	*
Division 2—Dallas-Fort Worth Ozone Nonattainment Area Utility Electric Generation Sources				
*	*	*	*	*
Section 117.1110	Emission Specifications for Attainment Demonstration.	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	117.1110(b) not in SIP.
*	*	*	*	*
Division 3—Houston-Galveston-Brazoria Ozone Nonattainment Area Utility Electric Generation Sources				
*	*	*	*	*
Section 117.1205	Emission Specifications for Reasonably Available Control Technology (RACT).	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	
Section 117.1210	Emission Specifications for Attainment Demonstration.	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	117.1210(b) not in SIP.
*	*	*	*	*
Subchapter D—Combustion Control at Minor Sources in Ozone Nonattainment Areas				
*	*	*	*	*
Division 2—Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Minor Sources				
*	*	*	*	*
Section 117.2135	Monitoring, Notification, and Testing Requirements.	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	

EPA-APPROVED REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
* * *	*	*	*	* * *
Subchapter E—Multi-Region Combustion Control				
* * *	*	*	*	* * *
Division 2—Cement Kilns				
Section 117.3100	Applicability	5/30/2007	01/14/2009 [Insert *FR* page number where document begins].	
Section 117.3101	Cement Kilns Definitions	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	
Section 117.3103	Exemptions	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	
Section 117.3110	Emission Specifications	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	
Section 117.3120	Source Cap	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	
Section 117.3123	Dallas-Fort Worth Eight-Hour Ozone Attainment Demonstration Control Requirements.	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	117.3123(f) not in SIP.
Section 117.3140	Continuous Demonstration of Compliance	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	
Section 117.3142	Emission Testing and Monitoring for Eight-Hour Attainment Demonstration.	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	
Section 117.3145	Notification, Recordkeeping, and Reporting Requirements.	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	
* * *	*	*	*	* * *
Subchapter F—Acid Manufacturing				
* * *	*	*	*	* * *
Division 3—Nitric Acid Manufacturing—General				
* * *	*	*	*	* * *
Subchapter H—Administrative Provisions				
Division 1—Compliance Schedules				
* * *	*	*	*	* * *
Section 117.9320	Compliance Schedule for Cement Kilns	5/30/2007	1/14/2009 [Insert *FR* page number where document begins].	
* * *	*	*	*	* * *

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[FR Doc. E9–119 Filed 1–13–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 22, and 52

[FAC 2005–29, Amendment–1; FAR Case 2007–013; Docket 2008–0001; Sequence 2]

RIN 9000–AK91

Federal Acquisition Regulation; FAR Case 2007–013, Employment Eligibility Verification

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule; delay of effective and applicability dates.

SUMMARY: The Department of Defense, General Services Administration, and National Aeronautics and Space Administration have agreed to delay the effective and applicability dates of FAR Case 2007–013, Employment Eligibility Verification, to January 19, 2009, and February 20, 2009, respectively.

DATES: *Effective Date:* The effective date of FAC 2005–29, the final rule amending 48 CFR Parts 2, 22, and 52, published in the **Federal Register** on November 14, 2008, at 73 FR 67650, is delayed January 15, 2009, until January 19, 2009.

Applicability Date: The applicability date of FAC 2005–29 is delayed until February 20, 2009.

Contracting officers shall not include the new clause at 52.222–54, Employment Eligibility Verification, in any solicitation or contract prior to the applicability date of February 20, 2009.

On or after February 20, 2009, contracting officers—

- Shall include the clause in solicitations in accordance with the clause prescription at 22.1803; and
- Should modify, on a bilateral basis, existing indefinite-delivery/indefinite-quantity contracts in accordance with FAR 1.108(d)(3) to include the clause for future orders if the remaining period of performance extends beyond August 20, 2009, and the amount of work or number of orders expected under the remaining performance period is substantial.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for further information pertaining to status or publication schedule. Please cite FAC 2005–29 (delay of effective and applicability dates).

SUPPLEMENTARY INFORMATION: This document extends to January 19, 2009, the effective date of the E-Verify rule, in order to comply with the Congressional Review Act (5 U.S.C. 801(a)(3)(A)). Although this rule was published in the **Federal Register** on November 14, 2008 (73 FR 67650), it was not received by Congress until November 19, 2008. Because of pending litigation, the applicability date for the regulation is being extended until February 20, 2009.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–29, Amendment-1, is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

The Federal Acquisition Regulation (FAR) contained in FAC 2005–29 is effective January 19, 2009, and applicable February 20, 2009.

Dated: January 9, 2009.

Linda W. Neilson,

Acting Deputy Director, Defense Procurement (Defense Acquisition Regulations System).

Dated: January 9, 2009.

David A. Drabkin,

Senior Procurement Executive & Deputy Chief Acquisition Officer, U.S. General Services Administration.

Dated: January 9, 2009.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. E9–651 Filed 1–13–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 071128765–81658–02]

RIN 0648–AW32

Endangered and Threatened Wildlife and Plants; Endangered Status for Black Abalone

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

ACTION: Final rule.

SUMMARY: Following completion of an Endangered Species Act (ESA) status review for black abalone (*Haliotis cracherodii*), we, NOAA's National Marine Fisheries Service (NMFS), published a proposed rule to list black abalone as endangered on January 11, 2008. After considering public comments on the proposed rule, we issue this final rule to list black abalone as endangered under the ESA. We also solicit information relevant to the designation of critical habitat for black abalone.

DATES: Effective February 13, 2009.

ADDRESSES: You may submit information by any of the following methods:

- Federal Rulemaking Portal: *www.regulations.gov*. Follow the instructions for submitting comments.
- Fax: 1–562–980–4027, Attention: Melissa Neuman.
- Mail: Submit written information to Chief, Protected Resources Division, Southwest Region, National Marine Fisheries Service, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213.

Reference materials regarding this determination can be obtained via the Internet at: *http://www.swr.nmfs.noaa.gov* (go to ''Latest News''/''News Archives''/January 2008). A request may also be submitted to the Assistant Regional Administrator, Protected Resources Division, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213.

FOR FURTHER INFORMATION CONTACT: Melissa Neuman, NMFS, Southwest Region (562) 980–4115; or Lisa Manning, NMFS, Office of Protected Resources (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

Black abalone was added to the National Marine Fisheries Service's (NMFS') Candidate Species List on June 23, 1999 (64 FR 33466), and transferred to the NMFS' Species of Concern List on April 15, 2004 (69 FR 19975). We initiated an informal ESA status review of black abalone on July 15, 2003, and formally announced initiation of a status review on October 17, 2006 (71 FR 61021), at the same time soliciting information from the public on the status of and threats facing black abalone. On December 27, 2006, we received a petition from the Center for Biological Diversity (CBD) to list black abalone as either an endangered or threatened species under the ESA and to designate critical habitat for the species concurrently with any listing

determination. We published a 90–day finding on April 13, 2007 (72 FR 18616), stating that the CBD petition presented substantial scientific information indicating that the petitioned actions may be warranted.

In June 2007, we assembled a Status Review Team (SRT) to review the available information, assess the extinction risk and threats facing the species, and produce an ESA status review report for black abalone. The status review report (VanBlaricom *et al.*, 2007) provides a thorough account of black abalone biology and natural history, and assesses demographic risks, threats and limiting factors, and overall extinction risk.

The NMFS Southwest Region initiated a technical peer review of the draft status review report on January 9, 2008. A proposal to list black abalone as endangered, a solicitation for public comment on the proposed rule, and solicitation for additional information regarding black abalone status and habitat needs were published in the **Federal Register** on January 11, 2008 (73 FR 1986). Technical comments received from reviewers and public comments received on or before April 10, 2008, are addressed in the final status review report and this rule.

Biology and Life History of Black Abalone

A thorough account of black abalone biology and life history may be found in the status review report (VanBlaricom *et al.*, 2008) and in the proposed rule to list black abalone as endangered under the ESA (73 FR 1986; January 11, 2008).

Statutory Framework for ESA Listing Determinations

Section 4 of the ESA (16 U.S.C. 1533) and implementing regulations (50 CFR part 424) set forth the procedures for adding species to the Federal list of threatened and endangered species. Section 4 requires that listing determinations be based solely on the best scientific and commercial data available, without consideration of possible economic or other impacts of such determinations, after conducting a status review of the species and considering conservation efforts being made to protect the species. After assessing a species' level of extinction risk and identifying factors, listed in section 4(a)(1), that have led to its decline, we assess efforts being made to protect the species to determine if those measures ameliorate the risks faced by the species. In judging the efficacy of existing protective efforts, we rely on the joint NMFS/U.S. Fish and Wildlife Service ''Policy for Evaluation of Conservation Efforts When Making Listing Decisions'' (''PECE;'' 68 FR 15100; March 28, 2003).

Summary of Comments Received in Response to the Proposed Rule

A joint NMFS/U.S. Fish and Wildlife Service policy requires us to solicit independent expert review from at least three qualified specialists (59 FR 34270; July 1, 1994). The Office of Management and Budget (OMB) Information Quality Bulletin for Peer Review (December 2004) further establishes minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Public Law 106–554), is intended to enhance the quality and credibility of the Federal Government's scientific information and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. Pursuant to our 1994 policy and the OMB Bulletin, we solicited the expert opinions of ten appropriate and independent specialists regarding pertinent scientific or commercial data and assumptions relating to the taxonomic, genetic, biological and ecological information supporting the proposal to list black abalone. We conclude that these expert reviews satisfy the requirements for ''adequate peer review'' under the OMB Bulletin and the requirements of the joint 1994 peer review policy. All of the independent experts found that the scientific information supported listing of black abalone as an endangered species.

No public hearings were requested during the 90–day public comment period on the proposed rule to list the black abalone as an endangered species, and no hearings were held. During the public comment period, however, we received seven written comments on the proposed rule: three from private citizens, three from non-governmental organizations, and one from a local government agency. Of the seven comments we received, four clearly stated their support for listing black abalone as an endangered species. Other commenters felt that the protections provided to black abalone from an ESA listing, namely habitat protection and protection from harvesting, would not benefit the species and that more emphasis needs to be placed on the treatment of withering syndrome, a fatal abalone disease. One commenter expressed concern over the methodology used to estimate the risk of black abalone extinction within the next 30 years and suggested that the risk analysis be reviewed by epidemiologists with expertise in the spread of and resistance to infectious diseases. A summary of the comments and the responses thereto are presented here.

Comment 1: Several commenters indicated that listing black abalone as endangered is not enough to ensure survival of the species and questioned how active management will halt the progression of withering syndrome.

Response: The final listing of black abalone as endangered under the ESA offers protection to the species by prohibiting all of the activities outlined in section 9 of the ESA (e.g., importation, exportation, take, possession, sale, and delivery) that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations, and agencies subject to U.S. jurisdiction. Section 7(a)(2) of the ESA requires Federal agencies to consult with NMFS to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat.

We acknowledge that managing the threat of withering syndrome will be difficult, especially because the etiology of the pathogen that causes the disease is unknown. However, the ESA requires that we evaluate all of the threats that a species faces and base our listing determination on that evaluation. Individual threats will be addressed in a recovery plan and through a critical habitat designation, both of which will be developed subsequent to this final rule. The recovery plan and subsequent rulemaking to designate critical habitat will incorporate the best available scientific information on methods to minimize the threat of withering syndrome in areas that have been exposed to it and halt further progression of the disease to areas that remain unaffected.

Comment 2: Several commenters urged NMFS to initiate a multi-step recovery plan. It was suggested that a large part of the recovery process needs to be focused on how to treat and eliminate withering syndrome because that is the major cause for the species' decline. One commenter provided information that there are disease-resistant abalone present at San Nicolas Island and felt that these should be used in a breeding program as part of a recovery plan. Another commenter suggested that the recovery plan identify the Channel Islands as an area for restoration activities because the islands historically supported high abundances of black abalone, are protected from certain stressors because of their

isolation from the mainland, have an additional law enforcement presence, and currently support a well-established abalone research and monitoring program.

Response: We recognize the urgent need for a recovery plan and will assemble a team of abalone experts to assist in the development of a recovery plan for the species. This recovery plan will specify recovery actions that should be carried out (e.g., disease treatment and elimination, restoration, enhancement); the geographic scope of recovery actions; and demographic, threats-based and long-term monitoring criteria that must be met in order to remove black abalone from the endangered species list. If the existence of withering syndrome-resistant black abalone is confirmed, we will consider incorporating their use into a captive propagation and enhancement program. The Channel Islands area should be emphasized in the recovery plan both in terms of continued monitoring and research and new restoration activities.

Comment 3: Two commenters were concerned about the threats of anthropogenic green house gas emissions, sea level rise, elevated water temperatures and ocean acidification to black abalone. One commenter was concerned about the entrainment and/or impingement risks posed by activities that involve the intake of seawater (e.g., desalination plants, coastal power generating facilities, and liquefied natural gas terminals). These commenters asserted that the proposed rule failed to identify and assess these threats adequately.

Response: Sea level rise and elevated water temperatures, induced by long-term climate change, were identified as threats to black abalone in the draft status review report that supported our proposed rule (VanBlaricom *et al.*, 2007). On a scale ranging from low to high overall threat level, sea level rise was assigned a medium threat level and elevated water temperature was assigned a high threat level. A few studies have examined the effects of rising sea surface temperature on abalone at the individual level and indicate that elevated temperatures are likely to have negative consequences on those abalone species associated with cooler water temperatures and on abalone species that are particularly susceptible to withering syndrome. For example, when red abalone were held at elevated laboratory water temperatures over the course of a year (Vilchis *et al.*, 2005), growth and reproduction halted and mortality due to withering syndrome rose significantly. We are not aware of any studies that have examined the potential effects of sea level rise on abalone. While the extent of future impacts resulting from sea level rise remains uncertain, sea level rise may result in loss of suitable black abalone habitat in preferred depth range because of increased erosion, turbidity and siltation.

We have revised the threat assessment in the status review report to analyze the impacts of ocean acidification resulting from the elevated carbon dioxide levels in the world's oceans (VanBlaricom *et al.*, 2008). Ocean acidification was assigned an overall threat level of medium. A few studies have examined the effects of elevated ocean acidity on marine gastropods and the coralline algae they graze upon at settlement. Reduced growth and survivorship resulted when marine gastropods were exposed to a small pH reduction over the course of six months (Shirayama and Thornton, 2005), and calcification rates dropped by as much as 40% in coralline algae exposed to increased partial pressure of CO_2 (Feely *et al.*, 2004). Thus, although the magnitude and timing of ocean acidification remain uncertain, reduced ocean pH levels may result in mortality, lower reproductive potential, and reduced individual growth of black abalone.

While we recognize that long-term climate change in coastal marine systems will result in a number of abiotic shifts that could affect black abalone, the biological responses to these shifts at the population, species and ecosystem levels are complex and not yet predictable. Thus, the magnitude and timing of the risks associated with long-term climate change remain uncertain and require future studies and better predictive models (Harley *et al.*, 2006). However, the overall threat rankings assigned to sea level rise, elevated water temperatures, and reduced pH levels are correct according to the criteria used in the threats assessment and described in more detail in the status review report (VanBlaricom *et al.*, 2008).

We acknowledge that entrainment or impingement of young stages of black abalone is possible when activities that require intake of seawater are conducted (e.g., desalination plants, coastal power generating facilities, and liquefied natural gas terminals) and have revised the threats assessment in the status review report accordingly (VanBlaricom *et al.*, 2008). Entrainment and/or impingement were assigned an overall threat level of low, because their severity and geographic scope were considered to be low and because there is a high degree of uncertainty regarding whether this threat affects black abalone. We are unaware of any studies that have assessed the historic, current or future effects of entrainment and/or impingement on abalone. However, certain aspects of the life history of black abalone suggest that entrainment/impingement risk could be relatively low. Larvae and juveniles are not likely to be in close proximity to seawater intakes because black abalone adults are believed to spawn in relatively protected and confined rocky crevices and cracks, larval dispersal time is limited (about 3–10 days before settlement and metamorphosis; McShane, 1992), larvae may disperse over distances of only a few meters (Chambers *et al.*, 2005), and genetic analyses support minimal gene flow among populations and a low degree of interchange via larval dispersal (Hamm and Burton, 2000).

Comment 4: Two commenters felt that designating critical habitat should be a top priority and urged NMFS to consider designating critical habitat throughout the historic range of black abalone. One commenter suggested that sufficient higher elevation areas should be considered as critical habitat to account for rising sea level. Another commenter proposed that the Channel Islands should be included in a critical habitat designation for black abalone.

Response: NMFS solicits information on critical habitat features and intends to proceed with a proposed designation in a subsequent rulemaking. A team of experts will be convened to evaluate the best scientific information available on geographical areas occupied by black abalone at the time of listing, including areas of the Channel Islands, that contain physical or biological features essential to the conservation of the species and which may require special management considerations or protection. The team will also evaluate whether areas outside the geographical area occupied by the species at the time of listing, including some areas of the Channel Islands, areas within the historic range of the species, and higher elevation areas along the coast, are essential for the conservation of the species.

Comment 5: One commenter felt that the proposed rule was not an accurate assessment of the extinction risk to black abalone, and to get an accurate assessment, epidemiologists with expertise in withering syndrome would need to be consulted. The commenter also questioned whether withering syndrome should be considered the primary threat to near-term extinction of black abalone given that recent literature suggests that infectious

diseases play a limited role in promoting extinction of species.

Response: The methods used for evaluating extinction risk in black abalone provide an accurate assessment of the probability of near-term extinction. The SRT used a simple quantitative model, incorporating uncertainty, to assess the risk that withering syndrome poses to black abalone. The method relies on the expert opinions of the SRT members and quantitative information presented in the status review report. First, a range of categorical probabilities was established for two scenarios: (1) that the spread of withering syndrome will cease, and (2) that black abalone will develop resistance to withering syndrome over the next 30 years. After considering the data collected and analyzed in previous sections of the status review report, SRT members adjusted the probabilities according to how certain they were that a particular probability category would occur. Finally, a single belief-weighted overall probability of effective extinction in 30 years of 96 percent was determined. All of the status review team members were certain that the probabilities of scenario (1) or (2) occurring were very low (less than 15 percent).

Although the commenter refers to recent literature suggesting that infectious diseases play a limited role in promoting extinction, the conclusions reached in the cited literature do not apply in the case of black abalone, as is well documented in the status review report. Specifically, the correlation between increased spread and manifestation of withering syndrome with elevated water temperatures, evidence of a variety of factors that can lead to rising ocean temperatures over large geographic scales, and the unequivocal empirical record of large scale population declines and little evidence of local recovery all suggest that withering syndrome will continue to play a significant role in determining the future of black abalone. In addition, there is now substantial concern among scientists and marine resource managers about the emergence of virulent diseases in marine organisms on a global scale in association with ocean warming in recent decades (e.g., Harvell *et al.*, 1999; Harvell *et al.*, 2002). Recent surveys of the literature suggest that the frequency of reporting of new diseases has increased for several major marine taxa, including mollusks (e.g., Ward and Lafferty, 2004).

The commenter questioned whether the status review team members were experts in disease ecology and, if not, was concerned that the team might not be qualified to assess the species' risk of extinction due to withering syndrome. Currently, we are not aware of any epidemiologists that specialize in withering syndrome, as it is a fairly new disease. Because the etiology of the pathogen that causes the disease is unknown and no epidemiological expertise exists, a team of scientists and resource managers familiar with the demography and ecology of black abalone and its decline was sufficient to assess the near-term risk that withering syndrome poses to the species. While our team members may not have had expertise in the evolution of disease resistance, the team's assessment of near-term extinction risk due to withering syndrome is the best scientific information available and an appropriate basis upon which to list black abalone as endangered because: (1) the team considered all of the relevant data on risks associated with the spread of withering syndrome and the disease's prevalence; and (2) emergence of widespread disease resistance within the next 30 years is unlikely given that it has not occurred during the previous 20 years of marked recorded decline.

Consideration as a ''Species'' Under the ESA

The ESA defines a species as ''any species or subspecies of wildlife or plants, or any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' Black abalone is a marine invertebrate and is not a subspecies; therefore, we list black abalone at the species level.

Status of Black Abalone

Black abalone has experienced major declines in abundance that prompted closure of the commercial and recreational fisheries in 1993 and resulted in local extinctions and low local densities in the majority of long-term monitoring studies in California (Tissot, 2007). These declines have been particularly severe in the Channel Islands which were major foci for the commercial fishery from 1970–1993 and where abalone densities were high (greater than 40 m–2) as late as the mid–1980s. Although the geographic range of black abalone extends to northern California, the vast majority of abalone populations have historically occurred south of Monterey, particularly in the Channel Islands (Cox, 1960; Karpov *et al.*, 2000). Thus, black abalone populations have been severely reduced in areas that comprised the majority of the adult abalone populations in California.

Natural recovery of severely reduced abalone populations can be a very slow process (e.g., Tegner, 1992). This is largely due to the low reproductive success of widely dispersed adult populations coupled with short larval dispersal distances (see ''Reproduction and Spawning Density'' in VanBlaricom *et al.*, 2008). Therefore, severely reduced populations, in addition to providing few reproductive adults, also experience reduced success of fertilization and recruitment of larval abalone.

Moreover, many studies have shown that abalone larvae are generally not widely dispersed. For example, Prince *et al.* (1988) and McShane (1992) showed a strong correlation between the abundances of adult and newly recruited abalone at several sites in South Australia, which suggests that larvae are not dispersed very far from their point of origin. Similarly, Tegner (1992) showed that recruitment of juvenile green abalone was rare in Palos Verdes, California, where adult abalone were very uncommon even though abundant adult stocks were found less that 30 km away in the Channel Islands. Thus, although more abundant black abalone populations occur in central and perhaps northern California, decimated stocks in southern California are unlikely to receive significant recruitment from these distant populations (Hamm and Burton, 2000).

Studies indicate that a local adult density ''threshold'' exists and influences local recruitment. Below the critical threshold density gametes released by males and females into the water column do not meet successfully and fertilization does not take place. Recovery will largely depend on the density of local brood stocks and whether this density is below the critical value necessary for successful recruitment (Tegner, 1992). Based on empirical data from three long-term studies of black abalone in California, recruitment failure occurred below adult densities of 0.75–1.10 m–2 (Tissot, 2007). Given that the majority of populations south of Cayucos in central California are below this threshold, many significantly so, it seems unlikely that these populations will be able to recover naturally to their former abundances, at least in the near future. Moreover, given the continued decline of most populations and the continued northward expansion of withering syndrome with warming events (Raimondi *et al.*, 2002), it seems likely that black abalone populations will continue to decline across their range.

Assessment of Risk of Extinction

Analysis of Demographic Risk

The demographic risks that black abalone face were assessed by considering four demographic criteria (abundance, growth rate/productivity, spatial structure/connectivity, and genetic diversity) and other key risks (e.g., threats). The SRT unanimously viewed black abalone as being at high risk of extinction throughout all or a significant portion of its range due to low abundance, low growth and productivity, compromised spatial structure and population connectivity, low genetic diversity, and the continued manifestation and spread of withering syndrome. This assessment is presented in more detail in the status review report (VanBlaricom *et al.*, 2008) and in the proposed rule to list black abalone as endangered under the ESA (73 FR 1986; January 11, 2008).

Quantitative Representation of Expert Opinion Incorporating Uncertainty

VanBlaricom *et al.* (2008) calculated the probability of extinction with time using a simple formula that accounts for the main threat that black abalone faces: withering syndrome. The probability of extinction is considered as a function of two parameters (R=the probability that the northward spread of withering syndrome will cease very soon and S=the probability that resistance will emerge very soon in the host). If this threat alone results in a high risk of extinction in a short time (i.e. 30 years-the expected life span of black abalone), then analysis of that factor alone may suffice to evaluate whether the species is in danger of extinction currently or in the foreseeable future. Assuming R and S are independent, the overall probability of functional extinction (i.e. the reproductive potential of isolated survivors is zero and no viable populations remain) in 30 years based on the SRT members' best professional judgment was 96 percent.

Summary of Factors Affecting the Species

According to section 4 of the ESA, the Secretary of Commerce (Secretary) determines whether a species is threatened or endangered as a result of any (or a combination) of the following factors: the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; or other natural or man-made factors affecting its continued existence. Collectively, these are often referred to as ''factors for decline'' or ''listing factors.≥

To determine the species' present vulnerability to extinction, we considered the historic, current, and/or potential impact of the listing factors on black abalone, as these relate to current species distribution and abundance, and the other demographic factors discussed above.

Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range

Elevated water temperatures are likely to have contributed to the decline of black abalone and pose a serious threat to the ability of the species to persist, because elevated water temperatures are correlated with accelerated rates of withering syndrome transmission and disease-induced mortality. Water temperatures can become elevated because of anthropogenic sources of thermal effluent and long and short-term climate change (e.g., global climate change and El Nino Southern Oscillation). Although there is no explicitly documented causal link between the existence of withering syndrome and long-term climate change, patterns observed over the past three decades suggest that progression of ocean warming associated with large-scale climate change may facilitate further and more prolonged vulnerability of black abalone to effects of withering syndrome.

Other activities leading to substrate destruction, such as coastal development, recreational access, cable repairs, nearshore military operations and benthic community shifts, have a narrow geographic scope, uncertain or indirect effects on black abalone, or occur infrequently. Some exceptions may exist in the cases of sedimentation and sea level rise, because these threats have the potential to produce more widespread impacts; but the certainty that these factors will affect black abalone are low. For example, sea level rise may result in loss of suitable habitat in a preferred depth range because of increased erosion, turbidity and siltation; but we currently lack information to determine whether these habitat changes will be important factors for further decline.

Finally, reduced food quality and quantity were classified as having a relatively low impact. Studies have shown that reductions and increases in kelp abundance are not correlated with black abalone abundance (e.g., Friedman *et al.*, 1997). Thus, reduced food quality and quantity has likely not played an important role in the overall decline of black abalone, and unless new information surfaces, this factor is not believed to pose a significant threat in the future.

Overutilization for Commercial, Recreational, Scientific or Educational Purposes

Throughout most of the species' range, local densities are below the critical threshold density required for successful spawning and recruitment. These low densities have occurred in part because of overutilization for commercial and recreational purposes prior to the California fishery closure in 1993. (The other major cause for these mass moralities is withering syndrome. See *Disease or Predation* below). Data from abalone fisheries in California and Baja California, Mexico indicate a decline in landings of at least 93 percent during the 1990s. These reductions, however, may not be indicative of population declines due only to fishing activities because mass mortalities due to withering syndrome had begun in many locations at approximately the same time. Rogers-Bennett *et al.* (2002) estimate that the California abalone fisheries may have contributed up to a 99 percent reduction in black abalone abundance in the USA, but the population may have already been declining due to the effects of withering syndrome (see Status of Black Abalone above). Thus, the estimated take of 3.5 million black abalone in California's commercial and recreational abalone fisheries likely contributed to the decline of local densities. This threat no longer exists in California because the black abalone fisheries were closed in 1993. The limited information we have from Mexico makes it difficult to ascertain the relative importance of fishing to overall species decline.

Disease or Predation

Withering syndrome in black abalone is caused by a Rickettsia-like prokaryotic organism, ''*Candidatus Xenohaliotis californiensis*'' (Gardner *et al.*, 1995; Friedman *et al.*, 1997; Friedman *et al.*, 2000; Friedman *et al.*, 2002). *Candidatus Xenohaliotis californiensis* (hereafter ''abalone rickettsia'') occurs in epithelial cells of the gastrointestinal tract. Infected symptomatic animals are unable to transfer digested food materials from the gut lumen into the epithelial cells and beyond, resulting in malnutrition, dramatic loss of tissue mass, and eventual death. The same pathogen is known to cause symptoms of withering syndrome in red abalone, and mortality rate is positively associated with water temperature in both red and black

abalone (Moore *et al.*, 2000a, b; Vilchis *et al.*, 2005).

The first reported occurrence of significant numbers of black abalone with symptoms of withering syndrome on the California mainland was in San Luis Obispo County in 1988 (Steinbeck *et al.*, 1992). Afflicted animals were found primarily within a cove receiving warmed effluent seawater from the cooling system of a nearby nuclear power plant. A mass mortality of black abalone occurred at the site between 1988 and 1989, with mortality rates correlating well to local patterns of sea temperature elevation associated with power plant effluent (Steinbeck *et al.*, 1992).

In wild animals symptomatic for withering syndrome, weakness resulting from the disease may cause the individual to lose the typically secure grip on the rocky substratum in response to wave impacts, allowing attack by predators or scavengers before the individual succumbs to the disease itself. Transfer of pathogens from animal to animal is fecal to oral on a local scale, and is therefore likely facilitated by aggregation of abalone in natural habitats. Transmission pathways on large spatial scales are entirely unknown at present. The pathogen for withering syndrome is now reported to be endemic to all the coastal marine waters of central (Friedman and Finley, 2003) and southern California (Moore *et al.*, 2002) south of San Francisco.

In the vast majority of cases where long-term monitoring data are available, the appearance of animals symptomatic for withering syndrome in a population lead inevitably to rapid and dramatic declines in population size, most often in excess of 90 percent (Tissot, 2007). The pattern has been documented for black abalone populations throughout the range in California. Reports indicate similar trends for black abalone populations in Mexico. Exceptions exist at San Miguel Island, where rates of decline at some long-term study sites have been atypically slow, and at one location each on Santa Cruz and San Nicolas islands. These exceptions suggest the potential for resilience and recovery in populations reduced dramatically by withering syndrome. However, Tissot (2007) describes the negative impacts of withering syndrome in multiple locations across the entire range of the species, coupled with evidence of increasing geographic scope of impact. Tissot (2007) indicates that withering syndrome continues to damage the size and sustainability of black abalone populations on a large scale.

We conclude that withering syndrome has been and continues to be the primary threat contributing to the decline of black abalone. The disease has caused mass mortality and near extirpation of populations throughout most of the species' range and the disease continues to spread to populations in Monterey County and to the north. The rate at which the disease is spreading northward will likely be exacerbated by warmer water temperatures that may result due to a variety of factors.

Abalone face predatory pressure from a number of consumer species such as gastropods, octopuses, lobsters, sea stars, fishes and sea otters (Ault, 1985; Estes and VanBlaricom, 1985; Shepherd and Breen, 1992). Despite the large number of identified abalone predators, we are aware of no studies that estimate mortality rates of black abalone in association with the predator species that have been identified. In the past black abalone populations were much more robust and able to absorb losses due to predation without compromising viability. Now that the few remaining populations are smaller, more isolated, and still declining throughout the range, predation may pose risk to the future survival of the species. In addition, non-anthropogenic predation could limit the effectiveness of future recovery efforts by interacting with other limiting factors.

Inadequate Regulatory Mechanisms

Although withering syndrome is spread largely by factors other than aquaculture, there is evidence suggesting that aquaculture operations provide a pathway for the spread of the disease (Friedman and Finley, 2003). Past State and federal regulations were not adequate to prevent the spread of withering syndrome within and outside the United States through the transfer of infected animals from one aquaculture facility to another and outplanting of infected animals from aquaculture facilities to the wild.

Recent State regulations to carefully monitor the health of abalone at aquaculture facilities and control the importation/exportation of abalone among facilities will likely reduce the threat that the aquaculture industry poses in the future. Currently, the State monitors aquaculture facilities for introduced organisms and disease on a regular basis. There is also a restriction on out-planting abalone from facilities which have not met certification standards. If new State regulations to carefully monitor aquaculture facilities are effective, the future threat that they pose to black abalone will be limited. In fact, aquaculture may emerge as an important, and possibly the only effective recovery tool for restoring black abalone populations through captive propagation and outplanting efforts.

Purposeful illegal harvest, typically termed poaching, has been a source of mortality for black abalone throughout their range since the establishment of harvesting regulations by the State of California (Taniguchi, unpublished data). Since the closure of the California black abalone fishery in 1993, a number of black abalone poaching cases along the California mainland coast, particularly in the northern portion of black abalone's geographic range, have been documented by the California Department of Fish and Game (CDFG) from 1993–2003 (Taniguchi, unpublished data). The chronic virtual absence of black abalone populations from highly accessible intertidal habitats near human population centers in California during the twentieth century also supports the conclusion that poaching has been a source of abalone mortality.

Enforcement effort has varied over the ten-year time period of 1993–2003, and was increased in 2000 because of coordinated efforts between CDFG marine and coastal regions and planned overflights along the Central California coast during low tides. The problem of poaching persists, and existing regulatory mechanisms have not yet effectively reduced the risks posed by illegal take.

Other Natural or Man-made Factors

Environmental pollutants and toxins are likely present in areas where black abalone have occurred and still occur, but evidence suggesting causal and/or indirect negative effects on black abalone due to exposure to pollutants or toxins is limited (e.g., Martin *et al.*, 1977; Miller and Lawrenz-Miller, 1993). There is ongoing concern that accidentally spilled oil from offshore drilling platforms or various types of commercial vessels could occur near shore in California and could affect a significant proportion of black abalone habitat; however, at this time we are uncertain how such an event would impact the species' overall status. The overall risk that environmental pollutants and toxins have posed is probably low given their limited geographic scope and uncertain effects on black abalone; however, a single event, depending on where it occurs, could irreparably damage one or more of the few remaining viable populations of black abalone.

A small number of studies have examined the effects of elevated ocean acidity on marine gastropods and the coralline algae they graze upon at settlement. Although the magnitude and timing of ocean acidification remain uncertain and no direct linkages have been established between ocean acidification and black abalone, reduced pH levels have the potential to result in mortality, lower reproductive potential, and reduced individual growth.

Entrainment or impingement of young stages of black abalone may result when activities that require intake of seawater are conducted (e.g., desalination plants, coastal power generating facilities, and liquefied natural gas terminals). Entrainment or impingement risk is likely to be relatively low because larvae and juveniles are spatially and temporally restricted (McShane, 1992; Chambers *et al.*, 2005, Hamm and Burton, 2000). Thus, the potential for large numbers of young black abalone to be present in a volume of water that becomes entrained at a sea water intake is likely low. However, until studies examine the potential for traditional and new power generating methods to entrain or impinge early life stages of black abalone, the effects of these activities on the species remain highly uncertain.

SRT Assessment of Overall Extinction Risk

The SRT concluded unanimously that black abalone is in danger of extinction throughout all of its range. The spread of withering syndrome poses imminent and significant risk to the species and exacerbates the high levels of demographic risk to which black abalone are subject as a result of extremely low local densities, low levels of growth and productivity, limited spatial structure and connectivity, and loss of genetic diversity. In addition, the SRT estimated that there is approximately a 96 percent probability that black abalone will suffer functional extinction throughout its range within the next 30 years.

Efforts Being Made to Protect the Species

When considering the listing of a species, section 4(b)(1)(A) of the ESA requires consideration of efforts by any State, foreign nation, or political subdivision of a State or foreign nation to protect such species. Such efforts would include measures by Native American tribes and organizations and local governments, and may also include efforts by private organizations. Also, Federal, tribal, state, and foreign recovery actions developed pursuant to 16 U.S.C. 1533(f) constitute conservation measures. On March 28, 2003, NMFS and the U.S. Fish and Wildlife Service (USFWS) published the final Policy for Evaluating Conservation Efforts (PECE)(68 FR 15100). The PECE provides guidance on evaluating current protective efforts identified in conservation agreements, conservation plans, management plans, or similar documents (developed by Federal agencies, state and local governments, tribal governments, businesses, organizations, and individuals) that have not yet been implemented or have been implemented but have not yet demonstrated effectiveness. The PECE establishes two basic criteria for evaluating current conservation efforts: (1) the certainty that the conservation efforts will be implemented, and (2) the certainty that the efforts will be effective. The PECE provides specific factors under these two basic criteria that direct the analysis of adequacy and efficacy of existing conservation efforts. As evaluated pursuant to PECE, the protective efforts described below do not as yet, individually or collectively, provide sufficient certainty of implementation and effectiveness to counter the extinction risk assessment conclusion that the species is in danger of extinction throughout its range.

National Marine Fisheries Service Programs

Black abalone was added to NMFS= Candidate Species List on June 23, 1999 (64 FR 33466), and remained on this list after we redefined the term ''candidate species'' on April 15, 2004 (69 FR 19975). Candidate species are those petitioned species that are actively being considered for listing as endangered or threatened under the ESA, as well as those species for which we have announced initiation of an ESA status review in the **Federal Register**. Black abalone was also added to the NMFS' Species of Concern List, which was created on April 15, 2004 (69 FR 19975). Species of concern are those species about which we have some concerns regarding status and threats, but for which insufficient information is available to indicate a need to list the species under the ESA. . Neither the ''candidate species'' nor ''species of concern'' classification carries any procedural or substantive protections under the ESA.

National Marine Sanctuaries Program

Three coastal national marine sanctuaries in California contain intertidal habitat suitable for black abalone: Channel Islands National Marine Sanctuary (CINMS), Monterey Bay National Marine Sanctuary (MBNMS), and Gulf of the Farallones National Marine Sanctuary (GFNMS). These sanctuary sites, administered by NOAA, are protected by federal regulations pursuant to the National Marine Sanctuaries Act of 1972 as amended (16 U.S.C. 1431 *et seq.*). See 15 CFR parts 922.71, 922.132, and 922.91, respectively. The regulations, which are similar at all three sites, provide protection against some of the threats to black abalone. At all three sanctuaries, the inshore boundary extends to the mean high water line, thus encompassing intertidal habitat.

Direct disturbance to or development of black abalone intertidal habitat is regulated at all three national marine sanctuaries. The regulations at all three sanctuaries require permits for the alteration of, construction upon, drilling into, or dredging of the seabed (including the intertidal zone), with exceptions for anchoring, installing navigation aids, special dredge disposal sites (MBNMS only), harbor-related maintenance, and bottom tending fishing gear in areas not otherwise restricted.

Water quality in black abalone habitat is regulated by strict discharge regulations at all three national marine sanctuaries. The regulations require permits for the discharge or deposit of pollutants within or into sanctuaries, except for the discharge or deposit of effluents required for normal boating operations (e.g., vessel cooling waters and effluents from marine sanitation devices, fish wastes and bait).

In addition to the permit requirement for the disturbance of the submerged lands of any sanctuary resource, which would be necessary to take black abalone, networks of marine reserves and marine conservation areas have been established by the CDFG and NOAA within the CINMS and by CDFG along portions of the MBNMS. Within these areas, especially within CINMS where the protected areas have been in place since 2003 and are within the Channel Islands National Park, multi-agency patrols provide elevated levels of enforcement presence and increased protection against poaching of black abalone.

We conclude that these regulations do not sufficiently ameliorate the extinction risk facing the species. Though the regulations may help slow the rate at which withering syndrome, the main risk facing the species, is progressing, they are unlikely to stop the progression of withering syndrome in the near future.

State/Local Programs

The depleted condition of abalone resources prompted the California Fish and Game Commission to close all abalone fisheries south of San Francisco by 1997, beginning with the black abalone fishery in 1993. The southern abalone fishery was closed indefinitely with the passage of the Thompson bill (AB 663) in 1997. This bill created a moratorium on taking, possessing, or landing abalone for commercial or recreational purposes in ocean waters south of San Francisco, including all offshore islands. The Thompson bill also mandated the creation of an Abalone Recovery and Management Plan (ARMP), which was finalized in December 2005. The bill further required the Fish and Game Commission to undertake abalone management in a manner consistent with the ARMP.

The CDFG's ARMP provides a cohesive framework for the recovery of depleted abalone populations in southern California, and for the management of the northern California fishery and future fisheries. All of California's abalone species are included in this plan: red, green, pink, white, pinto (*Haliotis kamtschatkana*, including *H.k. assimilis*), black, and flat abalone (*H. walallensis*). The ARMP provides a mechanism for helping to slow the progression of disease and invasive/exotic species through better monitoring of aquaculture facilities; however, this effort may only make a relatively small difference to the threat that disease poses given that spread of withering syndrome is due largely to factors other than aquaculture operations. The ARMP also provides a framework for restoring black abalone populations through translocation and captive propagation and enhancement programs; however, detailed plans and methodologies have neither been drafted nor tested and therefore their effectiveness for conserving black abalone remains uncertain.

International Conservation Efforts

The International Union for Conservation of Nature and Natural Resources (IUCN) publishes a Red List of species that are at high risk of extinction and, when data are sufficient, categorizes species as either Extinct, Extinct in the Wild, Critically Endangered, Endangered, Vulnerable, Near Threatened, or of Least Concern (IUCN, 2001). In 2003 the IUCN, based on an assessment by Smith *et al.* (2003), placed black abalone on the Red List as Critically Endangered under criterion A4e. Under criterion A4e, a species may be classified as Critically Endangered, Endangered, or Vulnerable when its population size, measured over the longer of 10 years or three generations, has declined greater than or equal to 80, 50, or 30 percent respectively, due to an ''observed, estimated, inferred, projected or suspected population reduction (up to a maximum of 100 years) where the time period must include both the past and the future, and where the causes of reduction may not have ceased or may not be understood or may not be reversible, based on the effects of introduced taxa, hybridization, pathogens, pollutants, competitors or parasites'' (IUCN, 2006). Inclusion on the IUCN Red List does not carry any regulatory weight with regard to conserving black abalone.

Final Listing Determination

Section 4(b)(1) of the ESA requires that the listing determination be based solely on the best scientific and commercial data available, after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any state or foreign nation to protect and conserve the species. We have reviewed the petition, the draft status report and the public comments, considered protective efforts being made and other available published and unpublished information, and consulted with species experts and other individuals familiar with black abalone. On the basis of the best available scientific and commercial information, we conclude that black abalone is presently in danger of extinction throughout all of its range. This endangered determination is based on a suite of risks that black abalone face especially: (1) the spread of and mortality caused by a disease called withering syndrome; (2) low adult densities below the critical threshold density required for successful spawning and recruitment; (3) elevated water temperatures that have accelerated the spread of withering syndrome; (4) reduced genetic diversity that will render extant populations less capable of dealing with both long- and short-term environmental or anthropogenic challenges; and (5) illegal harvest. The principal threat to black abalone is withering syndrome and associated conditions that may promote the spread of the disease (e.g., suboptimal water temperatures and introduction of infected animals into previously unaffected areas). Withering syndrome has caused mass mortality and near extirpation of populations in the recent past, and the spread of withering syndrome threatens the species with a very high probability (96 percent) of extinction within the next 30 years. This threat is unlikely to be ameliorated sufficiently by current conservation efforts.

Prohibitions and Protective Measures

Section 9 of the ESA prohibits certain activities (e.g., importation, exportation, take, sale, and delivery) that directly or indirectly affect endangered species. These activities would constitute a violation of section 9, and prohibitions apply to all individuals, organizations, and agencies subject to U.S. jurisdiction. Sections 10(a)(1)(A) and (B) of the ESA authorize NMFS to grant exceptions to the ESA's section 9 take prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-federal) for scientific purposes or to enhance the propagation or survival of a listed species. Activities potentially requiring a section 10(a)(1)(A) research/enhancement permit include scientific research that targets black abalone. Under section 10(a)(1)(B), the Secretary may permit takings otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity, provided that the requirements of section 10(a)(2) are met.

Section 7(a)(2) of the ESA requires Federal agencies to consult with NMFS to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify critical habitat. Under section 7(a)(4), Federal agencies must confer with us on any of these activities to ensure that any such activity is not likely to jeopardize the continued existence of a species proposed for listing or destroy or adversely modify proposed critical habitat. Examples of Federal actions that may affect black abalone include permits and authorizations relating to coastal development and habitat alteration, oil and gas development, military operations, coastal power plant operations, toxic waste and other pollutant discharges, and aquaculture operations.

Identification of Activities That Would Constitute a Violation of Section 9 of the ESA

On July 1, 1994, NMFS and USFWS published a policy to identify, to the maximum extent possible, those activities that would or would not constitute a violation of section 9 of the ESA once a species is listed (59 FR 34272). The intent of this policy is to increase public awareness of the effect

of listings on proposed and ongoing activities within the species' range. We identify, to the extent known, specific activities that will be considered likely to result in violation of section 9, as well as activities that will not be considered likely to result in violation. Activities that we believe could result in violation of section 9 prohibitions against ''take'' of black abalone include: (1) unauthorized take; (2) activities that directly result in elevation of sea surface temperatures (e.g. thermal effluent from power plants); (3) substrate destruction in intertidal habitats that adversely affects black abalone (e.g., coastal development, recreational access, oil spills, sea level rise); (4) unauthorized transfer of abalone species among aquaculture facilities or from aquaculture facilities to the wild; (5) discharging or dumping toxic chemicals or other pollutants into areas used by black abalone; and (6) unpermitted scientific research activities. We believe, based on the best available information, the following actions will not result in a violation of section 9: (1) possession of black abalone which are acquired lawfully by permit issued by NMFS pursuant to section 10 of the ESA, or by the terms of an incidental take statement pursuant to section 7 of the ESA; (2) federally funded or approved projects for which ESA section 7 consultation has been completed, and when activities are conducted in accordance with any terms and conditions provided by NMFS in an incidental take statement accompanying a biological opinion. These lists are not exhaustive. They are intended to provide some examples of the types of activities that might or might not be considered by NMFS as constituting a take of black abalone under the ESA and its regulations.

Critical Habitat

Critical habitat is defined in section 3 of the ESA as: (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the ESA, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) 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 (16 U.S.C. 1532(5)(A)). ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the ESA is no longer necessary (16 U.S.C. 1532(3)). Section 4(a)(3)(A) of the ESA requires that, to the maximum extent prudent and determinable, critical habitat be designated concurrently with the listing of a species (16 U.S.C. 1533(a)(3)(A)(i)). If critical habitat is not determinable at the time of listing, an extension of one year may be given, during which critical habitat must be designated (16 U.S.C. 1533(b)(6)(C)(ii)). Designations of critical habitat must be based on the best scientific data available and must take into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat. Once critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure that they do not fund, authorize or carry out any actions that are likely to destroy or adversely modify that habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure that their actions do not jeopardize the continued existence of listed species. We are currently considering critical habitat for black abalone, but a proposed designation is not yet determinable because: (1) we lack information sufficient to perform required analyses of the impacts of the designation; and (2) the habitat requirements of the species are not sufficiently well known to permit identification of an area as critical habitat. Thus, we seek public input to assist in gathering and analyzing the best available scientific data and information to support a critical habitat designation, which will be proposed in a subsequent **Federal Register** notice. Specifically, we seek information regarding: (1) current or planned activities within the range of black abalone, their possible impact on black abalone, and how those activities could be affected by a critical habitat designation; (2) quantitative evaluations describing the quality and extent of marine intertidal or subtidal habitats occupied in the past or presently by black abalone; and (3) the economic costs and benefits likely to result from the designation of critical habitat. We will continue to meet with co-managers and other stakeholders throughout the designation process.

Joint NMFS/USFWS regulations for listing endangered and threatened species and designating critical habitat at section 50 CFR 424.12(b) state that the agency ''shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection'' (hereafter also referred to as ''essential features''). Pursuant to the regulations, such requirements include, but are not limited to the following: (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, rearing of offspring, germination, or seed dispersal; and generally; (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. These regulations go on to emphasize that the agency shall focus on essential features within the specific areas considered for designation. These features ''may include, but are not limited to, the following: spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, geological formation, vegetation type, tide, and specific soil types.''

Information Solicited

To ensure that a designation of critical habitat will be as accurate and effective as possible, we solicit information from the public, other governmental agencies, the scientific community, industry, and any other interested parties. Specifically, we are interested in any information that will inform the designation including: (1) quantitative evaluations describing the quality and extent of marine intertidal or subtidal habitats (occupied currently or occupied in the past, but no longer occupied) for black abalone as well as information on areas that may qualify as critical habitat for black abalone in the future; (2) biological or other relevant data concerning threats to black abalone including, but not limited to: toxicological studies on the adverse effects of chemicals on black abalone and epidemiological data relating to withering syndrome; (3) current or planned activities within the range of black abalone and their possible impact on black abalone; (4) efforts being made to protect black abalone; (5) activities that could be affected by a critical habitat designation; and (6) the economic costs and benefits of additional requirements of management measures likely to result from the designation of critical habitat (see **DATES** and **ADDRESSES**).

References

A complete list of all references cited herein is available upon request (see **ADDRESSES** section).

Classification

National Environmental Policy Act

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus*, 675 F. 2d 825 (6th Cir. 1981), NMFS has concluded that ESA listing actions are not subject to the environmental assessment requirements of the National Environmental Policy Act (NEPA; See NOAA Administrative Order 216 6.)

Executive Order 12866, Regulatory Flexibility Act and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this rule is exempt from review under Executive Order 12866. This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Federalism

NMFS has conferred with the State of California in the course of assessing the status of black abalone through quarterly coordination meetings between the CDFG and NMFS and CDFG technical peer review of the black abalone draft status review report. The coordination meetings contributed to our consideration of Federal, state and local conservation measures. The CDFG technical peer review comments were considered and comments and information were incorporated into the final version of the status review report. As subsequent issues with ESA compliance and rulemaking arise (e.g., issuance of permits, critical habitat designation, recovery planning), we will continue to communicate with the States, and other affected local or regional entities, giving careful consideration to all concerns and comments received.

List of Subjects in 50 CFR Part 224

Endangered and threatened species, Exports, Imports, Transportation.

Dated: January 9, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 224 is amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation of part 224 continues to read as follows:

Authority: 16 U.S.C. 1531 1543 and 16 U.S.C. 1361 *et seq.*

■ 2. In § 224.101, paragraph (d) is revised to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

* * * * *

(d) *Marine invertebrates.* The following table lists the common and scientific names of endangered species, the locations where they are listed, and the citations for the listings and critical habitat designations.

Species		Where Listed	Citation (s) for Listing Determinations	Citations (s) for Critical Habitat Designations
Common name	Scientific name			
Black abalone	*Haliotis cracherodii*	USA, CA. From Crescent City, California, USA to Cape San Lucas, Baja California, Mexico, including all offshore islands.	[*insert Federal Register volume and page number where document begins; January 14, 2009*]	N/A
White abalone	*Haliotis sorenseni*	USA, CA. From Point Conception, California to Punta Abreojos, Baja California, Mexico including all offshore islands and banks.	NOAA 2001; 66 FR 29054, May, 29, 2001.	Deemed not prudent NOAA 2001; 66 FR 29054, May, 29, 2001.

[FR Doc. E9–635 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106673–8011–02]

RIN 0648–XM68

Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel Lottery in Areas 542 and 543

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

ACTION: Notification of fishery assignments.

SUMMARY: NMFS is notifying the owners and operators of registered vessels of their assignments for the 2009 A season Atka mackerel fishery in harvest limit area (HLA) 542 and/or 543 of the Aleutian Islands subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the harvest of the 2009 A season HLA limits established for area 542 and area 543 pursuant to the 2008 and 2009 harvest specifications for groundfish in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), January 9, 2009, until 1200 hrs, A.l.t., April 15, 2009.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone 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.

In accordance with § 679.20(a)(8)(iii)(A), owners and operators of vessels using trawl gear for directed fishing for Atka mackerel in the HLA are required to register with NMFS. Fourteen vessels have registered with NMFS to fish in the A season HLA fisheries in areas 542 and/or 543. In

accordance with § 679.20(a)(8)(iii)(B), the Administrator, Alaska Region, NMFS, has randomly assigned each vessel to the HLA directed fishery for Atka mackerel for which they have registered and is now notifying each vessel of its assignment in accordance with § 679.20(a)(8)(iii).

For the Amendment 80 cooperative, the vessels authorized to participate in the first HLA directed fishery in area 542 and the second HLA directed fishery in area 543 are as follows: Federal Fishery Permit number (FFP) 2134 Ocean Peace, FFP 2733 Seafreeze Alaska, FFP 3694 Arica, and FFP 3835 Seafisher.

For the Amendment 80 cooperative, the vessels authorized to participate in the first HLA directed fishery in area 543 and the second HLA directed fishery in area 542 are as follows: FFP 1610 Rebecca Irene, FFP 2110 Cape Horn, and FFP 3369 Unimak.

For the Amendment 80 limited access sector, vessels authorized to participate in the first HLA directed fishery in area 542 and in the second HLA directed fishery in area 543 are as follows: FFP 2443 Alaska Juris and FFP 3819 Alaska Spirit.

For the Amendment 80 limited access sector, the vessels authorized to participate in the first HLA directed fishery in area 543 and the second HLA directed fishery in area 542 are as follows: FFP 3423 Alaska Warrior and FFP 4093 Alaska Victory.

For the BSAI trawl limited access sector, the vessels authorized to participate in the first HLA directed fishery in area 542 are as follows: FFP 480 Muir Milach and FFP 11770 Alaska Knight.

For the BSAI trawl limited access sector, the vessel authorized to participate in the second HLA directed fishery in area 542 is as follows: FFP 6202 Epic Explorer.

Classification

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 unnecessary. This notice merely advises the owners of these vessels of the results of a random assignment required by regulation. The notice needs to occur immediately to notify the owner of each vessel of its assignment to allow these vessel owners to plan for participation in the A season HLA fisheries in area 542 and area 543.

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 § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: January 9, 2009.

Emily H. Menashes,

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

[FR Doc. E9–606 Filed 1–9–09; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 74, No. 9
Wednesday, January 14, 2009

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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AL77

Prevailing Rate Systems; Redefinition of Certain Appropriated Fund Federal Wage System Wage Areas

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a proposed rule that would redefine the geographic boundaries of several appropriated fund Federal Wage System wage areas for pay-setting purposes. Based on recent reviews of Metropolitan Statistical Area boundaries in a number of wage areas, OPM proposes redefinitions affecting the following wage areas: Birmingham, AL; Denver, CO; Wilmington, DE; Washington, DC; Atlanta, GA; Columbus, GA; Macon, GA; Chicago, IL; Bloomington-Bedford-Washington, IN; Indianapolis, IN; Louisville, KY; Baltimore, MD; Hagerstown-Martinsburg-Chambersburg, MD; St. Louis, MO; Southern Missouri; Omaha, NE; New York, NY; Philadelphia, PA; Scranton-Wilkes-Barre, PA; Eastern South Dakota; Richmond, VA; and Milwaukee, WI.

DATES: We must receive comments on or before February 13, 2009.

ADDRESSES: Send or deliver comments to Charles D. Grimes III, Deputy Associate Director for Performance and Pay Systems, Strategic Human Resources Policy Division, U.S. Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415–8200; e-mail *pay-performance-policy@opm.gov*; or FAX: (202) 606–4264.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606–2838; e-mail *pay-performance-policy@opm.gov*; or FAX: (202) 606–4264.

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is issuing a proposed rule to redefine the geographic boundaries of several appropriated fund Federal Wage System (FWS) wage areas. These changes are based on recommendations of the Federal Prevailing Rate Advisory Committee (FPRAC), the statutory national labor-management committee responsible for advising OPM on matters affecting the pay of FWS employees. From time to time, FPRAC reviews the boundaries of wage areas and provides OPM with recommendations for changes if the Committee finds that changes are warranted.

There are currently 132 FWS wage areas in the United States and the Commonwealth of Puerto Rico for blue-collar employees who are paid from appropriated funds. Each wage area is comprised of a survey area where a lead agency, the Department of Defense, measures local prevailing wage levels in a local labor market. Because it is not feasible to include every part of the United States in a survey area, those parts that are not in a survey area are combined with a nearby survey area to form a wage area's area of application.

OPM considers the following regulatory criteria under 5 CFR 532.211 when defining FWS wage area boundaries:

1. Distance, transportation facilities, and geographic features;
2. Commuting patterns; and
3. Similarities in overall population, employment, and the kinds and sizes of private industrial establishments.

In addition, OPM regulations at 5 CFR 532.211 do not permit splitting Metropolitan Statistical Areas (MSAs) for the purpose of defining a wage area, except in very unusual circumstances (*e.g.*, organizational relationships among closely located Federal activities).

The Office of Management and Budget defines MSAs and maintains and updates the definitions of MSA boundaries following each decennial census. MSAs are composed of counties and are defined on the basis of a central urbanized area-a contiguous area of relatively high population density. Additional surrounding counties are included in MSAs if they have strong social and economic ties to central counties.

When the boundaries of wage areas were first established in the 1960s, there were fewer MSAs than there are today and the boundaries of the then existing MSAs were much smaller. Most MSAs were contained within the boundaries of a wage area. MSAs have expanded each decade and in some cases now extend beyond the boundaries of the wage area.

FPRAC recently reviewed several wage areas where boundaries subdivide certain MSAs and concurred by consensus with the changes described in this proposed rule. These changes would be effective on the first day of the first applicable pay period beginning on or after 30 days following publication of the final regulations. FPRAC recommended no other changes in the geographic definitions of the wage areas.

Birmingham-Hoover, AL MSA: Bibb, Blount, Chilton, Jefferson, St. Clair, Shelby, and Walker Counties, AL, comprise the Birmingham-Hoover, AL MSA. Jefferson, St. Clair, Shelby, and Walker Counties are part of the Birmingham survey area, Bibb and Blount Counties are part of the Birmingham area of application, and Chilton County is part of the Columbus area of application. OPM proposes to redefine Chilton County to the Birmingham area of application so that the entire Birmingham-Hoover, AL MSA is in one wage area. There are currently no FWS employees working in Chilton County.

Denver-Aurora, CO MSA: Adams, Arapahoe, Broomfield, Clear Creek, Denver, Douglas, Elbert, Gilpin, Jefferson, and Park Counties, CO, comprise the Denver-Aurora, CO MSA. Adams, Arapahoe, Denver, Douglas, Gilpin, and Jefferson Counties are part of the Denver, CO, survey area and Clear Creek, Elbert, and Park are part of the Denver area of application. Broomfield County is currently undefined.

The municipality of Broomfield was incorporated in 1961 in the southeastern corner of Boulder County, CO. On November 15, 2001, Broomfield County officially separated from Boulder County and became the 64th county of Colorado. The boundaries of the City of Broomfield and the County of Broomfield are identical.

OPM proposes to define Broomfield County as part of the Denver survey area. There are three FWS employees working in Broomfield County.

Washington-Arlington-Alexandria, DC-MD-VA-WV MSA: Washington, DC; Calvert, Charles, Frederick,

Montgomery, and Prince George's Counties, MD; Arlington, Clarke, Fairfax, Fauquier, Loudoun, Prince William, Spotsylvania, Stafford, and Warren Counties, VA; Alexandria, Fairfax, Falls Church, Fredericksburg, Manassas, and Manassas Park Cities, VA; and Jefferson County, WV, comprise the Washington-Arlington-Alexandria, DC-MD-VA-WV MSA. Washington, DC; Charles, Frederick, Montgomery, and Prince George's Counties, MD; Arlington, Fairfax, Loudoun, and Prince William Counties, VA; and Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park Cities, VA; are part of the Washington survey area. Calvert and St. Mary's Counties, MD, and Fauquier, King George, and Stafford Counties, VA, are part of the Washington area of application. Spotsylvania County and Fredericksburg City, VA, are part of the Richmond area of application. Clarke and Warren Counties, VA, and Jefferson County, WV, are part of the Hagerstown-Martinsburg-Chambersburg area of application. OPM proposes to redefine Clarke, Spotsylvania, and Warren Counties, VA, Fredericksburg City, VA, and Jefferson County, WV, to the Washington area of application so that the entire Washington-Arlington-Alexandria, DC-MD-VA-WV MSA is in one wage area. There are no FWS employees working in Clarke and Spotsylvania Counties, but there are 31 FWS employees working in Warren County, 9 FWS employees working in Fredericksburg City, and 50 FWS employees working in Jefferson County.

Atlanta-Sandy Springs-Marietta, GA MSA: Barlow, Barrow, Butts, Carroll, Cherokee, Clayton, Cobb, Coweta, Dawson, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Haralson, Heard, Henry, Jasper, Lamar, Meriwether, Newton, Paulding, Pickens, Pike, Rockdale, Spalding, and Walton Counties, GA, comprise the Atlanta-Sandy Springs-Marietta, GA MSA. Butts, Cherokee, Clayton, Cobb, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Rockdale, and Walton Counties are part of the Atlanta survey area; Bartow, Barrow, Carroll, Coweta, Dawson, Haralson, Heard, Pickens, Pike, and Spalding Counties are part of the Atlanta area of application; Jasper and Lamar Counties are part of the Macon area of application; and Meriwether County is part of the Columbus area of application. OPM proposes to redefine Jasper, Lamar, and Meriwether Counties to the Atlanta area of application so that the entire Atlanta-Sandy Springs-Marietta, GA MSA is in one wage area. There are no FWS employees working in Jasper and Lamar Counties, but there is one FWS employee working in Meriwether County.

Chicago-Naperville-Joliet, IL-IN-WI MSA: Cook, DeKalb, DuPage, Grundy, Kane, Kendall, McHenry, and Will Counties, IL; Jasper, Lake, Newton, and Porter Counties, IN; and Lake and Kenosha Counties, WI, comprise the Chicago-Naperville-Joliet, IL-IN-WI MSA. Cook, DuPage, Kane, McHenry, and Will Counties, IL, and Lake County, WI, are part of the Chicago survey area; DeKalb, Grundy, and Kendall, IL, and Jasper, Lake, Newton, and Porter Counties, IN, are part of the Chicago area of application; and Kenosha County, WI, is part of the Milwaukee area of application. OPM proposes to redefine Kenosha County to the Chicago area of application so that the entire Chicago-Naperville-Joliet, IL-IN-WI MSA is in one wage area. There are six FWS employees working in Kenosha County.

Indianapolis, IN MSA: Boone, Brown, Hamilton, Hancock, Hendricks, Johnson, Marion, Morgan, Putnam, and Shelby Counties, IN, comprise the Indianapolis, IN MSA. Boone, Hamilton, Hancock, Hendricks, Johnson, Marion, Morgan, and Shelby Counties are part of the Indianapolis survey area; Putnam County is part of the Indianapolis area of application; and Brown County is part of the Bloomington-Bedford-Washington area of application. OPM proposes to redefine Brown County to the Indianapolis area of application so that the entire Indianapolis, IN MSA is in one wage area. There are no FWS employees working in Brown County.

Sioux City, IA-NE-SD MSA: Woodbury County, IA, Dakota and Dixon Counties, NE, and Union County, SD, comprise the Sioux City, IA-NE-SD MSA. Woodbury County, IA, and Dakota and Dixon Counties, NE, are part of the Omaha area of application and Union County, SD, is part of the Eastern South Dakota area of application. OPM proposes to redefine Union County to the Omaha area of application so that the entire Sioux City, IA-NE-SD MSA is in one wage area. There are no FWS employees working in Union County.

Louisville, KY-IN MSA: Clark, Floyd, Harrison, and Washington County, IN, and Bullitt, Henry, Jefferson, Meade, Nelson, Oldham, Shelby, Spencer, and Trimble Counties, KY, comprise the Louisville, KY-IN MSA. Clark, and Floyd Counties, IN, and Bullitt, Jefferson, and Oldham Counties, KY, are part of the Louisville survey area; Harrison County, IN, and Henry, Meade, Nelson, Shelby, Spencer, and Trimble Counties, KY, are part of the Louisville area of application; and Washington County, IN, is part of the Bloomington-Bedford-Washington area of application. OPM proposes to redefine Washington County to the Louisville area of application so that the entire Louisville, KY-IN MSA is in one wage area. There are no FWS employees working in Washington County.

Baltimore-Towson, MD MSA: Anne Arundel, Baltimore, Carroll, Harford, Howard, and Queen Anne's Counties, MD, and Baltimore City, MD, comprise the Baltimore-Towson, MD MSA. Anne Arundel, Baltimore, Carroll, Harford, and Howard Counties and Baltimore City are part of the Baltimore survey area and Queen Anne's County is part of the Wilmington area of application. OPM proposes to redefine Queen Anne's County to the Baltimore area of application so that the entire Baltimore-Towson, MD MSA is in one wage area. There are no FWS employees working in Queen Anne's County.

Jefferson City, MO MSA: Callaway, Cole, Moniteau, and Osage Counties, MO, comprise the Jefferson City, MO MSA. Callaway, Cole, and Osage Counties are part of the St. Louis area of application and Moniteau County is part of the Southern Missouri area of application. OPM proposes to redefine Moniteau County to the St. Louis area of application so that the entire Jefferson City, MO MSA is in one wage area. There are no FWS employees working in Moniteau County.

New York-Newark-Edison, NY-NJ-PA MSA: Bergen, Essex, Hudson, Hunterdon, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, and Union Counties, NJ; Bronx, Kings, Nassau, New York, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester Counties, NY; and Pike County, PA, comprise the New York-Newark-Edison, NY-NJ-PA MSA. Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset, and Union Counties, NJ, and Bronx, Kings, Nassau, New York, Queens, Suffolk, and Westchester Counties, NY, are part of the New York survey area. Monmouth, Ocean (excluding the Fort Dix Military Reservation), and Sussex Counties, NJ, and Putnam, Richmond, and Rockland Counties, NY, are part of the New York area of application. Hunterdon County, NJ, is part of the Philadelphia area of application and Pike County, PA, is part of the Scranton-Wilkes-Barre area of application. OPM proposes to redefine Hunterdon County, NJ, and Pike County, PA, to the New York area of application so that the entire New York-Newark-Edison, NY-NJ-PA MSA is in one wage area. There are no FWS employees working in Hunterdon

County, but there are five FWS employees working in Pike County.

Allentown-Bethlehem-Easton, PA-NJ MSA: Warren County, NJ, and Carbon, Lehigh, and Northampton Counties, PA, comprise the Allentown-Bethlehem-Easton, PA-NJ MSA. Warren County, NJ, and Lehigh and Northampton Counties, PA are part of the Philadelphia area of application and Carbon County, PA, is part of the Scranton-Wilkes-Barre area of application. OPM proposes to redefine Carbon County to the Philadelphia area of application so that the entire Allentown-Bethlehem-Easton, PA-NJ MSA is in one wage area. There are three FWS employees working in Carbon County.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Michael W. Hager,

Acting Director.

Accordingly, the U.S. Office of Personnel Management is proposing to amend 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

2. Appendix C to subpart B is amended by revising the wage area listings for Birmingham, AL; Denver, CO; Wilmington, DE; Washington, DC; Atlanta, GA; Columbus, GA; Macon, GA; Chicago, IL; Bloomington-Bedford-Washington, IN; Indianapolis, IN; Louisville, KY; Baltimore, MD; Hagerstown-Martinsburg-Chambersburg, MD; St. Louis, MO; Southern Missouri; Omaha, NE; New York, NY; Philadelphia, PA; Scranton-Wilkes-Barre, PA; Eastern South Dakota; Richmond, VA; and Milwaukee, WI, to read as follows:

APPENDIX C TO SUBPART B OF PART 532—APPROPRIATED FUND WAGE AND SURVEY AREAS

* * * * *

ALABAMA

* * * * *

Birmingham

Survey Area

Alabama:
Jefferson
St. Clair
Shelby
Tuscaloosa
Walker

Area of Application. Survey Area Plus

Alabama:
Bibb
Blount
Chilton
Cullman
Fayette
Greene
Hale
Lamar
Marengo
Perry
Pickens

* * * * *

COLORADO

Denver

Survey Area

Colorado:
Adams
Arapahoe
Boulder
Broomfield
Denver
Douglas
Gilpin
Jefferson

Area of Application. Survey Area Plus

Colorado:
Clear Creek
Eagle
Elbert
Garfield
Grand
Jackson
Lake
Larimer
Logan
Morgan
Park
Phillips
Pitkin
Rio Blanco
Routt
Sedgwick
Summit
Washington
Weld
Yuma

* * * * *

DELAWARE

Wilmington

Survey Area

Delaware:
Kent
New Castle
Maryland:
Cecil
New Jersey:
Salem

Area of Application. Survey Area Plus

Delaware:
Sussex
Maryland:
Caroline
Dorchester
Kent
Somerset
Talbot
Wicomico
Worcester (Does not include the Assateague Island portion.)

* * * * *

DISTRICT OF COLUMBIA

Washington, DC

Survey Area

District of Columbia:
Washington, DC
Maryland:
Charles
Frederick
Montgomery
Prince George's
Virginia (cities):
Alexandria
Fairfax
Falls Church
Manassas
Manassas Park
Virginia (counties):
Arlington
Fairfax
Loudoun
Prince William

Area of Application. Survey Area Plus

Maryland:
Calvert
St. Mary's
Virginia (city):
Fredericksburg
Virginia (counties):
Clarke
Fauquier
King George
Spotsylvania
Stafford
Warren
West Virginia:
Jefferson

* * * * *

GEORGIA

* * * * *

Atlanta

Survey Area

Georgia:
Butts
Cherokee
Clayton
Cobb
De Kalb
Douglas
Fayette
Forsyth
Fulton
Gwinnett
Henry
Newton
Paulding
Rockdale
Walton

Area of Application. Survey Area Plus

Georgia:

Banks
Barrow
Bartow
Carroll
Chattooga
Clarke
Coweta
Dawson
Fannin
Floyd
Franklin
Gilmer
Gordon
Greene
Habersham
Hall
Haralson
Heard
Jackson
Jasper
Lamar
Lumpkin
Madison
Meriwether
Morgan
Murray
Oconee
Oglethorpe
Pickens
Pike
Polk
Rabun
Spalding
Stephens
Towns
Union
White
Whitfield

* * * * *

Columbus

Survey Area

Georgia (counties):
Chattahoochee
Georgia (consolidated government):
Columbus
Alabama:
Autauga
Elmore
Lee
Macon
Montgomery
Russell

Area of Application. Survey Area Plus

Georgia:
Harris
Marion
Quitman
Schley
Stewart
Talbot
Taylor
Webster
Alabama:
Bullock
Butler
Chambers
Coosa
Crenshaw
Dallas
Lowndes
Pike
Tallapoosa
Wilcox

Macon

Survey Area

Georgia:
Bibb
Houston
Jones
Laurens
Twiggs
Wilkinson

Area of Application. Survey Area Plus

Georgia:
Baldwin
Bleckley
Crawford
Crisp
Dodge
Dooly
Hancock
Johnson
Macon
Monroe
Montgomery
Peach
Pulaski
Putnam
Telfair
Treutlen
Upson
Washington
Wheeler
Wilcox

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ILLINOIS

* * * * *

Chicago

Survey Area

Illinois:
Cook
Du Page
Kane
Lake
McHenry
Will

Area of Application. Survey Area Plus

Illinois:
Boone
De Kalb
Grundy
Iroquois
Kankakee
Kendall
La Salle
Lee
Livingston
Ogle
Stephenson
Winnebago
Indiana:
Benton
Jasper
Lake
La Porte
Newton
Porter
Pulaski
Starke
Wisconsin:
Kenosha

INDIANA

Bloomington-Bedford-Washington

Survey Area

Indiana:
Daviess
Greene
Knox
Lawrence
Martin
Monroe
Orange

Area of Application. Survey Area Plus

Indiana:
Crawford
Dubois
Gibson
Jackson
Owen
Perry
Pike
Posey
Spencer
Vanderburgh
Warrick
Illinois:
Edwards
Gallatin
Hardin
Lawrence
Richland
Wabash
White
Kentucky:
Crittenden
Daviess
Hancock
Henderson
Livingston
McLean
Ohio
Union
Webster

* * * * *

Indianapolis

Survey Area

Indiana:
Boone
Hamilton
Hancock
Hendricks
Johnson
Marion
Morgan
Shelby

Area of Application. Survey Area Plus

Indiana:
Bartholomew
Brown
Clay
Clinton
Decatur
Delaware
Fayette
Fountain
Henry
Madison
Montgomery
Parke
Putnam
Rush
Sullivan
Tippecanoe

Tipton
Vermillion
Vigo
Warren

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KENTUCKY

* * * * *

Louisville

Survey Area

Kentucky:
Bullitt
Hardin
Jefferson
Oldham
Indiana:
Clark
Floyd
Jefferson

Area of Application. Survey Area Plus

Kentucky:
Breckinridge
Grayson
Hart
Henry
Larue
Meade
Nelson
Shelby
Spencer
Trimble
Indiana:
Harrison
Jennings
Scott
Washington

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MARYLAND

* * * * *

Baltimore

Survey Area

Maryland:
Baltimore City
Anne Arundel
Baltimore
Carroll
Harford
Howard

Area of Application. Survey Area Plus

Maryland:
Queen Anne's

Hagerstown-Martinsburg-Chambersburg

Survey Area

Maryland:
Washington
Pennsylvania:
Franklin
West Virginia:
Berkeley

Area of Application. Survey Area Plus

Maryland:
Allegany
Garrett
Pennsylvania:
Fulton
Virginia (cities):
Harrisonburg
Winchester
Virginia (counties):
Culpeper
Frederick
Greene
Madison
Page
Rappahannock
Rockingham
Shenandoah
West Virginia:
Hampshire
Hardy
Mineral
Morgan

* * * * *

MISSOURI

St. Louis

Survey Area

Missouri:
St. Louis City
Franklin
Jefferson
St. Charles
St. Louis
Illinois:
Clinton
Madison
Monroe
St. Clair

Area of Application. Survey Area Plus

Missouri:
Audrain
Boone
Callaway
Clark
Cole
Crawford
Gasconade
Knox
Lewis
Lincoln
Marion
Moniteau
Monroe
Montgomery
Osage
Pike
Ralls
Randolph
St. Francois
Ste. Genevieve
Scotland
Shelby
Warren
Washington
Illinois:
Alexander
Bond
Calhoun
Clay
Effingham
Fayette
Franklin
Greene
Hamilton
Jackson
Jefferson
Jersey
Johnson
Macoupin
Marion
Massac
Montgomery
Morgan
Perry
Pike
Pope
Pulaski
Randolph
Saline
Scott
Union
Washington
Wayne
Williamson

Southern Missouri

Survey Area

Missouri:
Christian
Greene
Laclede
Phelps
Pulaski
Webster

Area of Application. Survey Area Plus

Missouri:
Barry
Barton
Benton
Bollinger
Butler
Camden
Cape Girardeau
Carter
Cedar
Dade
Dallas
Dent
Douglas
Hickory
Howell
Iron
Jasper
Lawrence
McDonald
Madison
Maries
Miller
Mississippi
Morgan
New Madrid
Newton
Oregon
Ozark
Perry
Polk
Reynolds
Ripley
St. Clair
Scott
Shannon
Stoddard
Stone
Taney
Texas
Vernon
Wayne
Wright
Kansas:
Cherokee
Crawford

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NEBRASKA

Omaha

Survey Area

Nebraska:

Douglas
Lancaster
Sarpy
Iowa:
Pottawattamie

Area of Application. Survey Area Plus

Nebraska:
Adams
Antelope
Arthur
Blaine
Boone
Boyd
Brown
Buffalo
Burt
Butler
Cass
Cedar
Chase
Cherry
Clay
Colfax
Cuming
Custer
Dakota
Dawson
Dixon
Dodge
Dundy
Fillmore
Franklin
Frontier
Furnas
Gage
Garfield
Gosper
Grant
Greeley
Hall
Hamilton
Harlan
Hayes
Hitchcock
Holt
Hooker
Howard
Jefferson
Johnson
Kearney
Keith
Keya Paha
Knox
Lincoln
Logan
Loup
McPherson
Madison
Merrick
Nance
Nemaha
Nuckolls
Otoe
Pawnee
Perkins
Phelps
Pierce
Platte
Polk
Red Willow
Richardson
Rock
Saline
Saunders
Seward
Sherman
Stanton
Thayer
Thomas
Thurston
Valley
Washington
Wayne
Webster
Wheeler
York
Iowa:
Adams
Audubon
Buena Vista
Cass
Cherokee
Clay
Crawford
Fremont
Harrison
Ida
Mills
Monona
Montgomery
O'Brien
Page
Palo Alto
Plymouth
Pocahontas
Sac
Shelby
Sioux
Taylor
Woodbury
South Dakota:
Union

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NEW YORK

* * * * *

New York

Survey Area

New York:
Bronx
Kings
Nassau
New York
Queens
Suffolk
Westchester
New Jersey:
Bergen
Essex
Hudson
Middlesex
Morris
Passaic
Somerset
Union

Area of Application. Survey Area Plus

New York:
Putnam
Richmond
Rockland
New Jersey:
Hunterdon
Monmouth
Ocean (Excluding the Fort Dix Military Reservation)
Sussex
Pennsylvania:
Pike

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PENNSYLVANIA

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Philadelphia

Survey Area

Pennsylvania:
Bucks
Chester
Delaware
Montgomery
Philadelphia
New Jersey:
Burlington
Camden
Gloucester

Area of Application. Survey Area Plus

Pennsylvania:
Carbon
Lehigh
Northampton
New Jersey:
Atlantic
Cape May
Cumberland
Mercer
Ocean (Fort Dix Military Reservation only)
Warren

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Scranton-Wilkes-Barre

Survey Area

Pennsylvania:
Lackawanna
Luzerne
Monroe

Area of Application. Survey Area Plus

Pennsylvania:
Bradford
Columbia
Lycoming (Excluding Allenwood Federal Prison Camp)
Sullivan
Susquehanna
Wayne
Wyoming

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SOUTH DAKOTA

Eastern South Dakota

Survey Area

South Dakota:
Minnehaha

Area of Application. Survey Area Plus

South Dakota:
Aurora
Beadle
Bennett
Bon Homme
Brookings
Brown
Brule
Buffalo
Campbell
Charles Mix
Clark
Clay
Codington
Corson
Davison
Day
Deuel
Dewey

Douglas
Edmunds
Faulk
Grant
Gregory
Haakon
Hamlin
Hand
Hanson
Hughes
Hutchinson
Hyde
Jerauld
Jones
Kingsbury
Lake
Lincoln
Lyman
McCook
McPherson
Marshall
Mellette
Miner
Moody
Potter
Roberts
Sanborn
Spink
Stanley
Sully
Todd
Tripp
Turner
Walworth
Washabaugh
Yankton
Ziebach

Iowa:
Dickinson
Emmet
Lyon
Osceola

Minnesota:
Jackson
Lincoln
Lyon
Murray
Nobles
Pipestone
Rock

* * * * *

VIRGINIA

* * * * *

Richmond

Survey Area

Virginia (cities):
Colonial Heights
Hopewell
Petersburg
Richmond

Virginia (counties):
Charles City
Chesterfield
Dinwiddie
Goochland
Hanover
Henrico
New Kent
Powhatan
Prince George

Area of Application. Survey Area Plus

Virginia (cities):
Charlottesville
Emporia

Virginia (counties):
Albemarle
Amelia
Brunswick
Buckingham
Caroline
Charlotte
Cumberland
Essex
Fluvanna
Greensville
King and Queen
King William
Lancaster
Louisa
Lunenberg
Mecklenburg
Middlesex
Northumberland
Nottoway
Orange
Prince Edward
Richmond
Sussex
Westmoreland

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WISCONSIN

* * * * *

Milwaukee

Survey Area

Wisconsin:
Milwaukee
Ozaukee
Washington
Waukesha

Area of Application. Survey Area Plus

Wisconsin:
Brown
Calumet
Door
Fond du Lac
Kewaunee
Manitowoc
Outagamie
Racine
Sheboygan
Walworth
Winnebago

[FR Doc. E9–528 Filed 1–13–09; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

7 CFR Part 625

RIN 0578–AA52

Healthy Forests Reserve Program

AGENCY: Natural Resources Conservation Service (NRCS), United States Department of Agriculture (USDA).

ACTION: Proposed rule; request for comment.

SUMMARY: On May 17, 2006, NRCS published an interim final rule for the Healthy Forests Reserve Program (HFRP) and received 11 comment letters. NRCS proposes to amend this rule to incorporate changes associated with enactment of the Food, Conservation, and Energy Act of 2008 (the 2008 Act). The 2008 Act authorizes $9,750,000 for each of the fiscal years 2009 through 2012 to carry out the program. As a result of the 2008 Act, NRCS will allow land enrollment through permanent easements, or easements for a maximum duration allowed under state law and continue to allow enrollment through 10-year cost-share agreements; and allow enrollment of land owned by tribes or members of tribes in 30-year contracts or 10-year cost-share agreements, or any combination of both. Forty percent of program expenditures in any fiscal year will be used for restoration cost-share agreement enrollment and 60 percent of program expenditures in any fiscal year will be for easement enrollment.

In addition to changes associated with the 2008 Act, NRCS is addressing comments received on the interim final rule and proposing additional changes that improve program implementation based on the experience gained from the HRFP implementation under the interim final rule.

DATES: Comments must be received on or before February 13, 2009. Comments will be made available to the public or posted publicly in their entirety.

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

Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending comments electronically.

NRCS Web site: Go to *http://www.nrcs.usda.gov* and follow the instructions for sending comments electronically.

Mail: Easements Programs Division, Natural Resources Conservation Service, Healthy Forests Reserve Program Comments, P.O. 2890, Room 6819–S, Washington, DC 20013.

Fax: 1–202–720–4265

Hand Delivery: Room 6819–S of the USDA South Office Building, 1400 Independence Avenue, SW., Washington, DC 20250, between 9 a.m. and 4 p.m., Monday through Friday, except Federal Holidays. Please ask the guard at the entrance to the South Office Building to call 202–720–4527 in order to be escorted into the building.

This proposed rule may be accessed via Internet. Users can access the NRCS homepage at *http://www.nrcs.usda.gov/*; select *Farm Bill*

link from the menu; select the *Proposed Rule* link from beneath the *Rules Index* title. Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

FOR FURTHER INFORMATION CONTACT:
Robin Heard, Director, Easement Programs Division, NRCS, P.O. Box 2890, Washington, DC 20013–2890; Phone: (202) 720–1854; Fax: (202) 720–4265; or e-mail: *HFRP@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Regulatory Certifications

Executive Order 12866

The Office of Management and Budget (OMB) determined that this proposed rule is not a significant regulatory action, and a benefit cost assessment has not been undertaken.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

Pursuant to section 304 of the Federal Crop Insurance Reform Act of 1994 (Pub. L. 103–354), USDA classified this rule as non-major. Therefore, a risk analysis was not conducted.

Regulatory Flexibility Act

Pursuant to 5 U.S.C. 605(c) of the Regulatory Flexibility Act, this proposed rule will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, a regulatory flexibility analysis is not required for this proposed rule. This proposed rule would amend the HFRP, which involves the voluntary acquisition of interests in property by NRCS.

Small Business Regulatory Enforcement Fairness Act of 1996

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

The 30-day comment period associated with this rulemaking will provide the public the opportunity to comment on the changes to this regulation. To ensure that NRCS has the regulatory framework in place to implement the Food, Conservation, and Energy Act of 2008 (the 2008 Act), Public Law 110–246, for a fiscal year 2009 sign-up, NRCS has determined that a 30 day comment period is necessary.

Environmental Analysis

The proposed rule for the Healthy Forests Reserve Program amends the current regulation to include congressionally required statutory changes to the program as a result of the Food, Conservation, and Energy Act of 2008 (the 2008 Act), Public Law 110–246. The 2008 Act changes the enrollment options for acreage owned by Indian tribes. In addition to using 10-year cost-share agreements, Indian Tribes may now enroll lands under a 30-year contracts option. The 2008 Act also allows the Natural Resources Conservation Service (NRCS) to acquire permanent easements, and establish limitations on the use of funds for cost-share agreements and easements. The proposed rule also amends the regulation in response to comments received by the Agency as a result of a public comment period in 2006; these changes would include language to clarify the Landowner Protections and Safe Harbor Agreements provisions. In addition, the proposed rule makes a number of minor changes to clarify the regulations for the public; such changes include clarifying the enrollment process, providing clear guidance on methods of determination of compensation, providing guidance on the Agency's treatment of ecosystem service credits, and clarifying language on Agency appeals.

After review of the previous Environmental Assessment (EA) prepared in April 2006, it has been determined that the proposed changes are minor and do not present significant new circumstances or new information relative to environmental issues from those analyzed in the 2006 EA. Accordingly, NRCS has determined and reaffirms that the previous EA and Finding of No Significant Impact (FONSI) have sufficiently analyzed the program's potential environmental impacts and are inclusive of the proposed rule. Copies of the EA and FONSI impact may be obtained from the National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, 1400 Independence Ave., SW., Washington, DC 20250; the Healthy Forests Reserve Program Manager, Easements Programs Division, NRCS, P.O. Box 2890, Room 6813-S, Washington, DC 20013; or electronically on the Internet through the NRCS homepage, at *http://www.nrcs.usda.gov/programs/HFRP/ProgInfo/Index.html*

Paperwork Reduction Act

The forms that will be utilized to implement this regulation have previously been approved for use and OMB assigned the control number 0578–0013. NRCS estimates that HFRP results in the following changes to the current package:

Type of Request: New Information Collection Package/form/etc.

- Increase of 26,020 respondents
- Increase of 23,926.3 responses
- Increase Burden Hours by 27,768.12 hours
- Increase in the average time to execute a form in the collection: 0.229 hours or 14.03 minutes.

Government Paperwork Elimination Act

NRCS is committed to compliance with the Government Paperwork Elimination Act and the Freedom to E-File Act, which require government agencies in general, and NRCS in particular, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Civil Rights Impact Analysis

USDA has determined through a Civil Rights Impact Analysis that the issuance of this rule would disclose no disproportionately adverse impacts for minorities, women, or persons with disabilities. Copies of the Civil Rights Impact Analysis are available, and may be obtained from the Director, Easement Programs Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013–2890, or electronically at *http://www.nrcs.usda.gov/programs/HFRP.*

Civil Justice Reform

This proposed rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The rule is not retroactive and preempts State and local laws to the extent that such laws are inconsistent with this 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 and 11 must be exhausted.

Executive Order 13132, Federalism

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. NRCS has determined that this proposed 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, NRCS concludes that this proposed rule does not have Federalism implications. Moreover, § 625.5 of this proposed rule shows sensitivity to Federalism concerns by providing an option for the responsible official (State Conservationist) to obtain input from other agencies in proposal development.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), NRCS assessed the effects of this proposed rule on State, local, and Tribal governments, and the public. This proposed rule does not compel the expenditure of $100 million or more by any State, local, Tribal governments, or anyone in the private sector; therefore, a statement under section 202 of the Unfunded Mandates Reform Act is not required.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

NRCS has assessed the impact of this proposed rule on Indian tribes and concluded that this proposed rule will not have a substantial direct effect on one or more Indian tribes. Given the legal complexity of acquiring easements on acreage owned by Indian Tribes, the 2008 Act added an enrollment option, in addition to the 10-year cost-share agreement option, of offering 30-year contracts. This change encourages Indian Tribal participation in the program. The proposed rule at § 625.12, will outline the procedures for enrolling land in the program through the 30-year contract option. The rule will neither impose compliance costs on Tribal governments, nor preempt Tribal law.

Discussion of Program

America's forests provide a wide range of environmental, economic, and social benefits including timber, wilderness, minerals, recreation opportunities, and fish and wildlife habitat. In addition, a healthy forest ecosystem provides habitat for endangered and threatened species, sustains biodiversity, protects watersheds, sequesters carbon, and helps purify the air. However, some forest ecosystems have had their ecological functions diminished by a number of factors, including fragmentation, reduction in periodic fires, lack of proper management, or invasive species. Habitat loss has been severe enough in some circumstances to cause dramatic population declines such as in the case of the ivory-billed woodpecker. As a result of the pressures on forest ecosystems, many forests need active management and protection from development in order to sustain biodiversity and restore habitat for species that have suffered significant population declines. Active management and protection of forest ecosystems can also increase carbon sequestration and improve air quality.

Many forest ecosystems are located on private lands and provide habitat for species that have been listed as endangered or threatened under Section 4 of the Endangered Species Act (ESA), 16 U.S.C. 1533, (listed species). Congress enacted the Healthy Forests Reserve Program (HFRP), Title V of the Healthy Forest Restoration Act of 2003 (Pub. L. 108–148, 16 U.S.C. 6571–6578, to provide financial assistance to private landowners to undertake projects that restore and enhance forest ecosystems to help promote the recovery of threatened and endangered species, improve biodiversity, and enhance carbon sequestration.

The Secretary of Agriculture has delegated authority to implement HFRP to the NRCS Chief (Chief). In addition, technical support associated with forest management practices may also be provided by the U.S. Forest Service. Section 501 of Title V of the Healthy Forests Restoration Act of 2003 (Pub. L. 108–148) provides that the program will be carried out in coordination with the Secretary of the Interior and the Secretary of Commerce. NRCS works closely with the FWS and the NMFS to further the species recovery objectives of the HFRP and to help make available to HFRP participants safe harbor or similar assurances and protection under ESA section 7(b)(4) or Section 10(a)(1), 16 U.S.C. 1536(b)(4), 1539(a)(1).

Proposed Changes to the Regulations Based on the Prior Comment Period

NRCS published an interim final rule that established the regulations captioned ''Healthy Forests Reserve Program'' in the **Federal Register** on May 17, 2006 (71 FR 28547). The Agency provided a 90-day comment period that ended on August 15, 2006. NRCS received comments from 11 commenters who raised a number of issues. This section discusses all of the relevant comments except for those that expressed agreement with provisions of the interim final rule. Based on the reasons set forth in the interim final rule and this document, NRCS proposes the changes discussed below.

Purpose and Eligibility

The statutory provisions at 16 U.S.C. 6571 state that the purpose of HFRP is to restore and enhance forest ecosystems in order to: (1) Promote the recovery of threatened and endangered species, (2) improve biodiversity, and (3) enhance carbon sequestration. Under 16 U.S.C. 6572(b), to be eligible for enrollment, land must be:

(1) Private land the enrollment of which will restore, enhance, or otherwise measurably increase the likelihood of recovery of a species listed as endangered or threatened under 16 U.S.C. 1533 and

(2) private land the enrollment of which will restore, enhance, or otherwise measurably improve the well-being of species that—

(a) are not listed as endangered or threatened under 16 U.S.C. 1533; but

(b) are candidates for such listing, State-listed species, or special concern species.

The authorizing statute further provides at 16 U.S.C. 6572(c) that the Secretary of Agriculture shall give additional consideration to enrollment of eligible land that will improve biological diversity and increase carbon sequestration.

One Federal agency commenter questioned whether land had to meet both criteria in order to be eligible. While the language of 16 U.S.C. 6572(b) uses ''and'' between both criteria, it has been determined that both categories of land are individually eligible. The interpretation that eligible land must meet both criteria is overly restrictive and is likely to occur rarely. The NRCS interpretation is intended to avoid negatively impacting its ability to achieve the program purposes. This is clarified in 7 CFR 625.4.

One commenter asserted that eligibility for the HFRP should be limited to non-industrial private forest lands. No changes were made to the regulations based on this comment because the Agency does not see any basis in the statute for limiting enrollment to non-industrial private forest lands. As noted above, 16 U.S.C. 6572 provides that any private land (including industrial private forest land) that meets the specified conditions is eligible.

Commenters asserted that HFRP places too much emphasis on protecting endangered species and too little emphasis on protecting the forest ecosystem. To help change the emphasis, commenters asserted that professional foresters should be heavily involved in ranking proposed sites for the HFRP. No changes were made to the regulations based on this comment. The emphasis on endangered species reflects the purpose of the program detailed in the statute: to promote the recovery of

threatened and endangered species, to improve biodiversity, and to enhance carbon sequestration. See 16 U.S.C. 6571 and 6572.

Two commenters questioned why clear-cutting was singled out as incompatible with HFRP and asserted that HFRP should allow for clear-cutting when it would enhance the long-term forest and wildlife health. No changes were made to the regulations based on these comments. It appears that the commenters referred to an example concerning clear-cutting in the preamble of the interim final rule, which indicated that clear-cutting may not be a compatible use for enrollment under the HFRP if the purpose was to achieve economic gain at the expense of the forest ecosystem or essential fish and wildlife habitat (71 FR 28551). The discussion was just an example and was not intended to cover all circumstances. Clear-cutting may be allowed under HFRP if such activity were designed to help accomplish the purposes of the program.

A number of commenters made reference to non-forest lands as part of a forest ecosystem. No changes were made to the regulations because non-forest land is eligible to be included if it is part of an eligible forest ecosystem.

Two commenters asserted that ''forest ecosystems'' eligible for HFRP should not be limited to lands with trees on them, but should include rangelands and other lands that are integral parts of a forest ecosystem and vital to the habitat of species or the enhancement of biodiversity and carbon sequestration. No changes were made to the regulations based on these comments. ''Rangelands and other lands'' described by the commenter are not prohibited from inclusion in HFRP. The statutory provisions at 16 U.S.C. 6572, state that to be eligible for enrollment, land must be:

(1) Private land the enrollment of which will restore, enhance, or otherwise measurably increase the likelihood of recovery of a species listed as endangered or threatened under 16 U.S.C. 1533 and

(2) private land the enrollment of which will restore, enhance, or otherwise measurably improve the well-being of species that—

(a) Are not listed as endangered or threatened under 16 U.S.C. 1533; but

(b) are candidates for such listing, State-listed species, or special concern species.

With respect to the statutory eligibility for enrollment of private land which would restore, enhance, or otherwise measurably improve the well-being of State-listed species, one commenter asserted that for States that do not have State lists, enrollment eligibility should include lands that provide habitat for G1–G2 species recognized by NatureServe and requests made by applicants. No changes were made to the regulations based on this comment. As noted above, the statutory provisions allow for eligibility for enrollment of private land the enrollment of which would restore, enhance, or otherwise measurably improve the well-being of ''special concern species.'' This provides a basis for enrolling lands in those States that do not have State lists.

One commenter asserted that the interim final rule should be changed by adding a definition of ''forestland.'' This comment appears to have been made to help clarify land eligibility. No changes were made to the regulations based on this comment. As noted above, private land that meets the eligibility criteria specified above is eligible for HFRP; the statute does not include a term ''forestland''.

One commenter asserted that rangelands and other lands that are integral parts of a forest ecosystem and vital to the habitat of species or the enhancement of biodiversity and carbon sequestration, should be eligible for inclusion in the HFRP to the extent that areas covered by trees might be eligible. One commenter asserted that riparian corridors that would protect aquatic species, such as salmon, should be eligible land for HFRP. NRCS did not make any changes to the regulations based on these comments. HFRP does not limit eligible lands to a particular type of private lands. Except as described in § 625.4(d), any type of private land may be eligible for inclusion in HFRP.

One commenter asserted that NRCS should remove the requirement that eligible property must have access from a public road. No changes were made to the regulations based on this comment. Although the 2006 interim final rule preamble indicated that there must be access to the property from a public road (71 FR 28551 and 28553), the interim final rule text at § 625.11(b)(1) provides merely that the easement shall grant the United States a right of access to the easement area. The Agency affirms the regulatory language that direct access from a public road is not required, if access to the easement area is conveyed to the United States through an acceptable right-of-way easement.

Priority for Enrollment

The statutory provisions at 16 U.S.C. 6572 set forth priority criteria for enrollment in HFRP. Subsection (f) provides the following regarding enrollment priority:

(1) Species—The Secretary of Agriculture shall give priority to the enrollment of land that provides the greatest conservation benefit to—

(a) Primarily, species listed as endangered or threatened under 16 U.S.C. 1533; and

(b) Secondarily, species that—

(i) Are not listed as endangered or threatened under 16 U.S.C. 1533; but

(ii) Are candidates for such listing, State-listed species, or special concern species.

(2) Cost-effectiveness—The Secretary of Agriculture shall also consider the cost-effectiveness of each agreement or easement, and associated restoration plans, so as to maximize the environmental benefits per dollar expended.

One commenter asserted that the HFRP should place emphasis on pollinator-related enhancements. Another commenter suggested that the HFRP should change the emphasis for enrollment under the HFRP from ''promoting'' the recovery of listed species, ''improving'' biodiversity, and ''enhancing'' carbon sequestration to ''does not detract from'' the recovery of listed species, ''does not detract from biodiversity,'' and ''does not detract from'' carbon sequestration. No changes were made to the regulations based on these comments. The Agency does not have statutory authority to change the emphasis of the HFRP as requested by commenters. However, issues regarding the forest ecosystem and pollinator-related enhancements would be considered for purposes of eligibility as set forth above.

One commenter recommended inclusion of the hardwoods of the Mississippi River and its tributaries and the mesic hardwoods forests of the Appalachian region (including the Cumberland plateau) as a regional forest ecosystem to be included as HFRP focus areas. No changes were made to the regulations based on this comment. Under the provisions of 16 U.S.C. 6572(f), any eligible lands, including those described by the commenter, may be considered if they meet the requirements for enrollment priority.

One commenter asserted that eligible non-profit conservation organizations should receive higher priority in application selection. No changes were made to the regulations based on this comment. As noted above, 16 U.S.C. 6572(f) sets forth the criteria for enrollment priority, and no statutory authority exists to give priority to non-profit conservation organizations eligible for participation in HFRP.

One commenter suggested that affected State Conservationists develop a uniform set of ranking criteria for a particular regional enrollment. No changes were made to the regulations based on this comment because the statute does not give NRCS the discretion to use priorities other than those set forth in 16 U.S.C. 6572. The required ranking considerations are found in the interim final rule at § 625.6. As a matter of policy, the NRCS State Conservationists will ensure that local conditions are considered in applying the ranking criteria.

Term of Enrollment

Statutory provisions at 16 U.S.C. 6572(e)(1) provide that land may be enrolled in the HFRP in accordance with:

- A 10-year cost-share agreement,
- A 30-year easement, or
- A permanent easement; or an easement for the maximum duration allowed under State law.

Under the provisions of 16 U.S.C. 6572(e)(3), the statute allows acreage owned by Indian Tribes to be enrolled into the program through the use of 30-year contracts or 10-year cost-share agreements or a combination of the two.

Two commenters asserted that NRCS should not adopt informal quotas for the three enrollment types. The original HFRP statutory language required that ''the extent to which each enrollment method is used shall be based on the approximate proportion of owner interest expressed in that method in comparison to the other methods.'' No changes were made to the regulations based on these comments. However, the 2008 Act included language specifying that 40 percent of program expenditures in any FY be for restoration cost-share agreement enrollment and 60 percent of program expenditures in any FY be for easement enrollment. The 2008 Act allows re-allocation if funds are not obligated by April 1st of the FY in which the funds were made available.

One commenter asserted that HFRP should allow a continuous enrollment process. Although NRCS recognizes that continuous enrollment may be more convenient for some landowners, no changes were made to the regulation based on this comment. Given the limited funding for HFRP, continuous enrollment would increase the administrative costs of implementing the program without providing additional beneficial effects.

Restoration Plans

The interim final rule provided that as a condition of HFRP participation, a landowner must agree to the implementation of a HFRP restoration plan. The purpose of the restoration plan is to restore, protect, enhance, maintain, and manage the habitat conditions necessary to increase the likelihood of recovery of listed species under the ESA, or measurably improve the well-being of species that are not listed but are candidates for such listing, State-listed species, or species identified by the Chief for special consideration for funding.

One commenter asserted that the HFRP should allow existing plans prepared for other forestry and conservation programs to be used to satisfy the requirement for a HFRP restoration plan. No changes were made to the regulations based on this comment because no other plans prepared for other forestry and conservation programs meet the criteria for participation in the HFRP. Further, 16 U.S.C. 6573 requires that the HFRP restoration plan be developed ''jointly, by the landowner and the Secretary of Agriculture, in coordination with the Secretary of the Interior.''

One commenter asserted that the HFRP should compensate applicants for the use of consulting services for preparing applications. No changes were made to the regulations based on this comment. Under the provisions of 16 U.S.C. 6575, NRCS is responsible for providing, including obtaining from third parties, any needed assistance in preparing the HFRP restoration plan.

With respect to reviewing and approving restoration plans, three commenters suggested that NRCS use the word ''confer'' instead of ''consult with'' based on the assertion that ''consult with'' could be misinterpreted to have a more formal meaning than intended. The interim final rule defined ''consultation'' or ''consult with'' to mean ''to talk things over for the purpose of providing information; to offer an opinion for consideration; and/or to meet for discussion or to confer, while reserving final decision-making authority with NRCS.'' Accordingly, ''consultation'' or ''consult with'' does not refer to a formal process. To avoid confusion, the Agency has eliminated the terms ''consultation'' and ''consult with'' and, instead, without a change in meaning, is using the term ''confer'' as suggested by the commenters.

Cost-Share Payments

Two commenters asserted that NRCS should use actual costs, including maximum caps, rather than average costs for determining cost-share assistance reimbursement rates as allowed under 16 U.S.C. 6574. They assert that the average may be far lower than the actual costs and thereby make full program implementation less likely in those places if landowners are not repaid for their full expenses. No changes were made to the regulation based on these comments. Calculating actual costs would require extensive reviews of each applicant's situation, including review of every relevant receipt. This would significantly increase the administrative workload and reduce the financial assistance available to HFRP participants. Average costs as determined on a regional basis will be used to ensure that the average costs are close to actual costs in that area.

Easements

One commenter asserted that the HFRP should provide for permanent easements. NRCS did not make any changes to the regulations based on this comment. The statute sets forth the methods through which land can be enrolled into the program. The 2008 Act amended the statutory language to allow for the enrollment of permanent easements. This change is discussed along with other statutory changes in a separate section which follows.

The Agency proposed to use a standard conservation easement deed, termed a negative restricted deed. The Agency specifically requested comments on whether the standard conservation easement deed or the reserved interest deed should be used in HFRP (71 FR 28551). The standard conservation easement deed, termed a negative restricted easement deed, represents an interest in land where the holder of the easement has the right to require the owner of the encumbered land (i.e., the easement area) to take, or not take, specific actions with respect to that land. On the other hand, the reserved interest deed acquires all rights in the property not specifically reserved to the landowner. In response, NRCS received two comments, asserting that the HFRP should use the standard conservation easement deed for HFRP. No changes were made to the regulations based on these comments because the Agency has been using the standard conservation easement deed in HFRP and will continue to do so. Standard conservation easement deeds work best on working lands in programs such as HFRP where the landowner will continue to conduct various activities on the easement area and few activities need to be prohibited in order to meet program purposes.

Cooperation and Technical Assistance

Under the provisions of 16 U.S.C. 6572, NRCS is to carry out the HFRP in

coordination with the FWS and the NMFS. The provisions of § 625.13(c), which concern the HFRP restoration plan development, state that NRCS, in coordination with FWS, will determine the conservation practices and measures for the restoration plan.

One commenter asserted that the reference to coordination with FWS should also include cooperation with NMFS. The language of 16 U.S.C. 6573 says that NRCS, the landowner, and FWS will develop the HFRP restoration plan. However, given that 16 U.S.C. 6572 states that NRCS is to carry out HFRP in coordination with FWS and NMFS, NRCS is changing the regulation text to refer to coordination with both FWS and NMFS as appropriate, in light of the species or habitat involved, in developing the HFRP conservation plan.

Landowner Protections and Safe Harbor Agreements

The 2006 interim final rule (71 FR 28557), included a definition of Landowner Protections as part of § 625.2 and the preamble described those protections and how program participants obtain them (71 FR 28548–28550). Landowner Protections were defined in the interim final rule as ''protections and assurances made available to HFRP participants whose voluntary conservation activities result in a net conservation benefit for listed, candidate, or other species. Landowner Protections made available by the Secretary of Agriculture to HFRP participants may be provided under section 7(b)(4) or section 10(a)(1) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1536(b)(4), 1539(a)(1)). These Landowner Protections may be provided by NRCS in conjunction with meeting its responsibilities under section 7 of the ESA, or by FWS or NFMS through section 10 of the ESA. These Landowner Protections include a permit providing coverage for incidental take of species listed under the ESA. Landowner Protections also include assurances related to potential modifications of HFRP restoration plans and assurances related to the potential (unlikely) termination of Landowner Protections and any 10-year cost share agreement.''

Commenters asserted that NRCS should establish specific provisions in agreements or in the regulations regarding how NRCS will cooperate with FWS and NMFS concerning the preparation of restoration plans and other activities under the HFRP. NRCS should include how it will cooperate with FWS and NMFS to make Landowner Protections available to participating landowners.

Under the statutory provisions at 16 U.S.C. 6573, NRCS is responsible for preparing restoration plans. NRCS develops the restoration plans jointly with the program participant in coordination with the FWS or NMFS, as appropriate. Further, NRCS will work with FWS and NMFS to establish memorandums of understanding to enhance the coordination process. In response to the commenters' request for more procedural details, NRCS clarified the definition of Landowner Protections in § 625.2 and added a new section in the regulations at § 625.13(d) to indicate how NRCS will help program participants obtain Landowner Protections.

NRCS has also added a definition for Candidate Conservation Agreement with Assurances (CCAA) and clarified the definitions of Landowner Protections and Safe Harbor Agreement (SHA) in § 625.2 of this rule to more fully describe the two types of Landowner Protections. These Landowner Protections are conditioned on to the HFRP restoration plan and associated cost-share agreement or easement being properly implemented. There is no requirement that HFRP participants obtain any Landowner Protections. Generally, the three elements of Landowner Protections are: (1) Authorization for the take of endangered or threatened species when conducting management activities under a HFRP restoration plan and when returning to the baseline conditions at the end of the cost-share agreement or easement period (whichever is longer), (2) assurance that the landowner will not be required to undertake additional or different management activities without the consent of the landowner, and (3) limitations on the possibility of termination of a HFRP restoration plan that is being properly implemented by the landowner.

The definition of Landowner Protections in the interim final rule (and text in the preamble), included a description of two approaches that the Secretary of Agriculture may use to make Landowner Protections available to HFRP participants. Based on the suggestions from commenters and to help ensure clarity, NRCS clarified the description in the definition in section § 625.2 and added § 625.13(d) to specify the two ways that NRCS can make Landowner Protections available to HFRP participants upon request. The first approach involves NRCS and the HFRP participant, and does not require direct involvement by FWS or NMFS with the participant. Under this approach, NRCS will extend to participants the incidental take authorization received by NRCS from FWS or NMFS through biological opinions issued as part of the interagency consultation process under section 7(a)(2) of the ESA.

Under the second approach for Landowner Protections, NRCS will provide technical assistance to help participants design and use their HFRP restoration plan for the dual purposes of qualifying for HFRP financial assistance and as a basis for entering into a SHA or CCAA with FWS or NMFS under section 10(a)(1)A of the ESA. SHAs are voluntary arrangements between either the FWS or NMFS and cooperating participants who agree to adopt practices and measures, or refrain from certain activities, in order to achieve net conservation benefits, i.e., a contribution to the recovery of listed species. A CCAA is a voluntary agreement between FWS or NMFS and cooperating landowners, who voluntarily agree to manage their lands or waters to remove threats to species at risk of becoming threatened or endangered, receive assurances that their conservation efforts will not result in future regulatory obligations in excess of those they agree to at the time they enter into the Agreement. CCAAs are intended to help conserve proposed and candidate species, and species likely to become candidates, by giving private, non-Federal landowners incentives to implement conservation measures for declining species. The primary incentive for a CCAA is an assurance that no further additional land, water, or resource use restrictions would be imposed should the species later become listed under the ESA. There is no requirement that HFRP participants enter into a SHA or a CCAA. All SHAs are subject to the SHA policy jointly adopted by FWS and NMFS (Announcement of Final Policy, 64 FR 32717, June 17, 1999), and SHAs with the FWS also are subject to regulations at 50 CFR Part 17, and specifically 50 CFR 17.22(c) for endangered species or 17.32(c) for threatened species. All CCAAs are subject to the CCAA policy jointly adopted by FWS and NMFS (Announcement of Final Policy, 64 FR 32726, June 17, 1999), and CCAAs with the FWS are also subject to regulations at 50 CFR Part 17, and specifically 50 CFR 17.22(d) for endangered species or 17.32(d) for threatened species.

The provisions of 16 U.S.C. 6575 require that the Secretary of Agriculture offer landowners with technical assistance to assist the landowners ''in complying'' with the terms of restoration plans (as included in agreements or easements) under the

HFRP. One commenter requested that NRCS indicate how this will be carried out. No changes were made to the regulation based on this comment because NRCS works with the landowner when developing the restoration plan. As part of the planning process, NRCS ensures that the landowner understands the plan requirements. The existing regulations at § 625.16 provide guidance as to how NRCS would work with those found to have deficiencies or committed violations.

Electric Transmission Facilities

One commenter asserted that the HFRP should not be implemented in a way that would be contrary to the use of electric transmission facilities. The commenter stated:

- NRCS should consider electronic transmission facilities to be compatible with HFRP and allow such facilities to be located on lands covered by NRCS easements without the need to modify each individual easement.
- NRCS should provide public notice of and the opportunity for comments on all pending NRCS projects, including easements in the HFRP.
- NRCS should have an up-to-date system at the regional level for obtaining information about existing and planned easements rather than an annual system so that utilities could easily identify where the easements may be located.
- After a utility has filed a formal application for construction of facilities, NRCS should stay any further action on proposed easements within the identified utility routes until final action is taken on the application by State and Federal agencies.

No changes were made to the regulations based on these comments. The Agency understands the importance of electric transmission facilities that provide electricity to homes and businesses across America. However, NRCS is purchasing conservation easements for the protection of certain conservation values: promoting the recovery of threatened and endangered species, improving biodiversity, and enhancing carbon sequestration. The protection of those conservation values will dictate the terms of any conservation easement deed. Most conservation easement deeds limit the development of structures and utilities. Whether an electric transmission facility would be allowed on an easement property is determined on a case-by-case basis and depends on whether the electronic transmission facilities would be compatible with the purposes of HFRP and the easement at issue. Regarding the comment about public notice and comment, NRCS is not required by law to provide public notice and an opportunity to comment on easements under HFRP. The last two comments are related to potential conflicts between the placement of an easement and the placement of utilities. NRCS policy requires that State Conservationists take into account utilities that are being planned for installation when making project funding decisions and seek to avoid conflicts with infrastructure projects when feasible.

Termination of Landowner Protection

The preamble of the 2006 interim final rule states that ''In easement circumstances, where a change of conditions requires the FWS and the NMFS to terminate a Landowner Protection, NRCS will work to address the changed conditions in the HFRP restoration plan in coordination with the landowner'' (71 FR 28549). One commenter questioned whether this referred to landowner non-compliance or changed environmental or ecological conditions. NRCS will work to address the changed conditions in coordination with the landowner regardless of the cause of the change. As provided for in this proposed rule in the clarified definition of Landowner Protections in § 625.2 and the associated provision at § 625.13(d), provided that the contract holder has acted in good faith and without the intent to violate the terms of the HFRP restoration plan, all appropriate options will be pursued with the participant to avoid termination in the case of landowner non-compliance or changed conditions. If the participant has entered into a SHA or CCAA with FWS or NMFS (the Services) based on a HFRP restoration plan, NRCS will work with the participant and the Services to seek appropriate means of avoiding revocation of a permit issued under section 10(a)(1) of the ESA by FWS or NMFS to implement the SHA or CCAA. However, in the event of a termination, any requested assurances from NRCS will be voided and the landowner will be responsible to FWS or NMFS for any violations of the ESA, as clarified in this proposed rule at § 625.13(d). The SHA policy regarding revocation of a permit issued in association with a SHA is: ''The Services are prepared as a last resort to revoke a permit implementing a Safe Harbor Agreement where continuation of the permitted activity would be likely to result in jeopardy to a species covered by the permit. Prior to taking such a step, however, the Services would first have to exercise all possible means to remedy such a situation.'' (Fish and Wildlife Service and National Fisheries Marine Service, Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, Final Rule and Notices, 64 FR 32724). Regulations pertaining to SHA permits issued by FWS have a similar provision (50 CFR 17.22(c)(7) and 17.32(c)(7)) for endangered and threatened wildlife.

Proposed Changes Resulting From Passage of the Food, Conservation, and Energy Act of 2008

NRCS proposes to amend the current regulation to include statutory changes included in Section 8205 of the 2008 Act (Pub. L. 110–246) as follows:

- Section 8205 amended the methods of enrollment by replacing the 99-year enrollment method with enrollment of permanent easements or the maximum duration allowed by state law. NRCS proposes to amend § 625.8(b), § 625.10(e)(1) and § 625.11(a) by removing reference to 99 year easements and inserting in its place the words ''permanent easement''.
- Section 8205 also expanded the enrollment methods to include the use of 30-year contracts or 10-year cost share agreements, or any combination of both, for acreage owned by Indian tribes. The statement of managers (Conference Report H.R. 110–627 for HR 2419, pages 202 and 203, May 13, 2008) provided additional clarification of Congressional intent by stating that ''the Managers intend that Tribal land enrolled in the program should be land held in private ownership by a tribe or an individual Tribal member. Tribal lands held in trust or reserved by the U.S. government or restricted fee lands should not be enrolled in the program regardless of ownership.'' NRCS proposes to add the definition of ''acreage owned by Indian Tribes'' in § 625.3 to read as follows: ''acreage owned by Indian Tribes means private lands to which the title is held by individual Indians and Indian tribes, including Alaska Native Corporations. This term does not include land held in trust by the United States or lands the title to which is held subject to Federal restrictions against alienation.''

NRCS also proposes to amend the following sections to incorporate reference to 30-year contracts: § 625.1(a); § 625.2; § 625.3 in the definition of ''restoration agreement;'' § 625.4(a); § 625.5(b); § 625.8(b)(2); § 625.8(d); § 625.15(b)(5); § 625.16(b); and § 625.20(b); NRCS proposes to add the term ''contract'' in reference to 30-year contracts in § 625.6(a)(7); § 625.7(a) and (b); § 625.14; § 625.17; and § 625.16(a)(3); and NRCS proposes to

add a new § 625.12, 30-year contracts, to include the provisions related to this new enrollment method. Consistent with the statutory requirement, NRCS must treat 30-year contracts like easements to the extent possible. In particular, statutory language in 16 U.S.C. 6572 requires that the value of a 30-year contract for Tribal lands shall be equivalent to the value of a 30-year easement. Although there are limitations to handling 30-year contacts like 30-year easements because of the fundamental differences between contract law and real property law related to easements, NRCS has structured 30-year contract requirements in § 625.12 to be as comparable as possible to the easements requirements in § 625.11.

Section 8205 of the 2008 Act establishes requirements regarding the use of funds for cost-share agreements and easements. Specifically, this section directs that of the total amount of funds expended under the program for a fiscal year to acquire easements and enter into cost-share agreements, not more than 40 percent shall be used for 10-year cost-share agreements and not more than 60 percent shall be used for easements. Funds not obligated by April 1st of the fiscal year may be used to carryout either enrollment method. Cost-share agreements and easements under the Tribal lands option do not count toward the 60/40 calculation. NRCS proposes to incorporate this statutory requirement in § 625.4(a).

Other Proposed Minor Changes for Clarification or Improved Program Administration

NRCS proposes to make other changes to clarify the regulations for the public; such changes include clarifying the enrollment process, providing clear language about determining easement, contract, and agreement compensation, providing guidance on the Agency's treatment of ecosystem service credits, and clarifying language on Agency appeals. The proposed changes include:

Section 625.1 Purpose and Scope

Section 625.1(b)(1) identifies one objective of the program as being to ''Promote the recovery of endangered and threatened species under the ESA.'' NRCS proposes to amend § 625.1(b)(1) to clarify that ESA is an abbreviation for the Endangered Species Act.

Section 625.2 Definitions

In addition to the definition of ''*Acreage owned by Indian Tribes*,'' which NRCS proposes to add as a result of statutory changes described in the previous section, NRCS proposes to add definitions for ''*Candidate Conservation Agreement with Assurances*,'' ''*Conservation practice*'' and ''*Forest ecosystem*''.

NRCS proposes to add a definition for the term ''*Candidate Conservation Agreement with Assurances*'' to ensure the public has clear understanding of the Landowner Protections provided through HFRP. NRCS proposes the definition to read as follows: ''Candidate Conservation Agreement with Assurances (CCAA) means a voluntary arrangement between FWS or NMFS, and cooperating non-Federal landowners under the authority of Section 10(a)(1) of the Endangered Species Act of 1973 (the Act), 16 U.S.C. 1539(a)(1). Under the CCAA and an associated enhancement of survival permit, the non-Federal landowner implements actions that are consistent with the conditions of the permit. Candidate Conservation Agreements with Assurances with FWS are also subject to regulations at 50 CFR 17.22(d) for endangered species or 50 CFR 17.32(d) for threatened species, or applicable subsequent regulations.''

NRCS proposes to add the term ''*Conservation practice*'' to replace the definition of ''practice.'' The definition of ''conservation practice'' describes a broader array of activities than the definition of the term ''practice.'' NRCS proposes to incorporate the following language as the definition of ''conservation practice.'' ''*Conservation practice* means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management, and other improvements that benefit the eligible land and optimize environmental benefits, planned and applied according to NRCS standards and specifications.''

The purpose of HFRP is to restore and enhance forest ecosystems. NRCS proposes to add the term ''forest ecosystem'' to clarify the program's purpose.

NRCS proposes amendments to other definitions as follows:

The definition of ''*Activity*'' is removed because statutory authority is only provided for ''*Practices*'' and ''*Measures*.''

The definition of ''*Biodiversity*'' is changed to clarify that ''*biodiversity*'' is the shortened term for biological diversity.

The definition of ''*Contract*'' is changed to be consistent with other programs administered by NRCS. NRCS proposes amending the definition to read as follows:

''*Contract/agreement* means the legal document that specifies the obligations and rights of any applicant who has been accepted to participate in the program. A contract/agreement is a binding agreement for the transfer of assistance from USDA to the participant for conducting the prescribed program implementation actions.''

The term ''*30-year contract*'' is added to incorporate the 30-year contract option.

The Agency is removing the definition of ''*Indian Trust Lands*,'' ''*Practice*,'' and ''*Consultation or consult*.'' The definition of ''*Indian Trust Lands*'' is removed and replaced by the definition of ''*Acreage owned by Indian Tribes*'' to be consistent with the statutory language. The definition of ''*Practice*'' is removed and replaced with the more specific term ''*Conservation practice*.'' The definition of ''*Consultation or consult*'' is removed and revised to change the term to confer for the reasons described in the public comment section above.

The definition of ''*landowner*'' is revised to remove the term ''*remaindermen*'' as a category of ownership. NRCS proposes removing this term because it unnecessarily complicates the definition.

The definition of ''*Landowner Protections*'' is changed as a result of the public comments received. The explanation for this proposal is provided under ''Proposed changes based on public comment.''

The definition of ''*Liquidated damages*'' is amended to read: ''*Liquidated damages*'' is defined as ''a sum of money stipulated in the HFRP restoration agreement that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the restoration agreement. The sum represents an estimate of the expenses incurred by NRCS to service the restoration agreement, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.'' This is consistent with how the term is defined in other programs administered by NRCS.

The definition of ''*Participant*'' is amended to incorporate non-substantive changes to make the definition consistent with the definition of ''*Participant*'' in other conservation programs and to address the addition of the 30-year contract option provided in the 2008 Act for Tribal lands. Specifically, a ''*Participant*'' is an applicant who is party to a 10-year cost share agreement, 30-year contract, or an option agreement to purchase an easement. The Agency is also taking the opportunity to note in this regulation, consistent with the appeal regulations at

7 CFR Part 614 and Federal real property law, that once a conservation easement is conveyed, the landowner is no longer a ''*Participant*'' for easement enforcement and management matters and, therefore, may not file an administrative appeal on those matters.

The definition of ''*Private land*'' is changed to read: ''*Private land* means land that is not owned by a governmental entity, and includes land meeting the definition of ''acreage owned by Indian Tribes.'' This proposed change ensures the public recognizes that the term ''*Private land*,'' as used in this regulation, includes acreage owned by Indian Tribes. The previous definition included the term ''*Indian Trust Lands*.''

The definition of ''*Safe harbor agreement*'' is changed as described in the public comment section above.

The definition of ''*State Conservationist*'' is changed to clarify that the former State Conservationist of Hawaii position has become the director of the Pacific Islands.

Section 625.4 Program Requirements

NRCS proposes to revise § 625.4(a) to incorporate the statutory limitation on the use of funds for cost-share agreements and easements. As described in the statutory change section above, Section 8205 of the 2008 Act requires an allocation of no more than 40 percent of program expenditures toward enrollment of restoration cost-share agreements and no more than 60 percent of program expenditures toward enrollment of easements. Any contracts on acreage owned by Indian Tribes are not included in this calculation. The 2008 Act allows the Secretary to use any funds that are not obligated by April 1st of the fiscal year to be used for either agreements or easements during that fiscal year. Any funds not obligated by April 1 or later will be re-distributed to projects with agreements or easements ready to obligate funding. NRCS proposes to manage this process at the national level to ensure that the allocation of funds meets the statutory requirements.

NRCS proposes to amend § 625.4(b) to clarify that an individual or entity can enroll in HFRP by replacing the term ''person'' with the words ''individual or entity.'' The current language refers to a ''person.'' This term is inaccurate due to participation of entities and Indian tribes.

NRCS proposes, for clarity purposes, to change § 625.4(d) to clarify that any land not eligible under the categories listed in § 625.4(c) is ineligible land. Section 625.4(c) identifies eligible land.

Section 625.5 Application Procedures

NRCS proposes revising § 625.5(a) to clarify the sign-up process. Specifically, the State Conservationists will develop proposals for the State to receive funds and may seek input from other agencies in doing so. The State Conservationists will submit proposals to the Chief for funding consideration. The Chief will evaluate and select proposals for funding and provide the State Conservationist with a funding allocation. Upon a State's selection for funding, the State Conservationists will issue a public sign-up notice to obtain applications from eligible landowners. The State Conservationists may consult with organizations or units of government with appropriate technical expertise in developing ranking criteria to be used in selecting applications best suited to achieving the project purpose. The applications will be ranked based on these criteria. The highest ranking applications are funded by the State Conservationists. Due to the limited funding provided for this program, continuous enrollment would likely increase the administrative burden of implementing the program. This sign-up process will ensure that the limited HFRP funding will be used for the best projects nationally, and help maximize the expected benefits related to habitat restoration and protection that address the recovery of endangered species, improvement in biodiversity, and enhanced carbon sequestration. In short, national competition will result in the optimal use of funds.

NRCS proposes to amend § 625.5(d) to clarify that any voluntary reduction in compensation must not be below the lowest rate allowed by the statute.

Section 625.6 Establishing Priority for Enrollment in HFRP

NRCS proposes to amend § 625.6(a) to reflect the change in the definition of biological diversity discussed above at § 625.2

Section 625.7 Enrollment of Easements, Contracts, and Agreements

NRCS proposes to amend § 625.7 to reflect a change in the NRCS business process that is designed to reduce the potential for de-obligating funds. NRCS has experienced difficulty in other easement programs where funds are obligated to projects whose enrollment is subsequently terminated due to irresolvable title issues and hazardous materials concerns. NRCS will no longer use commitment accounting, but will use the option agreement to purchase as the point of obligation. Also, additional evaluation that was formerly performed after the signing of the option agreement to purchase will now be performed prior to the obligation.

Section 625.7(a) is changed to clarify that the obligation of HFRP funds occurs when the landowner signs the option agreement to purchase, cost-share agreement, or 30-year contract. This policy helps ensures that HFRP funds are used to the greatest extent possible by reducing the potential for de-obligation.

Section 625.7(c) is changed to clarify the point at which land is considered enrolled into the program to be consistent with other easement programs administered by NRCS.

Section 625.7(d) is amended to clarify the conditions and procedures for withdrawing an offer after the land is considered enrolled in the program.

Section 625.8 Compensation for Easements and 30-Year Contracts

NRCS proposes to amend § 625.8(c) to clarify the Agency's existing authority to accept and use non-Federal contributions.

NRCS proposes to amend § 625.8(d) to identify that payments for 30-year contracts will be treated the same as 30-year easement payments. The statutory language in 16 U.S.C. 6572 instructs that the value of a 30-year contract shall be equivalent to the value of a 30-year easement.

Additionally, the following information about the appraisal methodology will be used for the valuation of HFRP offers: For permanent easements (or easements for the maximum duration allowed under State law), the HFRP statute states that the Secretary of Agriculture shall pay the landowner not less than 75 percent, nor more than 100 percent of (as determined by the Secretary) the fair market value of the land enrolled unencumbered by the easement, less the fair market value of such land encumbered by the easement. The term ''encumbered'' refers to the period of time when the easement becomes effective. The appraisal process established by NRCS is aimed at determining the difference between the value of the enrolled land prior to and after easement encumbrance.

When acquiring real property, Federal agencies generally follow the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and federally Assisted Programs (''the Uniform Relocation Act'') found in regulations at Part 24 of Title 49 of the Code of Federal Regulations. Section 24.103 of that title establishes that ''appraisals are to be prepared according to these requirements, which are

intended to be consistent with the Uniform Standards of Professional Appraisal Practice (USPAP). The Agency may have appraisal requirements that supplement these requirements, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA).'' [Yellow Book] The Yellow Book requires that compensation be based upon the impact that the easement encumbrance will have on the value of the ''larger parcel,'' which is all land owned by the landowner that may be impacted by the easement, as determined by the appraiser.

The HFRP language for permanent and maximum duration easements requires that compensation be based on the impact to value of only the land enrolled and encumbered by the easement. Thus, the Yellow Book requirement of appraising the larger parcel conflicts with the HFRP statutory requirement related to determining easement value for permanent easements, or those of the maximum duration required by state law. Therefore, the Agency proposes to use Uniform Standards for Professional Appraisal Practice (USPAP) for those easements, which is consistent with 49CFR24. Even though the HFRP statute states the approach for valuing permanent and 30-year easements in slightly different language, there is no actual distinction since both result in basing value on the enrolled land encumbered by the easement. Correspondingly, the Agency is maintaining consistency in the approach to determining easement compensation values for 30-year and permanent easements.

NRCS proposes to add language in § 625.8(h) that clarifies USDA policy regarding environmental credits such as carbon, water quality, biodiversity, or wetlands preservation, on land enrolled in HFRP. USDA considers these credits the property of the farmer, the landowner, or the person who applied the conservation practices on the land, regardless of the Federal funds invested.

Section 625.9 10-Year Restoration Cost-Share Agreements

NRCS proposes to amend § 625.9 (a) to reflect a change in section numbering caused by the addition of the 30-year contract section. Amendments to this section reflect the change from the term ''practice'' to ''conservation practice.''

NRCS proposes to amend § 625.9 (d) to clarify the meaning of the sentence and to clarify that termination of the restoration cost-share agreement can occur when the terms of § 625.9(d) 1, 2, or 3 are met.

Section 625.10 Cost-Share Payments

NRCS proposes to amend § 625.10(b) to clarify the addition of the term ''candidate species,'' as well as listed species, through a Candidate Conservation Agreement with Assurances.

Section 625.10(c) and § 625.10(g) and (h) are amended to reflect the change in the definition from ''practice'' to the more specific term ''conservation practice'' as discussed above at § 625.2. Section 625.10(e) is also amended for the same reason and to clarify that the conservation practice would need to meet NRCS standards and specifications.

Section 625.11 Easement Participation Requirements

NRCS proposes to amend § 625.11(a) to clarify the sentence to include not only listed species but to allow for other types of management that support forest ecosystem functions and values, such as activities to protect candidate species.

Section 625.12 30-Year Contracts

A new section is added to incorporate the statutory provision for 30-year contracts for acreage owned by Indian Tribes. The section describes enrollment and minimum requirements of the contract. Terms of the 30-year contract are kept as consistent as possible with terms of a 30-year easement, considering the differences in the legal instruments.

Section 625.13 The HFRP Restoration Plan Development and Landowner Protections

NRCS proposes to amend § 625.13(a), § 625.13(c) and § 625.13(d) to reflect the changes discussed above as a result of public comments. Section 625.13(a), was amended to replace the term ''consult'' with ''confer.'' In § 625.13(c) ''The National Marine Fisheries Service'' was added as an agency that would assist in determining eligible practices. Section 625.13(d) was amended to clarify Landowner Protections.

Section 625.14 Modification of the HFRP Restoration Plan

NRCS proposes to amend § 625.14 to make non-substantive changes to the sentence structure.

Section 625.15 Transfer of Land

NRCS proposes the following changes: Amend § 625.15(a) to clarify that this section refers to offers voided prior to enrollment in the program. This section would also be amended to clarify that this section applies to easements, agreements, and contracts.

In addition, amend § 625.15(b) to clarify that this section refers to actions following transfer of land. These changes clarify that cost-share payments can be transferred to the new owner upon presentation of an assignment of rights. Landowner Protections can be transferred to the new landowner, and if a SHA or CCAA is involved, the landowners need to coordinate with FWS or NMFS to transfer the agreement and assurances to the new landowner.

Section 625.16 Violations and Remedies

NRCS proposes to make the following amendments to this section: Amend § 625.16 (a) to clarify that extensions to correct violations beyond 30 days, under this section, should be made based on the State Conservationists determination of how much time is necessary to correct the violation.

Section 625.16(b) is amended to clarify that extensions to correct violations beyond 30 days should be based on the State Conservationists determination of how much time is necessary to correct the violation. NRCS is also removing the last sentence of paragraph (b)(3), all of paragraph (b)(4), and paragraph (b)(6). The last sentence of (b)(3) is removed because it is administratively burdensome to continue to monitor and enforce the operation and maintenance of practices for which the Agency no longer has a contract. Due to limited resources and funding, the Agency has determined that to administer the program more effectively after an agreement is terminated, that the Agency will recover the appropriate amount and will not continue to monitor the installed practices or measures. Paragraph (b)(4) is removed because it has been incorporated into (b)(3). Paragraph (b)(6) is removed because the Agency has determined that it is not in the interests of the program to allow participants to unilaterally terminate a contract without penalty or repayment, even when participants are in compliance with all conditions. The Agency is interested in ensuring practices are continued for the original duration of the contract and maintaining a high level of environmental benefits.

Section 625.18 Assignments

The text of Section § 625.18 is not amended. The only change to this section is the section heading which has been changed to reflect the insertion of the 30-year contract section above at § 625.12.

Section 625.19 Appeals

NRCS proposes to amend § 625.19(b) to clarify that appeals procedures apply to administrative actions and not for other purposes such as enforcement actions.

Section 625.19(d) is added to further clarify that enforcement actions taken by NRCS are not subject to review under administrative appeal regulations. This language is consistent with the appeal regulations at 7 CFR Part 614 and Federal real property law.

Specific Request for Public Comment

The Agency is particularly interested in receiving public input regarding the following topics: (1) The definition of acreage owned by Indian Tribes and the accompanying requirements for 30-year contracts at § 625.12; (2) the language regarding ownership of ecosystem services credits; and (3) the language regarding the establishment of easement compensation rates.

List of Subjects in 7 CFR Part 625

Administrative practice and procedure, Agriculture, Soil conservation, Forestry.

Text of Rule Amendments

For the reasons stated in the preamble, the Natural Resources Conservation Service proposes to revise 7 CFR part 625 to read as follows:

PART 625—HEALTHY FORESTS RESERVE PROGRAM

Sec.

625.1 Purpose and scope.
625.2 Definitions.
625.3 Administration.
625.4 Program requirements.
625.5 Application procedures.
625.6 Establishing priority for enrollment in HFRP.
625.7 Enrollment of easements, contracts, and agreements.
625.8 Compensation for easements and 30-year contracts.
625.9 10-year restoration cost-share agreements.
625.10 Cost-share payments.
625.11 Easement participation requirements.
625.12 30-year contracts.
625.13 The HFRP restoration plan development and landowner protections.
625.14 Modification of the HFRP restoration plan.
625.15 Transfer of land.
625.16 Violations and remedies.
625.17 Payments not subject to claims.
625.18 Assignments.
625.19 Appeals.
625.20 Scheme and device.

Authority: 16 U.S.C. 6571–6578.

§ 625.1 Purpose and scope.

(a) The purpose of the Healthy Forests Reserve Program (HFRP) is to assist landowners, on a voluntary basis, in restoring and enhancing forest ecosystems on private lands through easements, 30-year contracts, and 10-year cost-share agreements.

(b) The objectives of HFRP are to:

(1) Promote the recovery of endangered and threatened species under the Endangered Species Act (ESA);

(2) Improve plant and animal biodiversity; and

(3) Enhance carbon sequestration.

(c) The regulations in this part set forth the policies, procedures, and requirements for the HFRP as administered by the Natural Resources Conservation Service (NRCS) for program implementation and processing applications for enrollment.

(d) The Chief of NRCS may implement HFRP in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Marianna Islands.

§ 625.2 Definitions

The following additions shall be applicable to this part:

30-year Contract means a contract that is limited to acreage held in private ownership by Indian Tribes or individual tribal members. The 30-year contract is not eligible for use on tribal lands held in trust or subject to Federal restrictions against alienation.

Acreage Owned by Indian Tribes means private lands to which the title is held by individual Indians and Indian tribes, including Alaska Native Corporations. This term does not include land held in trust by the United States or lands where the fee title contains restraints against alienation.

Biodiversity (Biological Diversity) means the variety and variability among living organisms and the ecological complexes in which they live.

Candidate Conservation Agreement with Assurances (CCAA) means a voluntary arrangement between U.S. FWS or NMFS, and cooperating non-Federal landowners under the authority of Section 10(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1539(a)(1). Under the CCAA and an associated enhancement of survival permit, the non-Federal landowner implements actions that are consistent with the conditions of the permit. Candidate Conservation Agreements with Assurances with FWS are also subject to regulations at 50 CFR 17.22(d) for endangered species or 50 CFR 17.32(d) for threatened species, or applicable subsequent regulations.

Carbon sequestration means the long term storage of carbon in soil (as soil organic matter) or in plant material (such as in trees).

Chief means the Chief of the NRCS, United States Department of Agriculture (USDA), or designee.

Confer means to discuss for the purpose of providing information; to offer an opinion for consideration; or to meet for discussion, while reserving final decision-making authority with NRCS.

Conservation practice means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management, and other improvements that benefit the eligible land and optimize environmental benefits, planned and applied according to NRCS standards and specifications.''

Conservation treatment means any and all conservation practices, measures, activities, and works of improvement that have the purpose of alleviating resource concerns, solving or reducing the severity of natural resource use problems, or taking advantage of resource opportunities, including the restoration, enhancement, maintenance, or management of habitat conditions for HFRP purposes.

Contract or agreement means the legal document that specifies the obligations and rights of any applicant who has been accepted to participate in the program. A contract or agreement is a binding agreement for the transfer of assistance, including financial or technical assistance, from USDA to the participant for conducting the prescribed program implementation actions.

Coordination means to obtain input and involvement from others while reserving final decision-making authority with NRCS.

Cost-share agreement means a legal document that specifies the rights and obligations of any participant accepted into the program. A HFRP cost-share agreement is a binding agreement for the transfer of assistance from USDA to the participant to share in the costs of applying conservation. A cost-share agreement under HFRP has a duration of 10-years.

Cost-share payment means the payment made by NRCS to a program participant or vendor to achieve the restoration, enhancement, and protection goals of enrolled land in accordance with the HFRP restoration plan.

Easement means a conservation easement, which is an interest in land defined and delineated in a deed whereby the landowner conveys certain rights, title, and interests in a property to the United States for the purpose of protecting the forest ecosystem and the conservation values of the property.

Easement area means the land encumbered by an easement.

Easement payment means the consideration paid to a landowner for an easement conveyed to the United States under the HFRP.

Fish and Wildlife Service (FWS) is an agency of the United States Department of the Interior.

Forest ecosystem means a dynamic set of living organisms, including plants, animals and microorganisms interacting among themselves and with the environment in which they live. A forest ecosystem is characterized by a predominance of trees, and by the fauna, flora, and ecological cycles (energy, water, carbon, and nutrients)

Forest Service is an agency of the USDA.

HFRP restoration plan means the document that identifies the conservation treatments that are scheduled for application to land enrolled in HFRP in accordance with NRCS standards and specifications.

Indian Tribe means any Indian tribe, band, nation, 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 (85 Stat. 688, 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.

Landowner means an individual or entity having legal ownership of land, including those who may be buying land under a purchase agreement. The term ''landowner'' may also include all forms of collective ownership including joint tenants, tenants in common, and life tenants.

Landowner Protections means protections and assurances made available by NRCS to HFRP participants when requested and whose voluntary conservation activities result in a net conservation benefit for listed, candidate, or other species, and meet other requirements of the program. These Landowner Protections are subject to an HFRP restoration plan and associated cost-share agreement, 30-year contract, or easement being properly implemented. Landowner Protections made available by the Secretary of Agriculture to HFRP participants may include an incidental take authorization received by NRCS from FWS or NMFS or may be provided by a Safe Harbor Agreement or Candidate Conservation Agreement with Assurances directly between the HFRP participant and FWS or NMFS as appropriate.

Liquidated Damages means a sum of money stipulated in the HFRP restoration agreement that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the restoration agreement. The sum represents an estimate of the expenses incurred by NRCS to service the restoration agreement, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

Maintenance means work performed to keep the applied conservation practice functioning for the intended purpose during its life span. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

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 resources.

National Marine Fisheries Service (NMFS) is an agency of the United States Department of Commerce.

Natural Resources Conservation Service (NRCS) is an agency of the USDA, which has the responsibility for administering HFRP.

Participant means a person or entity who is a party to a 10-year cost share agreement, 30-year contract, or an option agreement to purchase an easement.

Private land means land that is not owned by a governmental entity, and includes land that meets the definition of ''acreage owned by Indian Tribes.''

Restoration means implementing any conservation practice (vegetative, management, or structural) or measure that improves forest ecosystem values and functions (native and natural plant communities).

Restoration agreement means a cost-share agreement between the program participant and NRCS to restore, enhance, and protect the functions and values of a forest ecosystem for the purposes of HFRP under either an easement, 30-year contract, or a 10-year cost-share agreement enrollment option.

Safe Harbor Agreement means a voluntary arrangement between FWS or NMFS, and cooperating non-Federal landowners under the authority of Section 10(a)(1) of the Endangered Species Act of 1973 (the Act), 16 U.S.C. 1539(a)(1). Under the Safe Harbor Agreement and an associated enhancement of survival permit, the private property owner implements actions that are consistent with the conditions of the permit. Safe Harbor Agreements with FWS are also subject to regulations at 50 CFR 17.22(c) for endangered species or 50 CFR 17.32 (c) for threatened species, or applicable subsequent regulations.

Sign-up notice means the public notification document that NRCS provides to describe the particular requirements for a specific HFRP sign-up.

State Conservationist means the NRCS employee authorized to implement HFRP and direct and supervise NRCS activities in a State, the Caribbean Area, or the Pacific Island Area.

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.

§ 625.3 Administration.

(a) The regulations in this part will be administered under the general supervision and direction of the Chief.

(b) The Chief may modify or waive a provision of this part if the Chief determines that the application of such provision to a particular limited situation is inappropriate and inconsistent with the goals 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) No delegation in this part to lower organizational levels shall preclude the Chief from determining any issue arising under this part or from reversing or modifying any determination arising from this part.

(d) The State Conservationist will develop the rates of compensation for an easement and 30-year contract, a priority ranking process, and any related technical matters.

(e) The NRCS shall coordinate with FWS and NMFS in the implementation of the program and in establishing program policies. In carrying out this program, NRCS may confer with private forest landowners, including Indian tribes, the Forest Service and other Federal agencies, State fish and wildlife agencies, State forestry agencies, State environmental quality agencies, other State conservation agencies; and nonprofit conservation organizations. No determination by FWS, NMFS, the

Forest Service, any Federal or State agency, conservation district, or other organization shall compel the NRCS to take any action which the NRCS determines will not serve the purposes of the program established by this part.

§ 625.4 Program requirements.

(a) General. Under the HFRP, NRCS will purchase conservation easements from, or enter into 30-year contracts or 10-year cost-share agreements with eligible landowners who voluntarily cooperate in the restoration and protection of forestlands and associated lands. To participate in HFRP, a landowner will agree to the implementation of a HFRP restoration plan, the effect of which is to restore, protect, enhance, maintain, and manage the habitat conditions necessary to increase the likelihood of recovery of listed species under the ESA, or measurably improve the well-being of species that are not listed as endangered or threatened under the ESA but are candidates for such listing, State-listed species, or species identified by the Chief for special consideration for funding. NRCS may provide cost-share assistance for the activities that promote the restoration, protection, enhancement, maintenance, and management of forest ecosystem functions and values. Specific restoration, protection, enhancement, maintenance, and management activities may be undertaken by the landowner or other NRCS designee.

(1) Of the total amount of funds expended under the program for a fiscal year to acquire easements and enter into 10-year cost-share agreements, not more than 40 percent shall be used for cost-share agreements and not more than 60 percent shall be used for easements.

(2) The Chief may use any funds that are not obligated by April 1st of the fiscal year for which the funds are made available to carry out a different method of enrollment during that fiscal year.

(b) Landowner eligibility. To be eligible to enroll an easement in the HFRP, an individual or entity must:

(1) Be the landowner of eligible land for which enrollment is sought; and

(2) Agree to provide such information to NRCS as the agency deems necessary or desirable to assist in its determination of eligibility for program benefits and for other program implementation purposes.

(c) Eligible land.

(1) The NRCS, in coordination with FWS or NMFS, shall determine whether land is eligible for enrollment and whether, once found eligible, the lands may be included in the program based on the likelihood of successful restoration, enhancement, and protection of forest ecosystem functions and values when considering the cost of acquiring the easement, 30-year contract, or 10-year cost share agreement, and the restoration, protection, enhancement, maintenance, and management costs.

(2) Land shall be considered eligible for enrollment in the HFRP only if the NRCS determines that:

(i) Such private land is capable of supporting habitat for a selected species listed under Section 4 of the ESA; or

(ii) Such private land is capable of supporting habitat for a selected species not listed under Section 4 of the ESA but is candidate for such listing, or the selected species is State-listed species, or is a species identified by the Chief for special consideration for funding.

(3) NRCS may also enroll land adjacent to eligible land if the enrollment of such adjacent land would contribute significantly to the practical administration of the easement area, but not more than it determines is necessary for such contribution.

(4) To be enrolled in the program, eligible land must be configured in a size and with boundaries that allow for the efficient management of the area for easement purposes and otherwise promote and enhance program objectives.

(5) In the case of acreage owned by an Indian Tribe, the NRCS may enroll acreage into the HFRP which is privately owned by either the Tribe or an individual.

(d) Ineligible land. The following land is not eligible for enrollment in the HFRP:

(1) Lands owned by the United States, States, or units of local government;

(2) Land subject to an easement or deed restriction that already provides for the protection of fish and wildlife habitat or which would interfere with HFRP purposes, as determined by NRCS; and

(3) Lands that would not be eligible for HFRP under paragraphs (c) (1) through (c) (5).

§ 625.5 Application procedures.

(a) Sign-up process. As funds are available, the Chief will solicit project proposals from the State Conservationist. The State Conservationist may consult with other agencies at the State, Federal, and local levels to develop proposals. The State Conservationist will submit the proposal(s) to the Chief for funding selection. Upon selection for funding, the State Conservationist will issue a public sign-up notice which will announce and explain the rationale for decisions based on the following information:

(1) The geographic scope of the sign-up;

(2) Any additional program eligibility criteria that are not specifically listed in this part;

(3) Any additional requirements that participants must include in their HFRP applications that are not specifically identified in this part;

(4) Information on the priority order of enrollment for funding;

(5) An estimate of the total funds NRCS expects to obligate during a given sign-up; and

(6) The schedule for the sign-up process, including the deadline(s) for applying.

(b) Application for participation. To apply for enrollment through an easement, 30-year contract, or 10-year cost-share agreement, a landowner must submit an application for participation in the HFRP during an announced period for such sign-up.

(c) Preliminary agency actions. By filing an application for participation, the applicant consents to an NRCS representative entering upon the land for purposes of determining land eligibility, and for other activities that are necessary or desirable for the NRCS to make offers of enrollment. The applicant is entitled to accompany an NRCS representative on any site visits.

(d) Voluntary reduction in compensation. In order to enhance the probability of enrollment in HFRP, an applicant may voluntarily offer to accept a lesser payment amount than is being offered by NRCS. Such offer and subsequent payments may not be less than those rates set forth in 625.8 and 625.10 of this part.

§ 625.6 Establishing priority for enrollment in HFRP.

(a) Ranking considerations. Based on the specific criteria set forth in a sign-up announcement and the applications for participation, NRCS, in coordination FWS and NMFS, may consider the following factors to rank properties:

(1) Estimated conservation benefit to habitat required by threatened or endangered species listed under Section 4 of the ESA;

(2) Estimated conservation benefit to habitat required by species not listed as endangered or threatened under Section 4 of the ESA but that are candidates for such listing, State-listed species, or species identified by the Chief for special consideration for funding;

(3) Estimated improvement of biodiversity, if enrolled;

(4) Potential for increased capability of carbon sequestration, if enrolled;

(5) Availability of contribution of non-federal funds;

(6) Significance of forest ecosystem functions and values;

(7) Estimated cost-effectiveness of the particular restoration cost-share agreement, contract, or easement, and associated HFRP restoration plan; and

(8) Other factors identified in an HFRP sign-up notice.

(b) The NRCS may place higher priority on certain forest ecosystems based regions of the State or multi-State area where restoration of forestland may better achieve NRCS programmatic and sign-up goals and objectives.

(c) Notwithstanding any limitation of this part, NRCS may enroll eligible lands at any time in order to encompass project areas subject to multiple land ownership or otherwise to achieve program objectives. Similarly, NRCS may, at any time, exclude otherwise eligible lands if the participation of the adjacent landowners is essential to the successful restoration of the forest ecosystem and those adjacent landowners are unwilling to participate.

(d) If available funds are insufficient to accept the highest ranked application, and the applicant is not interested in reducing the acres offered to match available funding, NRCS may select a lower ranked application that can be fully funded. In cases where HFRP funds are not sufficient to cover the costs of an application selected for funding, the applicant may lower the cost of the application by changing the duration of the easement or agreement or reducing the acreage offered, unless these changes result in a reduction of the application ranking score below that of the score of the next available application on the ranking list.

§ 625.7 Enrollment of easements, contracts, and agreements.

(a) Offers of enrollment. Based on the priority ranking, NRCS will notify an affected landowner of tentative acceptance into the program. This notice of tentative acceptance into the program does not bind NRCS or the United States to enroll the proposed project in HFRP, nor does it bind the landowner to convey an easement, or to contract, or agree to HFRP activities. The letter notifies the landowner that NRCS intends to continue the enrollment process on their land unless otherwise notified by the landowner.

(b) Acceptance of offer of enrollment. An option agreement to purchase or a restoration cost-share agreement or contract will be presented by NRCS to the landowner, which will describe the easement, agreement, or contract area; the easement, agreement, or contract terms and conditions; and other terms and conditions for participation that may be required by NRCS.

(c) Effect of the acceptance of the offer (enrollment). After the option agreement to purchase or restoration cost-share agreement or contract is executed by NRCS and the landowner, the land will be considered enrolled in the HFRP. For easements, NRCS will proceed with various easement acquisition activities, which may include conducting a survey of the easement area, securing necessary subordination agreements, procuring title insurance, and conducting other activities necessary to record the easement or implement the HFRP, as appropriate for the enrollment option being considered. For restoration cost-share agreements and contracts the landowner will proceed to implement the restoration plan with technical assistance and cost-share from NRCS.

(d) Withdrawal of offers. Prior to execution of an option agreement to purchase, a restoration cost-share agreement, and/or contract between the United States and the landowner, NRCS may withdraw the land from enrollment at any time due to lack of availability of funds, inability to clear title, or other reasons. An option to purchase shall be void, and the offer withdrawn, if not executed by the landowner within the time specified.

§ 625.8 Compensation for easements and 30-year contracts.

(a) Determination of easement payment rates.

(1) NRCS shall offer to pay not less than 75 percent nor more than 100 percent of the fair market value of the enrolled land during the period the land is subject to the easement less the fair market value of the land encumbered by the easement for permanent easements or easements for the maximum duration allowed under State law.

(2) NRCS shall offer to pay not more than 75 percent of the fair market value of the enrolled land less the fair market value of the land encumbered by the easement for 30-year easements or 30-year contracts.

(b) Acceptance and use of contributions. NRCS may accept and use contributions of non-federal funds to make payments under this section.

(c) Acceptance of offered easement or 30-year contract compensation.

(1) NRCS will not acquire any easement or 30-year contract unless the landowner accepts the amount of the payment that is offered by NRCS. The payment may or may not equal the fair market value of the interests and rights to be conveyed by the landowner under the easement or 30-year contract. By voluntarily participating in the program, a landowner waives any claim to additional compensation based on fair market value.

(2) Payments may be made in a single payment or no more than 10 annual payments of equal or unequal size, as agreed to between NRCS and the landowner.

(d) If a landowner believes they may be eligible for a bargain sale tax deduction that is the difference between the fair market value of the easement conveyed to the United States and the easement payment made to the landowner, it is the landowner's responsibility to discuss those matters with the Internal Revenue Service. NRCS disclaims any representations concerning the tax implications of any easement or cost-share transaction.

(e) Per acre payments. If easement payments are calculated on a per acre basis, adjustment to stated easement payment will be made based on final determination of acreage.

(f) Environmental Services Credits for Conservation Improvements. USDA recognizes that environmental benefits will be achieved by implementing conservation practices, measures, and activities funded through HFRP, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of an HFRP easement, contract, or restoration agreement. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure the requirements of an HFRP easement, contract, cost-share agreement, or restoration plan are met consistent with §§ 625.9 through 625.13 of this part. Where activities required under an environmental credit agreement may affect land covered under an HFRP easement, restoration cost-share agreement, or contract, an amendment to the restoration agreement or contract, or a compatible use approval under an easement, may be required and participants are highly encouraged to request a compatibility assessment from NRCS prior to entering into such environmental credit agreements.

§ 625.9 10-year restoration cost-share agreements

(a) The restoration plan developed under § 625.13 forms the basis for the 10-year cost-share agreement and its terms are incorporated therein.

(b) A 10-year cost-share agreement will:

(1) Incorporate all portions of a restoration plan;

(2) Be for a period of 10 years;

(3) Include all provisions as required by law or statute;

(4) Specify the requirements for operation and maintenance of applied conservation practices;

(5) Include any participant reporting and recordkeeping requirements to determine compliance with the agreement and HFRP;

(6) Be signed by the participant;

(7) Identify the amount and extent of cost-share assistance that NRCS will provide for the adoption or implementation of the approved conservation treatment identified in the restoration plan; and

(8) Include any other provision determined necessary or appropriate by the NRCS representative.

(c) Once the participant and NRCS have signed a 10-year cost-share agreement, the land shall be considered enrolled in HFRP.

(d) The State Conservationist may, by mutual agreement with the parties to the 10-year cost-share agreement, consent to the termination of the restoration agreement where:

(1) The parties to the 10-year cost-share agreement are unable to comply with the terms of the restoration agreement as the result of conditions beyond their control;

(2) Compliance with the terms of the 10-year cost-share agreement would cause a severe hardship on the parties to the agreement; or

(3) Termination of the 10-year cost-share agreement would, as determined by the State Conservationist, be in the public interest.

(e) If a 10-year cost-share agreement is terminated in accordance with the provisions of this section, the State Conservationist may allow the participants to retain any cost-share payments received under the 10-year cost-share agreement in a proportion appropriate to the effort the participant has made to comply with the restoration agreement, or, in cases of hardship, where forces beyond the participant's control prevented compliance with the agreement.

§ 625.10 Cost-share payments.

(a) NRCS may share the cost with landowners of restoring land enrolled in HFRP as provided in the HFRP restoration plan. The HFRP restoration plan may include periodic manipulation to maximize fish and wildlife habitat and preserve forest ecosystem functions and values over time and measures that are needed to provide the Landowner Protections under section 7(b)(4) or section 10(a)(1) of the ESA, including the cost of any permit.

(b) Landowner Protections may be made available to landowners enrolled in the HFRP who agree, for a specified period, to restore, protect, enhance, maintain, and manage the habitat conditions on their land in a manner that is reasonably expected to result in a net conservation benefit that contributes to the recovery of listed species under the ESA, candidate, or other species covered by this regulation. These protections operate with lands enrolled in the HFRP and are valid for as long as the landowner is in compliance with the terms and conditions of such assurances, any associated permit, the easement, contract, or the restoration agreement.

(c) If the Landowner Protections, or any associated permit, require the adoption of a conservation practice or measure in addition to the conservation practices and measures identified in the applicable HFRP restoration plan, NRCS and the landowner will incorporate the conservation practice or measure into the HFRP restoration plan as an item eligible for cost-share assistance.

(d) Failure to perform planned management activities can result in violation of the easement, 10-year cost-share agreement, or the agreement under which Landowner Protections have been provided. NRCS will work with landowners to plan appropriate management activities.

(e) The amount and terms and conditions of the cost-share assistance shall be subject to the following restrictions on the costs of establishing or installing NRCS approved conservation practices or implementing measures specified in the HFRP restoration plan:

(1) On enrolled land subject to a permanent easement or an easement for the maximum duration allowed under State law, NRCS shall offer to pay not less than 75 percent nor more than 100 percent of the average cost; and

(2) On enrolled land subject to a 30-year easement or 30 year contract, NRCS shall offer to pay not more than 75 percent of the average cost.

(f) On enrolled land subject to a 10-year cost-share agreement without an associated easement, NRCS shall offer to pay not more than 50 percent of the average costs.

(g) Cost-share payments may be made only upon a determination by NRCS that an eligible conservation practice or measure, or an identifiable component of the conservation practice has been established in compliance with appropriate standards and specifications. Identified conservation practices and measures may be implemented by the landowner or other designee.

(h) Cost-share payments may be made for the establishment and installation of additional eligible conservation practices and measures, or the maintenance or replacement of an eligible conservation practice or measure, but only if NRCS determines the conservation practice or measure is needed to meet the objectives of HFRP, and the failure of the original conservation practices or measures was due to reasons beyond the control of the landowner.

§ 625.11 Easement participation requirements.

(a) To enroll land in HFRP through a permanent easement, an easement for the maximum duration allowed under State law, or 30-year enrollment option, a landowner shall grant an easement to the United States. The easement deed shall require that the easement area be maintained in accordance with HFRP goals and objectives for the duration of the term of the easement, including the restoration, protection, enhancement, maintenance, and management of habitat and forest ecosystem functions and values.

(b) For the duration of its term, the easement shall require, at a minimum, that the landowner, and the landowner's heirs, successors and assignees, shall cooperate in the restoration, protection, enhancement, maintenance, and management of the land in accordance with the easement and with the terms of the HFRP restoration plan. In addition, the easement shall grant to the United States, through the NRCS:

(1) A right of access to the easement area;

(2) The right to permit compatible uses by the landowner of the easement area, which may include such activities as hunting and fishing, managed timber harvest, or periodic haying or grazing, if such use is consistent with the long-term protection and enhancement of the purposes for which the easement was established;

(3) The right to determine compatible uses on the easement area and specify the amount, method, timing, intensity, and duration of the compatible use;

(4) The rights, title, and interest to the easement area as specified in the conservation easement deed; and

(5) The right to perform restoration, protection, enhancement, maintenance, and management activities on the easement area.

(c) The landowner shall convey title to the easement which is acceptable to the NRCS. The landowner shall warrant that the easement granted to the United States is superior to the rights of all others, except for exceptions to the title

which are deemed acceptable by the NRCS.

(d) The landowner shall:

(1) Comply with the terms of the easement;

(2) Comply with all terms and conditions of any associated agreement or contract;

(3) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the easement in accordance with the terms of the easement and related agreements;

(4) Have the option to enter into an agreement with governmental or private organizations to assist in carrying out any landowner responsibilities on the easement area; and

(5) Agree that each person who is subject to the easement shall be jointly and severally responsible for compliance with the easement and the provisions of this part and for any refunds or payment adjustment that may be required for violation of any terms or conditions of the easement or the provisions of this part.

§ 625.12 30-year contracts.

(a) To enroll land in HFRP through the 30-year contract option, a landowner shall sign a 30-year contract with NRCS. The contract shall require that the contract area be maintained in accordance with HFRP goals and objectives for the duration of the term of the contract, including the restoration, protection, enhancement, maintenance, and management of habitat and forest ecosystem functions and values.

(b) For the duration of its term, the 30-year contract shall require, at a minimum, that the landowner, and the landowner's assignees, shall cooperate in the restoration, protection, enhancement, maintenance, and management of the land in accordance with the contract and with the terms of the HFRP restoration plan. In addition, the contract shall grant to the United States, through the NRCS:

(1) A right of access to the contract area;

(2) The right to allow such activities by the landowner as hunting and fishing, managed timber harvest, or periodic haying or grazing, if such use is consistent with the long-term protection and enhancement of the purposes for which the contract was established;

(3) The right to specify the amount, method, timing, intensity, and duration of the activities listed in paragraph (b)(2) of this section, as incorporated into the terms of the contract; and

(4) The right to perform restoration, protection, enhancement, maintenance, and management activities on the contract area.

(c) The landowner shall:

(1) Comply with the terms of the contract;

(2) Comply with all terms and conditions of any associated agreement or contract;

(3) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the contract area in accordance with the terms of the contract and related agreements.

(d) A 30-year contract will:

(1) Be signed by the participant;

(2) Identify the amount and extent of cost-share assistance that NRCS will provide for the adoption or implementation of the approved conservation treatment identified in the restoration plan; and

(3) Include any other provision determined necessary or appropriate by the NRCS representative.

(e) Once the landowner and NRCS have signed a 30-year contract, the land shall be considered enrolled in HFRP.

§ 625.13 The HFRP restoration plan development and landowner protections.

(a) The development of the HFRP restoration plan shall be made through an NRCS representative, who shall confer with the program participant and with the FWS and NMFS, as appropriate.

(b) The HFRP restoration plan shall specify the manner in which the enrolled land under easement, 30-year contract, or 10-year cost-share agreement shall be restored, protected, enhanced, maintained, and managed to accomplish the goals of the program.

(c) Eligible restoration practices and measures may include land management, vegetative, and structural practices and measures that will restore and enhance habitat conditions for listed species, candidate, State-listed, and other species identified by NRCS for special funding consideration. To the extent practicable, eligible practices and measures will improve biodiversity and increase the sequestration of carbon. NRCS, in coordination with FWS and NMFS, will determine the conservation practices and measures. NRCS will determine payment rates and cost-share percentages within statutory limits that will be available for restoration. A list of eligible practices will be available to the public.

(d) Landowner Protections. An HFRP participant who enrolls land in HFRP and whose conservation treatment results in a net conservation benefit for listed, candidate, or other species. A participant may request such Landowner Protections as follows:

(1) Incidental Take Authorization.

(i) NRCS will extend to participants the incidental take authorization received by NRCS from FWS or NMFS through biological opinions issued as part of the interagency cooperation process under section 7(a)(2) of the ESA;

(ii) NRCS will provide assurances, as a provision of the restoration plan, that when a participant is provided authorization for incidental take of a listed species, NRCS will not require management activities related to that species to be undertaken in addition to or different from those specified in the restoration plan without the participant's consent;

(iii) Provided the landowner has acted in good faith and without intent to violate the terms of the HFRP restoration plan, NRCS will pursue all appropriate options with the participant to avoid termination in the event of the need to terminate an HFRP restoration plan that is being properly implemented; and

(iv) If the 30-year contract or 10-year restoration cost-share agreement is terminated, any requested assurances, including an incidental take authorization under this section, provided by NRCS will be voided. As such, the landowner will be responsible to FWS or NMFS for any violations of the ESA.

(2) SHA or CCAA.

(i) NRCS will provide technical assistance to help participants design and use their HFRP restoration plan for the dual purposes of qualifying for HFRP financial assistance and as a basis for entering into a SHA or CCAA with FWS or NMFS and receiving an associated permit under section 10(a)(1)(a) of the ESA.

(ii) All SHAs and associated permits issued by FWS or NMFS are subject to the Safe Harbor Policy jointly adopted by FWS and NMFS according to the regulations at 64 FR 32717 or applicable subsequently adopted policy, and SHAs with FWS also are subject to regulations at 50 CFR 17.22(c) for endangered species or 50 CFR 17.32(c) for threatened species, or applicable subsequent regulations.

(iii) All CCAAs and associated permits issued by FWS or NMFS are subject to the CCAAs policy jointly adopted by FWS and NMFS according to the regulations at 64 FR 32706 or applicable subsequently adopted policy, and Candidate Conservation Agreements with Assurances with FWS also are subject to regulations at 50 CFR 17.22(d) for endangered species or 50 CFR 17.32(d) for threatened species, or applicable subsequent regulations.

(iv) If the 30-year contract or 10-year restoration cost-share agreement is terminated, the landowner will be responsible to notify and coordinate with FWS and NMFS, as appropriate, for any modifications related to the SHA or CCAA.

§ 625.14 Modification of the HFRP restoration plan.

The State Conservationist may approve modifications to the HFRP restoration plan that do not modify or void provisions of the easement, contract, restoration agreement, or Landowner Protections, and are consistent with applicable law. NRCS may obtain and receive input from the landowner and coordinate with FWS and NMFS to determine whether a modification is justified. Any HFRP restoration plan modification must meet HFRP program objectives, and must result in equal or greater wildlife benefits and ecological and economic values to the United States. Modifications to the HFRP restoration plan which are substantial and affect provisions of the easement, contract, restoration cost-share agreement, or Landowner Protections will require agreement from the landowner, FWS or NMFS, as appropriate, and may require execution of an amended easement, contract, and 10-year restoration cost-share agreement and modification to the protections afforded by the safe harbor assurances.

§ 625.15 Transfer of land.

(a) Offers voided prior to enrollment. Any transfer of the property prior to the applicant's acceptance into the program shall void the offer of enrollment. At the option of the State Conservationist, an offer can be extended to the new landowner if the new landowner agrees to the same or more restrictive easement, agreement, and contract terms and conditions.

(b) Actions following transfer of land.

(1) For easements or 30-year contracts with multiple annual payments, any remaining payments will be made to the original landowner unless NRCS receives an assignment of proceeds.

(2) Eligible cost-share payments shall be made to the new landowner upon presentation of an assignment of rights or other evidence that title has passed.

(3) Landowner protections shall be available to the new landowner and the new landowner shall be held responsible for assuring completion of all measures and conservation practices required by the contract, deed, and incidental take permit.

(4) If a SHA or CCAA, is involved, the previous and new landowners may coordinate with FWS or NMFS, as appropriate, to transfer the agreement and associated permits and assurances.

(5) The landowner and NRCS may agree to transfer a 30-year contract. The transferee must be determined by NRCS to be eligible to participate in HFRP and must assume full responsibility under the contract, including operation and maintenance of all conservation practices and measures required by the contract.

(c) Claims to payments. With respect to any and all payments owed to a person, the United States shall bear no responsibility for any full payments or partial distributions of funds between the original landowner and the landowner's successor. In the event of a dispute or claim on the distribution of cost-share payments, NRCS may withhold payments without the accrual of interest pending an agreement or adjudication on the rights to the funds.

§ 625.16 Violations and remedies.

(a) Easement Violations.

(1) In the event of a violation of the easement or any associated agreement involving a landowner, the landowner shall be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as the State Conservationist determines is necessary to correct the violation.

(2) Notwithstanding paragraph (a)(1) of this section, NRCS reserves the right to enter upon the easement area at any time to remedy deficiencies or easement violations. Such entry may be made at the discretion of NRCS when such actions are deemed necessary to protect important listed species, candidate species, and forest ecosystem functions and values or other rights of the United States under the easement. The landowner shall be liable for any costs incurred by the United States as a result of the landowner's negligence or failure to comply with easement or contractual obligations.

(3) In addition to any and all legal and equitable remedies as may be available to the United States under applicable law, NRCS may withhold any easement and cost-share payments owed to landowners at any time there is a material breach of the easement covenants, associated restoration agreement, or any associated contract. Such withheld funds may be used to offset costs incurred by the United States in any remedial actions or retained as damages pursuant to court order or settlement agreement.

(4) The United States shall be entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action.

(b) 30-year Contract and 10-year Cost-Share Agreement Violations.

(1) If the NRCS determines that a participant is in violation of the terms of a 30-year contract, or 10-year cost-share agreement, or documents incorporated by reference into the 30-year contract or 10-year cost-share agreement, the landowner shall be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as the State Conservationist determines is necessary to correct the violation. If the violation continues, the State Conservationist may terminate the 30-year contract or 10-year cost-share agreement.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, a 10-year cost-share agreement or 30-year contract termination is effective immediately upon a determination by the State Conservationist that the participant has: Submitted false information; filed a false claim; engaged in any act for which a finding of ineligibility for payments is permitted under this part; or taken actions NRCS deems to be sufficiently purposeful or negligent to warrant a termination without delay.

(3) If NRCS terminates a 10-year cost-share agreement or 30-year contract, the participant will forfeit all rights for future payments under the 10-year cost-share agreement or 30-year contract, and must refund all or part of the payments received, plus interest, and liquidated damages.

(4) When making any 30-year contract or 10-year cost-share agreement termination decisions, the State Conservationist may provide equitable relief in accordance with 7 CFR part 635.

§ 625.17 Payments not subject to claims.

Any cost-share, contract, or easement payment or portion thereof due any person under this part shall be allowed without regard to any claim or lien in favor of any creditor, except agencies of the United States Government.

§ 625.18 Assignments.

Any person entitled to any cash payment under this program may assign the right to receive such cash payments, in whole or in part.

§ 625.19 Appeals.

(a) A person participating in the HFRP may obtain a review of any administrative determination concerning eligibility for participation utilizing the administrative appeal

regulations provided in 7 CFR parts 11 and 614.

(b) Before a person may seek judicial review of any administrative action concerning eligibility for program participation under this part, the person must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for purposes of judicial review, no decision shall be a final Agency action except a decision of the Chief under these procedures.

(c) Any appraisals, market analysis, or supporting documentation that may be used by NRCS in determining property value are considered confidential information, and shall only be disclosed as determined at the sole discretion of NRCS in accordance with applicable law.

(d) Enforcement actions undertaken by NRCS in furtherance of its federally held property rights are under the jurisdiction of the Federal District Court and are not subject to review under administrative appeal regulations.

§ 625.20 Scheme and device.

(a) If it is determined by NRCS that a person has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid such person during the applicable period may be withheld or be required to be refunded with interest thereon, as determined appropriate by NRCS.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person of payments for 10-year cost share agreements, contracts, or easements for the purpose of obtaining a payment to which a person would otherwise not be entitled.

(c) A person who succeeds to the responsibilities under this part shall report in writing to NRCS any interest of any kind in enrolled land that is held by a predecessor or any lender. A failure of full disclosure will be considered a scheme or device under this section.

Arlen L. Lancaster,

Vice President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 985

[Docket Nos. AMS–FV–08–0104; FV09–985–1 PR]

Marketing Order Regulating the Handling of Spearmint Oil Produced in the Far West; Salable Quantities and Allotment Percentages for the 2009–2010 Marketing Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would establish the quantity of spearmint oil produced in the Far West, by class that handlers may purchase from, or handle for, producers during the 2009–2010 marketing year, which begins on June 1, 2009. This rule invites comments on the establishment of salable quantities and allotment percentages for Class 1 (Scotch) spearmint oil of 842,171 pounds and 42 percent, respectively, and for Class 3 (Native) spearmint oil of 1,196,109 pounds and 53 percent, respectively. The Spearmint Oil Administrative Committee (Committee), the agency responsible for local administration of the marketing order for spearmint oil produced in the Far West, recommended these limitations for the purpose of avoiding extreme fluctuations in supplies and prices to help maintain stability in the spearmint oil market.

DATES: Comments must be received by March 16, 2009.

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

FOR FURTHER INFORMATION CONTACT: Susan M. Coleman, Marketing Specialist or Gary D. Olson, Regional Manager, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (503) 326–2724; Fax: (503) 326–7440; or E-mail: *Sue.Coleman@usda.gov* or *GaryD.Olson@usda.gov.*

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 985 (7 CFR Part 985), as amended, regulating the handling of spearmint oil produced in the Far West (Washington, Idaho, Oregon, and designated parts of Nevada and Utah), hereinafter referred to as the ''order.'' This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, salable quantities and allotment percentages may be established for classes of spearmint oil produced in the Far West. This proposed rule would establish the quantity of spearmint oil produced in the Far West, by class, which may be purchased from or handled for producers by handlers during the 2009–2010 marketing year, which begins on June 1, 2009. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the

United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Pursuant to authority in §§ 985.50, 985.51, and 985.52 of the order, the full eight-member Committee met on October 15, 2008, and recommended salable quantities and allotment percentages for both classes of oil for the 2009–2010 marketing year. The Committee in a vote with six members in favor and two members opposed, recommended the establishment of a salable quantity and allotment percentage for Scotch spearmint oil of 842,171 pounds and 42 percent, respectively. For Native spearmint oil, the Committee unanimously recommended the establishment of a salable quantity and allotment percentage of 1,196,109 pounds and 53 percent, respectively.

This rule would limit the amount of spearmint oil that handlers may purchase from, or handle for, producers during the 2009–2010 marketing year, which begins on June 1, 2009. Salable quantities and allotment percentages have been placed into effect each season since the order's inception in 1980.

The U.S. production of Scotch spearmint oil is concentrated in the Far West, which includes Washington, Idaho, and Oregon and a portion of Nevada and Utah. Scotch spearmint oil is also produced in the Midwest states of Indiana, Michigan, and Wisconsin, as well as in the States of Montana, South Dakota, North Dakota, and Minnesota. However, production in the Midwest states has gone from 200,000 pounds in 2003, down to an estimated 25,000 pounds in 2008. This has increased the percentage of annual U.S. sales of Scotch spearmint oil in the production area covered by the marketing order to approximately 85 percent.

When the order became effective in 1980, the Far West had 72 percent of the world's sales of Scotch spearmint oil. While the Far West is still the leading producer of Scotch spearmint oil, its share of world sales is now estimated to be about 45 percent. This loss in world sales for the Far West region is directly attributed to the increase in global production. Other factors that have played a significant role include the overall quality of the imported oil and technological advances that allow for more blending of lower quality oils. Such factors have provided the Committee with challenges in accurately predicting trade demand for Scotch oil. This, in turn, has made it difficult to balance available supplies with demand and to achieve the Committee's overall goal of stabilizing producer and market prices.

The marketing order has continued to contribute to price and general market stabilization for Far West producers. The Committee, as well as spearmint oil producers and handlers attending the October 15, 2008, meeting, indicated that the 2008–2009 producer price for Scotch oil ranges from a low of $12.00 per pound to a high of $14.00 per pound. Although there is currently some forward contracting being done within this same price range, producers are generally wary of locking in a price because of the significant increases in their cost of production. The $12.00 to $14.00 producer price is generally less than the cost of production for most producers as indicated in a study from the Washington State University Cooperative Extension Service (WSU). In 2001, this study estimated production costs to be between $13.50 and $15.00 per pound. However, recent cost comparisons by the Committee indicate that the major costs of nitrogen, phosphate, sulfur, potash, herbicide, fuel, and rootstock have increased almost 120% since 2001.

Low producer returns have contributed to an overall reduction in acreage planted to Scotch spearmint in recent years. When the order became effective in 1980, the Far West region had 9,702 acres of Scotch spearmint. The Committee estimates that 2008–2009 Scotch spearmint acreage is about 7,435 acres. Based on this amount, the Committee estimates that Scotch spearmint oil production for the 2008–2009 marketing season will be about 841,427 pounds.

The Committee recommended the 2009–2010 Scotch spearmint oil salable quantity of 842,171 pounds and allotment percentage of 42 percent utilizing sales estimates for 2009–2010 Scotch spearmint oil as provided by several of the industry's handlers, as well as historical and current Scotch spearmint oil sales levels. The Committee is estimating that about 850,000 pounds of Scotch spearmint oil, on average, may be sold during the 2009–2010 marketing year. When considered in conjunction with the estimated carry-in of 124,735 pounds of oil on June 1, 2009, the recommended salable quantity of 842,171 pounds results in a total available supply of Scotch spearmint oil next year of about 966,906 pounds.

The recommendation for the 2009–2010 Scotch spearmint oil volume regulation is consistent with the Committee's stated intent of keeping adequate supplies available at all times, while attempting to stabilize prices at a level adequate to sustain the producers. Furthermore, the recommendation takes into consideration the industry's desire to compete with less expensive oil produced outside the regulated area.

Native spearmint oil producers are facing market conditions similar to those affecting the Scotch spearmint oil market. Over 90 percent of the U.S. production of Native spearmint is produced within the Far West production area. Very little pure Native spearmint oil is produced outside of the United States.

The supply and demand characteristics of the current Native spearmint oil market, combined with the stabilizing impact of the marketing order, have kept the price relatively steady. The Committee, as well as spearmint oil producers and handlers attending the October 15, 2008, meeting, estimate that the 2008–2009 Native oil producer price ranges between $11.50 per pound and $13.00 per pound. As with Scotch oil, there is some forward contracting of Native spearmint oil within this price range. The Committee is hopeful that this price range will be sufficient to stimulate additional increases in acreage in 2009, although the magnitude of the increases will likely be tempered by substantial increases in production costs and the availability of attractively priced alternative crops. The WSU study referenced earlier indicates that the cost of producing Native spearmint oil has ranged from $10.26 to $10.92 per pound. However, as stated earlier, this study was completed in 2001 and recent cost comparisons by the Committee indicate that the major costs of nitrogen, phosphate, sulfur, potash, herbicide, fuel, and rootstock have increased almost 120% since 2001.

As with Scotch, however, the relatively low level of producer returns has also caused an overall reduction in Native spearmint acreage. When the order became effective in 1980, the Far West region had 12,153 acres of Native spearmint. The Committee estimates that about 8,513 acres of Native spearmint were planted for the 2008–2009 season. Based on the reduced Native spearmint acreage, the Committee estimates that production for the 2008–2009 marketing season will be about 1,203,754 pounds.

The Committee's recommendation for the 2009–2010 Native spearmint oil salable quantity of 1,196,109 pounds and allotment percentage of 53 percent utilized sales estimates provided by several of the industry's handlers, as well as historical and current Native

spearmint oil sales levels. The Committee is estimating that about 1,250,000 pounds of Native spearmint oil may be sold during the 2009–2010 marketing year (trade demand). When considered in conjunction with the estimated carry-in of 51,363 pounds of oil on June 1, 2009, the recommended salable quantity of 1,196,109 pounds results in a total 2009–2010 available supply of Native spearmint oil of about 1,247,472 pounds.

The Committee's method of calculating the Native spearmint oil salable quantity and allotment percentage continues to primarily utilize information on price and available supply as they are affected by the estimated trade demand. The Committee's stated intent is to make adequate supplies available to meet market needs and improve producer prices.

The Committee believes that the order has contributed extensively to the stabilization of producer prices, which prior to 1980 experienced wide fluctuations from year to year. According to the National Agricultural Statistics Service, for example, the average price paid for both classes of spearmint oil ranged from $4.00 per pound to $11.10 per pound during the period between 1968 and 1980. Prices since the order's inception, the period from 1980 to 2007, have generally stabilized at an average price of $12.69 per pound for Scotch spearmint oil and $9.97 per pound for Native spearmint oil.

The Committee based its recommendation for the proposed salable quantity and allotment percentage for each class of spearmint oil for the 2009–2010 marketing year on the information discussed above, as well as the data outlined below.

(1) Class 1 (Scotch) Spearmint Oil

(A) Estimated carry-in on June 1, 2009—124,735 pounds. This figure is the difference between the revised 2008–2009 marketing year total available supply of 974,735 pounds and the estimated 2008–2009 marketing year trade demand of 850,000 pounds.

(B) Estimated trade demand for the 2009–2010 marketing year—850,000 pounds. This figure is based on input from producers at six Scotch spearmint oil production area meetings held in late September and early October 2008, as well as estimates provided by handlers and other meeting participants at the October 15, 2008, meeting. The average estimated trade demand provided at the six production area meetings is 852,447 pounds, whereas the estimated handler trade demand ranged from 800,000 to 1,000,000 pounds. The average of sales over the last three years is 831,342 pounds.

(C) Salable quantity required in the 2009–2010 marketing year production—725,265 pounds. This figure is the difference between the estimated 2009–2010 marketing year trade demand (850,000 pounds) and the estimated carry-in on June 1, 2009 (124,735 pounds).

(D) Total estimated allotment base for the 2009–2010 marketing year—2,005,168 pounds. This figure represents a one percent increase over the revised 2008–2009 total allotment base. This figure is generally revised each year on June 1 due to producer base being lost due to the bona fide effort production provisions of § 985.53(e). The revision is usually minimal.

(E) Computed allotment percentage—36.2 percent. This percentage is computed by dividing the required salable quantity by the total estimated allotment base.

(F) Recommended allotment percentage—42 percent. This recommendation is based on the Committee's determination that the computed 36.2 percent would not adequately supply the potential 2009–2010 market.

(G) The Committee's recommended salable quantity—842,171 pounds. This figure is the product of the recommended allotment percentage and the total estimated allotment base.

(H) Estimated available supply for the 2009–2010 marketing year—966,906 pounds. This figure is the sum of the 2009–2010 recommended salable quantity (842,171 pounds) and the estimated carry-in on June 1, 2009 (124,735 pounds).

(2) Class 3 (Native) Spearmint Oil

(A) Estimated carry-in on June 1, 2009—51,363 pounds. This figure is the difference between the revised 2008–2009 marketing year total available supply of 1,301,363 pounds and the estimated 2008–2009 marketing year trade demand of 1,250,000 pounds.

(B) Estimated trade demand for the 2009–2010 marketing year—1,250,000 pounds. This figure is based on input from producers at the six Native spearmint oil production area meetings held in late September and early October 2008, as well as estimates provided by handlers and other meeting participants at the October 15, 2008 meeting. The average estimated trade demand provided at the six production area meetings was 1,237,945 pounds, whereas the handler estimate ranged from 1,250,000 pounds to 1,300,000 pounds.

(C) Salable quantity required from the 2009–2010 marketing year production—1,198,637 pounds. This figure is the difference between the estimated 2009–2010 marketing year trade demand (1,250,000 pounds) and the estimated carry-in on June 1, 2009 (51,363 pounds).

(D) Total estimated allotment base for the 2009–2010 marketing year—2,256,810 pounds. This figure represents a one percent increase over the revised 2008–2009 total allotment base. This figure is generally revised each year on June 1 due to producer base being lost due to the bona fide effort production provisions of § 985.53(e). The revision is usually minimal.

(E) Computed allotment percentage—53.1 percent. This percentage is computed by dividing the required salable quantity (1,198,637) by the total estimated allotment base (2,256,810).

(F) Recommended allotment percentage—53 percent. This is the Committee's recommendation based on the computed allotment percentage (53.1 percent), the average of the computed allotment percentage figures from the six production area meetings (52.5 percent), and input from producers and handlers at the October 15, 2008, meeting.

(G) The Committee's recommended salable quantity—1,196,109 pounds. This figure is the product of the recommended allotment percentage (53 percent) and the total estimated allotment base (2,256,810).

(H) Estimated available supply for the 2009–2010 marketing year—1,247,474 pounds. This figure is the sum of the 2009–2010 recommended salable quantity (1,196,109 pounds) and the estimated carry-in on June 1, 2009 (51,363 pounds).

The salable quantity is the total quantity of each class of spearmint oil, which handlers may purchase from, or handle on behalf of producers during a marketing year. Each producer is allotted a share of the salable quantity by applying the allotment percentage to the producer's allotment base for the applicable class of spearmint oil.

The Committee's recommended Scotch and Native spearmint oil salable quantities and allotment percentages of 842,171 pounds and 42 percent, and 1,196,109 pounds and 53 percent, respectively, are based on the Committee's goal of maintaining market stability by avoiding extreme fluctuations in supplies and prices, and the anticipated supply and trade demand during the 2009–2010

marketing year. The proposed salable quantities are not expected to cause a shortage of spearmint oil supplies. Any unanticipated or additional market demand for spearmint oil, which may develop during the marketing year, can be satisfied by an increase in the salable quantities. Both Scotch and Native spearmint oil producers who produce more than their annual allotments during the 2009–2010 marketing year may transfer such excess spearmint oil to a producer with spearmint oil production less than their annual allotment or put it into the reserve pool until November 1, 2009.

This proposed regulation, if adopted, would be similar to regulations issued in prior seasons. Costs to producers and handlers resulting from this rule are expected to be offset by the benefits derived from a stable market and improved returns. In conjunction with the issuance of this proposed rule, USDA has reviewed the Committee's marketing policy statement for the 2009–2010 marketing year. The Committee's marketing policy statement, a requirement whenever the Committee recommends volume regulations, fully meets the intent of § 985.50 of the order. During its discussion of potential 2009–2010 salable quantities and allotment percentages, the Committee considered: (1) The estimated quantity of salable oil of each class held by producers and handlers; (2) the estimated demand for each class of oil; (3) the prospective production of each class of oil; (4) the total of allotment bases of each class of oil for the current marketing year and the estimated total of allotment bases of each class for the ensuing marketing year; (5) the quantity of reserve oil, by class, in storage; (6) producer prices of oil, including prices for each class of oil; and (7) general market conditions for each class of oil, including whether the estimated season average price to producers is likely to exceed parity. Conformity with the USDA's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" has also been reviewed and confirmed.

The establishment of these salable quantities and allotment percentages would allow for anticipated market needs. In determining anticipated market needs, consideration by the Committee was given to historical sales, as well as changes and trends in production and demand. This rule also provides producers with information on the amount of spearmint oil that should be produced for the 2009–2010 season in order to meet anticipated market demand.

Initial Regulatory Flexibility Analysis

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

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

There are eight spearmint oil handlers subject to regulation under the order, and approximately 55 producers of Scotch spearmint oil and approximately 94 producers of Native spearmint oil in the regulated production area. Small agricultural service firms 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.

Based on the SBA's definition of small entities, the Committee estimates that 2 of the 8 handlers regulated by the order could be considered small entities. Most of the handlers are large corporations involved in the international trading of essential oils and the products of essential oils. In addition, the Committee estimates that 18 of the 55 Scotch spearmint oil producers and 24 of the 94 Native spearmint oil producers could be classified as small entities under the SBA definition. Thus, a majority of handlers and producers of Far West spearmint oil may not be classified as small entities.

The Far West spearmint oil industry is characterized by producers whose farming operations generally involve more than one commodity, and whose income from farming operations is not exclusively dependent on the production of spearmint oil. A typical spearmint oil-producing operation has enough acreage for rotation such that the total acreage required to produce the crop is about one-third spearmint and two-thirds rotational crops. Thus, the typical spearmint oil producer has to have considerably more acreage than is planted to spearmint during any given season. Crop rotation is an essential cultural practice in the production of spearmint oil for weed, insect, and disease control. To remain economically viable with the added costs associated with spearmint oil production, most spearmint oil-producing farms fall into the SBA category of large businesses.

Small spearmint oil producers generally are not as extensively diversified as larger ones and as such are more at risk from market fluctuations. Such small producers generally need to market their entire annual allotment and do not have the luxury of having other crops to cushion seasons with poor spearmint oil returns. Conversely, large diversified producers have the potential to endure one or more seasons of poor spearmint oil markets because income from alternate crops could support the operation for a period of time. Being reasonably assured of a stable price and market provides small producing entities with the ability to maintain proper cash flow and to meet annual expenses. Thus, the market and price stability provided by the order potentially benefit the small producer more than such provisions benefit large producers. Even though a majority of handlers and producers of spearmint oil may not be classified as small entities, the volume control feature of this order has small entity orientation.

This proposed rule would establish the quantity of spearmint oil produced in the Far West, by class that handlers may purchase from, or handle for, producers during the 2009–2010 marketing year. The Committee recommended this rule to help maintain stability in the spearmint oil market by avoiding extreme fluctuations in supplies and prices. Establishing quantities to be purchased or handled during the marketing year through volume regulations allows producers to plan their spearmint planting and harvesting to meet expected market needs. The provisions of §§ 985.50, 985.51, and 985.52 of the order authorize this rule.

Instability in the spearmint oil sub-sector of the mint industry is much more likely to originate on the supply side than the demand side. Fluctuations in yield and acreage planted from season-to-season tend to be larger than fluctuations in the amount purchased by buyers. Demand for spearmint oil tends to be relatively stable from year-to-year. The demand for spearmint oil is expected to grow slowly for the foreseeable future because the demand for consumer products that use spearmint oil will likely expand slowly, in line with population growth.

Demand for spearmint oil at the farm level is derived from retail demand for spearmint-flavored products such as chewing gum, toothpaste, and mouthwash. The manufacturers of these

products are by far the largest users of mint oil. However, spearmint flavoring is generally a very minor component of the products in which it is used, so changes in the raw product price have no impact on retail prices for those goods.

Spearmint oil production tends to be cyclical. Years of large production, with demand remaining reasonably stable, have led to periods in which large producer stocks of unsold spearmint oil have depressed producer prices for a number of years. Shortages and high prices may follow in subsequent years, as producers respond to price signals by cutting back production.

The significant variability is illustrated by the fact that the coefficient of variation (a standard measure of variability; ''CV'') of Far West spearmint oil production from 1980 through 2007 was about 0.23. The CV for spearmint oil grower prices was about 0.14, well below the CV for production. This provides an indication of the price stabilizing impact of the marketing order.

Production in the shortest marketing year was about 50 percent of the 28-year average (1.85 million pounds from 1980 through 2007) and the largest crop was approximately 166 percent of the 28-year average. A key consequence is that in years of oversupply and low prices the season average producer price of spearmint oil is below the average cost of production (as measured by the Washington State University Cooperative Extension Service).

The wide fluctuations in supply and prices that result from this cycle, which was even more pronounced before the creation of the marketing order, can create liquidity problems for some producers. The marketing order was designed to reduce the price impacts of the cyclical swings in production. However, producers have been less able to weather these cycles in recent years because of the increase in production costs. While prices have been relatively steady, the cost of production has dramatically increased which has caused a hesitation by producers to plant. Producers are also enticed by the prices of alternative crops and their lower cost of production.

In an effort to stabilize prices, the spearmint oil industry uses the volume control mechanisms authorized under the order. This authority allows the Committee to recommend a salable quantity and allotment percentage for each class of oil for the upcoming marketing year. The salable quantity for each class of oil is the total volume of oil that producers may sell during the marketing year. The allotment percentage for each class of spearmint oil is derived by dividing the salable quantity by the total allotment base.

Each producer is then issued an annual allotment certificate, in pounds, for the applicable class of oil, which is calculated by multiplying the producer's allotment base by the applicable allotment percentage. This is the amount of oil for the applicable class that the producer can sell.

By November 1 of each year, the Committee identifies any oil that individual producers have produced above the volume specified on their annual allotment certificates. This excess oil is placed in a reserve pool administered by the Committee.

There is a reserve pool for each class of oil that may not be sold during the current marketing year unless USDA approves a Committee recommendation to make a portion of the pool available. However, limited quantities of reserve oil are typically sold to fill deficiencies. A deficiency occurs when on-farm production is less than a producer's allotment. In that case, a producer's own reserve oil can be sold to fill that deficiency. Excess production (higher than the producer's allotment) can be sold to fill other producers' deficiencies. All of this needs to take place by November 1.

In any given year, the total available supply of spearmint oil is composed of current production plus carry-over stocks from the previous crop. The Committee seeks to maintain market stability by balancing supply and demand, and to close the marketing year with an appropriate level of carryout. If the industry has production in excess of the salable quantity, then the reserve pool absorbs the surplus quantity of spearmint oil, which goes unsold during that year, unless the oil is needed for unanticipated sales.

Under its provisions, the order may attempt to stabilize prices by (1) limiting supply and establishing reserves in high production years, thus minimizing the price-depressing effect that excess producer stocks have on unsold spearmint oil, and (2) ensuring that stocks are available in short supply years when prices would otherwise increase dramatically. The reserve pool stocks grown in large production years are drawn down in short crop years.

An econometric model was used to assess the impact that volume control has on the prices producers receive for their commodity. Without volume control, spearmint oil markets would likely be over-supplied, resulting in low producer prices and a large volume of oil stored and carried over to the next crop year. The model estimates how much lower producer prices would likely be in the absence of volume controls.

The Committee estimated the trade demand for the 2009–2010 marketing year for both classes of oil at 2,100,000 pounds, and that the expected combined carry-in will be 176,098 pounds. This results in a combined required salable quantity of 1,923,902 pounds. Therefore, with volume control, sales by producers for the 2009–2010 marketing year would be limited to 2,038,280 pounds (the recommended salable quantity for both classes of spearmint oil).

The recommended salable percentages, upon which 2009–2010 producer allotments are based, are 42 percent for Scotch and 53 percent for Native. Without volume controls, producers would not be limited to these allotment levels, and could produce and sell additional spearmint. The econometric model estimated a $1.40 decline in the season average producer price per pound (from both classes of spearmint oil) resulting from the higher quantities that would be produced and marketed without volume control. The surplus situation for the spearmint oil market that would exist without volume controls in 2009–2010 also would likely dampen prospects for improved producer prices in future years because of the buildup in stocks.

The use of volume controls allows the industry to fully supply spearmint oil markets while avoiding the negative consequences of over-supplying these markets. The use of volume controls is believed to have little or no effect on consumer prices of products containing spearmint oil and will not result in fewer retail sales of such products.

The Committee discussed alternatives to the recommendations contained in this rule for both classes of spearmint oil. The Committee discussed and rejected the idea of recommending that there not be any volume regulation for both classes of spearmint oil because of the severe price-depressing effects that would occur without volume control.

The Committee considered various alternative levels of volume control for Scotch spearmint oil, including increasing the percentage to a less restrictive level, or decreasing the percentage. After considerable discussion the Committee unanimously determined that 842,171 pounds and 42 percent would be the most effective salable quantity and allotment percentage, respectively, for the 2009–2010 marketing year.

The Committee also considered various alternative levels of volume control for Native spearmint oil. After

considerable discussion the Committee unanimously determined that 1,196,109 pounds and 53 percent would be the most effective salable quantity and allotment percentage, respectively, for the 2009–2010 marketing year.

As noted earlier, the Committee's recommendation to establish salable quantities and allotment percentages for both classes of spearmint oil was made after careful consideration of all available information, including: (1) The estimated quantity of salable oil of each class held by producers and handlers; (2) the estimated demand for each class of oil; (3) the prospective production of each class of oil; (4) the total of allotment bases of each class of oil for the current marketing year and the estimated total of allotment bases of each class for the ensuing marketing year; (5) the quantity of reserve oil, by class, in storage; (6) producer prices of oil, including prices for each class of oil; and (7) general market conditions for each class of oil, including whether the estimated season average price to producers is likely to exceed parity. Based on its review, the Committee believes that the salable quantity and allotment percentage levels recommended would achieve the objectives sought.

Without any regulations in effect, the Committee believes the industry would return to the pronounced cyclical price patterns that occurred prior to the order, and that prices in 2009–2010 would decline substantially below current levels.

As stated earlier, the Committee believes that the order has contributed extensively to the stabilization of producer prices, which prior to 1980 experienced wide fluctuations from year-to-year. National Agricultural Statistics Service records show that the average price paid for both classes of spearmint oil ranged from $4.00 per pound to $11.10 per pound during the period between 1968 and 1980. Prices have been consistently more stable since the marketing order's inception in 1980, with an average price for the period from 1980 to 2007 of $12.77 per pound for Scotch spearmint oil and $9.98 per pound for Native spearmint oil.

According to the Committee, the recommended salable quantities and allotment percentages are expected to achieve the goals of market and price stability.

As previously stated, annual salable quantities and allotment percentages have been issued for both classes of spearmint oil since the order's inception. Reporting and recordkeeping requirements have remained the same for each year of regulation. These requirements have been approved by the Office of Management and Budget under OMB Control No. 0581–0178, Vegetable and Specialty Crops. Accordingly, this rule would not impose any additional reporting or recordkeeping requirements on either small or large spearmint oil producers and handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

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

In addition, the Committee's meeting was widely publicized throughout the spearmint oil industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the October 15, 2008, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

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

A 60-day comment period is provided to allow interested persons the opportunity to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 985

Marketing agreements, Oils and fats, Reporting and recordkeeping requirements, Spearmint oil.

For the reasons set forth in the preamble, 7 CFR Part 985 is proposed to be amended as follows:

PART 985—MARKETING ORDER REGULATING THE HANDLING OF SPEARMINT OIL PRODUCED IN THE FAR WEST

1. The authority citation for 7 CFR Part 985 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. A new § 985.228 is added to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 985.228 Salable quantities and allotment percentages—2009–2010 marketing year.

The salable quantity and allotment percentage for each class of spearmint oil during the marketing year beginning on June 1, 2009, shall be as follows:

(a) Class 1 (Scotch) oil—a salable quantity of 842,171 pounds and an allotment percentage of 42 percent.

(b) Class 3 (Native) oil—a salable quantity of 1,196,109 pounds and an allotment percentage of 53 percent.

Dated: January 8, 2009.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E9–604 Filed 1–13–09; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1000 and 1033

[AMS–DA–08–0049; AO–166–A77; Docket No. DA–08–06]

Milk in the Mideast Marketing Area; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; recommended decision.

SUMMARY: This decision recommends adoption of a proposal to adjust Class I prices in certain counties of the Mideast Federal milk marketing order. Class I prices are recommended to be unchanged in 193 counties within the marketing area and to be increased by up to $0.20 per hundredweight in 110 counties in the southern portion of the marketing area. The original hearing proposal to adjust Class I prices is recommended for adoption, except it is modified to recommend a $0.20 increase in the Class I price at Charleston, West Virginia.

DATES: Comments must be submitted on or before March 16, 2009.

ADDRESSES: All comments received will be posted without change, including any personal information provided. Comments (six copies) should be filed with the Hearing Clerk, United States Department of Agriculture, STOP 9200–Room 1031, 1400 Independence Avenue, SW., Washington, DC, 20250–1031. You may send your comments by the electronic process available at the Federal eRulemaking portal: *http://www.regulations.gov.* Reference should be made to the title of the action and docket number.

FOR FURTHER INFORMATION CONTACT: Erin C. Taylor, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231–Room 2963, 1400 Independence Ave., SW., Washington, DC 20250–0231, (202) 720–7183, e-mail address: *erin.taylor@usda.gov.*

SUPPLEMENTARY INFORMATION: This decision recommends adoption of amendments that would adjust the Class I pricing surface in certain counties within the geographical marketing area of the Mideast milk marketing order.

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674) (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 request modification or exemption from such order by filing 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 the law. A handler is afforded the opportunity for a hearing on the petition. After a 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 its principal place of business, has jurisdiction in equity to review USDA's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities.

For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farms. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During August 2008, the time of the hearing, there were 7,376 dairy farms pooled on the Mideast order. Of these, approximately 6,927 dairy farms (or 93.9 percent) were considered small businesses.

During August 2008, there were 53 handler operations associated with the Mideast order (27 fully regulated handlers, 9 partially regulated handlers, 2 producer-handlers and 15 exempt handlers). Of these, approximately 43 handlers (or 81 percent) were considered small businesses.

Minimum Class I prices are determined in all Federal milk marketing orders by adding a location specific differential, referred to as a ''Class I differential,'' to the higher of an advance Class III and Class IV price announced by USDA. The amendments recommended for adoption in this decision provide for adjusting Class I prices for certain counties within the geographic boundaries of the Mideast marketing area. Minimum Class I prices charged to regulated handlers are applied uniformly to both large and small entities. Class I price increases would generate a higher marketwide pool value in the Mideast order by approximately $280,000 to $300,000 per month. Therefore, the proposed Class I price adjustments will not have a significant economic impact on a substantial number of small entities.

The Agricultural Marketing Service (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 review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This recommended decision does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the approved forms are routinely used in most business transactions. The forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Interested parties were invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities.

Prior Documents in This Proceeding

Notice of Hearing: Issued July 21, 2008; published July 24, 3008 (73 FR 43160).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Mideast marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

Interested parties may file written exceptions to this decision with the

Hearing Clerk, U.S. Department of Agriculture, STOP 9200–Room 1031, 1400 Independence Ave., SW., Washington DC 20250–9200, by March 16, 2009. Six copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the Office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)). The hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. Some evidence was received that specifically addressed these issues and some of the evidence encompassed entities of various sizes.

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the Mideast marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The proposed amendments set forth below are based on the record of a public hearing held in Cincinnati, Ohio, pursuant to a notice of hearing issued July 21, 2008.

The material issues on the record of hearing relate to:

1. Class I Prices—Adjustments and Pricing Surface

Findings and Conclusions

This decision recommends adoption of a proposal, published in the hearing notice as Proposal 1, with one modification. The proposal would increase Class I prices in 110 of 303 counties within the Mideast marketing area. The minimum Class I prices of the Mideast order are determined by adding a location-specific differential, referred to as a Class I differential, to the higher of an advance Class III or Class IV price announced by USDA. Class I differentials are location-specific by county and parish for all States of the 48 contiguous United States. Class I differentials for the Mideast order are specified in 7 CFR 1000.52.

A witness appeared on behalf of the proponents of Proposal 1, Dairy Farmers of America, Michigan Milk Producers, Inc., Foremost Farms USA Cooperative, Inc., Dairylea Cooperative, Inc., and National Farmers Organization, Inc., hereinafter referred to as ''DFA, *et al.*,'' in support of increasing Class I prices in the southern tier of the Mideast milk marketing area. All of these organizations are Capper-Volstead cooperatives. According to the witness, DFA, *et al.*, markets the majority of the milk that is pooled and priced under the terms of the Mideast marketing order. The witness testified that DFA, *et al.*, members market milk in the Mideast marketing area through MEMMA. The witness described MEMMA as a common marketing agency that shares customer orders, milk availability, balancing capacity and other information to provide for the efficient assembly and transportation of milk. The witness stated that DFA, *et al.*, are supporters of Federal milk marketing orders and emphasized that the economic livelihood of dairy farmers would be diminished in their absence.

The DFA, *et al.*, witness testified that recent changes to the Class I price surface and transportation credit provisions in the Appalachian, Southeast and Florida marketing orders [1] (southeastern orders) have caused difficulties in supplying fluid milk processing plants in the southern tier of the Mideast marketing area. The witness testified that those changes increase the blend prices received by farmers whose milk is pooled on the southeastern orders and also provide more money to offset transportation costs of supplemental milk delivered to southeastern plants. The witness testified that these combined changes to the southeastern orders attract milk away from Mideast order fluid milk plants and justify the need for a temporary increase in the Class I price surface in the southern tier of the marketing area.

The DFA, *et al.*, witness testified regarding the need for making regional, temporary changes to the Class I price surface. The witness testified that adequate data do not currently exist to revise the Class I price surface on a national basis, and that the problem in the Mideast order should be addressed now. The witness noted that Proposal 1 should be considered a temporary adjustment that may be changed in the future if a national hearing should occur.

The DFA, *et al.*, witness asserted that the purpose of Class I differentials are to generate adequate revenue to assure that the fluid milk market is adequately supplied. The witness testified that increases in transportation costs combined with recent changes affecting Class I prices to the southeastern orders have made it more difficult to service Mideast fluid milk plants. Therefore, the witness concluded, a temporary increase in the Class I prices in the southern tier of the Mideast marketing area is warranted.

[1] See Tentative Partial Decision, Published February 29, 2008 (73 FR 11194).

The DFA, *et al.*, witness relied on data prepared by the Market Administrator to compare the volume of milk produced within the marketing area boundaries with the volume of milk actually pooled on the Mideast order. The data revealed total milk production by state and county that is either: Pooled on the Mideast order; usually associated with but not pooled on the order during the specified month; or pooled on another Federal order. The witness was of the opinion that milk produced within the boundaries of the Mideast marketing area but not pooled on the Mideast order can be assumed to have been marketed elsewhere for a higher return. The witness concluded from these data that the milk supply for the Mideast marketing area is concentrated in the central to northern regions of the marketing area.

The DFA, *et al.*, witness described the analysis used to examine the milk supply and demand situation in the Mideast marketing area. The witness explained how they divided the Mideast marketing area into northeast, northwest and southern regions. DFA, *et al.*, then requested that the Market Administrator calculate summary statistics for each region for January, April, August and November of 2007, and January and April of 2008.

The DFA, *et al.*, witness reviewed market administrator data that they had requested prior to the hearing that showed: (1) The volume of milk produced on farms located in the defined supply regions either pooled on the Mideast order or pooled on another Federal order and delivered to a pool distributing plant in the defined supply region; (2) The pounds of bulk milk physically received at distributing plants located in the defined supply regions; (3) The net of the two figures to demonstrate a milk deficit or surplus situation in each of the three regions; and (4) The hauling distances of producer milk to distributing plants within each of the three regions.

The DFA, *et al.*, witness described the northwest region of the marketing area as Michigan, northern Indiana and northwest Ohio. According to the witness, the northwest area has the largest volume of milk production and the largest volume of Class I demand when compared to the other two areas, while also being subject to the two lowest valued Class I differential zones in the Mideast marketing area. The witness characterized the northwest region as the reserve supply region for the Mideast marketing area since milk

production is greater than fluid milk demand and milk is frequently transported from this region into the other two regions. The witness said that the data indicated that the average hauling distance for milk delivered to distributing plants in the northwest region is 72 miles.

The DFA, *et al.*, witness described the northeast region of the Mideast marketing area as the northeastern half of Ohio and the western portion of Pennsylvania. The witness testified that the northeast region is also an area where milk production exceeds fluid milk demand and that the average hauling distance for milk delivered to distributing plants in the region is 70 miles.

The DFA, *et al.*, witness described the southern region of the marketing area as the southern portion of Indiana, southern portion of Ohio, northeast portion of Kentucky and the western half of West Virginia. The witness testified that, on average, the local milk supply for this region meets only 60 percent of fluid milk demand, making it the only deficit region of the marketing area. The southern region of the marketing area absorbs all of the local milk supply that is not attracted to the Appalachian or Southeast orders and relies on milk supplies from the northern tier of the marketing area to balance fluid milk needs, the witness said. The witness noted that the average hauling distance of milk delivered to distributing plants in the region is 133 miles, which in the witness' opinion represents milk produced outside the region being delivered to plants within the region. The witness added that the average hauling distance in this region is over 60 miles further than in the other two regions.

The DFA, *et al.*, witness, relying on Market Administrator data, detailed the competition for milk supplies from non-pool plants within the marketing area. The witness concluded from the data that there are a significant number of non-pool manufacturing plants located near the reserve supply regions of the marketing area. The witness was of the opinion that the Class I prices in the southern tier of the marketing area should be increased to attract milk away from these manufacturing operations for higher-valued fluid use by compensating farmers for the higher transportation costs they incur to service these fluid plants.

The DFA, *et al.*, witness testified that Class I differentials have only been modified twice in the past 23 years, once as a result of the 1985 Farm Bill, and another as a result of Federal order reform in 2000. The witness noted that the changes made to the Class I price surface during Federal order reform in 2000 were based on data from the mid-1990's. The witness said that there have been significant changes in marketing conditions since then, notably the number of dairy farms, the increase in size of existing dairy farms, population increases in the southern region of the Mideast marketing area and a shift in milk production to the northern region of the marketing area. The witness was of the opinion that the Class I price surface currently in place in the Mideast marketing area is too ''flat,'' and does not encourage the movement of milk from the supply region in the north to deficit regions in the south. The witness noted that the difference in Class I differentials between southern Michigan and Cincinnati, Ohio, for example, is $0.40, which according to the DFA, *et al.*, calculation represents only 26 percent of the actual transportation cost that a milk hauler would incur.

The DFA, *et al.*, witness relied on two methodologies to illustrate the inadequacies of the Class I price surface in the southern tier of the Mideast marketing area. The witness said that the first method examined milk transportation data provided by MEMMA, and the second method paralleled the methodology relied on to implement the adjustments to Class I prices in the southeastern orders. The witness used Market Administrator data to select eleven high milk production counties that, according to the witness, represent ''reserve'' supply areas for the Mideast market.

The DFA, *et al.*, witness described the MEMMA methodology used to determine the differences between actual transportation costs and Class I differential levels. The witness first presented diesel fuel cost data from the Energy Information Agency (EIA) that showed recent increases in fuel costs, with an average fuel cost of $4.52 a gallon from the beginning of 2008 until the time of the hearing (August 2008). The witness described how fuel costs are used to determine milk hauling costs and testified that MEMMA utilizes a $2.20 base hauling rate plus a monthly fuel surcharge to calculate total hauling rates. The witness relied on a 47 percent fuel surcharge for this calculation which is, according to the witness, MEMMA's average surcharge from the beginning of the year to the time of the hearing. The witness said that this results in a hauling rate of $3.23 per loaded mile, or $1.59 per cwt for the 235 mile haul from Clinton County, Michigan, (reserve area) to Eastside Dairy in Anderson, Indiana (deficit area).

The DFA, *et al.*, witness then calculated the net dollars provided by the differences in the Class I differentials to offset transportation costs between the eleven reserve counties they had previously selected and the ten fluid plants located in the deficit southern region. For example, the differences in the Class I differential levels would provide $0.20 per cwt to offset the transportation cost of the haul from Clinton County, Michigan, to Eastside Dairy in Anderson, Indiana. The witness used these data to determine the portion of transportation costs that are not covered by the differences in the Class I differential levels. For all of the supply counties and plant locations, the average shortfall was $1.76 per cwt, noted the witness. Accordingly, the witness concluded from the MEMMA methodology that the current Class I differential levels in the southern region of the Mideast marketing area are inadequate.

The DFA, *et al.*, witness then examined the methodology used to determine temporary increases in the Class I prices in the southeastern marketing orders to formulate the proposed Class I price adjustments in the southern tier of the Mideast marketing area. The witness noted that the basic foundation for deriving the temporary adjustments to the Class I price surface in the southeastern orders was the identification of potential supply areas. Once identified, the areas were relied upon to calculate the least-cost Class I price adjustment based on the farthest point of milk demand.

The DFA, *et al.*, witness testified that this methodology utilized the same diesel fuel rate from the EIA as was used in the previously discussed MEMMA example. Using the same methodology as in the proceeding for the southeastern orders, the witness determined a base period for fuel costs (May–June 2003), determined the increase in costs from the base period to the present and determined the fuel cost adjustor ($0.44) to be added to the $2.20 MEMMA base haul rate. This rate was divided by the 480 cwt of milk in a typical tanker load to determine that rate per cwt per mile of $0.00521. This rate was then used to compare the costs of alternative reserve supplies for the three regions of the Mideast marketing area.

The DFA, *et al.*, witness further explained that they relied on the methodology previously used to formulate the Class I price adjustments in their proposal. The witness offered the methodology used in the southeastern Class I pricing. The witness noted that the record of the southeastern proceeding identified five

potential alternative supply points surrounding the southeastern region of the country that could potentially supply the Miami market. The witness testified that the distances between the supply points and the demand point were multiplied by the mileage rate (described in the prior paragraph), and was further reduced by 20 percent to avoid having minimum prices set at actual transportation costs. The adjusted haul rate was then added to the current Class I differential for the supply point, yielding an ''acquisition cost'' as described by the witness. The witness explained that the difference between the acquisition cost and the actual Class I differential were used to suggest a reasonable temporary adjustment to Class I prices.

The DFA, *et al.*, witness testified that this methodology was repeated for six plants in the southern tier of the Mideast marketing area. The six plant locations were Indianapolis, IN, Marietta, OH, Newark, OH, Cincinnati, OH, Springfield, OH, and Charleston, WV. The witness stated that these plant locations represent the geographic spread of plants within the southern tier of the marketing area. DFA, *et al.*, then chose six potential supply points from the eleven previously determined counties which serve as the reserve supply of the order. The witness testified that for Indianapolis, IN, Elkhart County, IN, the least-cost alternative, was $2.55 per cwt. As compared to the current differential of $2.00, the $2.55 per cwt figure suggested an adjustment of $0.55 per cwt. The witness conducted the same least-cost alternative comparison for each of the five other plant locations.

The DFA, *et al.*, witness summarized the above conclusions in the context of the existing Class I differential levels and Class I price adjustments. The witness testified that under Proposal 1 the plants in the current $2.00 differential zone would be in a newly proposed zone that has a 15-cwt Class I price adjustment which should not substantially change existing competitive relationships. Similarly, noted the witness, plants in the current $2.20 differential zone, except the United Dairy plant in Charleston, WV, would be in a newly proposed zone that has a 40-cent Class I price adjustment. The witness explained how the location of the United Dairy plant in Charleston, WV, justified a greater adjustment to the Class I price than any other plant in the southern tier of the marketing area because of its distance from reserve supplies. Accordingly, DFA *et al.*, proposed that a $0.40 adjustment (increase) in the Class I price at Charleston, WV, will better align with the Class I prices applicable to their nearest three competitors, Dean Foods, Louisville, KY; Winchester Farms Dairy, Winchester, KY; and Flav-O-Rich Inc., London, KY. The witness noted that these competitor's Class I price levels include the $0.15 transportation credit balancing fund assessment for supplemental milk needed for Class I use that is administered in the Appalachian order.

The DFA, *et al.*, witness explained how they analyzed the cost of moving packaged milk between reserve supply locations and distributing plants (demand points) in the southern tier of the marketing area to gauge the expected impacts on the competitive relationships between handlers in the southern tier of the Mideast marketing area. The witness testified that although they do expect the competitive relationships between handlers to be affected by the proposed adjustment in Class I prices, they did not find any instance wherein the proposed changes exceeded the cost of moving packaged milk between handlers. The witness explained that by calculating the total acquisition and distribution costs for each supply and demand combination as the Class I differential at the supply location plus the cost of moving the packaged milk to the demand location, they found no instances where the cost of acquiring and moving packaged milk exceeded the proposed Class I price levels. Therefore, the witness concluded, the proposed Class I price adjustments are reasonable because they do not provide an incentive for uneconomic movements of milk.

The DFA, *et al.*, witness withdrew the proponents' original contention that emergency conditions exist to warrant the omission of a recommended decision, contingent, the witness said, on this proceeding adhering to the deadlines established by the 2008 Farm Bill. The witness was of the opinion that a recommended decision issued within 90 days of the close of the hearing would be reasonable.

A post-hearing brief filed by DFA, *et al.*, reiterated their testimony describing the market conditions for fluid milk in the Mideast marketing area. The brief reasserted proponent's claims that: the southern region of the marketing area is a deficit market; that the Class I differentials are too low to cover the costs of transporting an adequate supply of milk from the surplus northern regions to distributing plants in the southern region; and that, recent changes to the Class I prices in the southeastern orders has made it difficult for local distributing plants in the southern region of the Mideast marketing area to attract and maintain an adequate supply of fluid milk.

The DFA, *et al.*, brief addressed opposition that existing price relationships between plants should not be disturbed by adjusting Class I prices. DFA, *et al.*, wrote that the record shows that costs of supplying fluid plants have increased and the Class I price adjustments for plants in the southeastern orders has changed such that the competitive relationships between plants has already been altered. DFA, *et al.*, also asserted that the opponents to their proposal claiming that the Class I price surface should be changed via a national hearing is, in actuality, an attempt aimed at stalling any increase in their regulated minimum prices. In this regard, DFA, *et al.*, wrote that the proposed Class I price adjustments are justified by local supply and demand conditions.

The DFA, *et al.*, brief also expressed opposition to Dean's proposal of decreasing Class I differentials in the northern regions of the marketing area (to be discussed later in this decision). DFA, *et al.*, found fault with Deans' premise that the appropriate remedy to the increased cost of supplying plants in the southern region of the marketing area is to lower prices paid to dairy farmers in the northern regions.

A witness testifying on behalf of United Dairy, Inc. (United Dairy) opposed the adoption of Proposal 1. United Dairy operates three fluid milk processing plants in the Mideast marketing area. The witness was of the opinion that Proposal 1 singles out the United Dairy plant in Charleston, WV, for an unnecessarily large increase in its Class I price of $0.40 per cwt. The witness said that such a large increase would put the Charleston plant at a competitive disadvantage to its primary competitor, the Dean Foods' Broughton Foods plant in Marietta, OH, located 85 miles to the north.

The United Dairy witness explained that the Charleston, WV, plant is located in the $2.20 differential zone (the same as Cincinnati, OH), while the Marietta, OH, plant is located in the $2.00 differential zone. Proposal 1 seeks to increase the Class I price at the Marietta, OH, plant by $0.15, while it proposes a $0.40 Class I price increase for the Charleston, WV, plant, stated the witness. The witness highlighted that the Charleston plant would be the only regulated distributing plant in essentially a new price zone. The witness said that despite already paying a higher regulated milk price because of the difference in Class I differentials ($2.20 versus $2.00), the Charleston,

WV, plant has been able to compete for sales with the Marietta, OH, plant. However, if Proposal 1 is adopted, the witness explained, the Charleston, WV, plant will be subject to a $0.45 cost disadvantage relative to their Marietta, OH, plant competitor.

The United Dairy witness testified that despite proponent claims that the Charleston, WV, plant is the hardest plant in the marketing area to service, United Dairy has had no difficulty in attracting an adequate milk supply to meet its demand. The witness also countered proponent claims that it is difficult to attract milk supplies to the southern region of the marketing area. The witness said that MEMMA supplies most of the plants in the region, and is therefore able to shift its farm routes between customers to meet demand.

The United Dairy witness estimated that a 40-cent increase in its Class I price equates to a 3.5 cent increase per gallon of milk they produce. The witness asserted that competition for sales between plants can be won, or lost, over pennies. An increase of 3.5-cents per gallon would place the Charleston plant at a severe disadvantage and most likely result in lost sales, concluded the witness. While seeing no need to increase in the Class I price, the witness said that any increase found needed by USDA should assure that the competitive relationship between the Charleston, WV, and Marietta, OH, plants be maintained.

A post-hearing brief filed on behalf of United Dairy faulted DFA, et al's., reasoning for increasing the Class I prices in the Mideast marketing area as being tied to recent changes to the Class I prices in the three southeastern orders. United Dairy stated that the changes in the southeastern orders were made because the chronic milk deficit situation in those orders necessitated higher Class I prices aimed at attracting milk from states such as Ohio and Michigan to supply those fluid plants. United Dairy asserted that increasing Class I prices in the southern tier of the Mideast marketing area would undermine the steps taken in the southeastern orders to alleviate the milk supply problem.

United Dairy also argued in brief that proponents did not demonstrate that plants in the southern tier of the Mideast market are having difficulties attracting an adequate supply of fluid milk. United Dairy claimed that at the time of the hearing there was no data available to support the proponents claim because the changes in the southeastern orders did not become effective until May 1, 2008, and data from that month had not yet been released. Regardless, United Dairy asserted that the states comprising the Mideast order have experienced an increase in milk production while Class I demand has decreased 8.8 percent January 1, 2000.

United Dairy's brief reiterated testimony that its Charleston, WV, plant has not had difficulty acquiring an adequate milk supply. The brief stated that the Charleston, WV, plant provides a market outlet for independent producers in the Mideast order, and serves a vital role in supplying milk to school and rural customers in West Virginia. United Dairy wrote that increasing the Class I price of that plant by $0.40 would put it at a competitive disadvantage to plants located in areas where Class I prices are not also increased by $0.40. Lastly, United Dairy argued that emergency conditions that would warrant the omission of a recommend decision do not exist.

An Ohio dairy farmer supplier of United Dairy testified in opposition to Proposal 1. The witness agreed with proponent testimony that transportation costs have increased, but said that adjusting Class I prices could financially harm certain plants. The witness stated that it is important for plants to remain viable so that farmers have numerous market outlets for their milk.

The witness testified that their farm supplies the United Dairy plant in Martins Ferry, OH. The witness said that out of a total $0.92 per cwt that the milk hauler charges, they pay $0.82 and United Dairy pays $0.10. The witness disagreed with the methodology used by proponents in determining the proposed Class I price adjustments because, in the witness' opinion, the proposed adjustments are not equitable across distributing plants.

A witness testifying on behalf of The Kroger Company Manufacturing Group (Kroger) opposed the adoption of Proposal 1. According to the witness, Kroger operates three fluid distributing plants regulated by the Mideast order. The witness testified that two Kroger plants, Crossroad Farms Dairy located in Indianapolis, Indiana, and Tamarack Farms Dairy located in Newark, Ohio, are located in the pricing zones that would be increased if Proposal 1 was adopted. The witness testified that Kroger pays its suppliers over-order premiums and fuel surcharges which have increased recently due to higher fuel costs. The witness indicated that none of their suppliers have indicated problems in supplying any Kroger plants. The witness said that if Proposal 1 is adopted the Class I prices at both Kroger plants would increase by $0.15 per cwt.

The Kroger witness asserted that the proposed Class I price adjustments would alter plant price relationships that date back to the 1985 Farm Bill. These proposed differentials would place the Kroger plants in a difficult competitive situation, the witness said. According to the witness, the Kroger plants compete for sales with plants located to the north that, under Proposal 1, would not see a price adjustment.

The Kroger witness argued that much of the milk produced in the Mideast marketing area is actually committed to supplying plants located in the deficit southeastern orders. The witness concluded that if the southern region of the Mideast marketing area was really a deficit market, as the proponents purport, then much of the milk that currently goes south would instead stay in the Mideast marketing area. The witness was of the opinion that current milk supplies in the Mideast are more than adequate to meet demand rendering an increase in Class I prices unnecessary.

The Kroger witness indicated that, in the future, if the southern region of the marketing area has problems acquiring a milk supply, then a hearing to consider the promulgation of a new order in the southern region should be held. The witness stated that if such a new order was created then the monies generated within the new order would only be shared amongst producers serving that market, instead of being shared with all the producers in the Mideast market through the blend price. The witness also noted that emergency conditions do not exist to warrant exclusion of a recommended decision.

A witness testifying on behalf of Dean Foods (Dean) opposed the adoption of Proposal 1. According to the witness, Dean owns and operates eleven distributing plants regulated by the Mideast milk marketing order. The witness' testimony regarding the opposition to Proposal 1 was supported by Prairie Farms. The witness said that if Proposal 1 is adopted, three of the eleven Dean plants would see an increase in their Class I price.

The Dean witness was of the opinion that this rulemaking proceeding is the result of regulatory changes made to the Class I prices in the southeastern orders effective May 1, 2008. The witness stated that the Class I pricing changes in those orders and the proposed changes in the Mideast order essentially run counter to USDA's policy of a nationally coordinated Class I price surface. The witness reviewed the nine key criteria used by USDA in establishing the nationally coordinated Class I price surface (effective January 1, 2000), in

the context of the changes proposed in this rulemaking proceeding. The witness was of the opinion that the proposed increases would send inappropriate market signals to farmers to produce more milk despite the overall milk surplus observed in the Mideast order. The witness said that adjusting Class I prices not only changes the value of milk at that location, but it also changes the relative value of that milk at other locations, as was the case in the southeastern orders. The witness insisted that this underscores the importance of a nationally coordinated Class I price surface. In keeping with this rationale, the witness claimed that adjustments to Class I prices on an order-by-order basis would lead to disorderly marketing conditions.

The Dean witness noted that the proposed Class I price increases could lead to increased payouts from the Southeast and Appalachian transportation credit funds which use the differential in the county where milk is produced to compute the payout. The witness said that this would lead the transportation credit funds to be drawn down faster than otherwise would occur. On cross examination the witness admitted that the Southeast and Appalachian order transportation credit funds would only be drawn down faster if milk produced in the southern region of the Mideast order was pooled in the Southeast or Appalachian orders on a seasonal basis.

The Dean witness was of the opinion that it is too soon to tell if Class I price adjustments in the southeastern markets has provided handler equity in regards to raw product costs. Until the effect on handler equity can be determined in the Southeast, there should be no changes in the Class I prices in the Mideast, the witness said. The witness also stated that higher Class I prices will alter the competitive structure in the region and negatively affect handlers in the Mideast.

The Dean witness argued that the proposed Class I price increases would provide more incentive than is necessary to encourage milk to move into the southern region of the marketing area. The witness also objected to the proponent's attempt to divide the Mideast market into three regions. The witness said that the data are insufficient to determine whether the regions as proposed by proponents are accurate depictions of three separate regions within the marketing area.

The Dean witness was of the opinion that the marketing conditions in the Mideast order are different than the marketing conditions in the southeastern orders. Therefore, the witness said, USDA should consider a different approach to solving the problem in the Mideast marketing area. The witness stated that the easiest way to solve the milk supply issues of the Mideast would be for the USDA to reverse the decision to increase Class I prices in the southeastern orders and then deny the adoption of Proposal 1. Alternatively, the witness said that USDA could suspend the current hearing until such time as more data capable of documenting the impact southeastern order changes have had on Mideast milk movements becomes available. Alternative proposals, including those seeking to divide the marketing area into three separate orders, could then be made, the witness said. The witness then offered data that purported to reveal the marketwide pools that would result, if the Mideast order were divided into three separate marketing orders.

The Dean witness offered an alternative proposal at the hearing to lower the Class I differentials (and thus Class I prices) in the northern regions of the Mideast marketing area. The witness said that proponents have relied on Class I differential relationships between the northern surplus area and the southern deficit area to justify the proposed Class I price adjustments (increases). The witness insisted that decreasing the differentials in the north would also provide market signals to encourage milk to move from north to south. The witness proposed that the Class I prices in the northern surplus regions of the Mideast marketing area be decreased by anywhere between $0.05 to $0.15 per cwt.

The Dean witness stated that emergency conditions warranting the omission of a recommended decision do not exist.

Another Dean witness testified in opposition to the adoption of Proposal 1. The witness said that data provided by the proponents demonstrate that the milk supply in the Mideast marketing area is, on the whole, sufficient to meet in-area demand. The problem, the witness said, is the lack of incentives to move milk into the southern deficit region. From these data, the witness concluded that the defined marketing area is too large for marketwide pooling to properly function because Class I revenues from the south are being shared with all producers in the marketing area and diluting the incentives to supply plants in the deficit region.

The Dean witness was of the opinion that blend price differences between marketing orders encourages milk movements to deficit areas. The witness insisted that the proponent's data supports the theory that there should be three separate orders within the Mideast marketing area. The witness argued that if a separate order were in place for the southern region of the Mideast marketing area, the Class I utilization would be higher than that of the existing marketing area. The witness concluded that separate orders would generate blend price differences large enough to encourage milk to move south without the need for higher Class I prices.

A witness testifying on behalf of National Dairy Holdings (NDH) also opposed the adoption of Proposal 1. According to the witness, NDH is a fluid processor that owns and operates two distributing plants regulated by the Mideast order. The witness said that Meyer Dairy is the only fluid distributing plant owned and operated by National Dairy Holdings (NDH) that would be affected by the proposed Class I price increases. The witness stated that Meyer Dairy has not experienced any difficulty in acquiring a milk supply. If USDA determines that additional incentives are necessary to move milk to the southern region of the Mideast marketing area, then the witness is supportive of Dean's alternative proposal to lower Class I differentials in the northern region of the marketing area. The witness was of the opinion that the same desired results could be obtained by lowering differentials in the northern region of the marketing area thus making the price relationships more attractive so as to move milk south.

The NDH witness estimated that adoption of Proposal 1 would increase their milk costs anywhere from 2 cents to 3.5 cents per gallon relative to their competitors. However, the witness said that some of their competitors would also see an increase in their Class I differentials, albeit at a lesser amount than Meyer Dairy. The witness speculated that the proposed cost increases could result in lost contracts.

The NDH witness concurred with proponents that fuel and transportation costs have increased since the current Class I price surface became effective on January 1, 2000, and that one way of combating the resulting milk supply problem is to increase Class I prices in the deficit markets. However, the witness argued that the best solution would be to lower differentials in the north so that the new price relationship would encourage milk to service the deficit south. According to the witness, this change would provide the same result as Proposal 1, but without raising costs to consumers. The witness purported that checkout scanner data

from retail stores show a correlation between the Class I price increases in the southeastern orders and a reduction in fluid milk sales. During the months of June and July 2008, fluid milk sales in Atlanta and Miami were down 8.5 percent and 7.9 percent, respectively, relative to the same period in 2007.

A post-hearing brief submitted on behalf of Dean, National Dairy Holdings and Prairie Farms, hereinafter referred to as ''opponents brief,'' expressed continued opposition to the adoption of Proposal 1. The brief explained that proponents provided little evidence to prove that recent changes to Class I prices in the southeastern orders have made obtaining an adequate milk supply difficult for fluid plants located in the southern tier of the Mideast order. The brief noted that since the changes in the southeastern orders did not become effective until May 1, 2008, complete data capable of accounting for the impacts of the changes has yet to be compiled and published by the Market Administrator offices. To counter proponents claim that more milk is moving into the southeastern orders, the opponents brief cited Dairy Market News Statistics showing that, for the week ending on October 10, 2008, fewer loads of milk were shipped into Florida and other southeastern States than in the same week in 2007.

The opponents brief also argued that proponents attempt to divide the Mideast marketing area into three sub-regions resulted in arbitrary data. Opponents claimed that in defining the available milk supply for any of the three sub-regions, proponents did not take into account what milk was actually available and whether other near-by milk supplies were available.

The opponent's brief stated that the Mideast marketing area as a whole is a reserve supply of milk for the southeastern orders. It contended that the purpose of nationally coordinated Class I price surface is to bring forth an adequate supply of milk, therefore there is no justification for increasing Class I prices in reserve supply areas such as the Mideast. The brief further argued that increasing the Class I prices in the southern tier of the Mideast marketing area would cause disorderly marketing conditions because milk that is ineligible for transportation credits in the southeastern orders would seek to move to the higher priced zones in the Mideast marketing area. However, the opponents brief disagreed with the DFA, et al.'s, use of transportation credits in the Appalachian and Southeast orders as a factor in determining appropriate Class I price adjustments. Opponents stated that transportation credits serve a different economic purpose and should not be a factor in considering if Class I prices should be increased in the Mideast.

The opponents brief also argued that Class I prices should be addressed on a national, not order-by-order basis, as was done in the southeastern orders and as is proposed in the Mideast. According to Dean, the proponents provided no justification to abandon past USDA precedent for maintaining a nationally coordinated Class I price structure.

The opponents brief summarized the alternative proposal they offered at the hearing to decrease Class I differentials in the northern surplus areas of the Mideast marketing area. (Prairie Farms did not offer support of Dean's alternative proposal.) In brief, Dean wrote that in areas of milk surplus, the correct market signal to farmers is a lower price to encourage them to produce less. Dean concluded that the subsequent decrease in production would, in turn, lead to an increase in milk prices.

In brief, opponents continued to argue that proponents provided no evidence demonstrating an emergency situation that would warrant omission of a recommended decision. The brief stated that the significant period of time between when the proponents first requested data for a Mideast Class I price surface hearing (September 2007) and their actual hearing request (June 2008) demonstrates that no emergency exists. Therefore, Dean wrote, the public should be provided an opportunity to comment on USDA's decision before implementation of any proposed changes.

A witness appearing on behalf of Nestle USA (Nestle) testified in opposition to Proposal 1. According to the witness, Nestle is a milk manufacturer who operates one fluid distributing plant regulated by the Mideast order which is located in Anderson, IN, where the proponents have proposed a $0.15 adjustment in the Class I price. The witness said that Nestle's milk supplier has not indicated any difficulty supplying milk to the Nestle plant. The witness stated that the Nestle plant only recently opened, but when Nestle was originally considering a location for the plant they were approached by multiple suppliers in the Mideast marketing area, all of whom indicated that providing a reliable milk supply to the plant in Anderson, IN, would not be difficult.

The Nestle witness referred to proponent data indicating that the average cost to supply a plant in Anderson, IN, was $1.60 per cwt more than the Class I differential at the location. According to the witness, Nestle already pays its supplier, on average, over-order premiums in excess of this amount as well as a fuel surcharge for milk delivered to the plant.

The Nestle witness testified that the Anderson plant primarily produces flavored milk products that exhibit a great deal of sensitivity to price changes. The witness also asserted that the Nestle flavored milk products compete more directly with soft drinks, bottled water and orange juice, than with milk. Therefore, the witness said, any price increase in their products would result in lost sales to competing non-dairy products. The witness also testified that products produced at the Anderson plant are marketed nationwide and must compete with products produced at plants located in counties that are not subject to a proposed increase to their Class I price. The witness concluded that there is no milk shortage problem in the southern region of the Mideast marketing area and as such, Proposal 1 should be denied.

A post-hearing brief was submitted on behalf of Associated Milk Producers Inc., Bongards Creamery, Family Dairies USA, First District Association, Manitowoc Milk Producers Association, Mid-West Dairymen's Company, Milwaukee Cooperative Milk Producers and the Wisconsin Department of Agriculture, Trade and Consumer Protection. The brief stated that collectively these organizations are members of the Midwest Dairy Coalition (MDC). MDC argued that proponents have not demonstrated that there is a milk deficit in the Mideast marketing area and as such, they are opposed to the adoption of Proposal 1. MDC stated that if there is a milk supply problem in the Mideast as a result of effectively changing Class I differential levels in the southeastern orders then the proponents have the ability to negotiate higher over-order premiums to cover any higher supply costs.

MDC also addressed the broader issue of effectively changing Class I differentials on an order-by-order, rather than national basis. They argued that such changes not only have local, but also national implications and should therefore be addressed in a larger national framework.

Discussion and Findings

At issue in this proceeding is the consideration of proposed adjustments to Class I prices in the southern region of the Mideast milk marketing area as a means of ensuring an adequate supply of milk for fluid use. Adjustments to

Class I prices in the southern tier of counties in the marketing area are recommended for adoption herein and result in a change to the Class I pricing surface. The adjustments to Class I prices are specified in the order language. Providing for higher Class I prices under the order in the counties that make up the southern tier of the marketing area will help attract an adequate supply of fluid milk to distributing plants and will increase the blend prices to dairy farmers who deliver milk to those plant locations.

The minimum Class I prices of the Mideast order are set by adding a location-specific differential, referred to as a Class I differential, to the higher of an advance Class III or Class IV price announced by USDA. The Class I differentials are location-specific by county, parish or city for all States of the 48 contiguous United States. These Class I differentials were adopted on January 1, 2000, and are specified in CFR section 1000.52.

The proponents, DFA, *et al.*, who collectively market more than 50 percent of the producer milk pooled on the Mideast order maintain that it has become increasingly costly to supply fluid distributing plants located in the southern tier of the Mideast marketing area. Their claim is based on two factors: (1) Recent adjustments to Class I prices of the southeastern orders have drawn milk, that previously would have been utilized by fluid milk plants in the southern region, away from the Mideast order; and (2) Transportation costs have increased such that the current Class I differentials do not offer sufficient pricing incentives to cover the cost of transporting milk from reserve northern surplus regions to the deficit southern region of the marketing area.

Proponents divided the marketing area into three separate regions and presented data to examine marketing conditions within the marketing area and to explain how the southern region of the marketing area is consistently milk deficit. Record evidence demonstrates a significant difference in the volume of milk delivered to pool distributing plants in the southern region relative to the volume of milk produced in the region and either pooled on the Mideast order, or pooled on another order and delivered to a pool distributing plant located in the southern region of the Mideast marketing area. For example, during April 2008, 189.8 million pounds of producer milk was received at distributing plants located in the southern region. However, during that month only 74.6 million pounds were produced in and delivered to pool distributing plants in the same region, indicating a net deficit of 115.2 million pounds. The data does not reflect the amount of milk produced in the southern region that is then pooled and delivered to plants in another order. However, it is reasonable to conclude that if additional milk supplies are produced in, but not delivered to southern region plants, then such milk has found a higher priced alternative outlet.

Record evidence indicates that milk delivered to distributing plants in the southern tier of the marketing area must travel further distances than milk delivered to other plants in the marketing area. The record contains hauling data for the months of January, April, August and November 2007, and January and April 2008. The data reveal that during these six months, milk delivered to plants in the southern region traveled an average of 133 miles from farm to plant. In comparison, the average distance for milk delivered to the Northwest and Northeast regions during that same time period was 72 miles and 70 miles, respectively. Proponents contend that this data demonstrates that the local milk supply in the southern region of the marketing area is not adequate to meet the demand of the local plants.

DFA, *et al.*, utilized two different methodologies to derive their proposed adjustments to Class I prices to compensate for greater transportation costs. These methods demonstrate that that the cost of transporting milk from surplus to deficit regions in the marketing area far exceed the differences in Class I differential levels.

The first methodology uses a transportation model derived from transportation cost data supplied by MEMMA. The data indicate that MEMMA's cost of moving milk within the Mideast marketing area (at the time of the hearing) was $3.23 per loaded mile. Using this cost basis, a per cwt cost of moving milk from 11 predetermined alternative supply points to each of the fluid distributing plants in the marketing area's southern region was established. Record evidence compares how much of the estimated hauling cost is covered by the differences in Class I differential levels between supply points and each of the southern fluid distributing plants (demand points). The average difference for the supply/demand point combinations was $1.76 per cwt, with a range of $0.45 to $3.25 per cwt. This transportation cost model demonstrates that the current differential levels in the southern region of the marketing area fall significantly short of the cost of transporting needed milk to those distributing plants.

The second transportation cost model proponents relied upon was utilized in a recent three market southeastern order hearing that adjusted the Class I prices in those orders (73 FR 11194). Utilizing the same methodology, the model established a fuel adjusted transportation rate of $2.64 per mile, or $0.0055 per cwt per mile. This model compared the acquisition cost (Class I differential of alternative supply area plus transportation cost) of delivering milk from 6 of the 11 potential alternative supply locations to 6 fluid distributing plants in the southern region of the Mideast marketing area. The model then compared the least-cost supply alternative for each distributing plant with the current Class I differential of that plant. For example, the least cost alternative for the Charleston, WV, plant was Wayne County, OH, with an acquisition cost of $2.89 per cwt. The Class I differential at Charleston, WV, is $2.20, suggesting that a Class I price adjustment of $0.69 would be appropriate.

Opponents to the proposed changes claimed that DFA, *et al.*, provided inadequate data to support their claim that changes in the Class I prices for the southeastern orders has made it more costly to supply plants in the southern region of the Mideast marketing area. This criticism is misplaced. As cooperative producer-member organizations that supply the majority of the marketing areas Class I needs, they clearly demonstrated the higher costs associated with supplying plants in the southern region of the marketing area. Almost all opposition witnesses for providing Class I price increases at the hearing agreed that differences in blend prices between orders moves milk. Thus it can be concluded that higher blend prices, through higher Class I prices, attract milk to plants in those orders by providing the economic incentive to supply milk to plants located in the southeastern order marketing areas.

Monthly data recently released by the Appalachian Market Administrator reveals that there has been a significant increase in the amount of producer milk being received from Ohio at plants regulated by the Appalachian order since May 1, 2008, when the Class I prices were increased.[2] The data reveal that producer milk deliveries from Ohio from May through August 2006 averaged 17.7 million pounds per

[2] Official notice is taken of Appalachian Marketing Order Statistics: Producer Milk Pounds by States 2006–2008, found at *http://www.malouisville.com*.

month and 16.5 million pounds per month for the same time period in 2007. From May through August 2008, monthly Ohio producer milk deliveries averaged 44.6 million pounds—an increase of 161 percent from the average of the previous two years. Average monthly deliveries from Ohio from January through August were 21.3 million pounds, 18.2 million pounds and 35.1 million pounds in 2006, 2007 and 2008, respectively. This represents an increase in deliveries from Ohio of 61 percent from 2006 to 2008, and a 92 percent increase from 2007 to 2008.

Recently released data from the Appalachian order supports the proponents' claim that higher Class I prices brought about by providing Class I price adjustments in the southeastern orders have resulted in more milk servicing those orders from farms located in the Mideast marketing area. It is reasonable to conclude from this record evidence, that when coupled with evidence of increased transportation costs, the Class I prices in the southern region of the marketing area provide inadequate incentives to farmers to supply the fluid milk needs of those plants. The recommended adjustments to the Class I prices will provide, under the order, the economic incentives to supply fluid distributing plants located in the southern tier of counties of the Mideast marketing area.

DFA, et al's., proposed Class I price adjustments differ from those calculated in the transportation models. The proposed Class I adjustments as presented align with the differentials in the northern regions of the marketing area, as well as with neighboring marketing areas. These adjustments also ensure that similarly situated Class I handlers in the southern region of the marketing area have similar minimum regulated Class I prices. Providing similar regulated prices for similarly situated handlers is consistent with the requirements of the AMAA.

The proposed Class I price adjustments provide a steeper price surface and reasonable alignment with the current Class I price surface of the marketing areas beyond the geographical boundaries of the Mideast order. The proposed Class I price adjustments result in price relationships that are different from those that exist under the current pricing structure. Despite criticism that the proposed Class I price adjustments change price relationships between plants, the key requirement that similarly located plants have similar regulated minimum prices is maintained.

DFA, *et al.*, analyzed acquisition and distribution costs (Class I differential plus the cost of transportation) of packaged milk in an effort to assure the reasonableness of the level of the proposed Class I price adjustments and determine the effect the proposed adjustments would have on the competitive relationship among handlers in the southern region. The record reflects that the proposed Class I differentials at all locations do not exceed the cost of moving packaged milk to those same locations. From this analysis it is concluded that the proposed Class I adjustments will not encourage uneconomic movements of milk. This method of evaluating the proposed Class I pricing changes in comparison to packaged milk movement forms a rational basis to conclude that the proposed changes to Class I pricing are reasonable.

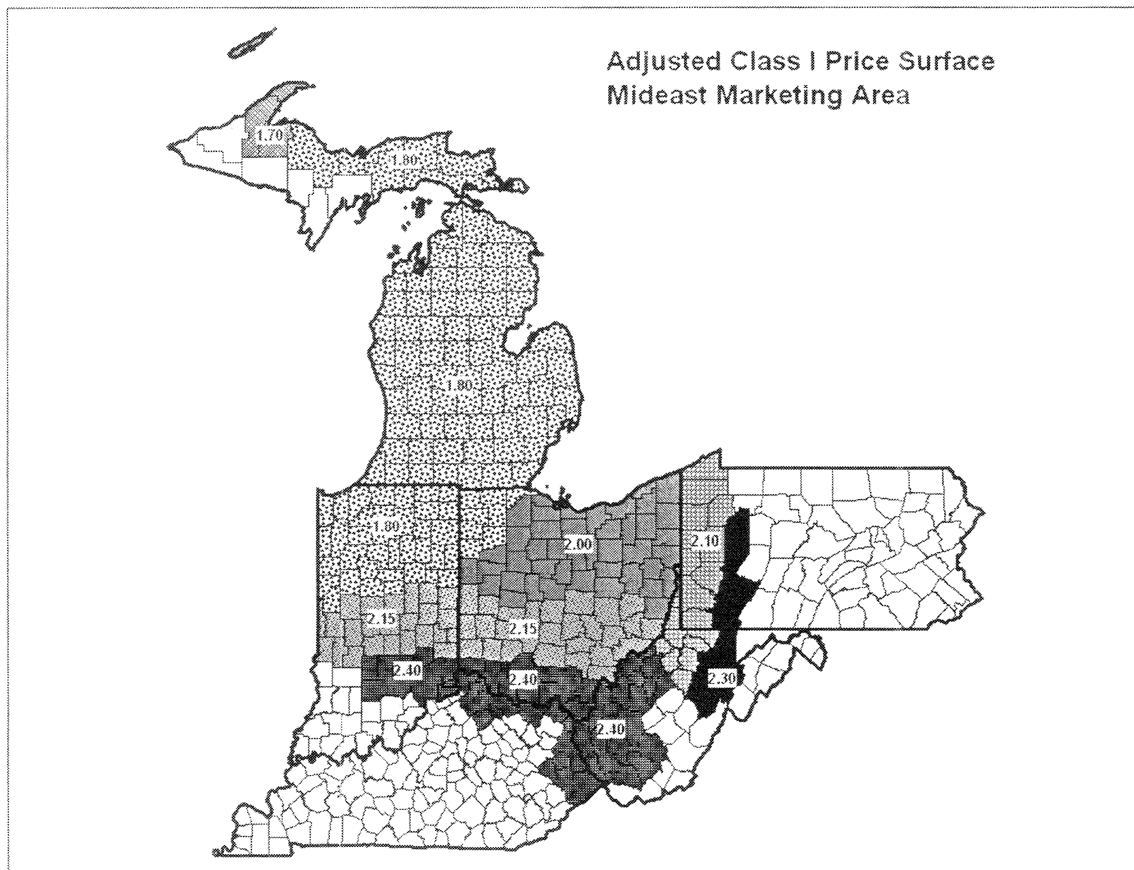
Record evidence cites specific opposition testimony regarding the proposed $0.40 per cwt Class I price adjustment at Charleston, WV. This increase would create a price zone where only one fluid distributing plant operates, the United Dairy plant in Charleston, WV. DFA, *et al.*, claimed that this Class I price adjustment reflects the higher cost of servicing that plant due to its further distance from potential reserve supplies. In its post-hearing brief, DFA, *et al.*, clarifies that the proposed adjustment will align Charleston more properly with the Class I prices of its competitors located and regulated by the Appalachian order. DFA derived the proposed $0.40 Class I price adjustment by taking into account the $0.15 per cwt transportation credit balancing fund assessment that is charged year-round in the Appalachian order on Class I milk.

This decision does not find it appropriate to consider the Appalachian transportation credit balancing fund assessment in determining needed Class I price adjustments in the Mideast marketing area. The transportation credits applicable in the Appalachian order, as asserted by opponents, serve as an economic incentive for needed supplemental milk supplies and should have no bearing on the appropriate adjusted Class I price at Charleston, WV.

The United Dairy witness testified at great length regarding the competitive disadvantage that would be placed on the Charleston, WV, plant when compared to its nearest competitor—the Dean Foods plant in Marietta, OH. The United Dairy plant is currently located in the $2.20 zone, while the Dean Foods plant is located in the $2.00 zone. This means that when competing for sales, the United Dairy plant faces a raw milk cost that is $0.20 per cwt higher. The proposed Class I price adjustment would put the United Dairy plant in a $2.60 price zone (Class I differential plus the Class I price adjustment) and the Dean Foods plant in a $2.15 zone price, increasing the raw milk cost spread to $0.45 per cwt.

This decision finds that a $0.40 increase in the Class I price at Charleston, WV, would unnecessarily change the competitive relationship between the United Dairy plant and its nearest competitors. While the record reflects that the cost of transporting milk to Charleston, WV, is greater than the cost of transportation to other parts of the marketing area, the record does not justify an increase of $0.40 because of the competitive sales relationship with other plants in the southern tier of the marketing area. This decision recommends that the Class I price at Charleston, WV, be increased by $0.20.

The recommended Class I price adjustments are presented in Figure 1. While the Class I differentials in the Mideast marketing area are not changed in this decision, the Class I price adjustments have been added to the current Class I differentials for illustrative purposes. Figure 1 provides a graphic presentation of the combined value of Class I differentials plus the adjustment values adopted in this decision.



The proposed Class I price adjustments will not result in the uneconomic movement of milk as asserted by opponents. The proposed Class I pricing surface provides greater pricing incentives under the order to transport needed milk from alternative surplus northern regions to the deficit southern region of the marketing area. The location value of milk is higher in the southern region because of the cost involved in transporting milk to locations in that milk-deficit region. The recommended Class I price adjustments result in a steeper Class I price surface that correlates with the higher location value fluid milk has in the southern region of the marketing area.

Opponents argued that the proposed Class I price adjustments will cause uneconomic movements of milk because milk in the southeastern orders that is not eligible to receive transportation credits will seek to serve plants north and west. As discussed above, it is inappropriate to consider transportation credits in any aspect of adjusting Class I prices.

Opponents to DFA, *et al's.*, Class I price adjustments asserted that there is an adequate supply of milk in the order to meet fluid demands. Record evidence shows that there is an adequate supply of milk in the order as a whole to meet fluid demand. However, in the deficit southern region of the Mideast marketing area, there must be sufficient price incentives provided under the order to encourage the movement of milk from surplus areas to the deficit area. In this regard, the location value of milk needs to account for prevailing marketing conditions which in this proceeding is largely the cost of transportation. The recommended Class I price adjustments should provide the additional incentive needed under the order by offsetting a greater portion of the costs associated with transporting milk longer distances for Class I use.

Opponents also argued that any increase in the Class I prices will be distributed to all producers whose milk is pooled on the Mideast order, and thus there will be no actual incentive to service plants in the deficit southern region. This argument is misplaced. Blend prices paid to producers are adjusted to the location to which milk is delivered. In the Mideast order, the blend price announced each month is for Cuyahoga County, Ohio, which has a current Class I differential of $2.00. Producers whose milk is pooled by plants within the $2.00 zone receive the announced blend price. Producers whose milk is received by plants located outside the $2.00 zone receive the announced blend price adjusted for the location to which delivered. For example, a producer whose milk is received at a plant located in the $2.15 zone will receive the announced blend price plus $0.15. Therefore, producers delivering milk to plants located in the areas where the Class I prices are proposed to be increased will receive more for that milk. Producers supplying plants located outside of the proposed increased zones will see no change to the prices they receive.

At the hearing, Dean Foods proposed that instead of increasing Class I prices in the southern region, Class I differentials should be decreased in the northern regions of the marketing area. Dean argued that this would accomplish the same goal as the proponents—moving milk to deficit plants—without increasing costs to consumers through higher Class I prices.

This decision finds no justification for such an action. The proposed Class I price adjustments represent the location value of Class I milk which is largely reflective of the costs of servicing fluid distributing plants at a particular location. The record of this proceeding did not examine the location value of milk in the northern regions of the marketing area and the record contains no evidence to indicate that the cost of

servicing plants in the northern regions of the marketing area has decreased.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Mideast order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to Section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for the milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreement upon which a hearing has been held.

Recommended Marketing Agreement and Order Amending the Order

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in the Mideast marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Parts 1000 and 1033

Milk marketing orders.

For the reasons set forth in the preamble, 7 CFR Parts 1000 and 1033, are proposed to be amended as follows:

1. The authority citation for 7 CFR parts 1000 and 1033 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

2. In § 1000.50 paragraphs (b) and (c) are revised to read as follows:

§ 1000.50 Class prices, component prices and advanced pricing factors.

* * * * *

(b) Class I skim milk price. The Class I skim milk price per hundredweight shall be the adjusted Class I differential specified in § 1000.52 plus the adjustment to Class I prices specified in § 1005.51(b), § 1006.51(b), § 1007.51(b) and § 1033.51 (b) plus the higher of the advanced pricing factors computed in paragraphs (q)(1) or (2) of this section.

(c) Class I butterfat price. The Class I butterfat price per pound shall be the adjusted Class I differential specified in § 1000.52 divided by 100, plus the adjustments to Class I prices specified in § 1005.51(b), § 1006.51(b), § 1007.51(b) and § 1033.51 (b) divided by 100, plus the advanced butterfat price computed in paragraph (q) (3) of this section.

* * * * *

PARTS 1033—MILK IN THE MIDEAST MARKETING AREA

3. Revise § 1033.51 to read as follows:

§ 1033.51 Class I differential, adjustments to Class I prices, and Class I price.

(a) The Class I differential shall be the differential established for Cuyahoga County, Ohio, which is reported in § 1000.52. The Class I price shall be the price computed pursuant to § 1033.50 (a) for Cuyahoga County Ohio.

(b) Adjustments to Class I prices. Class I prices shall be established pursuant to § 1000.50(a), (b), and (c) using the following adjustments:

State	County/parish	FIPS	Class I price adjustment
IN	ADAMS	18001	0.00
IN	ALLEN	18003	0.00
IN	BARTHOLOMEW	18005	0.20
IN	BENTON	18007	0.00
IN	BLACKFORD	18009	0.00
IN	BOONE	18011	0.15
IN	BROWN	18013	0.20
IN	CARROLL	18015	0.00
IN	CASS	18017	0.00
IN	CLAY	18021	0.15
IN	CLINTON	18023	0.00
IN	DE KALB	18033	0.00
IN	DEARBORN	18029	0.20
IN	DECATUR	18031	0.20
IN	DELAWARE	18035	0.15
IN	ELKHART	18039	0.00
IN	FAYETTE	18041	0.15
IN	FOUNTAIN	18045	0.00
IN	FRANKLIN	18047	0.15
IN	FULTON	18049	0.00
IN	GRANT	18053	0.00
IN	HAMILTON	18057	0.15

State	County/parish	FIPS	Class I price adjustment
IN	HANCOCK	18059	0.15
IN	HENDRICKS	18063	0.15
IN	HENRY	18065	0.15
IN	HOWARD	18067	0.00
IN	HUNTINGTON	18069	0.00
IN	JACKSON	18071	0.20
IN	JASPER	18073	0.00
IN	JAY	18075	0.00
IN	JEFFERSON	18077	0.20
IN	JENNINGS	18079	0.20
IN	JOHNSON	18081	0.15
IN	KOSCIUSKO	18085	0.00
IN	LA PORTE	18091	0.00
IN	LAGRANGE	18087	0.00
IN	LAKE	18089	0.00
IN	LAWRENCE	18093	0.20
IN	MADISON	18095	0.15
IN	MARION	18097	0.15
IN	MARSHALL	18099	0.00
IN	MIAMI	18103	0.00
IN	MONROE	18105	0.20
IN	MONTGOMERY	18107	0.15
IN	MORGAN	18109	0.15
IN	NEWTON	18111	0.00
IN	NOBLE	18113	0.00
IN	OHIO	18115	0.20
IN	OWEN	18119	0.15
IN	PARKE	18121	0.15
IN	PORTER	18127	0.00
IN	PULASKI	18131	0.00
IN	PUTNAM	18133	0.15
IN	RANDOLPH	18135	0.15
IN	RIPLEY	18137	0.20
IN	RUSH	18139	0.15
IN	SHELBY	18145	0.15
IN	ST. JOSEPH	18141	0.00
IN	STARKE	18149	0.00
IN	STEUBEN	18151	0.00
IN	SWITZERLAND	18155	0.20
IN	TIPPECANOE	18157	0.00
IN	TIPTON	18159	0.00
IN	UNION	18161	0.15
IN	VERMILLION	18165	0.15
IN	VIGO	18167	0.15
IN	WABASH	18169	0.00
IN	WARREN	18171	0.00
IN	WAYNE	18177	0.15
IN	WELLS	18179	0.00
IN	WHITE	18181	0.00
IN	WHITLEY	18183	0.00
KY	BOONE	21015	0.20
KY	BOYD	21019	0.20
KY	BRACKEN	21023	0.20
KY	CAMPBELL	21037	0.20
KY	FLOYD	21071	0.20
KY	GRANT	21081	0.20
KY	GREENUP	21089	0.20
KY	HARRISON	21097	0.20
KY	JOHNSON	21115	0.20
KY	KENTON	21117	0.20
KY	LAWRENCE	21127	0.20
KY	LEWIS	21135	0.20
KY	MAGOFFIN	21153	0.20
KY	MARTIN	21159	0.20
KY	MASON	21161	0.20
KY	PENDLETON	21191	0.20
KY	PIKE	21195	0.00
KY	ROBERTSON	21201	0.20
MI	ALCONA	26001	0.00
MI	ALGER	26003	0.00
MI	ALLEGAN	26005	0.00
MI	ALPENA	26007	0.00
MI	ANTRIM	26009	0.00

State	County/parish	FIPS	Class I price adjustment
MI	ARENAC	26011	0.00
MI	BARAGA	26013	0.00
MI	BARRY	26015	0.00
MI	BAY	26017	0.00
MI	BENZIE	26019	0.00
MI	BERRIEN	26021	0.00
MI	BRANCH	26023	0.00
MI	CALHOUN	26025	0.00
MI	CASS	26027	0.00
MI	CHARLEVOIX	26029	0.00
MI	CHEBOYGAN	26031	0.00
MI	CHIPPEWA	26033	0.00
MI	CLARE	26035	0.00
MI	CLINTON	26037	0.00
MI	CRAWFORD	26039	0.00
MI	EATON	26045	0.00
MI	EMMET	26047	0.00
MI	GENESEE	26049	0.00
MI	GLADWIN	26051	0.00
MI	GRAND TRAVERSE	26055	0.00
MI	GRATIOT	26057	0.00
MI	HILLSDALE	26059	0.00
MI	HOUGHTON	26061	0.00
MI	HURON	26063	0.00
MI	INGHAM	26065	0.00
MI	IONIA	26067	0.00
MI	IOSCO	26069	0.00
MI	ISABELLA	26073	0.00
MI	JACKSON	26075	0.00
MI	KALAMAZOO	26077	0.00
MI	KALKASKA	26079	0.00
MI	KENT	26081	0.00
MI	KEWEENAW	26083	0.00
MI	LAKE	26085	0.00
MI	LAPEER	26087	0.00
MI	LEELANAU	26089	0.00
MI	LENAWEE	26091	0.00
MI	LIVINGSTON	26093	0.00
MI	LUCE	26095	0.00
MI	MACKINAC	26097	0.00
MI	MACOMB	26099	0.00
MI	MANISTEE	26101	0.00
MI	MARQUETTE	26103	0.00
MI	MASON	26105	0.00
MI	MECOSTA	26107	0.00
MI	MIDLAND	26111	0.00
MI	MISSAUKEE	26113	0.00
MI	MONROE	26115	0.00
MI	MONTCALM	26117	0.00
MI	MONTMORENCY	26119	0.00
MI	MUSKEGON	26121	0.00
MI	NEWAYGO	26123	0.00
MI	OAKLAND	26125	0.00
MI	OCEANA	26127	0.00
MI	OGEMAW	26129	0.00
MI	OSCEOLA	26133	0.00
MI	OSCODA	26135	0.00
MI	OTSEGO	26137	0.00
MI	OTTAWA	26139	0.00
MI	PRESQUE ISLE	26141	0.00
MI	ROSCOMMON	26143	0.00
MI	SAGINAW	26145	0.00
MI	SANILAC	26151	0.00
MI	SCHOOLCRAFT	26153	0.00
MI	SHIAWASSEE	26155	0.00
MI	ST. CLAIR	26147	0.00
MI	ST. JOSEPH	26149	0.00
MI	TUSCOLA	26157	0.00
MI	VAN BUREN	26159	0.00
MI	WASHTENAW	26161	0.00
MI	WAYNE	26163	0.00
MI	WEXFORD	26165	0.00
OH	ADAMS	39001	0.20

State	County/parish	FIPS	Class I price adjustment
OH	ALLEN	39003	0.00
OH	ASHLAND	39005	0.00
OH	ASHTABULA	39007	0.00
OH	ATHENS	39009	0.15
OH	AUGLAIZE	39011	0.00
OH	BELMONT	39013	0.00
OH	BROWN	39015	0.20
OH	BUTLER	39017	0.15
OH	CARROLL	39019	0.00
OH	CHAMPAIGN	39021	0.00
OH	CLARK	39023	0.15
OH	CLERMONT	39025	0.20
OH	CLINTON	39027	0.15
OH	COLUMBIANA	39029	0.00
OH	COSHOCTON	39031	0.00
OH	CRAWFORD	39033	0.00
OH	CUYAHOGA	39035	0.00
OH	DARKE	39037	0.15
OH	DEFIANCE	39039	0.00
OH	DELAWARE	39041	0.00
OH	FAIRFIELD	39045	0.15
OH	FAYETTE	39047	0.15
OH	FRANKLIN	39049	0.15
OH	FULTON	39051	0.00
OH	GALLIA	39053	0.20
OH	GEAUGA	39055	0.00
OH	GREENE	39057	0.15
OH	GUERNSEY	39059	0.15
OH	HAMILTON	39061	0.20
OH	HANCOCK	39063	0.00
OH	HARDIN	39065	0.00
OH	HARRISON	39067	0.00
OH	HENRY	39069	0.00
OH	HIGHLAND	39071	0.20
OH	HOCKING	39073	0.15
OH	HOLMES	39075	0.00
OH	JACKSON	39079	0.20
OH	JEFFERSON	39081	0.00
OH	KNOX	39083	0.00
OH	LAKE	39085	0.00
OH	LAWRENCE	39087	0.20
OH	LICKING	39089	0.15
OH	LOGAN	39091	0.00
OH	LORAIN	39093	0.00
OH	LUCAS	39095	0.00
OH	MADISON	39097	0.15
OH	MAHONING	39099	0.00
OH	MARION	39101	0.00
OH	MEDINA	39103	0.00
OH	MEIGS	39105	0.15
OH	MERCER	39107	0.00
OH	MIAMI	39109	0.15
OH	MONROE	39111	0.15
OH	MONTGOMERY	39113	0.15
OH	MORGAN	39115	0.15
OH	MORROW	39117	0.00
OH	MUSKINGUM	39119	0.15
OH	NOBLE	39121	0.15
OH	PAULDING	39125	0.00
OH	PERRY	39127	0.15
OH	PICKAWAY	39129	0.15
OH	PIKE	39131	0.20
OH	PORTAGE	39133	0.00
OH	PREBLE	39135	0.15
OH	PUTNAM	39137	0.00
OH	RICHLAND	39139	0.00
OH	ROSS	39141	0.15
OH	SANDUSKY	39143	0.00
OH	SCIOTO	39145	0.20
OH	SENECA	39147	0.00
OH	SHELBY	39149	0.00
OH	STARK	39151	0.00
OH	SUMMIT	39153	0.00

State	County/parish	FIPS	Class I price adjustment
OH	TRUMBULL	39155	0.00
OH	TUSCARAWAS	39157	0.00
OH	UNION	39159	0.00
OH	VAN WERT	39161	0.00
OH	VINTON	39163	0.15
OH	WARREN	39165	0.15
OH	WASHINGTON	39167	0.15
OH	WAYNE	39169	0.00
OH	WILLIAMS	39171	0.00
OH	WOOD	39173	0.00
OH	WYANDOT	39175	0.00
PA	ALLEGHENY	42003	0.00
PA	ARMSTRONG	42005	0.00
PA	BEAVER	42007	0.00
PA	BUTLER	42019	0.00
PA	CLARION	42031	0.00
PA	CRAWFORD	42039	0.00
PA	ERIE	42049	0.00
PA	FAYETTE	42051	0.00
PA	GREENE	42059	0.00
PA	LAWRENCE	42073	0.00
PA	MERCER	42085	0.00
PA	VENANGO	42121	0.00
PA	WASHINGTON	42125	0.00
PA	WESTMORELAND	42129	0.00
WV	BARBOUR	54001	0.00
WV	BOONE	54005	0.20
WV	BROOKE	54009	0.00
WV	CABELL	54011	0.20
WV	CALHOUN	54013	0.20
WV	DODDRIDGE	54017	0.00
WV	FAYETTE	54019	0.20
WV	GILMER	54021	0.20
WV	HANCOCK	54029	0.00
WV	HARRISON	54033	0.00
WV	JACKSON	54035	0.20
WV	KANAWHA	54039	0.20
WV	LEWIS	54041	0.00
WV	LINCOLN	54043	0.20
WV	LOGAN	54045	0.20
WV	MARION	54049	0.00
WV	MARSHALL	54051	0.00
WV	MASON	54053	0.20
WV	MINGO	54059	0.20
WV	MONONGALIA	54061	0.00
WV	OHIO	54069	0.00
WV	PLEASANTS	54073	0.20
WV	PRESTON	54077	0.00
WV	PUTNAM	54079	0.20
WV	RALEIGH	54081	0.20
WV	RANDOLPH	54083	0.00
WV	RITCHIE	54085	0.20
WV	ROANE	54087	0.20
WV	TAYLOR	54091	0.00
WV	TUCKER	54093	0.00
WV	TYLER	54095	0.00
WV	UPSHUR	54097	0.00
WV	WAYNE	54099	0.20
WV	WETZEL	54103	0.00
WV	WIRT	54105	0.20
WV	WOOD	54107	0.20
WV	WYOMING	54109	0.20

Dated: January 8, 2009.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E9–607 Filed 1–13–09; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket No. EERE–2008–BT–STD–0015]

RIN 1904–AB86

Energy Efficiency Program for Consumer Products: Public Meeting and Availability of the Framework Document for Walk-In Coolers and Walk-In Freezers; Date Change; Correction

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

ACTION: Proposed rule; date change; correction.

SUMMARY: The Department of Energy published a notice in the **Federal Register** on January 6, 2009, of a public meeting and availability of the framework document regarding energy conservation standards for walk-in coolers and walk-in freezers. This notice corrects the date of the public meeting, the date of the deadline for requesting to speak at the public meeting, and the date of the deadline for submitting written comments on the framework document.

FOR FURTHER INFORMATION CONTACT: Charles Llenza, 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) 586–2192. e-mail: *Charles.Llenza@ee.doe.gov.*

Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–8145. e-mail: *Michael.Kido@hq.doe.gov.*

Date Change/Corrections

In the **Federal Register** of January 6, 2009, FR Doc. E8–31405, on page 411, the following correction is made to the **DATES** section:

DATES: The Department will hold a public meeting on Wednesday, February 4, 2009, from 9 a.m. to 4 p.m. in Washington, DC. Any person requesting to speak at the public meeting should submit such request along with a signed original and an electronic copy of the statement to be given at the public meeting before 4 p.m., Wednesday, January 28, 2009. Written comments on the framework document are welcome, especially following the public meeting, and should be submitted by Thursday, February 12, 2009.

SUPPLEMENTARY INFORMATION: As noted above, DOE will hold a public meeting on Wednesday, February 4, 2009, in Washington, DC, the purpose of the meeting is to discuss the analyses presented and issues identified in the Framework Document. For additional information regarding the document and the meeting, the agency refers readers to the prior January 6, 2009 notice. 74 FR 411.

The Department welcomes all interested parties, whether or not they participate in the public meeting, to submit written comments regarding matters addressed in the Framework Document, as well as any other related issues by February 12, 2009.

Issued in Washington, DC, on January 8, 2009.

David E. Rodgers,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

[FR Doc. E9–591 Filed 1–13–09; 8:45 am]

BILLING CODE 6450–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

RIN 3245–AF83

Business Loan Program Regulations: Incorporation of London Interbank Offered Rate (LIBOR) Base Rate and Secondary Market Pool Interest Rate Changes

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Interim Final Rule, notice of reopening of comment period.

SUMMARY: SBA is reopening the comment period for an additional 90 days.

DATES: Comments on the interim final rule on Business Loan Program Regulations: Incorporation of London Interbank Offered Rate (LIBOR) Base Rate and Secondary Market Pool Interest Rate Changes, must be received on or before April 14, 2009.

ADDRESSES: You may submit comments, identified by 3245–AF83, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* Grady Hedgespeth, Director, Office of Financial Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

All comments will be posted on *http://www.regulations.gov.* If you wish to include within your comment confidential business information (CBI) as defined in the Privacy and Use Notice/User Notice at *http://www.regulations.gov,* and you do not want that information disclosed, you must submit the comments by either Mail or Hand Delivery and you must address the comment to Grady Hedgespeth, Director, Office of Financial Assistance. In the submission, you must highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will make a final determination, in its discretion, of whether information is CBI and, therefore, the comments will not be published.

FOR FURTHER INFORMATION CONTACT: Grady Hedgespeth, Director, Office of Financial Assistance, 202–205–7562, or *grady.hedgespeth@sba.gov.*

SUPPLEMENTARY INFORMATION: On November 13, 2008, SBA published in the **Federal Register** an interim final rule permanently adding a base rate of LIBOR for lenders to use when pricing 7(a) loans and allowing for secondary market loan pools to be formed with weighted average coupon rates. (73 FR 67099). This rule was added to help ensure continued availability of capital to small businesses and to improve liquidity in and efficiency of the secondary market for SBA loans. The original comment period ended on December 15, 2008. SBA is reopening the comment period for a limited time until April 14, 2009 in order to solicit additional comments as our lending partners and secondary market participants continue to implement the two changes allowed in the interim final rule. Some SBA partners are still updating their systems to incorporate LIBOR based loans. SBA's recently published Procedural Notice No. 5000–1081: One Month LIBOR Plus 3 Percent Allowed as SBA Base Rate (Nov. 14, 2008) and SBA Information Notice: Implementation of SBA's Addition of LIBOR Plus 3 Percent as a Base Rate (Nov. 20, 2008), both of which can be found at *http://www.sba.gov.* Additionally, procedures for weighted average coupon pools were recently released by SBA. SBA Procedural Notice

No. 5000–1086: Initiative to Facilitate the Sale of SBA 7(a) Loans on the Secondary Market (Dec. 17, 2008), which can be found at *http://www.sba.gov.* SBA would like to ensure that lenders and secondary market participants are afforded an opportunity to comment on the interim final rule as they fully implement these program changes.

Authority: 15 U.S.C. 634.

Eric Zarnikow,
Associate Administrator, Office of Capital Access.

[FR Doc. E9–430 Filed 1–13–09; 8:45 am]
BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 511

[FHWA Docket No. FHWA–2006–24219]

RIN 2125–AF19

Real-Time System Management Information Program

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: Section 1201 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) requires the Secretary of Transportation (Secretary) to establish a Real-Time System Management Information Program that provides, in all States, the capability to monitor, in real-time, the traffic and travel conditions of the major highways of the United States and to share that data with State and local governments and with the traveling public. This proposed rule would establish minimum parameters and requirements for States to make available and share traffic and travel conditions information via real-time information programs.

DATES: Comments must be received on or before April 14, 2009. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Docket Management Facility, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or fax comments to (202) 493–2251. Comments may be submitted electronically to the Federal eRulemaking portal at *http://www.regulations.gov.* All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Robert Rupert, FHWA Office of Operations, (202) 366–2194, or via e-mail at *robert.rupert@dot.gov;* or, Mr. James Pol, U.S. DOT ITS Joint Program Office, (202) 366–4374, or via e-mail at *james.pol@dot.gov.* For legal questions, please contact Ms. Lisa MacPhee, Attorney Advisor, FHWA Office of the Chief Counsel, (202) 366–1392, or via e-mail at*lisa.macphee@dot.gov.* Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Federal eRulemaking portal at: *http://www.regulations.gov.* Electronic submission and retrieval help and guidelines are available under the help section of the Web site. The Federal eRulemaking portal is available 24 hours each day, 365 days each year. Please follow the instructions. An electronic copy of this document may also be downloaded by accessing the Office of the **Federal Register**'s home page at *http://www.archives.gov* or the Government Printing Office's Web page at *http://www.gpoaccess.gov/nara.*

A Brief Description of the Proposed Rule

The FHWA proposes to require that each State establish a real-time information program that would provide traffic and travel conditions reporting and support other efforts related to congestion relief. The provision of traffic and travel conditions reporting to other agencies and to travelers would enable agencies to communicate the operational characteristics within their State or metropolitan area. Such information would disclose the presence and severity of congestion and other travel impedances that limit traveler mobility and the efficient movement of goods.

These proposed regulations would not impose any requirement for a State to apply any particular technology, any particular technology-dependent application, or any particular business approach for establishing a real-time information program. States and other public agencies instead would be encouraged to consider any salient technology, technology-dependent application, and business approach options that yield information products consistent with the requirements set forth in this proposed rule. States will be encouraged to work with value added information providers to establish real-time information programs. Value added information providers presently and in the future will create information products for commercial use, for sale to a customer base, or for other commercial enterprise purposes. Based upon this proposed rule, such products could be derived from information from public sector sources in addition to the private sector's own capabilities for creating information content.

The FHWA proposes to require real-time information programs to be capable of delivering traffic and travel conditions on: traffic incidents that block roadway travel, roadway weather conditions, and construction activities affecting travel conditions. Those real-time information programs that deliver traffic and travel conditions for Metropolitan Areas exceeding a population of 1 million inhabitants also would provide travel times for highway segments.

The FHWA proposes to require general uniformity among the real-time information programs to ensure consistent service to travelers and to other agencies. The table below identifies the proposed traffic and travel condition categories and characteristics:

Category of information	Timeliness for delivery			
	Metropolitan areas (in minutes)	Non-metropolitan areas (in minutes)	Availability (in percent)	Accuracy (in percent)
Construction activities:				
Implementing or removing lane closures	10	20	90	85
Roadway or lane blocking traffic incident information	10	20	90	85
Roadway weather observation updates	20	20	90	85
Travel time along highway segments	10	NA	90	85

Further details are provided in this notice on how the FHWA determined these categories of information, the timeliness for delivery, availability, and accuracy in the Section-by-Section description. Readers of this notice are directed to the description for Section 511.309, ''Provisions for traffic and travel conditions reporting'' for the details.

The FHWA proposes to require that real-time information programs be established in two stages: First for reporting traffic and travel conditions along all Interstate highways in each State; second for reporting traffic and travel conditions along other Metropolitan Area, non-Interstate highways that sustain local mobility and that serve as diversion routes that alleviate congested locations.

The FHWA proposes that the establishment of the real-time information programs for reporting traffic and travel conditions along all Interstate highways in each State should be completed within two years. Therefore, the FHWA proposes to require a completion date of two years after publication of the final rule in the **Federal Register** to establish the real-time information program for traffic and travel conditions reporting on all Interstate highways.

Finally, the FHWA proposes to require that the establishment of the real-time information programs for reporting traffic and travel conditions along Metropolitan Area, non-Interstate highways be completed within 4 years of the date the final rule is published in the **Federal Register**. The selection of non-Interstate highways to be covered in a real-time information program will depend on factors determined by the local partners. The FHWA proposes to encourage selection criteria such as recurring or frequent congestion, utility for use as a diversion route, and susceptibility for other mobility and safety limiting impacts.

The FHWA requests comment on the proposed approach summarized above and described in detail below to monitor traffic and travel conditions in real-time, and on how such monitoring can make the most cost-effective use of the limited resources available to the States. Further, the FHWA requests comment on the consideration, options, and use of information to account for the analysis of the balance between the benefits and cost of the proposed rule, as described in detail in the ''Regulatory Cost Analysis of Proposed Rulemaking'', available in the docket.

Program Administration

This proposed rule will be subject to the provisions set forth in § 1.36 of Title 23 of the Code of Federal Regulations which states, ''[i]f the Administrator determines that a State has violated or failed to comply with the Federal laws or the regulations in this part with respect to a project, he may withhold payment to the State of Federal funds on account of such project, withhold approval of further projects in the State, and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State to the satisfaction of the Administrator.''

Background

In May 2006, the Department announced its *National Strategy to Reduce Congestion on America's Transportation Network* (the Congestion Relief Initiative), a bold and comprehensive national program to reduce congestion on the Nation's roads, rails, runways, and waterways.[1] The FHWA is concentrating on congestion relief by promoting a variety of technology and techniques, including: Tolling and Pricing; Public and Private Partnerships; Real-Time Traveler Information; Traffic Incident Management; Work Zone Mobility; and, Traffic Signal Timing. These efforts by the FHWA address many of the root causes of recurring and non-recurring congestion.

At its most fundamental level, highway congestion is caused by the failure to develop mechanisms to efficiently manage use of existing capacity and expand capacity in locations where the benefits are the greatest. The ever increasing demands for the use of the nation's highways are severely imbalanced with the level of funding provided to maintain and construct new highways. For highway users, the phenomenon of demand outstripping supply ultimately manifests a cost upon individual travelers who have to bear increasing congestion. The price of highway travel (gas taxes, registration fees, etc.) currently bears little or no relationship to the cost of congestion. Put differently, the average rush hour driver pays out of pocket costs that do not reflect the true costs of the travel. As a result, the network gets swamped, vehicle throughput collapses, and the cost of congestion to all users grows rapidly.

In more immediate terms, congestion is caused by a number of additional factors, including traffic incidents, special events, weather, work zones, and poor signal timing. Various research studies conducted by the FHWA indicate that half of recurring congestion occurs because of bottlenecks, poor signal timing, and special events. The remainder is divided among non-recurring phenomena such as work zones, traffic incidents, and bad weather.

The purpose of the Real-Time System Management Information Program is to provide congestion relief by stimulating cooperation among State Departments of Transportation, other responsible agencies, and commercial entities to widen the accessibility of traffic and travel conditions information via real-time information programs. Travelers and transportation agencies increasingly will depend on traffic and travel conditions information, delivered by combinations of public and private

[1] Speaking before the National Retail Federation's annual conference on May 16, 2006, in Washington, D.C., former U.S. Transportation Secretary Norman Mineta unveiled a new plan to reduce congestion plaguing America's roads, rail, and airports. The National Strategy to Reduce Congestion on America's Transportation Network includes a number of initiatives designed to reduce transportation congestion. The transcript of these remarks is available at the following URL: *http://www.dot.gov/affairs/minetasp051606.htm.*

information providers, to manage congestion.[2]

The value for a real-time information program to travelers is experienced at a personal level. Traffic and travel conditions information is ''decision-quality'' information that allows travelers to choose the most efficient mode, time of departure, and route to their final destination. This information should be easily accessed at a low cost in order to be useful to the average traveler. Timely and detailed information about traffic incidents, weather conditions, construction activities, and special events aid in improving travel time predictability, better choices, and reduced congestion.

The value for a real-time information program to transportation agencies would be greater control of system-wide transportation assets. Information collection and dissemination are critical for enabling public agencies to provide for efficient interstate movement of goods and to reduce the level of congestion commonly experienced in metropolitan areas. Thus, the minimum set of information that would be required in this proposed rule include:

- Construction activities affecting travel conditions, such as implementing or removing lane closures;
- Roadway or lane blocking traffic incident information;
- Updated roadway weather observations; and,
- Travel time information along highway segments in metropolitan areas.

This proposed rule results from the efforts of private industry, elected officials, and public officials to reduce congestion and the burden it places on travelers. The 109th Congress recognized the collaborative efforts to reduce congestion and directed the FHWA to provide congestion relief to American travelers.

Under the heading of ''Congestion Relief,'' section 1201 of SAFETEA–LU (Pub. L. 109–59, 119 Stat. 1144, Aug. 10, 2005) requires the Secretary of Transportation to establish a Real-Time System Management Information Program to provide, in all States, the capability to monitor, in real-time, the traffic and travel conditions of the major highways of the United States and to share that information to improve the security of the surface transportation system, to address congestion problems, to support improved response to weather events and surface transportation incidents, and to facilitate national and regional highway traveler information. The purposes of the Real-Time System Management Information Program are to:

(1) Establish, in all States, a system of basic real-time information for managing and operating the surface transportation system;

(2) Identify longer range real-time highway and transit monitoring needs and develop plans and strategies for meeting such needs; and

(3) Provide the capability and means to share that data with State and local governments and the traveling public.

Section 1201(c)(1) of SAFTEA–LU states that as State and local governments develop or update regional intelligent transportation system (ITS) architectures, described in 23 CFR 940.9, such governments shall explicitly address real-time highway and transit information needs and the systems needed to meet such needs, including addressing coverage, monitoring systems, data fusion and archiving, and methods of exchanging or sharing highway and transit information. The FHWA envisions that States carrying out updates of regional ITS architectures would consider broadening the geographic coverage area for gathering and reporting traffic and travel conditions.

This NPRM does not pertain to subsections 1201(b) or 1201(c)(2) of the SAFETEA–LU, which address the establishment of data exchange formats. Data exchange formats shall be established to ensure that the data provided by highway and transit monitoring systems may be exchanged readily among State and local governments and information applications that communicate to the traveling public. The FHWA established these data exchange formats to satisfy the 2-year statutory deadline defined by SAFETEA–LU to complete this task. The SAFETEA–LU legislation establishes that States shall incorporate the data exchange formats established by the Secretary. The FHWA published data exchange formats and a technical memorandum describing the implementation and use of the data exchange formats in the **Federal Register** on October 15, 2007 (72 FR 58347) and on the FHWA Office of Operations Web site, available at URL: *http://www.ops.fhwa.dot.gov.*

May 2006 Request for Information

On May 4, 2006, the FHWA published a notice in the **Federal Register** (71 FR 26399) outlining some proposed preliminary program parameters and seeking public comments on the proposed description of the Real-time System Management Information Program, including its outcome goals, definitions for various program parameters, and the current status of related activities in the States. The comments submitted in response to this notice were used to develop this proposed rulemaking.[3] We received a total of 44 comments to the docket, of which 22 of the submissions were from State Departments of Transportation (DOT's). Responses also were received from representatives of the private sector and national associations.

Many of the State DOT's that responded identified that they were capable of achieving many of the goals outlined in the notice by 2009, provided that there would be a phased approach for achieving key milestones. The public sector responses often cited funding limitations, budget and planning cycles, and the lack of data collection infrastructure as obstacles to fully achieving all of the program goals by a 2009 date. All of the private sector responses indicated that all of the stated objectives could be achieved by 2009 and perhaps sooner.

The private sector respondents generally believed that having the information on nearly every road, at least in urban areas, was a reasonable goal. Many State and local public sector respondents did support reporting of conditions along arterial highways, but preferred to define which ones locally. Respondents generally noted that rural and urban areas might have different needs for coverage. Several rural States noted that monitoring the National Highway System plus other limited access roadways would overwhelm their strained resources and would not necessarily improve the quality of the traffic and travel conditions reporting. One private sector respondent suggested using the same definition of ''major highway'' as the mapping industry.

There was general support for including travel times and speeds, as well as extent and degree of congested conditions in urban areas. Several rural States objected to the congestion requirement. Several States suggested adding expected duration for incidents, scheduled events, Homeland Security emergency notifications, maintenance work zones as well as construction work zones, hurricane evacuation, and terrorist acts. There was strong and

[2] Additional discussion on the extensibility of traffic and travel conditions information is provided in *Closing the Data Gap: Guidelines for Quality Advanced Traveler Information System (ATIS) Data* available at the following URL: *http://www.itsdocs.fhwa.dot.gov//JPODOCS/REPT_MIS/13580.html*

[3] All comments received via the U.S. DOT Docket Management System or the Federal eRulemaking portal can be viewed at *http://www.regulations.gov.* The submitted comments can be retrieved via Docket No. 24219.

articulate opposition from States about including information on public transportation disruptions.

There was general support for the proposed definition of ''real-time'' for congestion, travel time, and lane blockage information. There was no consensus among the respondents concerning the proposed thresholds for timeliness and accuracy: Private sector respondents commonly suggested more stringent thresholds, some State agencies suggested weaker thresholds; some overall respondents agreed with the thresholds identified in the notice. Several respondents, including State DOTs, noted that a more stringent timeliness threshold (5 minutes or less) would be more useful to the public. A few State agencies and private sector organizations noted that they were already meeting and exceeding these proposed threshold requirements. A few States objected to the timeliness threshold requirements as inappropriate for rural areas. Several respondents noted that the timeliness threshold requirements imply either a fully automated system or a 24/7 staff, which is likely not available immediately in all areas of the country.

Overall the responses reflected reasonable support for the proposed scope of the program, with the acknowledgement that there were dissenting opinions on some details. Nearly all the respondents anticipated that the FHWA would propose a rule to establish a program to advance the level of traffic and travel conditions reporting available today. The FHWA is proposing this NPRM to exercise the authority established by Congress to provide for congestion relief and to support the Department's Congestion Relief Initiative. This proposed rule enables various methods for mitigating the effects of recurring and non-recurring congestion by assisting agencies in providing 511 telephone-based traveler information; enhancing traffic incident management; improving work zone mobility; updating and coordinating traffic signal timing; and providing localized bottleneck relief.[4]

The comments that were received in the docket contributed substantially to this proposed rule in two key areas: program phasing and content requirements. The preference for a phased approach in achieving the program implementation milestones led to the two distinct dates proposed for establishing a real-time information program: One deployment for all Interstates 2 years after the date the final rule is published in the **Federal Register**, the other for non-Interstate highways in metropolitan areas by 4 years from the date the final rule is published in the **Federal Register**. The FHWA viewed that the combined efforts of the public and private sectors could successfully achieve these proposed milestones. The FHWA noted the interest of many public sector respondents about their preference to select the routes for traffic and travel conditions reporting.

There was wide variability in the content requirements for traffic and travel conditions reporting, especially in selecting a threshold for disseminating information after it has been collected. The FHWA considered the responses in parallel with the types of information that are needed to provide congestion relief. Based on the comments, the focus of the information to be reported centered on non-recurrent events like construction/maintenance; road closures and major delays; major special events; and, weather and road surface conditions.[5]

Transportation System Operations Enhancements Enabled by the Proposed Rule

A critical factor in the ability of transportation managers to respond effectively to a wide variety of events and situations is the availability of information that conveys the operating status of transportation facilities in real-time. Through the availability of information that improves upon today's geographic coverage, data accessibility, accuracy, and availability, transportation system operators would have the tools necessary to reduce congestion, facilitate incident management, and improve management of transportation systems assets.

Real-time information programs are proposed to be established so that States easily can exchange information on the real-time operational status of the transportation network with other States and with the private sector, value-added information market.[6] This cooperation and sharing of information could stimulate the dissemination of traffic and travel conditions that include Web or wireless access to route-specific travel time and toll information; route planning assistance using historical records of congestion by time of day; and communications technologies that gather traffic and incident-related data from a sample of vehicles traveling on a roadway and then publishing that information to travelers via mobile phones, personal digital assistants (PDAs), in-car units, or dynamic message signs.

The establishment of real-time information programs could enable the exchange of commonly applied information among public and private partners, which would stimulate national availability of travel conditions information. Real-time information programs could increase the available quantity of data for conditions prediction, expand commercial markets that broker information, provide validated and accurate data for performance measure development and reporting, and stimulate new information products that could not be achieved with present day methods.

The Real-Time System Management Information Program as described in the statute is focused upon making data available for a range of applications that benefit States and travelers. The proposed rule would implement that statute to provide a substantial foundation for the collection and gathering of data in a manner that would provide coherent use for other applications. The *511 Implementation and Operational Guidelines Version 3.0*[7] (2005) illustrate what detailed information from a real-time information program could be provided for other applications:

- Location—The location or portion of route segment where a reported item is occurring, related to mileposts, interchange(s) and / or common landmark(s).
- Direction of Travel—The direction of travel where a reported item is occurring.
- General Description and Impact—A brief account and impact of the reported item.
- Days/Hours and/or Duration—The period in which the reported item is ''active'' and possibly affecting travel.
- Travel Time or Delay—The duration of traveling from point A to

[4] Additional information about FHWA's focus on congestion is available at the following URL: *http://www.fhwa.dot.gov/congestion/toolbox/index.htm.*

[5] These types of content are consistent with those documented in *Implementation and Operational Guidelines for 511 Services, v.3.0* (2005), available at the following URL: *http://www.deploy511.org/implementationguide.htm.* The guidelines were prepared by the 511 Deployment Coalition of the American Association of State Highway and Transportation Officials (AASHTO), ITS America, the American Public Transportation Association (APTA), and the USDOT to promote service consistency to help achieve a nationwide 511 system.

[6] The value-added information market creates products intended for commercial use, for sale to a customer base, or for other commercial enterprise purposes. The market may rely on information gathered by States, from other sources, or from the market's own capabilities to create the information.

[7] Available at the following URL: *http://www.deploy511.org/implementationguide.htm.*

point B, a segment or a trip expressed in time (or delay a traveler will experience).

• Detours/Restrictions/Routing Advice—As appropriate, summaries of required detours, suggested alternate routes or modes and restrictions associated with a reported item.

• Forecasted Weather and Road Surface Conditions—Near-term forecasted weather and pavement conditions along the route segment.

• Current Observed Weather and Road Surface Conditions—Conditions known to be in existence that impact travel along the route segment.

The extent of the proposed rule would be solely the provision of real-time information, yet the outcomes possible through this program would also reach the business of the private sector and the public sector. The proposed rule itself is neither centered on a particular technology nor on a technology-dependent application. States establishing a real-time information program would be able to employ any solution chosen to make the information available. States and public agencies can enter into collaborative agreements with the private sector for establishing the program and gathering the data. States and public agencies could purchase value added information products from value added information providers. States and public agencies could apply combinations of these, and other, approaches to establish a successful real-time information program.

Section-by-Section Discussion

This NPRM proposes to incorporate a new, Part 511 to be titled Real-Time System Management Information Program.

Section 511.301 Purpose

The purpose of this part would be to implement the requirements of subsections 1201(a)(1); 1201(a)(2); and, 1201(c)(1) of SAFETEA–LU, which directs the Secretary to establish a Real-Time System Management Information Program that creates the capability in each State to monitor and collect, in real-time, the operational status of the transportation system network.

Section 511.303 Policy

Researchers working on a study on mobility considered the following question, ''Are Traffic Congestion and/or Travel Reliability Getting Worse?'' Their observations noted that ''four years (2000 through 2003) of archived detector data in the Mobility Monitoring Program point to an overall national trend of steady growth in traffic congestion and decline in travel reliability.'' [8] The continued growth in congestion poses a burden on society by degrading quality of life, diminishing economic productivity, and jeopardizing personal safety.[9] The Real-Time System Management Information Program would become an asset for the Department as it advances the Congestion Relief Initiative. Promoting Operational and Technical Improvements is featured as one of the elements in the Departmental Congestion Initiative, stressing the need to improve operational performance, including providing better real-time traffic information to all system users.

In Subtitle B to the SAFETEA–LU, Congress directs the FHWA to improve the security of the surface transportation system, to address congestion problems, to support improved response to weather events and surface transportation incidents, and to facilitate national and regional highway traveler information. Section 1201 of SAFETEA–LU directs the Department of Transportation to establish a Real-Time System Management Information Program that establishes real-time monitoring of traffic and travel conditions of the major highways of the United States and to enable States to share that data with other governments and with the traveling public. The data used to craft traffic and traveler conditions information are extensible, which systems developers would apply towards enabling a range of applications that agencies and travelers use to make more effective decisions.

In the *Travel Time Data Collection Handbook*,[10] the FHWA documented that the availability of traffic conditions reporting offers data that are extensible for a broad array of uses:

Planning and Design

Develop transportation policies and programs
Perform needs studies/assessments
Rank and prioritize transportation improvement projects for funding
Evaluate project-specific transportation improvement strategies
Input/calibration for air quality/mobile source emission models
Input/calibration for travel demand forecasting models
Calculate road user costs for economic analyses

Operations

Develop historical travel time data base
Input/calibration for traffic models (traffic, emissions, fuel consumption)
Real-time freeway and arterial street traffic control
Route guidance and navigation
Traveler information
Incident detection

Evaluation

Congestion management system/performance measurement
Establish/monitor congestion trends (extent, intensity, duration, reliability)
Identify congested locations and bottlenecks
Measure effectiveness and benefits of improvements
Communicate information about transportation problems and solutions
Research and development

The utility of the information may extend to events of various breadths of impact and scale. The information that is conveyed via real-time information programs can be considered highly valuable for the coordination of response and recovery from no-notice events, such as industrial accidents and willful acts of destruction, as well as those events that stimulate large displacements of people and disruptions to goods movements, such as in the event of hurricanes. The real-time information program should be treated as an asset for the first responder community, the homeland security community, and the transportation community.

The FHWA does not propose to require a particular technology or methodology for use in establishing the real-time information program. Instead, the FHWA encourages States to consider all available and cost-effective approaches, including those that involve the participation of the value added information providers or other public-private partnership ventures.

Section 511.305 Definitions

This section proposes to include definitions for terms that have special significance to a proposal under the Real-Time System Management Information program.

The proposed definition for ''Statewide incident reporting system'' is the same that is listed in section 1201(f) of SAFETEA–LU.

[8] Monitoring Urban Roadways in 2003: Current Conditions and Trends from Archived Operations Data, available at the following URL: *http://mobility.tamu.edu/mmp/FHWA-HOP-05-018/findings.stm.*

[9] Detailed facts and figures are provided on the FHWA Focus on Congestion Web site, available at the following URL: *http://www.fhwa.dot.gov/congestion/describing_problem.htm.*

[10] Report No. FHWA-PL-98-035, published in 1998, is available at the following URL: *http://www.fhwa.dot.gov/ohim/timedata.htm.* The Travel Time Data Collection Handbook provides guidance to transportation professionals and practitioners for the collection, reduction, and presentation of travel time data. The handbook provides a reference for designing travel time data collection efforts and systems, performing travel time studies, and reducing and presenting travel time data.

Section 511.307 Eligibility for Federal Funding

The FHWA proposes to permit a State to use its National Highway System, Congestion Mitigation and Air Quality Improvement (CMAQ) program, and Surface Transportation Program Federal-aid program apportionments for activities related to the planning and deployment of real-time monitoring elements that advance the goals of the Real-Time System Management Information Program. The FHWA has issued policy guidance, available at *http://www.ops.fhwa.dot.gov/travelinfo/resources/ops_memo.htm*, indicating that transportation system operations activities, such as real-time monitoring, are eligible under the major Federal-aid programs noted previously, within the requirements of the specific programs. State planning and research funds would also be available for activities relating to the planning of real-time monitoring elements.

Title 23, U.S. Code, section 120(a) provides for a 90 percent Federal share payable for projects providing traffic and travel conditions reporting on the Interstate System. Only projects that provide traffic and travel conditions reporting on the Interstate highways are subject to this provision. The establishment of real-time information programs on non-Interstate highways is subject to an 80 percent Federal share payable, as provided under 23 U.S.C. 120(b).

Section 511.309 Provisions for Traffic and Travel Conditions Reporting

This section describes the proposed parameters and performance characteristics for States to establish effective traffic and travel conditions reporting capabilities. The parameters and performance characteristics were outlined in the notice published in the **Federal Register** on May 4, 2006 (discussed in more detail in the Background section). The responses to this notice were applied to define the proposed project parameters.

At a minimum, the proposed information categories for traffic and travel conditions reporting would include: construction activities affecting travel conditions, such as implementing or removing lane closures; roadway or lane blocking traffic incident information; regularly updated roadway weather conditions; and, travel time along metropolitan area highway segments.

The responses to the May 2006 **Federal Register** notice indicated little preference for the provision of transit event information to be included with the other categories of traffic and travel conditions reporting. The FHWA requests and welcomes comments on the viability and practicality for including transit event information. Additionally, the FHWA requests and welcomes comments on whether transit event information should be explicitly identified as part of the final regulation to be codified in the Code of Federal Regulations.

The following table summarizes the proposed categories and criteria for the data. Also note that there are separate characteristics for traffic and travel conditions reporting in metropolitan areas and non-metropolitan areas.

Category of information	Timeliness for delivery			
	Metropolitan areas (in minutes)	Non-metropolitan areas (in minutes)	Availability (in percent)	Accuracy (in percent)
Construction activities:				
Implementing or removing lane closures	10	20	90	85
Roadway or lane blocking traffic incident information	10	20	90	85
Roadway weather observation updates	20	20	90	85
Travel time along highway segments	10	NA	90	85

The rationale for determining these proposed traffic and travel conditions characteristics is based upon responses to the request for comments notice dated May 2006, several research studies commissioned by FHWA and other transportation associations, and guidance documents published by the FHWA. The following paragraphs provide the details on how the FHWA determined that these characteristics are appropriate for the proposed rule.

The relationship between data accuracy and timeliness for delivery may be described as indirectly proportional: the longer the time-span for delivery the more accurate the data become. There are other contributing factors involved and the relationship does not hold true in every possible application. However, it is unmistakable that unambiguous and efficient data exchange depends on data quality. One way to ensure that data quality and data accuracy satisfy a minimum threshold is to perform validity checks to test if data have become corrupted from the time it is created at the source location to the time it is received. Simply put, performing validity checks takes time.

Researchers who have studied the characteristics of metropolitan area information gathering have noted a wide variance in the timeliness characteristic.[11] ''The time aggregation level varies widely, from 20 seconds in San Antonio to 15 minutes in several areas.'' The timeliness characteristic in this proposed rule is most essential for reporting of travel time along highway segments in metropolitan areas. A common practice in many metropolitan areas is the point detection of speeds and volume, in which information is collected discreetly for one point along the highway. Such an approach lends to preparing estimates of travel times along highway segments because of the lack of a spatial dimension in the original information gathering.

There are several contributing factors that led to the timeliness thresholds that the FHWA proposes in this rule: The wide array of traffic and travel conditions information gathering; the short life span of travel time information; the temporal variability in which many metropolitan areas gather information from source locations; the time needed to perform estimate calculations; and, the time needed to amass the data from other sources to perform adequate validity checks to ensure accuracy.

The FHWA proposes that metropolitan areas should be subject to a more stringent timeliness threshold than non-metropolitan areas. The basis for this is rooted in the results of several ITS Deployment Tracking Surveys that indicate growing sophistication in metropolitan area traffic and travel

[11] *Monitoring Urban Roadways in 2003: Current Conditions and Trends from Archived Operations Data*, available at the following URL: *http://mobility.tamu.edu/mmp/FHWA-HOP-05-018/data.stm.* The Mobility Monitoring Program is an effort by the FHWA to track and report traffic congestion and travel reliability on a national scale. The referenced document provides an analysis of archived traffic detector data, spanning 2000 through 2003, from nearly 30 cities.

conditions reporting.[12] Also, metropolitan areas are subject to congestion effects which can be measured through travel time and delay.

The FHWA proposes that non-metropolitan areas should satisfy a timeliness metric for information delivery threshold, yet such a threshold should consider the context of transportation operations in such locations. Non-metropolitan areas commonly feature fewer source locations for which traffic and travel conditions information are generated. The broader distances between the likely sources of information, the reduced availability of power and communications to convey source information, and the lower susceptibility to recurring congestion effects (e.g., poor signal timing, bottlenecks) justify a longer timeliness threshold. The timeliness threshold values for non-metropolitan areas in this proposed rule are oriented towards the movement of goods and for promoting the safety of travelers along the nation's Interstate highways.

It should also be noted that higher accuracy and more rapid availability of data likely will be needed to support complex operations such as High Occupancy Toll (HOT) operations and other congestion and value pricing applications. Additionally, States increasingly will rely on accurate performance measure data to determine the effectiveness of High Occupancy Vehicle (HOV) lanes for mitigating regional congestion. States should consider the data quality implications in advance of developing congestion management applications that rely upon data from various sources. Some States may consider the data gathering methods for specific transportation facilities such as dedicated HOT/HOV lanes, cordon area entry points, and other zones which may feature rigorous and complex data gathering mechanisms.

The FHWA believes that conveying travel times along highway segments would be valuable for a real-time information program. In a guidance document titled Travel Time Data Collection Report (Report FHWA–PL–98–035) the FHWA identifies the following broad characteristics for defining highway segments:

> The segment lengths may vary depending upon the data collection technique, but should be no longer than the following general ranges:
> • Freeways/Expressways: 1.6 to 4.8 km (1 to 3 mi)
> • Principal Arterials: 1.6 to 3.2 km (1 to 2 mi)
> • Minor Arterials: 0.8 to 3.2 km (1/2 to 2 mi)

The FHWA welcomes comments on the viability and practicality for using the above mentioned parameters as a guide for highway segment definition. Additionally, the FHWA welcomes comments on whether such parameters should be explicitly identified as part of the final regulation to be codified in the Code of Federal Regulations.

Section 511.311 Real-Time Information Program Establishment

This section proposes to require that every State establish a real-time information program for delivering traffic and travel conditions reporting along Interstate highways no later than 2 years after the date the final rule is published in the **Federal Register**. This section reiterates SAFETEA–LU section 1201(c)(1), requiring that updates to existing Regional ITS architectures shall conform to the National ITS Architecture[13] as described in 23 CFR 940. Furthermore, section 1201(c)(1) requires that updated Regional ITS architecture ''address real-time highway and transit information needs and the systems needed to meet such needs'' and include ''methods of exchanging or sharing highway and transit information.'' States would continue the current practice of providing the real-time information through common Internet-based communications.

The FHWA anticipates that the capability exists to establish traffic and traveler information by the proposed completion date. There is ample evidence that traffic and travel conditions reporting exists that can be leveraged to establish the enhancements in this proposed rule. As of October 31, 2007, there were 40 active 511 systems[14] for delivering traveler information via telephony along with 29 co-branded 511 Web sites.[15] Several hundred information outlets spanning every State have been documented by the FHWA to illustrate a vibrant traveler information marketplace.[16]

The information types for non-metropolitan area traffic and travel conditions reporting are most often produced by individuals at the incident scene and construction site, and thus may be information produced by resources available in the present day. Updated weather conditions information commonly involves automated mechanisms to produce actionable observations. The FHWA, working with States and associations, continue to work collaboratively to produce information management tools that extend today's weather observation capabilities. The FHWA has preliminarily determined that the wealth of information sources that exist today make establishing the real-time information program within the proposed completion date feasible.

Section 511.313 Metropolitan Area Real-time Information Program Supplement

This section pertains to those Metropolitan Statistical Areas (MSAs) of 1 million inhabitants or more.[17] As of December 31, 2006, the MSAs that exceed the 1 million population threshold include the following 49 locations:

1	New York-Northern New Jersey-Long Island, NY-NJ-PA	18,323,002
2	Los Angeles-Long Beach-Santa Ana, CA	12,365,627
3	Chicago-Napeville-Joliet, IL-IN-WI	9,098,316
4	Philadelphia-Camden-Wilmington, PA-NJ-DE	5,687,147
5	Dallas-Fort Worth-Arlington, TX	5,161,544
6	Miami-Fort Lauderdale-Miami Beach, FL	5,007,564
7	Washington-Arlington-Alexandria, DC-VA-MD	4,796,183

[12] Based upon freeway miles with real-time traffic data collection technologies as described in the ''National Trends'' page of the ITS Deployment Statistics Web site, available at the following URL: *http://www.itsdeployment.its.dot.gov/Trendsgraph.asp?comp=FM*.

[13] The National ITS Architecture is a common framework for Intelligent Transportation Systems interoperability. The National ITS Architecture is maintained by the U.S. DOT and is available on the DOT Web site at *http://www.its.dot.gov*.

[14] Simply stated, 511 is an easy-to-remember 3-digit telephone number, available nationwide, that provides current information about travel conditions, allowing travelers to make better choices—choice of time, choice of mode of transportation, choice of route.

[15] Information on the deployment of 511 is available at the following URL: *http://www.deploy511.org*.

[16] Information on the 511 program is available at the following URL: *http://www.fhwa.dot.gov/trafficinfo/index.htm*.

[17] As defined in Table 3a of the ''Ranking Tables for Population of Metropolitan Statistical Areas (Areas defined by the Office of Management and Budget as of June 6, 2003)'', available at the following URL: *http://www.census.gov/population/www/cen2000/phc-t29.html*.

8	Houston-Baytown-SugarLand, TX	4,715,407
9	Detroit-Warren-Livonia, MI	4,452,557
10	Boston-Cambridge-Quincy, MA-NH	4,391,344
11	Atlanta-Sandy Springs-Marietta, GA	4,247,981
12	San Francisco-Oakland-Fremont, CA	4,123,740
13	Riverside-San Bernardino-Ontario, CA	3,254,821
14	Phoenix-Mesa-Scottsdale, AZ	3,251,876
15	Seattle-Tacoma-Bellevue, WA	3,043,878
16	Minneapolis-St. Paul-Bloomington, MN-WI	2,968,806
17	San Diego-Carlsbad-San Marcos, CA	2,813,833
18	St. Louis, MO-IL	2,698,687
19	Baltimore-Towson, MD	2,552,994
20	Pittsburgh, PA	2,431,087
21	Tampa-St. Petersburg-Clearwater, FL	2,395,997
22	Denver-Aurora, CO	2,179,240
23	Cleveland-Elyria-Mentor, OH	2,148,143
24	Cincinnati-Middletown, OH-KY-IN	2,009,632
25	Portland-Vancouver-Beavertown, OR-WA	1,927,881
26	Kansas City, MO-KS	1,836,038
27	Sacramento-Arden-Arcade-Roseville, CA	1,796,857
28	San Jose-Sunnyvale-Santa Clara, CA	1,735,819
29	San Antonio, TX	1,711,703
30	Orlando, FL	1,644,561
31	Columbus, OH	1,612,694
32	Providence-New Bedford-Fall River, RI-MA	1,582,997
33	Virginia Beach-Norfolk-Newport News, VA-NC	1,576,370
34	Indianapolis, IN	1,525,104
35	Milwaukee-Waukesha-West Allis, WI	1,500,741
36	Las Vegas-Paradise, NV	1,375,765
37	Charlotte-Gastonia-Concord, NC-SC	1,330,448
38	New Orleans-Metairie-Kenner, LA	1,316,510
39	Nashville-Davidson-Murfreesboro, TN	1,311,789
40	Austin-Round Rock, TX	1,249,763
41	Memphis,TN-MS-AR	1,205,204
42	Buffalo-Niagara Falls, NY	1,170,111
43	Louisville, KY-IN	1,161,975
44	Hartford-West Hartford-East Hartford, CT	1,148,618
45	Jacksonville, FL	1,122,750
46	Richmond, VA	1,096,957
47	Oklahoma City, OK	1,095,421
48	Birmingham-Hoover, AL	1,052,238
49	Rochester, NY	1,037,831

In addition to the provisions of section 511.311, the State Departments of Transportation that correspond to the qualifying metropolitan areas would be required to deliver travel time information along Interstate highway segments throughout the entire metropolitan area. This section continues to propose a requirement to establish the real-time information program to deliver traffic and travel conditions reporting along the Interstate System highways within qualifying metropolitan areas no later than two years after the date the final rule is published in the **Federal Register**.

Section 511.313(d) proposes to require every State to identify routes of significance from among other non-Interstate highways that merit traffic and travel conditions reporting. States would apply existing coordination practices that are applied to make decisions concerning regional transportation system operations, management, and maintenance. Routes of significance would be identified by States, in consultation with the FHWA, to identify non-Interstate highways that would be included in a metropolitan area real-time information program. Federally-funded, State and locally-funded, and privately-funded highways could be designated routes of significance. Other highways that apply tolling and variable end-user pricing could be designated routes of significance. It would be up to the discretion of the States to define the criteria for selecting routes of significance, however, States are encouraged to consider highway safety (e.g., crash rate, routes affected by environmental events), public safety (e.g., routes used for evacuations), economic productivity, and severity of congestion among the criteria. The FHWA proposes to require the State Departments of Transportation corresponding to the qualifying metropolitan areas to establish the real-time information program components for traffic and travel conditions reporting along the State-designated routes of significance within these metropolitan areas no later than 4 years after publication of the final rule.

The rationale for determining the completion dates for Metropolitan Area traffic and travel conditions reporting is based upon responses to the request for comments notice dated May 2006, reported availability from States to the level of deployment of transportation operations applications, and research studies conducted by the FHWA and other organizations on operational challenges on the arterial highways that commonly serve as diversion routes away from congestion. The following paragraphs provide the details on how the FHWA determined that these time limits are appropriate for the proposed rule.

The FHWA anticipates that the capability exists in the largest metropolitan areas to establish traffic and traveler information by the proposed completion date. Deployment statistics collected by the FHWA from State and other public agencies illustrate substantial capabilities to perform traffic and travel conditions

reporting.[18] In 2005 there were 56 metropolitan areas out of 71 surveyed metropolitan areas that feature traffic and travel reporting capabilities, providing reporting coverage of over 6,500 miles of metropolitan area freeways. This figure corresponds to a 38 percent proportion of coverage of all 17,000 freeway miles contained within the 56 metropolitan areas known to have reporting features. There is ample evidence that traffic and travel conditions reporting exists today that can be leveraged to establish the enhancements in this proposed rule. The FHWA believes that the wealth of information sources that exist today enable Interstate reporting by the proposed completion date.

A separate completion date is proposed for establishing real-time information programs that extend geographic coverage to State selected highways. Many of the responses to the May 2006 Request for Comments indicated a desire for a phased approach in which States could establish broader geographic coverage. The responses also indicated that traffic and travel conditions reporting along non-Interstate highways may lack some key information characteristics, most notably travel time reporting. The FHWA recognizes that travel time reporting along non-Interstate highways and arterial highways can be challenging because of issues such as property access features, coordination with Interstate interchanges, and signalized intersection control. The FHWA also recognizes that metropolitan areas need to coordinate with a range of partners to agree upon additional non-Interstate highways that merit traffic and travel conditions reporting to serve a number of purposes, including providing a diversion route away from congestion. In this proposal, the FHWA estimates that the additional 24 months represents adequate time to determine the additional facilities and establishing the real-time information program for these locations.

Section 511.315 Program Administration

This section proposes that compliance with Part 511 will be monitored by the FHWA. The FHWA may decline to approve Federal-aid projects pursuant to 23 CFR 1.36 if a State fails to establish a real-time information program described in section 511.311 and section 511.313.

[18] The ITS Deployment Statistics Database Web site is available at the following URL: *http://www.itsdeployment.its.dot.gov.*

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, the FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined preliminarily that this action would be an economically significant rulemaking action within the meaning of Executive Order 12866 and would be a significant within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. This rulemaking proposes provisions and parameters for States to implement real-time monitoring of the transportation system as mandated in section 1201 of SAFETEA–LU. The Real-Time System Management Information Program is a newly created and complex program, receiving no dedicated Federal funding. This action is considered significant because of the substantial State and local government, and public interest in the information products enabled through this program.

This proposed rule is not anticipated to adversely affect, in a material way, any sector of the economy. This proposed rulemaking sets forth provisions and parameters for State Departments of Transportation to implement on Interstate highways and maintain from 2010 until 2018 an effective Real-Time System Management Information Program, which will result in some cost impacts to States or Metropolitan Planning Organizations (MPOs). This period would reflect the establishment of real-time information programs plus a seven-year period of operation. The seven-year period of operation assumes that equipment and supporting material for the real-time information program is fully replaceable after the operational life cycle. The FHWA has conducted a cost analysis identifying each of the proposed regulatory changes that would have a significant cost impact for MPOs or State DOTs. This cost analysis is included as a separate document, entitled ''Regulatory Cost Analysis of Proposed Rulemaking,'' and is available for review in the docket. Based on the cost analysis, we propose an estimate that the net present value of the estimated costs and benefits through 2018 represents at least a $1.8 Billion benefit to American travelers and taxpayers, corresponding to a benefit-cost ratio of 2.5. In addition, the State DOTs have the flexibility to use most other Federal highway dollars including Congestion Mitigation and Air Quality (CMAQ) program and Surface Transportation Program (STP) funds for real-time monitoring program implementation. Additionally, State Planning and Research (SPR) funds can be applied fully towards the planning of real-time monitoring projects.

The FHWA requests comments on the economic analysis of these proposed regulations including appropriateness of using the Georgia NaviGAtor study in the ''Regulatory Cost Analysis of Proposed Rulemaking'' to estimate benefits. Comments, including those from the State DOTs, regarding specific burdens, impacts, costs, and cost-effective use of limited resources would be most welcome and would aid us in more fully appreciating the impacts of substantially increasing the real-time monitoring and reporting capabilities nationwide. FHWA requests comments from State DOT's and others regarding how they anticipate they will comply with these proposed regulations, including the technologies to be used and the estimated cost per center-line mile. Hence, we encourage comments on all facets of this proposal regarding its costs, burdens, and impacts.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) we have evaluated the effects of this proposed action on small entities. The FHWA has determined that States and MPOs are not included in the definition of small entity set forth in 5 U.S.C. 601. Small governmental jurisdictions are limited to representations of populations of less than 50,000. MPOs, by definition, represent urbanized areas having a minimum population on 50,000. The FHWA preliminarily certifies that this action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 1041–4; 109 Stat. 48) requires

Federal 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 States, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation to $136.1 million in 2007 dollars). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires the agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation of why that alternative was not adopted.

The effects of this proposed rulemaking are discussed earlier in the preamble and in the ''Regulatory Cost Analysis of Proposed Rulemaking'' contained in the docket for this rulemaking. Because the proposed rule is neither centered on a particular technology nor on a technology-dependent application, these documents consider a number of alternatives and provide a number of technological choices, thereby offering broad flexibility to minimize costs of compliance with the standard. This NPRM proposes a phased approach and limits the content requirements for a real-time information system only to those needed to provide congestion relief. Additionally, while no new funding is available for this program, States and MPOs are afforded flexibility to use its National Highway System, CMAQ, and Surface Transportation Program Federal-aid apportionments for activities related to the planning and deployment of real-time monitoring elements that advance the goals of the Real-Time System Management Information Program. As such, the agency has provided a proposal that selects the most cost-effective alternative that achieves the objectives of the rulemaking. As noted above, the FHWA requests and welcomes comments on this benefit-cost analysis, providing the public input necessary to ensure the most cost-effective use of limited government resources.

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has determined preliminarily that this proposed action would not have sufficient federalism implications to warrant the preparation of a Federalism assessment. The FHWA has also preliminarily determined that this proposed action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. The FHWA contacted the National Governors' Association in writing about its determination. The National Governors' Association did not respond. The FHWA requests and welcomes comments on the Federalism implications of these proposed regulations.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations.

The FHWA has determined that this proposed rule contains a requirement for data and information to be collected and maintained in the support of operational decisions that affect the safety and mobility of the traveling public related to information on construction activities, including implementing and removing lane closures; roadway or lane blocking traffic incident information; roadway weather observation updates; and, calculated travel times along highway segments. In order to streamline the process, the FHWA intends to request that the OMB approve a single information collection clearance for all of the data in this proposed regulation. The FHWA reminds potential respondents that the Real-Time System Management Information Program is a program that supports solely the collection of transportation system data, primarily through automated means, with the transportation system data available for other use. The proposed Real-Time System Management Information Program itself does not produce informational or reporting products that are required by the Department of Transportation or other entities in the Federal Government.

Respondents to this information collection include State Transportation Departments from all 50 States, Puerto Rico, and the District of Columbia. The FHWA estimates that 20 States presently do not appear to provide real-time information on a continual basis to the public or to other States using conventional information dissemination technologies.[19] The FHWA estimates that a total of 175,200 burden hours per year would be imposed on these non-Federal entities to provide all the required information to comply with the proposed regulation requirements for real-time information programs.

Further, there are 32 States operating at least one 511 traveler information dissemination service that provide nearly all of the information categories identified in this proposed regulation.[20] The automated systems that gather the input for delivery for 511 also convey information via Dynamic Message Signs (DMS) for en-route travelers. The use of DMS is common for conveying travel time information messages. Based on known reports for 511 delivery services and for travel time messages on DMS[21] a more accurate calculation of the burden hours is possible. For all 32 States known to provide automated real-time traveler information: All 32 States provide construction activities information; all 32 States provide roadway incident information; 28 States provide roadway weather observations; and, 15 States provide travel time information on highway segments.

The estimated total burden to provide the additional information needed to attain full compliance with the proposed regulation includes 175,200 burden hours for States with no observable real-time information capability, plus 148,920 burden hours for States with real-time information capabilities to deliver travel time information, plus 35,040 burden hours for States with real-time information capabilities to deliver weather observation updates. The total estimated burden therefore is 359,160 hours for automated sources to deliver the information categories identified in this proposed regulation.

The FHWA is required to submit this proposed collection of information to OMB for review and approval, and accordingly, seeks public comments. Comments are requested regarding any aspect of these information collection requirements, including, but not limited

[19] Based upon the table ''Freeway Miles Under Traffic Surveillance'' from the 2005 Metropolitan Summary survey. This table is retrievable from the ITS Deployment Statistics Web site, available at the following URL: *http://www.itsdeployment.its.dot.gov/Results.asp?year=2005&rpt=M&filter=1&ID=307.*

[20] Based upon the document titled, ''Profiles of Traveler Information Services Update 2008,'' available at the following URL: *http://www.fta.dot.gov/documents/2008_511_Profiles.pdf.* As of July 2008 there are 41 known 511 systems in operation.

[21] Based on the page ''Travel times on DMS Status,'' available at the following URL: *http://ops.fhwa.dot.gov/travelinfo/dms/index.htm.*

to: (1) The accuracy of the estimated burden; (2) ways to enhance the quality, utility and clarity of the collected information; and, (3) ways to minimize the collection burden without reducing the quality of the collected information.

National Environmental Policy Act

The agency has analyzed this proposed action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) and has determined that the establishment of the Real-Time System Management Information Program, as required by the Congress in SAFETEA–LU, may yield a $384 million benefit from the reduction of greenhouse gas emissions and also from reductions of fuel consumption [22] and has determined preliminarily that this rule will not significantly affect the quality of the human environment. The promulgation of regulations has been identified as a categorical exclusion under 23 CFR 771.117(c)(20).

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this proposed rule under Executive Order 12630, Governmental Actions and Interface with Constitutionally Protected Property Rights. The FHWA does not anticipate that this proposed action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this proposed action would not cause any environmental risk to health or safety that might disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. The proposed rulemaking addresses provisions and parameters for the Real-Time System Management Information Program and would not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this proposed action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use dated May 18, 2001. We have determined that the proposed rule is not a significant energy action under that order since it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Executive Order 12898 (Environmental Justice)

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The FHWA has preliminarily determined that this proposed rule does not raise any environmental justice issues. The FHWA requests comment on this assessment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 511

Grant programs—transportation, Highway traffic safety, Highways and roads, Transportation, Travel, Travel restrictions.

Issued on: January 6, 2009.

Thomas J. Madison, Jr.,

Federal Highways Administrator.

In consideration of the foregoing, the FHWA proposes to add a new part 511, to Title 23, Code of Federal Regulations, to read as follows:

PART 511—REAL-TIME SYSTEM MANAGEMENT INFORMATION PROGRAM

Subpart A—[Reserved]

Subpart B—[Reserved]

Subpart C—Real-Time System Management Information Program

Sec.

511.301 Purpose.
511.303 Policy.
511.305 Definitions.
511.307 Eligibility for Federal Funding.
511.309 Provisions for traffic and travel conditions reporting.
511.311 Real-time information program establishment.
511.313 Metropolitan area real-time information program supplement.
511.315 Program administration.

Authority: Section 1201, Pub. L. 109–59; 23 U.S.C. 315; 23 U.S.C. 120; 49 CFR 1.48.

Subpart A—[Reserved]

Subpart B—[Reserved]

Subpart C—Real-Time System Management Information Program

§ 511.301 Purpose.

The purpose of this part is to establish the provisions and parameters for the Real-Time System Management Information Program. This regulation provides the provisions for implementing Subsections 1201(a)(1), (a)(2), and (c)(1) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59; 119 Stat. 1144), pertaining to Congestion Relief.

§ 511.303 Policy.

This regulation establishes the provisions and parameters for the Real-Time System Management Information Program so that State Departments of Transportation, other responsible agencies, and partnerships with other commercial entities can establish a real-time information program that secures accessibility to traffic and travel conditions information to other public agencies, the traveling public, and to other parties who may deliver value added information products on a fee-for-service basis.

§ 511.305 Definitions.

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this subpart. As used in this part:

Accessibility means the relative ease with which data can be retrieved and

[22] This estimated benefit is documented in Table 1 on Page 14 of the *Regulatory Benefit-Cost Analysis of Proposed Rulemaking* included in this docket.

manipulated by data consumers to meet their needs.

Accuracy means the measure or degree of agreement between a data value or set of values and a source assumed to be correct.

Availability means the degree to which data values are present in the attributes (e.g., volume and speed are attributes of traffic) that require them. Availability is typically described in terms of percentages or number of data values.

Congestion means the level at which transportation system performance is unacceptable due to excessive travel times and delays.

Coverage means the degree to which data values in a sample accurately represent the whole of that which is to be measured.

Data quality means the fitness of data for all purposes that require such data.

Metropolitan Areas means the geographic areas designated as Metropolitan Statistical Areas by the Office of Management and Budget in the Executive Office of the President with a population exceeding 1,000,000 inhabitants.

Real-time information program means creating the methods by which States gather the data necessary for traffic and travel conditions reporting. Such means may involve State-only activity, State partnership with commercial providers of value added information products, or other effective means that enable the State to satisfy the provisions for traffic and travel time conditions reporting stated in this Subsection.

Statewide incident reporting system means a statewide system for facilitating the real-time electronic reporting of surface transportation incidents to a central location for use in monitoring the event, providing accurate traveler information, and responding to the incident as appropriate. This definition is consistent with Public Law 109–59; 119 Stat. 1144, Section 1201(f).

Timeliness means the degree to which data values or a set of values are provided at the time required or specified.

Traffic and travel conditions means the characteristics that the traveling public experiences. Traffic and travel conditions include the following characteristics:

(1) Road or lane closures because of construction, traffic incidents, or other events;

(2) Roadway weather or other environmental conditions restricting or adversely affecting travel;

(3) Extent and degree of congested conditions, (e.g., length of roadway experiencing stop-and-go or very slow, prevailing speed of traffic less than half of speed limit); and

(4) Travel times or speeds on limited access roadways in metropolitan areas that experience recurring congestion. Traffic and travel conditions may report predicted conditions in addition to the real-time conditions.

Validity means the degree to which data values fall within the respective domain of acceptable values.

Value added information products means crafted products intended for commercial use, for sale to a customer base, or for other commercial enterprise purposes. These products may be derived from information gathered by States. These products may be created from other party or proprietary sources. These products may be created using the unique means of the value added information provider.

§ 511.307 Eligibility for Federal funding.

Subject to project approval by the Secretary, a State may obligate funds apportioned to the State under Title 23 United States Code sections 104(b)(1), also known as National Highway System funds, 104(b)(2), also known as Congestion Mitigation and Air Quality funds, and 104(b)(3), also known as Surface Transportation Program funds, for activities relating to the planning and deployment of real-time monitoring elements that advance the goals and purposes of the Real-Time System Management Information Program. State Planning and Research funds, apportioned according to 23 U.S.C. 505(a), may be applied to the development and implementation of a real-time information program.

Those project applications to establish a real-time information program solely for Interstate System highways are entitled to a Federal share of 90 percent of the total project cost, pursuant to 23 U.S.C. 120(a). Those project applications to establish a real-time information program for non-Interstate highways are entitled to a Federal share of 80 percent of the total project cost, as per 23 U.S.C. 120(b).

§ 511.309 Provisions for traffic and travel time conditions reporting.

(a) All real-time information programs that are funded in whole or in part with the highway trust fund are subject to these provisions.

(1) *Construction activities.* The timeliness for delivery of full construction activities affecting travel conditions, such as implementing or removing lane closures, will be 20 minutes or less from the time of the event occurrence for highways outside of Metropolitan Areas. The timeliness for delivery of full construction activities affecting travel conditions, such as implementing or removing lane closures, will be 10 minutes or less from the time of the event occurrence for highways within Metropolitan Areas.

(2) *Roadway or lane blocking incidents and events.* The timeliness for delivery of roadway or lane blocking traffic incident, or other event information will be 20 minutes or less from the time that the incident is detected, or reported, and verified for highways outside of Metropolitan Areas. The timeliness for delivery of roadway or lane blocking traffic incident, or other event information will be 10 minutes or less from the time that the incident is detected, or reported, and verified for highways within Metropolitan Areas.

(3) *Roadway weather observations.* The timeliness for delivery of roadway weather observation updates from observation locations along highway segments will be 20 minutes or less from the observation time for highways within Metropolitan Areas and also for highways outside of Metropolitan Areas.

(4) *Travel time information.* The timeliness for delivery of updated travel time information along highway segments within Metropolitan Areas will be 10 minutes or less from the time that the travel time calculation is completed.

(5) *Information accuracy.* The designed accuracy for a real-time information program shall be 85 percent accurate at a minimum, or have a maximum error rate of 15 percent.

(6) *Information availability.* The designed availability for a real-time information program shall be 90 percent available at a minimum.

(b) Real-time information programs may be established using legacy monitoring mechanisms applied to the highways, using a statewide incident reporting system, using new monitoring mechanisms applied to the highways, using value added information products, or using a combination of monitoring mechanisms and value added information products.

§ 511.311 Real-time information program establishment.

(a) *Requirement.* States shall establish real-time information programs that are consistent with the parameters defined under § 511.309. The real-time information program shall be established to take advantage of the existing traffic and travel condition reporting capabilities, and build upon them where applicable. The real-time information program shall provide, as a minimum, geographic coverage to encompass all Interstate highways

operated by the State. In addition, the real-time information program shall complement current transportation performance reporting systems by making it easier to gather or enhance required information.

(b) *Data quality.* The States shall develop the methods by which data quality can be ensured to the data consumers. The criteria for defining the validity of traffic and travel conditions reporting from real-time information programs shall be defined by the States in collaboration with their partners for establishing the programs.

(c) *Participation.* The establishment, or the enhancement, of a real-time information program should include participation from the following agencies: Highway agencies; public safety agencies (e.g. police, fire, emergency/medical); transit operators; and other operating agencies necessary to sustain mobility through the region and/or the metropolitan area.

(d) *Update of Regional ITS Architecture.* All States and regions that have created a Regional ITS architecture in accordance with Section 940 in Title 23 of the Code of Federal Regulations are required to complete an update of the Regional ITS architecture. The updated Regional ITS architecture shall explicitly address real-time highway and transit information needs and the methods needed to meet such needs. The updated Regional ITS architecture shall address coverage, monitoring systems, data fusion and archiving, and accessibility to highway and transit information for other States and for value added information product providers. The updated Regional ITS architecture shall feature the components and functionality of the real-time information program.

(e) *Effective date.* Traffic and travel conditions reporting needs for all Interstate system highways shall be considered. Establishment of the real-time information program for traffic and travel conditions reporting along the Interstate system highways shall be completed no later than [date 2 years after date of publication of final rule].

§ 511.313 Metropolitan Area real-time information program supplement.

(a) *Applicability.* Metropolitan Areas exceeding a population of 1,000,000 inhabitants are subject to the provisions of this section.

(b) *Requirement.* Metropolitan Areas shall establish a real-time information program for traffic and travel conditions reporting with the same provisions described in § 511.311.

(c) *Effective date.* Traffic and travel conditions reporting needs and the impacts from congestion for all Metropolitan Area Interstate system highways shall be considered. Establishment of the real-time information program for traffic and travel conditions reporting along the Metropolitan Area Interstate system highways shall be completed no later than [date 2 years after date of publication of the final rule].

(d) *Routes of significance.* States shall designate metropolitan area, non-Interstate highways that are routes of significance that merit traffic and travel conditions reporting. States shall apply the existing practices and procedures that are used for compliance with 23 CFR part 940, and with 23 CFR part 420. States shall select routes of significance based on various factors relating to roadway safety (e.g. crash rate, routes affected by environmental events), public safety (e.g. routes used for evacuations), economic productivity, severity of congestion, frequency of congestion, and utility of the highway to serve as a diversion route for congestion locations. States shall consider, in consultation with the FHWA, routes that are federally funded, State and locally funded, and privately funded when designating routes of significance. States shall consider toll facilities and other facilities that apply end user pricing mechanisms when designating routes of significance. Arterial highways and other highways that serve as diversion routes for congestion shall be considered for designating routes of significance. Establishment of the real-time information program for traffic and travel conditions reporting along the State-designated metropolitan area routes of significance shall be completed no later than [date 4 years after date of publication of the final rule].

§ 511.315 Program administration.

(a) Prior to authorization of highway trust funds for construction or implementation of ITS projects, compliance with § 511.311 and § 511.313 shall be demonstrated.

(b) Compliance with this part will be monitored under Federal-aid oversight procedures as provided under 23 U.S.C. 106 and 133, and 23 CFR 1.36.

[FR Doc. E9–392 Filed 1–13–09; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–153–FOR; Docket ID: OSM–2008–0021]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on the proposed amendment.

SUMMARY: We are announcing receipt of an amendment to the Pennsylvania regulatory program (the ''Pennsylvania program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). In response to a required program amendment codified in the Federal regulations and to a subsequent notification by letter, Pennsylvania has submitted changes to its regulations involving definitions; permit and reclamation fees; and the use of money and has provided additional descriptions, assurances, and supporting information to ensure that the reclamation of all sites that were bonded under its previous Alternative Bonding System (ABS) will be provided for under the approved Pennsylvania program and consistent with Federal regulations at 30 CFR Part 800.

This document gives the times and locations that the Pennsylvania program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments until 4 p.m., *e.s.t.* February 13, 2009. If requested, we will hold a public hearing on February 9, 2009.

We will accept requests to speak at a hearing until 4 p.m., *e.s.t.* on *January 29, 2009.*

ADDRESSES: You may submit comments, identified by PA–153–FOR; Docket ID: OSM–2008–0021 by either of the following two methods:

Federal eRulemaking Portal: www.regulations.gov. The proposed rule has been assigned Docket ID: OSM–2008–0021. If you would like to submit comments through the Federal eRulemaking Portal, go to *www.regulations.gov* and do the following. Click on the ''Advanced Docket Search'' button on the right side of the screen. Type in the Docket ID

OSM–2008–0021 and click the ''Submit'' button at the bottom of the page. The next screen will display the Docket Search Results for the rulemaking. If you click on OSM–2008–0021, you can view the proposed rule and submit a comment. You can also view supporting material and any comments submitted by others.

Mail/Hand Delivery/Courier: Mr. George Rieger, Chief, Pittsburgh Field Division, Office of Surface Mining Reclamation and Enforcement, 4th and Market Sts., Suite 3C, Harrisburg, Pennsylvania 17101.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: In addition to obtaining copies of documents at *www.regulations.gov*, information may also be obtained at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Pittsburgh Field Division Office.

George Rieger, Chief, Pittsburgh Field Division, Harrisburg Office, Office of Surface Mining Reclamation and Enforcement, 4th and Market Sts., Suite 3C, Harrisburg, Pennsylvania 17101, Telephone No. (717) 782–4036, E-mail: *grieger@osmre.gov*

Joseph P. Pizarchik, Director, Bureau of Mining and Reclamation, Pennsylvania Department of Environmental Protection, Rachel Carson State Office Building, P.O. Box 8461, Harrisburg, Pennsylvania 17105–8461, Telephone: (717) 787–5015 E-mail: *jpizarchik@state.pa.us.*

FOR FURTHER INFORMATION CONTACT: George Rieger, Telephone: (717) 782–4036. E-mail: *grieger@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program
II. Description of the Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982.

From 1982 until 2001, Pennsylvania's bonding program for surface coal mines, coal refuse reprocessing operations, and coal preparation plants, was funded under an ABS, which included a central pool of money, the Surface Mining Conservation and Reclamation Fund (Fund), used for reclamation. This pool was funded in part by a per-acre reclamation fee paid by operators of permitted sites and supplemented by site bonds posted by those operators for each mine site.

In 1991, our oversight activities determined that Pennsylvania's ABS included unfunded reclamation liabilities for backfilling, grading, and revegetating mined land and we determined that the ABS was financially incapable of abating or treating pollutional discharges from bond forfeiture sites under its jurisdiction. As a result, on May 31, 1991, we imposed the required amendment codified at 30 CFR 938.16(h). That amendment required Pennsylvania to demonstrate that the revenues generated by its collection of the reclamation fee would assure that its Fund could be operated in a manner that would meet the ABS requirements contained in 30 CFR 800.11(e). This provision requires that an ABS assure that ''the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time.'' It also requires that the ABS ''provide a substantial economic incentive for the permittee to comply with all reclamation provisions''.

Also, on October 1, 1991, OSM sent Pennsylvania a letter, pursuant to 30 CFR Part 732, notifying the State that it must submit a program amendment that would address the aforementioned deficiencies in the ABS. This document is commonly referred to as a ''732 letter.''

After a decade of trying to address the problems with the ABS, the Pennsylvania Department of Environmental Protection (PADEP) terminated the ABS in 2001 and began converting active surface coal mining permits to a conventional bonding system (CBS) or ''full-cost'' bonding program. This CBS requires a permittee to post a site-specific bond in an amount sufficient to cover the estimated costs to complete reclamation in the event of bond forfeiture.

By letter dated June 12, 2003, OSM notified the PADEP that it concurred that the conversion to a CBS, as well as other additional measures taken by the State, were sufficient to remedy the deficiencies cited in the 732 letter, which it declared to be terminated. Then, on October 7, 2003, OSM published a final rule removing the required amendment at 30 CFR 938.16(h) on the basis that the conversion from an ABS to a CBS rendered the requirement to comply with 30 CFR 800.11(e) moot. 68 FR 57805. Subsequent to these OSM actions, a lawsuit was filed in the U.S. District Court for the Middle District Court of Pennsylvania, *Pennsylvania Federation of Sportsmen's Clubs Inc. et al.* v. *Norton,* No. 1:03–CV–2220. The district court affirmed OSM's decision in a Memorandum Opinion and Order dated February 1, 2006. *Id.*

However, on August 2, 2007, the United States Court of Appeals for the Third Circuit reversed the district court's decision and set aside OSM's decision to remove the required amendment and the 732 letter. *Pennsylvania Federation of Sportsmen's Clubs* v. *Kempthorne,* 497 F.3d 337 (3rd Cir. 2007). At issue, relevant to this notice, was whether OSM properly terminated the requirement that Pennsylvania demonstrate that its Surface Mining Conservation and Reclamation Fund was in compliance with 30 CFR 800.11(e).

The Third Circuit concluded: ''While it is true that the 'ABS Fund' continues to exist in name, it no longer operates as an ABS, that is, as a bond pool, to provide liability coverage for new and existing mining sites.'' 497 F.3d at 349. However, the Court went on to ''conclude that 800.11(e) continues to apply to sites forfeited prior to the CBS conversion.'' *Id.* at 353. In commenting further on 30 CFR 800.11(e), the Court stated that ''[t]he plain language of this provision requires that Pennsylvania demonstrate adequate funding for mine discharge abatement and treatment at all ABS forfeiture sites.'' *Id.* at 354. Finally, the court also concluded that ''a plain reading of the words 'any areas which may be in default at any time' indicates that the obligations prescribed by Section 800.11(e) are not restricted to the immediate circumstances surrounding the approval of an ABS, but are instead ongoing in nature and apply at any time, so long as those mining areas originally bonded under the ABS, and not yet converted to CBS bonds, still exist.'' *Id.* at 352. Pennsylvania believes the submission that is the subject of this rulemaking will comply with the Third Circuit's mandate, and thus will satisfy the reinstated required

amendment and the October 1, 1991, 732 letter.

You can find additional background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register**, 47 FR 33050. You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15 and 938.16.

II. Description of the Amendment

By letter dated August 1, 2008 (Administrative Record Number PA 802.43), Pennsylvania sent us a proposed program amendment that is intended to satisfy a required amendment that was imposed by OSM in a final rule published in the **Federal Register** on May 31, 1991, 56 FR 24687, and codified in the Federal Regulations at 30 CFR 938.16(h). This proposed program amendment is also intended to satisfy the 732 letter dated October 1, 1991. Both the required amendment and the 732 letter are discussed in more detail in Section I.

This Pennsylvania program amendment submission provides a 44-page detailed narrative of actions taken by PADEP subsequent to the OSM 1991 required amendment and 732 letter to address bond program deficiencies. Pennsylvania requests that the changes described be included in its approved program. The program amendment under consideration consists of changes to Pennsylvania regulations as well as narrative demonstrations as identified below. Included in parentheses are the pages within the 44-page Pennsylvania narrative that are specific to each amendment:

A. *Regulatory Changes to Establish Legally Enforceable Means of Funding the O&M and Recapitalization Costs for the ABS Legacy Sites* (summarized on pages 36–39; the actual text of these regulatory changes, along with brief summaries of them, are set forth below in Section A of Section Descriptions);

B. *The Conversion Assistance Program* (pages 13–18);

C. *Trust Funds as an Alternative System and Other Equivalent Guarantee: Rationale for Approval* (pages 26–31);

D. *Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites* (pages 31–33); and

E. *Demonstration of Sufficient Funding for Construction of All Necessary Discharge Treatment Facilities at the Primacy ABS Forfeiture Site* (pages 33–34).

Pennsylvania believes this State program amendment includes provisions that will cover the costs of all reclamation for sites bonded under the ABS that have had their bonds forfeited, as well as potential reclamation costs for sites bonded under the ABS and not yet forfeited, but for which conventional, full cost bonds or other sufficient financial assurance mechanisms have not been posted. These sites are the responsibility of the former ABS should they be forfeited prior to the posting of full-cost bonds or other adequate financial mechanisms.

Section Descriptions

A. Regulatory Changes To Establish Legally Enforceable Means of Funding the O&M and Recapitalization Costs for the ABS Legacy Sites

Pennsylvania has completed final rulemaking to amend existing provisions of Chapter 86 relating to reclamation fees, definitions, and to the PADEP's use of money for reclamation of forfeited surface coal mine sites. The revised regulatory language and the State's summary of its rationale for these specific changes are identified below:

Subchapter A. General Provisions: Revised Language to the Pennsylvania Code:

Subchapter A. General Provisions

Section 86.1 Definitions

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

ABS Legacy Sites—Mine sites, permitted under the primacy Alternate Bonding System, that have a post-mining pollutional discharge where the operator has defaulted on its obligation to adequately treat the discharge and, either the bond posted for the site is insufficient to cover the cost of treating the discharge, or a trust to cover the costs of treating the discharge was not fully funded and is insufficient to cover the cost of treating the discharge.

* * * * *

Operational Area—The maximum portion of the permitted area that the permittee is authorized to disturb at any specific time during the permit term in accordance with the approved mining and reclamation plan, including all of the land affected by mining activities that is not planted, growing and stabilized.

Operation and Maintenance Costs—Expenses associated with the day-to-day operation and maintenance of a conventional or a passive treatment facility, such as chemicals, electricity, labor, water sampling, sludge removal and disposal, maintenance of access roads, mowing, snow removal, inspecting facilities, repairing and maintaining all aspects of the treatment facility, equipment, and buildings.

* * * * *

Primacy Alternate Bonding System—Bonding system utilized by Pennsylvania from July 31, 1982 until August 4, 2001 for surface coal mines, coal refuse reprocessing facilities, and coal preparation plants in which a central pool of money to be used by the Department for reclamation of forfeited sites was funded in part through imposition of a per-acre reclamation fee paid by operators of permitted sites.

* * * * *

Recapitalization Costs—The costs associated with replacing discharge treatment facility components or the costs to install treatment systems with lower operation and maintenance costs than the system being replaced.

Summary of Regulatory Changes—Section 86.1, Definitions

a. Section 86.1 (Definition of "ABS Legacy Sites")

The term "ABS legacy sites" has been added to the list of terms in Section 86.1 because it is used throughout the amendments to Sections 86.17(e) and 86.187. The term "ABS legacy sites" represents a certain class of surface coal mine sites which were permitted under the PADEP's ABS. These sites have post-mining pollutional discharge(s), the operator has defaulted on its obligation to adequately treat the discharge(s), and the operator's financial guarantee for reclamation is insufficient to cover the cost of treating the discharge in perpetuity. The PADEP's means for addressing reclamation of the ABS legacy sites, including the cost of treating the discharges in perpetuity, is the subject of the ruling of the Third Circuit Court of Appeals in the Kempthorne case discussed above. The cost of treating the discharges at these sites is being addressed by the amendments to Sections 86.17(e) and 86.187 as part of this final rulemaking.

b. Section 86.1 (Definition of "Operational Area")

The term "Operational Area" is being added to Section 86.1 in order to help clarify the amendments to Section 86.17(e) concerning the manner in which the reclamation fee is assessed in a CBS.

c. Section 86.1 (Definition of "Operation and Maintenance Costs")

The term "Operation and Maintenance Costs" is being added to

Section 86.1 in order to help clarify the amendments to Section 86.17(e) and Section 86.187 concerning how certain monies are to be used to treat discharges on a certain class of bond forfeiture sites—the ABS legacy sites.

d. Section 86.1 (Definition of ''Primacy Alternate Bonding System'')

The term ''Primacy Alternate Bonding System'' is being added to Section 86.1 to accurately identify the class of mine sites being addressed by the amendments to Section 86.17(e) and Section 86.187. The ABS legacy sites, which are the focus of the *Kempthorne* case, are a class of coal mine sites that were permitted under the ''primacy alternate bonding system'' and have certain additional characteristics described in the definition for ''ABS legacy sites.'' PADEP is proposing this definition because it believes that it is necessary to distinguish sites permitted under the ABS from those converted to, or originally permitted under, the CBS in order to accurately identify the ABS legacy sites. Pennsylvania also proposes this definition to distinguish further between the ''primacy'' ABS and the ABS that existed for surface coal mine sites prior to Pennsylvania obtaining primacy in July 1982, because the pre-primacy ABS sites are not subject to the requirements of 30 CFR 800.11(e).

e. Section 86.1 (Definition of ''Recapitalization Costs'')

The term ''Recapitalization Costs'' is being added to the list of terms in Section 86.1. Recapitalization costs are expressly included as part of the operation and maintenance costs for treating discharges at ABS legacy sites in changes being made to Section 86.17(e) and Section 86.187. When calculating the costs to treat post-mining pollutional discharges at mine sites in perpetuity, the PADEP proposes to include an amount to cover the costs to replace discharge treatment facility components over time (as such components simply wear out or otherwise need to be replaced). This term is needed to assure that these specific equipment-replacement costs are identified as part of the ongoing costs for treating post-mining discharges at the ABS legacy sites.

Subchapter B. Permits: Revised Language to the Pennsylvania Code:

Subchapter B. Permits

General Requirements for Permits and Permit Applications

Section 86.17 Permit and Reclamation Fees

* * * * *

(e) In addition to the bond established under Sections 86.143, 86.145, 86.149 and 86.150 (relating to Requirement to File a Bond; Department responsibilities; determination of bond amount; and minimum amount), and subject to the exception provided for in Section 86.283(c) (relating to procedures), the applicant for a permit or a permit amendment shall pay a per-acre reclamation fee for surface mining activities except for the surface effects of underground mining. This reclamation fee will be assessed for each acre of the approved operational area and shall be paid by the applicant prior to the Department's issuance of a surface mining permit. If a permit amendment results in an increase in the approved operational area, the reclamation fee will be assessed on the increased acreage and shall be paid by the operator prior to the Department's issuance of the permit amendment.

(1) The reclamation fee will be deposited into a separate subaccount within the Surface Mining Conservation and Reclamation Fund called the Reclamation Fee O&M Trust Account, as a supplement to bonds forfeited from ABS Legacy Sites. The reclamation fee will be used by the Department to pay the construction costs and operation and maintenance costs associated with treating post-mining pollutional discharges at ABS Legacy Sites, and such money may not be used for any other purpose. The interest earned on the monies in the Reclamation Fee O&M Trust Account will be deposited into the Reclamation Fee O&M Trust Account and will be used by the Department to pay the construction costs and operation and maintenance costs associated with treating post-mining pollutional discharges at ABS Legacy Sites. Such interest may not be used for any other purpose. For purposes of this section, operation and maintenance costs include recapitalization costs.

(2) After the end of each fiscal year, the Department will prepare a fiscal-year report containing a financial analysis of the revenue and expenditures of the Reclamation Fee O&M Trust Account for the past fiscal year and the projected revenues and expenditures or the current fiscal year. Beginning with the report for fiscal year 2008–09, the report will include the Department's calculation of the required amount of the reclamation fee, and the proposed adjustment of the reclamation fee amount. The fiscal-year report will be submitted to the members of the Mining and Reclamation Advisory Board for their review and comment and will be published on the Department's Web site. Notice of the report's availability will be published in the *Pennsylvania Bulletin*. The Department will review the fiscal-year report at a meeting of the Mining and Reclamation Advisory Board.

(3) The amount of the reclamation fee shall be $100 per acre until December 31, 2009. Commencing January 1, 2010 and continuing until either a permanent alternative funding source is established or the ABS Legacy Sites Trust Account is actuarially sound, the reclamation fee will be adjusted as necessary to ensure that there are sufficient revenues to maintain a balance in the Reclamation Fee O&M Trust Account of at least $3,000,000.

(i) The reclamation fee will be used until the ABS Legacy Sites Trust Account is actuarially sound unless an alternative permanent funding source in lieu of the reclamation fee is used to fund the Reclamation Fee O&M Trust Account.

(ii) Until the ABS Legacy Sites Account is actuarially sound, the alternative permanent funding source must provide sufficient revenues to maintain a balance in the Reclamation Fee O&M Trust Account of at least $3,000,000 and to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at the ABS Legacy Sites. Funds that are not needed for annual operation and maintenance or to maintain the $3,000,000 balance may be deposited into the ABS Legacy Sites Trust Account.

(4) Commencing January 1, 2010 and continuing until the ABS Legacy Sites Trust Account is actuarially sound, the amount of the reclamation fee will be annually calculated and, if necessary, will be adjusted in multiples of $50 based on the following factors:

(i) The current balance in the Reclamation Fee O&M Trust Account;

(ii) The total amount of revenue into the Trust Account during the previous fiscal year from collection of the reclamation fee, the interest accrued by the Reclamation Fee O&M Trust Account, the deposits of civil penalties into the Trust Account and deposits from other sources of monies into the Trust Account;

(iii) The amount of ongoing operation and maintenance costs incurred by the Reclamation Fee O&M Trust Account during previous fiscal years;

(iv) The projected number of acres subject to the reclamation fee during the current fiscal year;

(v) The projected amount of revenue into the Reclamation Fee O&M Trust Account during the current fiscal year from projected interest accrued by the Trust Account, projected deposits of civil penalties, and projected deposits of monies from other sources; and

(vi) The projected expenditures of the Reclamation Fee O&M Trust Account for operation and maintenance costs for the current fiscal year.

(5) Following the Department's review of its calculation of the required reclamation fee amount at a public meeting of the Mining and Reclamation Advisory Board pursuant to Subsection (2), the Department will publish the adjustment in the required amount of the reclamation fee in the *Pennsylvania Bulletin*. Adjustments to the amount of the reclamation fee will become effective upon publication in the *Pennsylvania Bulletin*. The Department's determination of the required amount of the reclamation fee pursuant to Subsections (3) and (4) will be a final action of the Department appealable to the Environmental Hearing Board.

(6) The Department will cease to assess and collect the reclamation fee when the ABS Legacy Sites Trust Account established pursuant to Section 86.187(a) (relating to use of money) becomes actuarially sound. The ABS Legacy Sites Trust Account will become actuarially sound when the following conditions are met:

(i) Financial guarantees sufficient to cover reclamation costs, including the costs to treat each discharge in perpetuity, have been approved by the Department for all mine sites permitted under the Primacy Alternate Bonding System;

(ii) Construction of the necessary discharge treatment facilities has been completed at the ABS Legacy Sites; and

(iii) The ABS Legacy Sites Trust Account, combined with the Reclamation Fee O&M Trust Account, contains funds which generate interest at a rate and in an amount sufficient to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at the ABS Legacy Sites.

Summary of Regulatory Changes—Section 86.17, Permit and Reclamation Fees

a. Section 86.17(e) Reclamation Fees

This proposal revises the text of Section 86.17(e) to clarify the application of this subsection in the context of the CBS. The revisions provide that the reclamation fee is assessed for each acre of the approved operational area of the permit. The proposed revisions also clarify the manner in which the reclamation fee is assessed. Finally, minor editorial changes were made by adding references to Section 86.143 (relating to the requirement to file a bond) and to the exception for remining areas provided in Section 86.283(c).

b. Section 86.17(e)(1) (Deposit and Use of Reclamation Fees)

This provision, in conjunction with Section 86.187(a)(1), establishes a separate subaccount within the Surface Mining Conservation and Reclamation (SMCR) Fund called the Reclamation Fee O&M (operation and maintenance) Trust Account, and requires the PADEP to deposit all reclamation fees it collects into the Reclamation Fee O&M Trust Account. This subsection also requires that the PADEP use the reclamation fees only for the purpose of paying the costs associated with treating post-mining pollutional discharges at ABS legacy sites. In addition, this paragraph requires that all interest earned on the monies in the Reclamation Fee O&M Trust Account be deposited into the account and be used only to pay the costs associated with treating post-mining pollutional discharges at ABS legacy sites. The name of this account reflects that it is a trust established by this rulemaking and that the funds contained in the account are held in trust by the Commonwealth for the benefit of the people to be used by the Commonwealth to treat post mining pollutional discharges at ABS legacy sites. The PADEP decided to make the reclamation fee an adjustable source of revenue that would be used to help cover the costs of treating discharges at the ABS legacy sites.

c. Section 86.17(e)(2) (Preparation of Fiscal-Year Report on Reclamation Fee O&M Trust Account)

This provision requires the PADEP to prepare a report at the end of each fiscal year, which will include a financial analysis and projections of the revenues and expenditures of the Reclamation Fee O&M Trust Account. The report must be made available for review by the Pennsylvania Mining and Reclamation Advisory Board (MRAB) and the general public. This provision establishes a process by which the MRAB and the general public can examine the PADEP's expenditure of funds from the Reclamation Fee O&M Trust Account for the treatment of discharges at the ABS legacy sites, the amount of revenue deposited into the account during the prior fiscal year from the various dedicated revenue sources, the projected expenditures and projected revenue. Pennsylvania believes that this provision will assist OSM, the MRAB, affected persons in the industry, and interested members of the public, with their oversight of the PADEP's compliance with the requirements of 30 CFR Section 800.11(e) as applied to the ABS legacy sites, the Court ruling in *Kempthorne*, and the required program amendment at 30 CFR Section 938.16(h).

d. Section 86.17(e)(3) (Amount of the Reclamation Fee)

The amount of the reclamation fee is currently set at $100 per acre. Section 86.17(e)(3) requires the fee amount to be maintained at $100 per acre until December 31, 2009. After this initial period at $100 per acre, the reclamation fee will be adjusted annually based on criteria specified in Sections 86.17(e)(3) and (4). This section also includes provisions concerning the potential for a permanent alternative source of funding to be used in lieu of the reclamation fee—if that alternative funding source meets the conditions in Sections 86.17(e)(3)(i) and (ii). Section 86.17(e)(3) provides that the PADEP will begin annually adjusting the amount of the reclamation fee as of January 1, 2010, and will continue to do so, until either a permanent alternative funding source is established or the ABS Legacy Sites Trust Account becomes actuarially sound. (See the discussion of the ABS Legacy Sites Trust Account in subsection 4.g., below.) Section 86.17(e)(3)(i) reiterates the commitment for annual adjustment of the reclamation fee until the ABS Legacy Sites Trust Account is actuarially sound, unless a permanent alternative funding source in place of the reclamation fee is used to fund the Reclamation Fee O&M Trust Account. Section 86.17(e)(3)(ii) establishes the conditions that a permanent alternative funding source must meet before the reclamation fee could be discontinued and the permanent alternative source used instead. The State indicates that such an alternative funding source must be permanent; must provide sufficient revenues to maintain a balance in the Reclamation Fee O&M Trust Account of at least $3,000,000; and must provide sufficient revenue to pay the annual operation and maintenance costs for all the ABS legacy sites.

e. Section 86.17(e)(4) (Amount of the Reclamation Fee)

The PADEP expects that the adjusted amount of the reclamation fee will become effective as of January 1, 2010, and will be similarly made effective on

that date each year thereafter. Section 86.17(e)(3) sets the basic parameters for annually adjusting the amount of the reclamation fee, and Section 86.17(e)(4) lists the specific factors to be used in the PADEP's calculation of the adjusted amount. Section 86.17(e)(3) requires that the reclamation fee be annually adjusted to ensure that there are sufficient revenues to maintain a balance of at least $3,000,000 in the Reclamation Fee O&M Trust Account. Following the close of the Commonwealth's 2008–09 fiscal year (in June 2009), the PADEP must prepare its year-end financial analysis of the Reclamation Fee O&M Trust Account pursuant to Section 86.17(e)(2). The 2008–09 fiscal-year report must include the PADEP's calculation of the amount of the reclamation fee for the upcoming calendar year commencing on January 1, 2010. Section 86.17(e)(4) prescribes the factors to be used for making the calculation—essentially an analysis of the revenues and expenditures for the past year and projected revenues and expenditures for the current fiscal year.

Sections 86.17(e)(3) and (4) establish a mechanism for annually adjusting the amount of the reclamation fee. Pennsylvania indicates that the adjustment procedure is necessary to accommodate the fluctuations in the operation and maintenance costs for treating pollutional discharges at the ABS legacy sites that will occur over time. The PADEP believes that the adjustment procedure is also necessary in order to maintain a sufficient cushion in the Reclamation Fee O&M Trust Account to prevent pollution and assure that the PADEP has sufficient money at any time to treat the discharges at the ABS legacy sites, including any sites with discharges that were originally permitted under the ABS, and for which the bonds are subsequently forfeited before the posting of a full cost, conventional bond or other financial mechanism that is sufficient to cover the costs of discharge treatment, in accordance with 30 CFR Section 800.11(e).

f. Section 86.17(e)(5) (Publishing Amount of the Adjusted Reclamation Fee; Calculation Appealable)

Section 86.17(e)(5) is added to prescribe a procedure for the PADEP to publish the amount of the adjusted reclamation fee. The PADEP must review its calculation of the adjusted reclamation fee amount at a public meeting of the MRAB (most likely in October of each year), where the members of the MRAB, affected persons in the industry, and the general public, will have an opportunity to comment on the PADEP's financial report and its calculation of the adjusted amount of the fee. The PADEP will subsequently publish the adjusted amount of the reclamation fee in the Pennsylvania Bulletin, with the adjusted amount becoming effective upon publication. This provision also establishes that PADEP's calculation of the adjusted reclamation fee is a final action appealable to the Environmental Hearing Board. According to Pennsylvania, section 86.17(e)(5) balances the PADEP's need for a flexible mechanism to assure funding to treat discharges at the ABS legacy sites with the interests of the industry and the public in reviewing, commenting on, and challenging, before an independent forum, the PADEP's administration of the Reclamation Fee O&M Trust Account and the calculation of the new reclamation fee.

g. Section 86.17(e)(6) (Conditions for Ceasing Collection of Reclamation Fee)

Section 86.17(e)(6) requires the PADEP to cease assessment and collection of the reclamation fee when the ABS Legacy Sites Trust Account, established pursuant to Section 86.187(a)(i), is actuarially sound. The conditions which must be met for the ABS Legacy Account to become actuarially sound are prescribed here and in Section 86.187(a)(2)(ii). The PADEP's current estimate of the annual operation and maintenance costs for treating the discharges at the ABS legacy sites is approximately $1,200,000. However, the ultimate annual amount for operation and maintenance costs vary considerably depending upon the number of additional underfunded sites which go into default and other relevant factors. When financial guarantees sufficient to cover reclamation costs have been approved for all mine sites permitted under the primacy ABS, no additional sites will need to be added to the class of ABS legacy sites. Once the PADEP completes construction of all necessary discharge treatment systems for all of the ABS legacy sites, the PADEP will ascertain the amount of annual operation and maintenance costs, including recapitalization costs, which will be necessary to treat the discharges at all of the ABS legacy sites. This provision allows the PADEP to cease collection of the reclamation fee when the ABS Legacy Account contains funds which generate interest at a rate sufficient to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at all the ABS legacy sites. At that point, the State believes that the PADEP will always have sufficient funds on hand in the ABS legacy sites Account to cover the costs of treating the discharges at all the ABS legacy sites, and that Pennsylvania will have met the requirements of 30 CFR 800.11(e) without the need for additional revenue from the reclamation fee.

Subchapter F. Bonding and Insurance Requirements: Revised Language to the Pennsylvania Code:

Subchapter F. Bonding and Insurance Requirements

Bond Forfeiture

Section 86.187 Use of Money

(a) Monies received from fees, fines, penalties, bond forfeitures and other monies received under authority of the Surface Mining Conservation and Reclamation Act (52 P.S. Sections 1396.1–1396.31), and interest earned on the monies, will be deposited in the Fund.

(1) Monies received from the reclamation fees required by Section 86.17[(b)](E) (relating to permit and reclamation fees), and the interest accrued on these monies, will be deposited into a separate subaccount within the fund called the Reclamation Fee O&M Trust Account.

(i) The Department will deposit into the Reclamation Fee O&M Trust Account, up to $500,000 in a fiscal year, the monies collected from civil penalties assessed by the Department pursuant to the Surface Mining Conservation and Reclamation Act (52 P.S. Sections 1396.1–1396.31) less the percentage of those penalty monies due the Environmental Education Fund pursuant to 35 P.S. Section 7528. If the amount of penalty monies collected exceeds $500,000 during a fiscal year, the Department may deposit the amount collected in excess of $500,000 into the fund and use the excess amount in accordance with Subsection (3).

(ii) The Department may deposit into the Reclamation Fee O&M Trust Account a portion, to be determined at the Department's discretion, of the interest earned on other monies in the fund.

(iii) The Department may deposit other monies into the Reclamation Fee O&M Trust Account, including appropriations, donations, or the fees collected for sum-certain financial guarantees needed to facilitate full-cost bonding in accordance with applicable law.

(iv) The monies deposited in the Reclamation Fee O&M Trust Account will be used to pay construction costs and operation and maintenance costs associated with treating post-mining

pollutional discharges at ABS Legacy Sites, and such monies may not be used for any other purpose. For purposes of this section, operation and maintenance includes recapitalization costs. Monies in the Reclamation Fee O&M Trust Account will be held by the Commonwealth in trust for the benefit of all the people to protect their right to pure water and the preservation of the values of the environment. The State Treasurer will manage the investment of the funds in the Reclamation Fee O&M Trust Account with the advice of the Department.

(2) Monies received from the forfeiture of bonds will be used only to reclaim land and restore water supplies affected by the surface mining operations upon which liability was charged on the bond, except as otherwise provided in this section and in Section 86.190 (relating to sites where reclamation is unreasonable, unnecessary or impossible; excess funds). Interest accrued on these monies will be used only to reclaim land and restore water supplies affected by surface mining operations for which the Department has forfeited bonds, as a supplement to bond forfeiture funds.

(i) Monies received from bonds forfeited on ABS Legacy Sites, and the interest accrued on such monies, will be deposited into a separate subaccount in the Fund called the ABS Legacy Sites Trust Account, the Department may, upon review and recommendation of the Mining and Reclamation Advisory Board, transfer excess monies from the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account. The Department may deposit other monies into the ABS Legacy Sites Trust Account, including appropriations, donations, or interest earned on other monies in the fund.

(ii) Monies in the ABS Legacy Sites Trust Account, including the interest accrued by the Trust Account, will be used to pay the operation and maintenance costs associated with treating post-mining pollutional discharges at ABS Legacy Sites, and such monies may not be used for any other purpose. Monies in the ABS Legacy Sites Trust Account will be held by the Commonwealth in trust for the benefit of all the people to protect their right to pure water and the preservation of the values of the environment. The State Treasurer will manage the investment of the funds in the ABS Legacy Sites Trust Account with the advice of the Department.

(iii) The Department may not make disbursements from the ABS Legacy Sites Trust Account until that Trust Account becomes actuarially sound. The ABS Legacy Sites Trust Account will become actuarially sound when the following conditions are met:

(A) Financial guarantees sufficient to cover reclamation costs, including the costs to treat each discharge in perpetuity, have been approved by the Department for all mine sites permitted under the Primacy Alternate Bonding System;

(B) Construction of the necessary discharge treatment facilities has been completed at the ABS Legacy Sites; and

(C) The ABS Legacy Sites Trust Account, combined with the Reclamation Fee O&M Trust Account, contains funds which generate interest at a rate and in an amount sufficient to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at the ABS Legacy Sites.

(iv) When the ABS Legacy Sites Trust Account becomes actuarially sound the Department will transfer the monies in the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account and the Reclamation Fee O&M Trust Account will terminate. At that time, the reclamation fee or alternative permanent funding source, whichever is in place, will cease and the deposit of civil penalty monies pursuant to Section 86.187(a)(1)(i) will also cease.

Summary of Regulatory Changes—Section 86.187, Use of Money

a. Section 86.187(a)(1) (Deposit of Reclamation Fee Into Reclamation Fee O&M Trust Account)

This provision, in conjunction with Section 86.17(e)(1), has been revised to establish a separate subaccount within the SMCR Fund called the Reclamation Fee O&M Trust Account, and to require that the reclamation fees collected by the PADEP pursuant to Section 86.17(e) must be deposited into the Reclamation Fee O&M Trust Account. The provision also directs that the interest accrued on collected reclamation fees must be deposited into the Reclamation Fee O&M Trust Account. Section 86.187 (relating to use of money) specifies the purposes for which the PADEP must use monies from fees, fines, penalties, bond forfeitures and other monies received under the Pennsylvania Surface Mining Conservation and Reclamation Act (PASMCRA), as well as interest earned on these monies. Pennsylvania believes that the enforceable regulatory mechanism created by these revisions will enable its bonding program to meet the requirements of 30 CFR Section 800.11(e).

b. Section 86.187(a)(1)(i) (Deposit of Civil Penalties Into Reclamation Fee O&M Trust Account)

Under Section 18(a) of PASMCRA, civil penalties collected pursuant to that statute may be used by the PADEP for reclamation of surface coal mine sites, restoration of water supplies affected by surface coal mining, or for any other conservation purposes provided by PASMCRA 52 P.S. Section 1396.18(a). The PADEP is thus authorized to use civil penalty monies, as a supplement to forfeited bonds, for purposes of reclaiming the ABS legacy sites including treatment of post-mining pollutional discharges at these sites. New Section 86.187(a)(1)(i) will require the PADEP to deposit into the Reclamation Fee O&M Trust Account the monies collected from civil penalties assessed pursuant to PASMCRA, and to use those monies deposited into the account to pay the costs associated with treating discharges at the ABS legacy sites. PADEP believes that, in order to comply with the Court's ruling in *Kempthorne*, supra, it must identify and dedicate specified sources of revenue that combined will generate enough money to cover the costs for treating discharges at all the ABS legacy sites. This subsection identifies a source of revenue—civil penalties collected pursuant to PASMCRA—and requires the PADEP to use this source of revenue to fund the discharge-treatment costs of the ABS legacy sites.

This provision recognizes that a percentage of the civil penalties collected must be allotted to the Environmental Education Fund by law. (See 35 P.S. Section 7528.) Section 86.187(a)(1)(i) also caps the amount of civil penalties that must be deposited into the Reclamation Fee O&M Account during a single fiscal year at $500,000. If the PADEP collects more than $500,000 in civil penalties during a fiscal year, Section 86.187(a)(1)(i) gives the PADEP discretion to deposit the excess amount into the SMCR Fund where it may be used for the purposes described in Section 86.187(a)(3).

c. Section 86.187(a)(1)(ii) (Deposit of Interest Earned on Other Monies in the SMCR Fund Into the Reclamation Fee O&M Trust Account)

Similar to the deposit of civil penalties required by Section 86.187(a)(1)(i), this section is being added to authorize the PADEP to deposit into the Reclamation Fee O&M Trust Account a portion of the interest that is earned on other monies in the SMCR Fund. The SMCR Fund includes monies from released bonds, license

fees, and other sources; these monies earn interest that may be used by the PADEP for the purposes specified by Section 18(a) of PASMCRA. See 52 P.S. Section 1396.18(a); 25 Pa. Code Section 86.187(a). This provision gives the PADEP discretion as to the amount of the interest earned on other monies in the SMCR Fund which will be deposited into the Reclamation Fee O&M Trust Account during any given fiscal year.

d. Section 86.187(a)(1)(iii) (Deposit of Other Monies Into the Reclamation Fee O&M Trust Account)

Section 86.187(a)(1)(iii) will give the PADEP authority to deposit other monies from sources such as legislative appropriations or donations into the Reclamation Fee O&M Trust Account. In addition, in the event a change in the applicable law provides for it, this provision will give the PADEP authority to deposit into the Reclamation Fee O&M Trust Account the fees that will be collected for ''sum-certain financial guarantees needed to facilitate full-cost bonding.'' (These devices are also known as ''conversion assistance financial guarantees'' or ''conversion assistance bonds,'' and are described below in Section B.)

e. Section 86.187(a)(1)(iv) (Restriction on Use of Monies in the Reclamation Fee O&M Trust Account)

Section 86.187(a)(1)(iv) specifies that all monies deposited into the Reclamation Fee O&M Trust Account must be used to pay the costs associated with treating the post-mining pollutional discharges at the ABS legacy sites. This provision establishes that the monies held in the Reclamation Fee O&M Trust Account are being held by the State in trust for the benefit of all the people of the State in order to protect their rights under Article I, Section 27 of the Pennsylvania Constitution. Pennsylvania believes that an actuarially sound account will satisfy the requirements of 30 CFR Section 800.11(e).

f. Section 86.187(a)(2) (Use of Monies Received From Forfeiture of Bonds)

A minor editorial change is being made to this provision to clarify that monies received from the PADEP's forfeiture of bonds on ABS legacy sites will be used to reclaim the land and restore water supplies affected by the surface mining operations upon which liability was charged on the bond, and, more specifically, in accordance with the provisions in Sections 86.187(a)(2)(i) and (ii), which are being added as part of this final rulemaking.

g. Section 86.187(a)(2)(i) (Deposit of Monies From Bonds Forfeited on ABS Legacy Sites Into Separate Subaccount)

Section 86.187(a)(2)(i) establishes a separate subaccount within the SMCR Fund called the ABS Legacy Sites Trust Account. The monies received from the bonds forfeited on ABS legacy sites, and all interest accrued on such monies, must be deposited into the ABS Legacy Sites Trust Account according to new Section 86.187(a)(2)(i). Section 86.187(a)(2)(i) will also provide regulatory authorization for the PADEP to deposit monies from other sources, such as appropriations, donations, or interest earned on other monies in the SMCR Fund, into this account. Finally, Section 86.187(a)(2)(i) authorizes the PADEP to transfer ''excess'' monies from the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account. This provision requires the PADEP to seek the MRAB's review and recommendation prior to transferring any ''excess'' funds. Pennsylvania indicates that Section 86.187(a)(2)(i) responds to the court ruling in the *Kempthorne* case regarding the obligation of the PADEP to meet the requirements of 30 CFR 800.11(e).

Section 86.187(a)(2)(i) will establish a type of savings account for monies ultimately to be used to pay the annual operation and maintenance costs associated with all of the ABS legacy sites. The PADEP currently has approximately $4.8 million in forfeited bonds held for primacy ABS forfeited discharge sites; these funds will constitute the initial principal in the ABS Legacy Sites Trust Account. Section 86.187(a)(2)(iii), discussed below, prohibits the PADEP from making any disbursements from the ABS Legacy Sites Trust Account until the account becomes actuarially sound. The Reclamation Fee O&M Trust Account will be used to pay the ongoing operation and maintenance costs on a pay-as-you-go basis, while funds in the ABS Legacy Sites Trust Account accumulate from earned interest and other potential income sources. Pennsylvania believes that the amendments to Section 86.17(e) will enable the PADEP to annually replenish and maintain funds in the Reclamation Fee O&M Trust Account sufficient to cover the annual operation and maintenance costs for treating discharges at the ABS legacy sites. Pennsylvania indicates that the ABS Legacy Sites Trust Account will grow to the point that the interest earned on that account will be enough to cover all the annual operation and maintenance costs for the ABS legacy sites, without the need to generate any additional revenue from other sources such as the reclamation fee.

h. Section 86.187(a)(2)(ii) (Restriction on Use of Monies in ABS Legacy Sites Trust Account)

This provision requires that all monies deposited into the ABS Legacy Sites Trust Account be used only to pay the operation and maintenance costs for treating discharges at the ABS legacy sites. As in Section 86.187(a)(1)(iv), the PADEP is declaring that it is establishing the ABS Legacy Sites Trust as an account in the SMCR Fund. The PADEP has included language in Section 86.187(a)(2)(ii) that specifically establishes the trust called the ABS Legacy Sites Trust Account. This regulation states that all monies deposited in the ABS Legacy Sites Trust Account are held by the State in trust for the benefit of the people of the State to protect their rights under Article 1, Section 27 of the Pennsylvania Constitution.

i. Section 86.187(a)(2)(iii), (A), (B), (C) (Restrictions on ABS Legacy Sites Trust Account)

Section 86.187(a)(2)(iii) prohibits the PADEP from making any disbursements from the ABS Legacy Sites Trust Account until the account becomes actuarially sound. The conditions that must be met for the ABS Legacy Sites Trust Account to become actuarially sound are prescribed here. First, financial guarantees sufficient to cover all reclamation costs must have been approved by the PADEP for all mine sites permitted under the primacy ABS. Second, the PADEP must have completed construction of all necessary discharge treatment systems for all of the ABS legacy sites. Once the entire class of ABS legacy sites is known, and all necessary discharge treatment systems have been constructed for these sites, the PADEP will be able to ascertain the amount of annual operation and maintenance costs, including recapitalization costs, which will be necessary to treat all the discharges at all of the ABS legacy sites. Once this figure is known, the third condition precedent may be satisfied, *i.e.*, the ABS Legacy Sites Trust Account and Reclamation O&M Trust Account must contain funds that generate interest at a rate and amount sufficient to pay the annual operation and maintenance costs for treating all post-mining pollutional discharges at all the ABS legacy sites. Pennsylvania believes that, once the ABS Legacy Sites Trust Account becomes actuarially sound, the PADEP will always have sufficient

funds on hand in the Account to cover the costs of treating the discharges at all the ABS legacy sites, and Pennsylvania's bonding program will meet the requirements of 30 CFR 800.11(e) without the need for any revenue from the reclamation fee or the other revenue sources dedicated to the Reclamation Fee O&M Trust Account.

j. Section 86.187(a)(2)(iv) (Transfer of Remaining Funds in Reclamation Fee O&M Trust Account to ABS Legacy Sites Trust Account)

Section 86.187(a)(2)(iv) provides for termination of the Reclamation Fee O&M Trust Account when the ABS Legacy Sites Trust Account becomes actuarially sound. This provision authorizes the PADEP to transfer the remaining funds in the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account when the latter account becomes actuarially sound. At that point, the Reclamation Fee O&M Trust Account will no longer be necessary and will terminate. In addition, the reclamation fee (or an alternative permanent funding source established in lieu of the reclamation fee) will no longer be needed and will cease to be collected, and the deposit of civil penalty monies into the Reclamation Fee O&M Trust Account pursuant to Section 86.186(a)(1)(i) will also cease.

The remaining portions of this State program amendment, described in Sections B through E, below, do not consist of changes to Pennsylvania regulations. Rather, they are financial mechanisms PADEP has established that will, in the PADEP's view, work in concert with the regulatory changes described above to bring Pennsylvania into compliance with the required amendment at 30 CFR 938.16(h), the 1991, 732 letter, and, consequently, with the ABS standard of sufficiency set forth in 30 CFR 800.11(e).

B. ABS Program Amendment—The Conversion Assistance Program

Pennsylvania indicated that when implementing the revised CBS and converting the ABS permits to conventional bonding, it had serious concerns regarding the financial ability of existing permittees to post significantly increased bond amounts. To address these risks, the PADEP developed and implemented a conversion assistance program as part of the conversion of ABS active permits to a CBS. Using its authority under Section 4(d.2) of the PASMCRA, 52 P.S. Section 1396.4(d.2), Pennsylvania developed the conversion assistance program as an alternative financial assurance mechanism that, it contends, meets the purposes and objectives of the bonding program. In pertinent part, Section 4(d.2) states that ''[t]he department [PADEP] may establish alternative financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program.''

The Conversion Assistance program was developed in which the PADEP would essentially operate as a surety company. Funded with an initial general-revenue appropriation of $7,000,000, and supplemented by annual premiums, the PADEP issued a ''land reclamation financial guarantee'' in a sum-certain amount to individual ABS permittees required to convert to a full-cost bond for land reclamation on an existing permit. The Land Reclamation Financial Guarantees (LRFG) were issued only to ABS permittees that were converting to a conventional bonding permit. Applicants who submitted applications after termination of the ABS are not eligible for the conversion assistance program. The PADEP indicates that, as of November 30, 1999, the forfeiture rate for primacy ABS permits was 10.4%. The PADEP concluded that, based on this historic rate, the $7,000,000 principal would cover up to $70,000,000 in bond exposure. The PADEP determined that the $7,000,000, when combined with existing site bonds, would be sufficient to pay for all forfeitures that may occur. Additionally, premiums collected for the LRFGs would provide additional funds to complete reclamation.

In June 2001, the Pennsylvania legislature appropriated the $7,000,000 for the conversion assistance program. *See* Act of June 22, 2001 (Pub. L. 979, No. 6A), known as the ''General Appropriation Act of 2001,'' at Section 213 (appropriating $7,000,000 ''for the conservation purpose of providing sum-certain financial guarantees needed to facilitate the implementation of full-cost bonding for a fee and, in the event of forfeiture, to finance reclamation of the forfeited surface mining site in an amount not to exceed the sum-certain guarantee''). The general revenue appropriation of $7,000,000 was for one fiscal year, which necessitated the issuance of all the LRFGs by mid-2002. Issuance of new LRFGs ended after mid-2002, although some LRFGs have been reassigned to a new operator, generally as part of a permit transfer.

As part of this submission, Pennsylvania requests that OSM approve the Conversion Assistance Program and its use of the LRFG as a financial guarantee equivalent to a conventional bond. Section 4(d.2) of PASMCRA is submitted as part of this program amendment as the authority for employing LRFGs under the Conversion Assistance Program.

The PADEP stated, however, that by the close of the conversion process, there were six permittees actively mining large anthracite operations with outstanding bonding obligations that had to be addressed through Consent Orders and Agreements (CO & A's) establishing reclamation and payment schedules. These sites were either not provided with conversion assistance guarantees, or were provided with guarantees that fell short of underwriting the full estimated cost of land reclamation. Currently, only two of these permittees remain underbonded, and the PADEP asserts that it has made provisions for fully funding the outstanding reclamation obligations for these two remaining cases through reclamation and payment schedules.

C. Trust Funds as an Alternative System and Other Equivalent Guarantee

Pennsylvania is also submitting the provision in Section 4(d.2) of PASMCRA for the additional purpose of providing the authority for the establishment of site-specific trust funds to be used to pay the costs of treating post-mining pollutional discharges in perpetuity. Pennsylvania is requesting approval of site-specific trusts as an alternative financial assurance mechanism consistent with Section 509(c) of SMCRA and other applicable provisions of SMCRA. Pennsylvania proposes that its site-specific trust fund program is an alternative financial system to a bonding program that achieves the objectives and purposes of a conventional bonding program, and provides equivalent guarantees no less effective than a performance bond and 30 CFR subchapter J.

In support of its request for approval of site-specific trusts as an alternative financial assurance mechanism consistent with Section 509(c) of SMCRA and other applicable provisions of SMCRA, PADEP provided descriptions and demonstrations on its authority to enter into trust agreements, trust development and management process, and some of the administrative and financial components. More specifically, PADEP has provided discussions on Section 4(d.2) of PASMCRA authority to establish alternative financial assurance mechanisms, the use of the Consent Order and Agreement and a companion Trust Agreement, factors currently used to determine the amount of a site-specific trust fund, and the use of AMD-Treat for cost estimating. PADEP's

proposed amendment also discusses rates of return, inflation rates, and volatility rates used on previous trust agreements as well as how operation and maintenance (O&M) and recapitalization costs are addressed. Finally, the amendment submission describes trust disbursement procedures and flexibility to allow the permittee a reasonable period of time to fully fund a treatment trust.

D. Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites

An analysis by the PADEP of the existing land reclamation ABS forfeiture sites was initially prepared in a February 2000 report titled *Assessment of Pennsylvania's Bonding Program for Primacy Coal Mining Permits*. Based on the report's conclusions, the PADEP requested that the Pennsylvania legislature appropriate general revenue funds to provide the additional money needed to complete the land reclamation of ABS forfeiture sites. In 2001, the General Assembly appropriated $5,500,000 to be used solely for the costs of land reclamation at ABS forfeiture sites (the ''ABS Closeout Funds''). *See* Act of June 22, 2001 (Pub. L. 979, No. 6A), known as the ''General Appropriation Act of 2001,'' at Section 213. PADEP states that it has used the ABS Closeout Funds to complete land reclamation for some of the ABS forfeiture sites. In 2007–08, the PADEP prepared an updated list of primacy ABS bond forfeiture sites with outstanding land reclamation. It also prepared a detailed analysis of the current costs to complete all outstanding land reclamation at these sites and provided an estimated total cost to complete the land reclamation for all primacy ABS bond forfeiture sites of $7,946,890.

The PADEP indicates that, in addition to the $5.5 Million legislative appropriation, it has sufficient other funds on hand to cover all land reclamation costs on ABS forfeiture sites. (See the ABS Bond Forfeiture Sites Land Reclamation Status Report, July 2008, p. 15, included as part of Attachment 8 to this State program amendment.) There is also money available in several other accounts in the SMCR Fund. Where funds are not restricted by law solely for use in reclaiming ABS forfeiture sites, the PADEP has identified monies which it is authorized by law to spend for this purpose. (See ABS Financial Summary, July 2008, included as part of Attachment 10 to this State program amendment.) Thus, the PADEP believes it has demonstrated that it has available sufficient money to complete the outstanding land reclamation for the ABS legacy sites at any time, as required by the Third Circuit's decision interpreting 30 CFR 800.11(e)(1).

E. Demonstration of Sufficient Funding for Construction of All Necessary Discharge Treatment Facilities at the Primacy ABS Forfeiture Sites

Pennsylvania submitted information to demonstrate that it has sufficient funding to complete any initial facility construction at primacy ABS forfeiture sites. An evaluation of all the primacy ABS forfeited discharge sites was completed by PADEP to project the costs of treating the discharges. Post-mining treatment costs were evaluated in three categories: (i) Initial facility construction costs; (ii) the annual operation and maintenance cost; and (iii) recapitalization costs. Initial facility construction costs cover all of the costs to get a treatment system up and running, such as facility design costs and construction.

The PADEP calculated that, as of July 2008, the total capital cost to construct all necessary discharge-treatment facilities for the primacy ABS forfeiture discharge sites is $2,073,104. The PADEP states that it has taken a conservative approach to this cost calculation.

To address this aspect of the ABS legacy, the PADEP must assure that it has the funds to meet this obligation. The PADEP indicates that it currently has funds on hand that are available to cover the approximately $2,100,000 total capital cost to construct the necessary treatment facilities for the primacy ABS forfeiture discharge sites. Pennsylvania has committed to using the funds in the released bond account to address the reclamation liability for the ABS legacy sites. In addition, money in the PADEP's SMCR Fund, General Operations Account, may be used for reclamation purposes as well as general administrative costs. *See* 52 P.S. Section 1396.18. (See ABS Financial Summary, July 2008, included as part of Attachment 10 to this State program amendment.) Thus, the PADEP believes it has demonstrated that it has available, at any time, sufficient money to construct the necessary discharge-treatment facilities for all the ABS legacy sites, as required by 30 CFR Section 800.11(e)(1).

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the submission satisfies the applicable program approval criteria of 30 CFR 732.15. We are also seeking comments as to whether the submission satisfies the required amendment at 30 CFR 938.16(h), and the October 1991, 732 letter. If we approve the amendment, it will become part of the Pennsylvania program.

Electronic or Written Comments

If you submit written comments, they should be specific, confined to issues pertinent to the submission, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent Tribal or Federal laws or regulations, technical literature, or other relevant publications. We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed above (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will not consider anonymous comments.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., *e.s.t.* on January 29, 2009. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and

wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If there is only limited interest in participating in a public hearing, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the submission, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that, to the extent allowable by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is ''to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that state laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA. Section 503(a)(7) requires that state programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve Federal regulations involving Indian lands.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute a major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal that is the subject of this rule is based on counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State or local governmental agencies or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the state submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based on the analysis performed under various laws and executive orders for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 917

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 18, 2008.

Michael K. Robinson,

Acting Appalachian Regional Director.

[FR Doc. E9–603 Filed 1–13–09; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AN16

Presumption of Service Connection for Osteoporosis for Former Prisoners of War

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its adjudication regulation to establish a presumption of service connection for osteoporosis for former Prisoners of War (POWs) who were detained or interned for at least 30 days and whose osteoporosis is at least 10 percent disabling. The proposed amendment would implement a decision by the Secretary to establish such a presumption based on scientific studies.

DATES: Comments must be received by VA on or before February 13, 2009.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov*; by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll-free number). Comments should indicate that they are submitted in response to ''RIN 2900–AN16—Presumption of Service Connection for Osteoporosis for Former Prisoners of War.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Nancy Copeland, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–9685.

SUPPLEMENTARY INFORMATION: The standard for creating a presumption of service connection for former POWs is set out in 38 CFR 1.18, ''Guidelines for establishing presumptions of service connection for former prisoners of war.'' The Secretary may establish a presumption of service connection for a disease where there is ''at least limited/suggestive evidence that an increased risk of such disease is associated with service involving detention or internment as a prisoner of war and an association between such detention or internment and the disease is biologically plausible.'' 38 CFR 1.18(b). The term ''limited/suggestive evidence'' is defined in § 1.18(b)(1) to mean ''evidence of a sound scientific or medical nature that is reasonably suggestive of an association between prisoner-of-war experience and the disease, even though the evidence may be limited because matters such as chance, bias, and confounding could not be ruled out with confidence or because the relatively small size of the affected population restricts the data available for study.'' Section 1.18(d) of title 38, Code of Federal Regulations, explains that ''the requirement in paragraph (b) of this section that an increased risk of disease be 'associated' with prisoner-of-war service may be satisfied by evidence that demonstrates either a statistical association or a causal association.''

This proposed rule would establish a presumption of service connection for osteoporosis for any former prisoner of war (POW) who was interned or detained for a period of at least 30 days while on active duty and develops osteoporosis that manifests to a degree of 10 percent or more at any time after discharge from active military, naval or air service even though there is no record of such disease during service.

Osteoporosis is a disease characterized by inadequate bone formation resulting in a decrease in bone mass and increased bone weakness. The Merck Manual of Diagnosis & Therapy 469 (17th ed. 1999). The major clinical manifestations of osteoporosis are bone fractures. *Id.* at 470. The cause of osteoporosis is generally related to a number of risk factors, including low calcium, phosphorus, and vitamin D intake, advanced age, hormone deficiency, genetic factors, and immobilization. *Id.*

On October 8, 2008, the Under Secretary for Health advised the Secretary of Veterans Affairs that ''there is at least limited/suggestive evidence that an increased risk of osteoporosis is associated with service involving detention or internment as a POW'' and recommended establishing a presumption of osteoporosis for former POWs. The Secretary of Veterans Affairs agrees that the following reports constitute evidence of a sound scientific or medical nature that is reasonably suggestive of an association between prisoner-of-war experience and osteoporosis.

The basis of the Under Secretary's recommendation regarding establishing a presumption of service connection for osteoporosis for former POWs was a study conducted by Dr. Stanley M. Garn, Ph.D. of the University of Michigan Center for Human Growth and Development that found that, while in captivity, U.S. Air Force personnel imprisoned in North Vietnam, who were subject to malnutrition, protein-deficiency, recurrent dysenteries, vitamin deficiencies, and a variety of infectious diseases, suffered from serious bone loss long after their release from captivity. Stanley M. Garn, ''Researcher Says POWs Sustained Bone Loss,'' 23 U. of Mich. Hospital Star (Oct. 1975). Garn and his associates examined the skeletal x-rays of 108 former POWs and found that, although the POWs seemed to be in relative ''good health'' upon release from captivity, the POWs nonetheless had ''far less bone structure than is usual for their age, with bone losses averaging 10 percent and going as high as 45.8 percent.'' *Id.* The study also found that many of the former male POWs ages 30 to 40 exhibited ''a skeletal structure which might be expected in an 80-year old man.'' *Id.* Although not published in peer-reviewed literature, the study was presented as a paper on August 9, 1975, at the 10th International Congress of Nutrition, in Kyoto, Japan. *Id.*

The Under Secretary also cited a 2001 abstract of a study conducted at the Robert Mitchell Center for Prisoner of War Studies, Navy Personnel Command, that reported increased rates of osteopenia among former POWs with posttraumatic stress disorder (PTSD). Kenneth P. Sausen *et al.*, ''The Relationship Between PTSD & Osteopenia,'' 63 Psychosomatic Medicine 144 (2001), *http://navmedmpte.med.navy.mil/nomi/rpow/centcolresproj.cfm*. Study participants included 131 repatriated male POWs in an ongoing medical follow-up program. The study showed that POW participants with PTSD were twice as likely to be osteopenic as POW participants without PTSD. In addition, the study showed that, without proper identification and intervention, POWs with PTSD may be at risk for osteoporosis and its attendant physical disabilities. ''The Relationship Between PTSD & Osteopenia,'' 63 Psychosomatic Medicine, at 144.

An unpublished study by M.R. Ambrose *et al.*, referenced by the Under Secretary showed increased rates of osteopenia in aviators who were POWs in Vietnam.

The Under Secretary's recommendation also cited an article,

Jerri W. Nieves, ''Osteoporosis: the role of micronutrients,'' 81 Am. Journal of Clinical Nutrition 1232S (2005), reporting that ''[o]steoporosis and low bone mass are currently estimated to be a major public health threat'' for U.S. men and women age 50 and older. The article explored the significance of adequate nutrition in the prevention and treatment of osteoporosis and stated that calcium and vitamin D are the two key micronutrients of ''greatest importance.'' *Id.* Nieves discussed the potential importance of Vitamin D in peak bone mass and recommended at least 600 International Units (IU) of vitamin D in persons over age 70 for optimal bone health. *Id.* at 1236S.

Another source cited by the Under Secretary for Health, the National Osteoporosis Foundation (NOF) Web site, states that calcium is a ''building block of bone'' and vitamin D helps the ''body use calcium.'' *http://www.nof.org/prevention/risk.htm.* Without vitamin D, a person is ''at much greater risk for bone loss and osteoporosis.'' *Id.* Although calcium and vitamin D are the two most significant nutrients related to bone development and prevention of bone loss, NOF also reports that magnesium, vitamin K, vitamin B6, and vitamin B12 are other key minerals that enhance bone health and may prevent bone loss. *Id.*

Dietary deficiencies have been recognized as a common feature of prisoner of war captivity across different conflicts. See H.R. Rep. No. 91–1166 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3723, 3727–28 (noting prevalence of dietary deficiencies among POWs in World War II, the Korean Conflict, and the Vietnam War); *Acree* v. *Republic of Iraq,* 271 F. Supp. 2d 179, 185, 186 (D.D.C. (2003) (finding that U.S. POWs held by Iraq between January 17, 1991, and March 1991 ''were systematically starved'' and suffered nausea, severe weight loss, dysentery), *vacated* 370 F.3d 41 (D.C. Cir. 2004).

The Under Secretary for Health advised the Secretary of Veterans Affairs that osteoporosis has apparently not been a major health and disability issue among former POWs until recently, probably because this condition usually does not manifest as a major medical condition until later in life. Since most former POWs are now in their 80's, it is much more of a health problem among this cohort of veterans now than in the past. Undiagnosed and untreated osteoporosis may result in progressive bone loss and eventual fracture.

Finally, the Under Secretary relied on a 2003 World Health Organization (WHO) report on osteoporosis. World Health Org. Scientific Group, Technical Rep. Series 921, ''Prevention and Management of Osteoporosis'' (2003). The report stated that ''[e]arly osteoporosis is not usually diagnosed and remains asymptomatic; it does not become clinically evident until fractures occur.'' *Id.* at 2. WHO also stated that, ''[u]ntil recently, osteoporosis was an under-recognized disease'' and ''[i]mprovements in diagnostic technology over the past decade now means that it is possible to detect the disease before fractures occur.'' *Id.* at 7.

The referenced studies are suggestive of a link between osteoporosis and internment or detention as a POW for a period sufficient to result in nutritional deficiency. Further, the fact that osteoporosis has been shown in the medical literature to be associated with nutritional deficiency establishes the biological plausibility of a link between osteoporosis and internment or detention as a POW. After careful consideration of the scientific evidence referenced above, the Secretary of Veterans Affairs believes there is limited/suggestive evidence that an increased risk of osteoporosis is associated with detention or internment as a POW and that an association between such detention or internment and osteoporosis is biologically plausible. The Secretary therefore is establishing a presumption of service connection for osteoporosis for former POWs who were interned or detained for not less than 30 days and whose osteoporosis is manifest to a degree of 10 percent or more at any time after discharge or release from active service. 38 CFR 1.18; 38 U.S.C. 501(a)(1).

Accordingly, this proposed rule would amend 38 CFR 3.309(c)(2) to add osteoporosis as a presumptive disease for former POWs who were interned or detained for not less than 30 days and whose osteoporosis is manifested to a degree of 10 percent or more at any time after discharge from active duty service. As a result of such presumption, osteoporosis would be considered to have been incurred in or aggravated by internment or detention for at least 30 days, even though there is not evidence of osteoporosis during such service. The requirement of internment for at least 30 days would conform to policies embodied in current statutes and regulations, which require at least 30 days of internment as a POW as a prerequisite for presumptive service connection for diseases associated with nutritional deficiencies, but require no minimum period of internment for presumptive service connection of diseases associated with acute physical or psychological trauma. 38 U.S.C. 1112(b); 38 CFR 3.309(c). As explained above, nutritional deficiencies play a primary role in the incurrence of osteoporosis. The 1975 study finding increased bone loss among former POWs discussed the bone loss observed in persons who had been interred as POWs for periods of years and suggested that nutritional deficiencies over such periods may be the cause of the observed bone loss. VA has reviewed the scientific literature on osteoporosis and it does not disclose how long a period of malnutrition may cause the disease. Although we have no specific scientific information upon which to define the duration of malnutrition necessary to cause osteoporosis, we also have no scientific basis for distinguishing osteoporosis from the other nutrition-related disabilities identified in 1112(b)(3), for which Congress has determined that a 30-day period is appropriate. In the absence of evidence supporting a different result, treating osteoporosis the same as other nutrition-related disabilities is the fairest result. Therefore, VA proposes to set a 30-day internment requirement for this presumption. If new scientific evidence shows that a shorter or longer period of malnutrition may cause osteoporosis, VA reserves the right to change the required internment period. Accordingly, consistent with other presumptions for diseases associated with nutritional deficiencies, the presumption for osteoporosis would apply to periods of at least 30 days internment as a POW.

This presumption would be rebutted if there is affirmative evidence that osteoporosis was not incurred during or aggravated by such service or affirmative evidence that osteoporosis was caused by the veteran's own willful misconduct. 38 U.S.C. 1113; 38 CFR 3.307(d) and 3.309(c)(2)(ii).

Administrative Procedure Act

The Secretary has determined that there is good cause to limit the public comment period on this rule to 30 days. This proposed rule is necessary to implement the Secretary's decision to establish a presumption of service connection for osteoporosis for veterans who are former POWs. Due to the advanced age of many veterans who would benefit from this presumption, any delay in implementing this presumption would be contrary to the public interest. In April 2006, the VA Office of Policy and Planning identified 29,350 living POWs. Statistical data shows that development of osteoporosis is correlated to advanced age, thus any delay in implementation would be extremely detrimental particularly to former POWs of World War II, Korea,

and Vietnam, who are currently afflicted with osteoporosis. Therefore, in order to ensure that as many former POWs as possible benefit from this presumption, it is critical that VA take action as soon as practicable. Accordingly, the Secretary has provided a 30-day comment period for this rule.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments, or on the private sector.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a ''significant regulatory action'' requiring review by the Office of Management and Budget, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of entitlement recipients; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

VA has examined the economic, interagency, budgetary, legal, and policy implications of this proposed rule and has concluded that it is a significant regulatory action under Executive Order 12866 because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are as follows: 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: November 5, 2008.

James B. Peake,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 3 as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Amend § 3.309(c)(2) by:

(a) In the list of diseases, adding ''Osteoporosis.'' after ''Cirrhosis of the liver.''.

(b) Revising the authority citation at the end of the paragraph.

The revision reads as follows:

§ 3.309 Disease subject to presumptive service connection.

* * * * *

(c) * * *

(2) * * *

Authority: 38 U.S.C. 501(a) and 1112(b).

[FR Doc. E9–587 Filed 1–13–09; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–1031; FRL–8754–6]

Approval and Promulgation of Air Quality Implementation Plans; Utah's Emission Inventory Reporting Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed Rule.

SUMMARY: EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by the State of Utah on September 7, 1999, and December 1, 2003. The revisions add the requirements of EPA's Consolidated Emission Reporting Rule (CERR) to the State's SIP. The intended effect of this action is to approve only those portions from the State's submittals that add CERR requirements. This action is being taken under section 110 of the Clean Air Act.

In the ''Rules and Regulations'' section of this **Federal Register**, EPA is approving the State's SIP revisions as a direct final rule without prior proposal because the Agency views these as non-controversial SIP revisions and anticipates no adverse comments. A detailed rationale for taking this action is set forth in the preamble to the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

DATES: Any written comments on this proposal must be received on or before February 13, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2007–1031, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: videtich.callie@epa.gov* and *komp.mark@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** section if you are faxing comments).
- *Mail:* Callie Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Callie Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Mark Komp, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129, (303) 312–6022, *komp.mark@epa.gov.*

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final Action of the same title which is located in the Rules and Regulations Section of this **Federal Register**.

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

Dated: November 24, 2008.

Stephen S. Tuber,

Acting Regional Administrator, Region 8.

[FR Doc. E9–522 Filed 1–13–09; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 070514119–81404–02]

RIN 0648–AV51

Magnuson–Stevens Fishery Conservation and Management Reauthorization Act; Proposed Rule to Implement Identification and Certification Procedures to Address Illegal, Unreported, and Unregulated (IUU) Fishing Activities and Bycatch of Protected Living Marine Resources (PLMRs)

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to implement identification and certification procedures to address illegal, unreported, and unregulated (IUU) fishing activities and bycatch of protected living marine resources (PLMRs) pursuant to the High Seas Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act). The objective of these procedures is to promote the sustainability of transboundary and shared fishery stocks and to enhance the conservation and recovery of PLMRs. The proposed rule is intended to implement existing U.S. statutory authorities to address noncompliance with international fisheries management and conservation agreements and encourage the use of bycatch reduction methods in international fisheries that are comparable to methods used by U.S. fishermen. NMFS is seeking public comment on these procedures and on the sources and types of information to be considered in these procedures.

DATES: Written comments must be received no later than 5 p.m. Eastern time on May 14, 2009.

ADDRESSES: Written comments on this action, identified by RIN 0648–AV51, may be submitted by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- Mail: Laura Cimo, Trade and Marine Stewardship Division, Office of International Affairs, NMFS, 1315 East–West Highway, Silver Spring, MD 20910.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Laura Cimo, Trade and Marine Stewardship Division, Office of International Affairs, NMFS, at (301) 713–9090.

SUPPLEMENTARY INFORMATION: NMFS is soliciting feedback on the proposed rule. Information and comments concerning this proposed rule may be submitted by any one of several methods (see **ADDRESSES**). NMFS will also seek feedback from other nations on the proposed rule at bilateral and multilateral meetings, as appropriate. Information related to the international fisheries provisions of the Moratorium Protection Act can be found on the NMFS Web site at *http://www.nmfs.noaa.gov/msa2007/*. NMFS will consider all comments and information received during the comment period in preparing a final rule.

National Environmental Policy Act (NEPA)

NMFS prepared a draft Environmental Assessment (EA) to accompany this proposed rule. The EA was developed as an integrated document that includes a Regulatory Impact Review (RIR) and an Initial Regulatory Flexibility Analysis (RFA). Copies of the draft EA/RIR/RFA analysis are available at the following address: Office of International Affairs, F/IA, National Marine Fisheries Service, 1315 East–West Highway, Silver Spring, MD 20910. Copies are also available via the Internet at the NMFS website at *http://www.nmfs.noaa.gov/msa2007/*.

Electronic Access

This proposed rule is accessible via the Internet at the Government Printing Office website at *http://www.access.gpo.gov/su__docs/*.

Background

The Magnuson–Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA),

which was signed into law in January 2007, amends the Moratorium Protection Act to require that actions be taken by the United States to strengthen international fishery management organizations and address IUU fishing and bycatch of PLMRs. Specifically, the Moratorium Protection Act requires the Secretary of Commerce to identify in a biennial report to Congress those foreign nations whose fishing vessels are engaged in IUU fishing or fishing activities or practices that result in bycatch of PLMRs. NMFS has determined that this language applies to vessels entitled to fly the flag of the nation in question. The Moratorium Protection Act also requires the establishment of procedures to certify whether nations identified in the biennial report are taking appropriate corrective actions to address IUU fishing or bycatch of PLMRs by fishing vessels of those nations. Identified nations that are not positively certified by the Secretary of Commerce could be subject to prohibitions on the importation of certain fisheries products into the United States and other measures, including limitations on port access, under the High Seas Driftnet Fisheries Enforcement Act (Enforcement Act)(16 U.S.C. 1826a). This proposed rule sets forth procedures to implement these requirements of the Moratorium Protection Act.

Definitions under the Moratorium Protection Act

In this rulemaking, NMFS proposes to include several definitions at 50 CFR 300.201 for purposes of implementing the Moratorium Protection Act.

NMFS was required to publish a definition of IUU fishing for purposes of the Moratorium Protection Act. See 16 U.S.C. 1826j. This definition of IUU fishing was originally published in the **Federal Register** on April 12, 2007 (72 FR 18404). In the proposed rule, NMFS proposes to codify this definition at 50 CFR part 300 under subpart N for ease of reference. At this time, NMFS is not proposing to revise the definition of IUU fishing that was originally published. However, NMFS plans to consider revising this definition at a later date in order to take into account, as appropriate, outcomes of negotiations in international fora that are of relevance to IUU fishing, including the United Nations Food and Agriculture Organization (FAO) Technical Consultations to develop a global binding agreement on minimum standards for port State measures to combat IUU fishing.

NMFS is actively soliciting comments from the public on the IUU definition. Specifically, NMFS is seeking comment on whether to broaden the definition to include such activities as illegal incursions of a nation's vessels into the waters of other nations, flagrant reflagging, beneficial ownership, and lack of registration.

The definition of PLMR is defined in the Moratorium Protection Act at 16 U.S.C. 1826k. The definition of PLMR will be codified at 50 CFR 300.201 for ease of reference.

Biennial Report to Congress on International Compliance

Pursuant to the requirements of the Moratorium Protection Act (see 16 U.S.C. 1826h), the Secretary of Commerce, in consultation with the Secretary of State, will provide a report to Congress (by no later than January 12, 2009, and every two years thereafter) which includes:

- The state of knowledge on the status of international living marine resources shared by the United States or managed under treaties or agreements to which the United States is a party, including a list of all such fish stocks classified as overfished, overexploited, depleted, endangered, or threatened with extinction by any international or other authority charged with management or conservation of living marine resources;
- A list of nations identified pursuant to the Moratorium Protection Act whose fishing vessels are engaged, or have been engaged, in IUU fishing or bycatch of PLMRs, including the specific offending activities and any enforcement or other responsive actions taken by the nation;
- A description of efforts taken by nations on the list of identified nations to take appropriate corrective actions to address IUU fishing activities of their flagged vessels, including by the implementation and enforcement of effective conservation and management measures, and an evaluation of the progress of those actions, including steps taken by the United States to encourage corrective action and improve international compliance;
- Progress at the international level to strengthen the efforts of Regional Fishery Management Organizations (RFMOs) to end IUU fishing; and
- Steps taken by the Secretary at the international level to encourage the adoption of international measures comparable to those of the United States to reduce impacts of fishing practices on PLMRs, if no international agreement to achieve such goal exists, or if the relevant international fishery or conservation organization has failed to implement effective measures to end or reduce the adverse impacts of fishing practices on such species.

The biennial report will also include information on whether nations identified in the previous report have taken corrective actions to address IUU fishing or bycatch of PLMRs by fishing vessels of that nation. Specifically, the report will include information on whether:

- The government of each nation identified in the previous biennial report as having fishing vessels engaged in IUU fishing has provided evidence documenting that it has taken appropriate enforcement or other responsive action to address the IUU or bycatch activities of its fishing vessels identified in the report;
- The relevant RFMO has adopted and the identified member state has implemented, and is enforcing, effective measures to prevent, deter and eliminate IUU fishing activity;
- The government of each nation identified in the previous biennial report as having fishing vessels engaged in bycatch of PLMRs has provided evidence documenting the adoption and enforcement of a regulatory program to end or reduce bycatch of PLMRs that is comparable to that of the United States, accounting for different conditions; and
- The government of each nation identified in the previous biennial report as having fishing vessels engaged in bycatch of PLMRs has established, and is enforcing, a management plan containing requirements that will assist in gathering species–specific data to support international stock assessments and conservation enforcement efforts for PLMRs.

Proposed Rulemaking

Despite actions taken by the United States, other nations, and international organizations to address IUU fishing and bycatch of PLMRs, these problems continue to threaten the sustainability of living marine resources. The regulatory measures proposed here encourage nations to cooperate with the United States towards ending IUU fishing and reducing the bycatch of PLMRs. NMFS is proposing these procedures pursuant to its rulemaking authority under the Moratorium Protection Act.

Although not mandated by the Moratorium Protection Act, NMFS is proposing to promulgate, through rulemaking, procedures for the identification of foreign nations whose fishing vessels are engaged in IUU fishing or bycatch of PLMRs, in order to provide the public an opportunity to review and comment on these procedures. Since the identification of nations under the Moratorium

Protection Act triggers the need for a certification, NMFS is proposing to promulgate identification procedures and certification procedures in a single rulemaking. The Agency believes this approach will promote transparency in the identification and certification processes. As discussed above, the Moratorium Protection Act requires that NMFS identify foreign nations whose fishing vessels are engaged in IUU fishing or bycatch of PLMRs and list these nations in a biennial report to Congress, the first of which is due in January 2009. Because identification and certification procedures will not be implemented prior to publication of the first biennial report to Congress, NMFS will make its first identifications, as appropriate, under authority provided in the Moratorium Protection Act.

The Moratorium Protection Act envisions a multilateral process to implement effective measures to end IUU fishing, and eliminate or reduce the bycatch of PLMRs by those nations that receive a negative certification. In the case of bycatch of PLMRs, NMFS will work on a bilateral and/or multilateral basis to assist nations with the adoption of regulatory regimes designed to end or reduce bycatch that are comparable in effectiveness to those measures that are required in the United States, taking into account relevant environmental and/or socioeconomic conditions that may bear on their feasibility or effectiveness.

Identification Procedures

As required under the Moratorium Protection Act, NMFS will identify, and list in the biennial report to Congress, those nations whose fishing vessels are engaged, or have been engaged at any point during the preceding two calendar years, in IUU fishing. NMFS will also identify nations whose fishing vessels are engaged, or have been engaged during the preceding calendar year, in fishing activities either in waters beyond any national jurisdiction that result in bycatch of a PLMR, or beyond the U.S. exclusive economic zone (EEZ) that result in bycatch of a PLMR shared by the United States.

Procedures to Identify Nations Engaged in IUU Fishing

When determining whether to identify a nation as having fishing vessels engaged in IUU fishing, NMFS will exercise due diligence in evaluating appropriate information and evidence that are available to the agency. This information could include data gathered by the U.S. Government as well as data offered by other nations, or international organizations (such as regional fisheries management organizations), institutions, or arrangements that could, if true, support a determination that a nation's vessels have been engaged in IUU fishing. NMFS will review and verify the pertinent information when determining, for the purposes of identification, whether a nation's fishing vessels are engaged, or have been engaged, during the previous two calendar years in IUU fishing as defined under the Moratorium Protection Act.

Once NMFS has determined that the information is credible and supports, for the purposes of identification, a finding that a nation's fishing vessels are engaged in IUU fishing, NMFS, acting through or in cooperation with the State Department, will initiate bilateral discussions with the nation to:

- Seek corroboration of the alleged IUU activity or credible information that refutes such allegations;
- Communicate the requirements of the Moratorium Protection Act to the nation; and
- Encourage such nation to take corrective action to address the IUU fishing activity in question.

Corrective actions taken by the nation or information refuting allegations of IUU fishing activity will be considered by NMFS, along with all verified information on alleged IUU fishing activity, prior to making identifications.

In identifying nations whose fishing vessels are engaged, or have been engaged, in IUU fishing under the Moratorium Protection Act, NMFS will take into account, and list in the biennial report, whether or not the nation has implemented, and is enforcing, measures that are deemed to be comparable in effectiveness to measures implemented by the United States to address the pertinent IUU fishing activity. NMFS will also consider if an RFMO exists with a mandate to regulate the fishery in which the IUU activity in question takes place, whether or not the nation is party to or maintains cooperating status with the organization, whether or not the relevant RFMO has adopted measures that are deemed by NMFS to be effective at addressing such IUU fishing activity, and whether, if the nation is a party or cooperating non–party, the nation has implemented, and is enforcing, such measures. If a nation is not party to the relevant RFMO in which the IUU activity occurs, NMFS will consider whether the nation has implemented, and is enforcing, measures deemed to be effective at addressing the IUU activity, including any measures that have been recommended by such RFMO.

Effective measures by nations to address IUU fishing could include measures that reflect the recommendations of international organizations to prevent, deter and eliminate IUU fishing. Such flag state measures and actions, as relevant, may include, but are not limited to, those that fall into the following categories:

- Data collection and catch reporting programs, including observer programs, catch documentation programs, and trade tracking schemes;
- Trade–related measures that seek to reduce or eliminate trade in fish and fish products derived from IUU fishing;
- At–sea or dockside boarding and inspection schemes;
- Programs documenting whether fish were caught in a manner consistent with conservation and management measures;
- IUU vessel lists identifying fishing vessels that violate and/or undermine management measures;
- Port state measures to prohibit landings and transshipment of unauthorized or other IUU catch;
- Catch and effort monitoring, including licensing and permitting schemes, reporting, and vessel monitoring systems (VMS);
- Bycatch reduction and mitigation strategies, techniques, and equipment, if the IUU fishing activity includes a violation of bycatch reduction requirements of an international fishery management agreement to which the United States is a party;
- In the case of fishing activities having an adverse impact on vulnerable marine ecosystems (VMEs), programs or measures for the identification and protection of VMEs in waters beyond any national jurisdiction (including seamounts, hydrothermal vents, and cold water corals) from significant adverse impacts due to fishing activities;
- Efforts to improve and enhance fisheries enforcement and compliance, including through the development of effective sanctions and monitoring, control and surveillance (MCS) capacity;
- Participation in voluntary international efforts to combat IUU fishing (e.g., the International Monitoring, Control, and Surveillance (MCS) network or other cooperative enforcement and compliance networks).

In evaluating whether or not a nation has implemented measures that will effectively address IUU fishing, NMFS will also examine whether adequate enforcement measures and capacity exist to help promote compliance.

Procedures to Identify Nations Engaged in PLMR Bycatch

When determining whether to identify a nation as having fishing vessels engaged in the bycatch of PLMRs, NMFS will evaluate appropriate information and evidence. In determining whether a nation's fishing vessels are engaged, or have been engaged in the previous calendar year, in fishing activities or practices that result in bycatch of PLMRs, in accordance with the Moratorium Protection Act, NMFS will review and verify the pertinent information and evidence. Once NMFS has determined that the information is credible and supports, for the purposes of identification, a finding that a nation's fishing vessels are engaged in bycatch of PLMRs, NMFS, acting through or in cooperation with the State Department, will initiate bilateral discussions with the nation to:

- Seek corroboration of the alleged PLMR bycatch or credible information that refutes such allegations;
- Communicate the requirements of the Moratorium Protection Act to the nation; and
- Encourage such nation to take corrective action to address the PLMR bycatch.

In its determination whether to identify nations as having fishing vessels engaged in bycatch of PLMRs, NMFS will examine whether the nation has implemented measures that are deemed to be effective to end or reduce bycatch of the relevant PLMRs as well as any corrective actions taken by the nation or information refuting the allegations of PLMR bycatch. NMFS will also examine if an international organization for the conservation and protection of such PLMR, or an international or regional fishery organization with jurisdiction over or responsibility for bycatch of such PLMR exists; and whether the nation whose fishing vessels are engaged, or have been engaged during the preceding calendar year, in bycatch of PLMRs is party to or maintains cooperating status with the relevant international body. NMFS will consider whether the relevant international body has or has not adopted measures which have been demonstrated to end or reduce bycatch of PLMRs, and whether, if the nation is a party or cooperating non–party, the nation has implemented, and is enforcing, such measures. If an identified nation is not party to the international body with jurisdiction over or responsibility for bycatch of the PLMRs in question, NMFS will consider whether the nation has implemented measures deemed to be effective at addressing the bycatch of such PLMRs, including any measures that have been recommended by the relevant international body. Such measures, where appropriate, may include, but are not limited to, those that fall into the following categories:

- Programs for data collection and sharing, including observer programs;
- Bycatch reduction and mitigation strategies, techniques, and equipment, including gear restrictions and gear modifications; and
- Improved monitoring, control, and surveillance of fishing activities.

In its evaluation whether or not a nation has implemented measures that will effectively address bycatch of PLMRs, NMFS will examine whether or not adequate enforcement measures and capacity exist to promote compliance.

When determining whether to identify nations as having fishing vessels engaged in bycatch of PLMRs, NMFS will also consider whether or not the nation has adopted, and is enforcing, measures designed to end or reduce bycatch of the PLMRs in question that are comparable in effectiveness to measures required in the United States, taking into account different conditions (oceanographic or other conditions) that could bear on the feasibility and efficacy of comparable measures. If other measures could address bycatch of the PLMRs in question that are comparable in effectiveness, then the implementation of such measures by a nation may be deemed sufficient for purposes of the Moratorium Protection Act.

Notification of Identification Decisions and Consultation

Pursuant to the requirements under the Moratorium Protection Act, NMFS will publish a list of nations that have been identified as having fishing vessels engaged in IUU fishing and/or bycatch of PLMRs in the biennial report to Congress. After submission of the biennial report to Congress, the Secretary of Commerce, acting through the Secretary of State, will officially notify nations that have been identified in the biennial report as having fishing vessels that are engaged in IUU fishing and/or bycatch of PLMRs. NMFS, acting through or in cooperation with the State Department, will notify such nations of the requirements of the Moratorium Protection Act and enter into consultations regarding the IUU fishing activity and/or bycatch of PLMRs.

Notification of and Consultations with Nations Identified as Having Fishing Vessels Engaged in IUU Fishing

Upon identifying a nation whose vessels have been engaged in IUU fishing activities in the biennial report to Congress, the Secretary of Commerce will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will:

(1) notify nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding two calendar years, in IUU fishing activities;

(2) notify identified nations of the requirements under the Moratorium Protection Act and this subpart; and

(3) notify any relevant international fishery management organization of actions taken by the United States to identify nations whose fishing vessels are engaged in IUU fishing and initiate consultations with such nations.

Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will initiate consultations with nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding two calendar years, in IUU fishing activities for the purpose of encouraging such nations to take appropriate corrective action with respect to the IUU fishing activities described in the biennial report.

Notification for and Consultation with Nations Identified as Having Fishing Vessels Engaged in Bycatch of PLMRs

Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will:

(1) initiate consultations as soon as possible with the governments of identified nations for the purposes of entering into bilateral and multilateral treaties with such nations to protect the PLMRs from bycatch activities described in the biennial report; and

(2) seek agreements through the appropriate international organizations calling for international restrictions on the fishing activities or practices described in the biennial report that result in bycatch of PLMRs and, as necessary, initiate the amendment of any existing international treaty to which the United States is a party for

the protection and conservation of the PLMRs in question to make such agreements consistent with this subpart.

Certification Procedures

Based on the identification, notification, and consultation processes outlined above, NMFS will certify nations that have been identified in the biennial report as having fishing vessels engaged in IUU fishing and/or bycatch of PLMRs. NMFS will notify nations prior to a formal certification determination and will provide such nations an opportunity to support and/or refute preliminary certification determinations, and communicate any corrective actions taken to address the IUU fishing activity and/or bycatch of PLMRs described in the biennial report to Congress.

Identified nations will receive either a positive or negative certification from the Secretary of Commerce. A positive certification indicates that a nation has taken appropriate corrective action pursuant to the Moratorium Protection Act to address the IUU fishing activity and/or bycatch of PLMRs described in the biennial report, and a negative certification indicates that a nation has failed to take appropriate corrective action. When evaluating whether appropriate corrective action has been taken by a nation to address IUU fishing and/or bycatch of PLMRs, NMFS will consider relevant criteria, including but not limited to:

- Efforts towards improving data collection, catch monitoring, and reporting programs;
- Record of implementation of or compliance with international measures to address IUU fishing and/or bycatch of PLMRs;
- Participation in technical assistance and capacity building programs to address IUU fishing and/or reduce bycatch and enhance enforcement;
- Adequacy of surveillance, enforcement, and prosecution to promote compliance with conservation and management measures and respond to non–compliance;
- A nation's response to IUU fishing activity and/or PLMR bycatch; and
- Participation in voluntary international efforts to combat IUU fishing (e.g., the International Monitoring, Control, and Surveillance (MCS) network or other cooperative enforcement and compliance networks);
- Cooperation with other governments in enforcement, apprehension, and prosecution efforts related to those vessels of the identified nation that have engaged in IUU fishing and/or PLMR bycatch.

When evaluating whether appropriate corrective action has been taken by a nation, NMFS will also consider the extent to which nations have taken action to implement measures intended to address IUU fishing and/or PLMR bycatch.

The Secretary of Commerce will make the first certification determinations no later than 90 days after promulgation of a final rule establishing identification and certification procedures pursuant to the Moratorium Protection Act. Subsequent certification determinations will be published in the biennial report. Identified nations will receive notice of certification determinations.

Once certification determinations are published in the biennial report, NMFS will, working through or in consultation with the Department of State, continue consultations with the affected nations and provide them an opportunity to take corrective action with respect to the IUU fishing activities or bycatch of PLMRs described in the biennial report to Congress.

NMFS is proposing to develop separate procedures for the certification of nations that have been identified as having fishing vessels engaged in IUU fishing and those nations that have been identified as having fishing vessels engaged in PLMR bycatch.

Procedures to Certify Nations Identified as Having Fishing Vessels Engaged in IUU Fishing

To determine whether appropriate corrective action has been taken by nations to warrant a positive certification, NMFS will consider the extent to which the IUU fishing activities described in the biennial report have been effectively addressed and future IUU activity deterred. When evaluating whether the relevant identified member nation has implemented effective measures to address the IUU fishing activities described in the biennial report, NMFS will examine whether measures have been implemented, and are being effectively enforced, that are comparable in effectiveness to measures implemented by the United States. Such flag State measures may include, but are not limited to, those that fall into the following categories:

- Catch and effort monitoring, including licensing and permitting schemes, reporting, and vessel monitoring systems (VMS);
- Programs for data collection and sharing, including observer programs;
- Catch documentation and trade tracking schemes that identify the origin and document the legality of fish from the point of harvest through the point of market/import;
- Trade–related measures, such as import and export controls or prohibitions, to reduce or eliminate trade in fish and fish products derived from IUU fishing;
- Programs that document fish were caught in a manner consistent with, or that does not undermine, conservation and management measures;
- Port state control measures;
- At–sea and dockside inspection schemes;
- Bycatch reduction and mitigation strategies, techniques, and equipment, if the IUU fishing activity includes a violation of bycatch reduction requirements of an international fishery management agreement to which the United States is a party;
- Systems to improve monitoring, control, and surveillance of fishing activities;
- Sufficient sanctions and legal frameworks to support effective enforcement; and
- Measures to protect VMEs from significant adverse impacts from fishing activities in waters beyond any national jurisdiction.

When considering whether appropriate corrective action has been taken to warrant a positive certification, NMFS, in consultation with the Secretary of State, will take into account the outcome of consultations with the identified nation, comments received from such nation, and subsequent actions taken by the relevant nation and applicable RFMO to address the IUU fishing activity described in the biennial report, including participation in applicable RFMOs and requests for assistance in building fisheries management and enforcement capacity.

Procedures to Certify Nations Identified as Having Fishing Vessels Engaged in Bycatch of PLMRs

When determining whether nations identified as having fishing vessels engaged in bycatch of PLMRs have taken appropriate corrective action to warrant a positive certification, the Secretary of Commerce will consider whether the government of each nation identified in the biennial report as having fishing vessels engaged in bycatch of PLMRs has implemented measures to end or reduce bycatch of the relevant PLMRs that are comparable in effectiveness to those required in the United States. As relevant, NMFS will consider whether measures have been implemented and effectively enforced including, but not limited to, those that fall into the following categories:

- Programs for data collection and sharing, including observer programs;
- Bycatch reduction and mitigation strategies, techniques, and equipment (including training and assistance for bycatch reduction technology and equipment); and
- Improved monitoring, control, and surveillance of fishing activities.

The Secretary of Commerce will examine if conditions exist that could bear on the feasibility and effectiveness of comparable measures. In some circumstances, comparable measures may not be feasible or effective at addressing bycatch of the PLMRs in question. Under these circumstances, NMFS will assist identified nations, to the extent practicable, with the implementation of alternative measures designed to end or reduce bycatch. To qualify for a positive certification in the case of pelagic longline fisheries, the regulatory program of an identified nation includes mandatory use of circle hooks, careful handling and release equipment, and training and observer programs.

When determining if nations identified in the biennial report as having vessels engaged in the bycatch of PLMRs qualify for a positive certification, NMFS will also consider whether the government of each identified nation has established a management plan with requirements that will assist in the collection of data on bycatch of the pertinent PLMRs in support of international stock assessments and conservation efforts.

When making certification determinations, the Secretary of Commerce will, in consultation with the Secretary of State, evaluate the information discussed above, comments received from such nation, the consultations with each identified nation, and subsequent actions taken by the relevant nation to address the bycatch of PLMRs described in the biennial report, including requests for assistance in the implementation of measures comparable to those of the United States and establishment of an appropriate management plan. The Secretary of Commerce will also take into account whether the nation participates in existing certification programs, such as those authorized under Section 609 of Public Law 101–162, or the affirmative finding process under the International Dolphin Conservation Program Act. Nothing in this rulemaking will modify such existing certification procedures.

Effect of Certification Determinations

If nations identified as having fishing vessels engaged in IUU fishing and/or PLMR bycatch receive a positive certification from the Secretary of Commerce pursuant to the Moratorium Protection Act, no actions will be taken against such nations.

If an identified nation fails to take sufficient action to address IUU fishing and/or PLMR bycatch and does not receive a positive certification from the Secretary of Commerce, the nation could face denial of port privileges, prohibitions on the import of certain fish and fish products into the United States, as well as other appropriate measures. In determining the appropriate course of action to recommend to the President, the Secretary of Commerce and other Federal agencies, as appropriate, will take into account the nature, circumstances, extent, duration, and gravity of the IUU fishing activity and/or bycatch of PLMRs for which the initial identification was made. With respect to the nation whose fishing vessels are engaged in IUU fishing and/or bycatch of PLMRs, the Secretary of Commerce will also consider the degree of culpability, any history of prior IUU fishing activities and/or bycatch of PLMRs, and other relevant matters. The Secretary of Commerce, in cooperation with the Secretary of State, may initiate further consultations with identified nations that fail to receive a positive certification prior to determining an appropriate course of action.

When recommending actions to the U.S. President to be taken against identified nations that have not received a positive certification, the Secretary of Commerce will recommend appropriate measures, including trade restrictive measures, to address the relevant IUU fishing activity and/or PLMR bycatch for which such nations were identified in the biennial report. Trade restrictive measures will be implemented in accordance with international law, including the WTO Agreement, in a fair, transparent, and non–discriminatory manner. To facilitate enforcement, nations that do not receive a positive certification may be required to submit documentation of admissibility along with fish or fish products not subject to the import restrictions that are offered for entry into the United States.

In implementing the certification procedures under the Moratorium Protection Act, in order to inform U.S. ports that cargo originating from a foreign port may not be permitted to enter into the United States, NMFS intends to collaborate with other Federal agencies and, as appropriate, take advantage of existing prior notification procedures, such as those required under section 343(a) of the Trade Act of 2002, or those proposed for further development under the International Trade Data System (ITDS) established under the Security and Accountability for Every (SAFE) Port Act of 2006. These efforts will be undertaken to help mitigate the effects of a negative certification determination on U.S. industry.

Information for Identification and Certification Determinations

Reliable and timely information is critical to making accurate and effective use of identification and certification provisions under the Moratorium Protection Act. Potential sources of information include NOAA and other U.S. government agencies; foreign, state, and local governments; international organizations, including RFMOs; nongovernmental organizations, including industry organizations; and citizens and citizen groups.

Other potential sources of information for identification and certification determinations include fishing vessel records; testimony and reports from off–loading facilities, port–side government officials, enforcement agents, military personnel, port inspectors, transshipment vessel workers and fish importers; government vessel registries; IUU vessel lists from RFMOs; RFMO catch documents and statistical document programs; appropriate certification programs; and governments, international organizations, or nongovernmental organizations. NMFS will consider all available information when making a determination whether or not to identify a particular nation.

In determining whether information is appropriate for use in making identification and certification determinations, NMFS will consider several criteria, including but not limited to:

- Corroboration of testimony and evidence;
- Whether multiple sources have been able to provide information in support of an identification;
- The methodology used to collect the information;
- Specificity of the information provided; and
- Susceptibility of the information to falsification and alteration; and
- Credibility of the individuals or organization providing the information.

Based on the considerations outlined above, NMFS will validate information and evidence provided for use in making identification and certification determinations through methods that include, but are not limited to, corroboration with governments,

RFMOs, international organizations, non–governmental organizations, and other available sources. If information or evidence is deemed by NMFS to be inaccurate, unfounded, or unreliable, it will not be used in support of an identification determination or in a certification determination.

Alternative Procedures

Section 609(d)(2) of the Moratorium Protection Act authorizes the Secretary of Commerce to establish alternative procedures for the certification of fish or fish products from a nation identified under section 609(a) of the Act in the event that the Secretary cannot reach a certification determination for such identified nation by the time of the next biennial report. The alternative procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this Act. Under these alternative procedures, the Secretary of Commerce may allow entry of fish or fish products on a shipment–by–shipment, shipper–by–shipper, or other basis as long as specified conditions are met.

For nations that have been identified as having fishing vessels engaged in IUU fishing and have not received a certification from the Secretary of Commerce, certain fish or fish products of that nation may be eligible for alternative certification procedures. To qualify for the alternative certification procedures, NMFS must determine that the relevant vessel has not engaged in IUU fishing, or been identified by an international fishery management organization as participating in IUU fishing activities.

Section 610(c)(4) of the Moratorium Protection Act requires the Secretary of Commerce to establish alternative procedures for the certification of fish or fish products from a nation identified under section 610(a) of the Act in the event that the Secretary cannot reach a certification determination for such identified nation by the time of the next biennial report. The alternative procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this Act. Under these alternative procedures, the Secretary of Commerce may allow entry of fish or fish products on a shipment–by–shipment, shipper–by–shipper, or other basis as long as specified conditions are met. To qualify for the alternative certification procedures, NMFS must determine that imports were harvested by practices that do not result in bycatch of a protected living marine resource, or were harvested by practices comparable to those required in the United States, accounting for different conditions that affect the feasibility and efficacy of such practices. NMFS must also determine that the vessel collects species–specific bycatch data that can be used to support international stock assessments and efforts to conserve PLMRs. If such imports were harvested by a vessel engaged in pelagic longline fishing, they can qualify for the alternative certification procedure only if the vessel is required to use circle hooks, careful handling and release equipment, and training and observer programs.

Advance Notice of Proposed Rulemaking and Public Participation

NMFS published an Advance Notice of Proposed Rulemaking (ANPR) on June 11, 2007 (72 FR 32052) to announce that it was developing certification procedures to address IUU fishing and bycatch of PLMRs pursuant to the Moratorium Protection Act. Public comments were solicited for a period of 45 days. In conjunction with publication of the ANPR, NMFS held three public input sessions in July 2007 in locations where it expected substantial public interest in the proposed certification procedures. These sessions were held in Silver Spring, Maryland (July 2, 2007); Seattle, Washington (July 5, 2007); and Long Beach, California (July 5, 2007). In addition, NMFS hosted a meeting of representatives from foreign embassies (July 9, 2007) to explain the ANPR and solicit their comments. These meetings provided valuable opportunities for NMFS to explain the ANPR, respond to questions, and receive feedback from the public. A summary of the comments received on the ANPR and how these comments were addressed in the proposed rule can be found below.

Responses to Comments on the ANPR

In addition to the comments received on the ANPR at various meetings, NMFS received 14 sets of comments on the ANPR (by electronic mail, mail, or fax). Comments were submitted by governmental entities, individuals, and organizations. Comments received were compiled and posted at *http://www.nmfs.noaa.gov/msa2007/*. In this proposed rule notice, NMFS addresses the following issues that directly relate to the measures in the proposed rulemaking.

Definition of Bycatch

Comment 1: NMFS received several questions regarding the pertinent definition of ''bycatch'' for purposes of the rulemaking. Notably, the term bycatch is not defined in the Moratorium Protection Act.

Response: NMFS proposes to use a definition of bycatch for purposes of the Moratorium Protection Act based upon the definitions of bycatch in pertinent U.S. law (Magnuson–Stevens Fishery Conservation and Management Act, and Marine Mammal Protection Act); a 1998 NMFS report titled, ''Managing Our Nation's Bycatch''; and a 2004 NMFS report titled, ''Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs.''

Definition of IUU Fishing

Comment 2: Several commenters suggested that the IUU definition in the ANPR was overly broad to include fishing activities that have an adverse impact on seamounts, hydrothermal vents, and cold water corals in areas beyond national jurisdiction. A suggestion was made that NMFS use the guidance on IUU fishing in the United Nation Food and Agriculture Organization's International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA–IUU).

Response: The Moratorium Protection Act requires that the definition of IUU fishing include several elements, including ''fishing activity that has an adverse impact on seamounts, hydrothermal vents, and cold water corals beyond any national jurisdiction, for which there are no applicable conservation or management measures or in areas with no applicable international fishery management organization or agreement'' (see 16 U.S.C. 1826j). Accordingly, the definition provided in the ANPR and the proposed rule reflects these elements as required in the Moratorium Protection Act.

Recent efforts by the international community to address sustainable fisheries support the inclusion of fishing activities that have an adverse impact on VMEs in the definition of IUU fishing. The informal consultations on the 2006 United Nations General Assembly (UNGA) Sustainable Fisheries resolution (A/Res/61/105) reviewed domestic and international progress on protecting VMEs, such as seamounts, cold–water corals and hydrothermal vents, from destructive fishing practices and the impacts of fishing, as called for in UNGA resolution 59/25 (2004), and proposed further recommendations. Resolution 61/105 (2006) calls upon RFMOs and regional fishery management agreements to:

- Assess whether individual bottom fishing activities would have significant adverse impacts on VMEs and, if so,

manage such fishing to prevent such impacts or not authorize it to proceed;

- Identify where VMEs are and determine if bottom fishing would cause significant adverse impacts to either the VMEs and long term sustainability of deep sea fish stocks through, among others, scientific research, data collection and sharing, and new and exploratory fisheries;
- Close areas to bottom fishing if VMEs are present or are likely to be, based on the best available scientific information, and not allow such fishing to proceed unless conservation and management measures are in place to prevent significant adverse impacts on VMEs;
- Cease bottom fishing if a VME is encountered and report the location so that appropriate measures can be adopted in respect of the relevant site; and
- Make the relevant measures adopted in accordance with resolution 61/105 public.

The text calls for RFMOs or regional fishery management agreements to comply with these provisions by December 31, 2008. For States participating in negotiations to establish new RFMOs or regional fishery management agreements to regulate bottom fisheries, the text calls for those States to implement interim measures, consistent with the above provisions, by December 31, 2007. Further, the text calls for flag States to adopt and implement the above measures or to cease authorizing bottom fishing in areas where there is no competent RFMO or regional fishery management agreement, or where no interim measures have been adopted in conjunction with negotiations to establish a new RFMO or regional fishery management agreement. Finally, States agreed to review actions taken in accordance with the resolution, and, if necessary, propose further recommendations at the 2009 UNGA fisheries resolution negotiations. The 2007 UNGA sustainable fisheries resolution (A/RES/62/177) reaffirmed the call for RFMOs, regional fishery management agreements, and Flag States to implement these measures.

Definition of PLMRs

Comment 3: One commenter stated that the definition of PLMRs in the ANPR is overly broad and that the regulations under Section 610(a) of the Moratorium Protection Act should only be applied to commercial fisheries to reflect the intent behind the certification procedures.

Response: PLMRs are defined in the Moratorium Protection Act. This definition is reflected in the proposed rule.

Section 610 of the Moratorium Protection Act seeks to encourage the United States to work with other nations to implement measures to eliminate or reduce the bycatch of PLMRs that are comparable in effectiveness to those in the United States. There is no distinction made in this statute to support the position that only commercial fishing vessels should be subject to these provisions. Thus, the proposed rule does not specify that the requirements of the Moratorium Protection Act only apply to commercial fishing vessels.

Consistency with Plans of Action to Address IUU Fishing

Comment 4: A commenter pointed to the detailed guidance provided in the United Nations Food and Agriculture Organization's IPOA–IUU, as well as the U.S. strategies, techniques, and equipment to combat IUU fishing, and suggested that these documents serve as a source of information to NMFS in its implementation of the requirements of the Moratorium Protection Act.

Response: NMFS concurs that these documents are valuable sources of information. Through this rulemaking, NMFS seeks to achieve the goals espoused in these plans.

IUU Vessels Lists

Comment 5: NMFS received a substantial number of questions regarding how the Agency plans to treat vessels that are listed on RFMO IUU vessel lists. Specifically, NMFS was asked whether or not vessels on RFMO IUU vessel lists would be denied entry into U.S. ports under this rulemaking, and if so, whether legally harvested product aboard such vessels would be allowed into the United States.

Response: The United States is obliged to take action, consistent with its international obligations, to implement conservation and management measures that are agreed upon at RFMOs to which the United States is a party. Such measures may establish lists of vessels that have engaged in IUU fishing activities and require member states to impose sanctions on listed vessels, including the potential denial of port access and services. The Moratorium Protection Act does not, however, authorize the United States to deny entry of vessels into U.S. ports based solely on their inclusion on an RFMO IUU vessel list. The Moratorium Protection Act authorizes the United States to take action to address IUU fishing on a nation–by–nation basis, rather than on a vessel–by–vessel basis. NMFS will be implementing its obligations under RFMO conservation and management measures that establish IUU vessel lists in a separate rulemaking.

Information Collection and Validation

Comment 6: NMFS received various suggestions regarding potential sources of information for the identification and certification of nations. Some commenters expressed concern about the existence of balanced and accurate data to be used in identifying nations whose vessels are engaged in IUU fishing or PLMR bycatch. NMFS was urged to develop criteria or quality control mechanisms to be used in the evaluation of collected information. Commenters suggested that the United States use information that has been peer–reviewed, agreed upon by a tribunal, and/or corroborated by a U.S. or foreign government source.

Response: Many of the suggestions for potential information sources were adopted as part of the proposed rule. NMFS shares the concerns raised by commenters regarding the submission of false information. Such information could erroneously suggest a nation's vessels are engaged in IUU fishing or bycatch of PLMRs. To prevent erroneous information from being used in identification and certification decisions, NMFS plans to carefully review and corroborate information received on activities of a nation's fishing vessels, in cooperation with other appropriate government officials, foreign and domestic, before using this information to make identification and certification decisions under the Moratorium Protection Act.

''Reason to Believe'' Standard

Comment 7: NMFS was asked to examine the ''reason to believe'' standard in identifying whether a nation's vessels are engaged in IUU fishing or bycatch of PLMRs, which was addressed by the Court of International Trade (CIT) in litigation related to the identification of Italy pursuant to the Enforcement Act.

Response: Section 609(a) and Section 610(a) of the Moratorium Protection Act establish a different standard for the identification of nations than the ''reason to believe'' standard under the Enforcement Act. Under the standard set forth in Section 609(a), nations must be identified if fishing vessels of that nation ''are engaged, or have been engaged at any point during the preceding 2 years, in illegal, unreported, or unregulated fishing'' See 16 U.S.C. 1826j. Under the standard set forth in Section 610(a), nations must be

identified if fishing vessels of that nation ''are engaged, or have been engaged during the preceding calendar year in fishing activities or practices that result in bycatch of a protected living marine resource '' See 16 U.S.C. 1826k. NMFS believes that this standard is a higher threshold for identification, relative to the ''reason to believe'' standard set forth in the High Seas Driftnet Fisheries Enforcement Act, requiring evidence of IUU fishing activity and/or bycatch of PLMRs on the part of a nation's vessels for the nation to be identified.

Requirements for Certification

Comment 8: NMFS received comments that the guidelines for certification decisions should be clear and consistent over time.

Response: In the proposed rule, NMFS sought to outline criteria for certification decisions to a greater extent than what was addressed in the ANPR. These criteria should provide guidance and promote greater transparency in the decision making process.

Capacity Building

Comment 9: NMFS was encouraged to use incentives, such as capacity building, to assist nations in addressing IUU fishing and PLMR bycatch. However, concerns were raised that current capacity building activities are often fragmented, uncoordinated, and may be ineffective. A suggestion was made to improve the coordination of assistance for capacity building across the relevant Federal agencies to help achieve sustainable fisheries. Recommendations were made to measure capacity at the start of projects, as well as the incremental change resulting from the capacity building project, to demonstrate progress and the need for additional assistance, if necessary.

Response: In fulfillment of the objectives outlined in the Moratorium Protection Act, NMFS will address IUU fishing and PLMR bycatch through bilateral and multilateral efforts. Further, NMFS will seek to emphasize investments in capacity building projects that address the full range of scientific, legal, and operational enforcement issues involved in the adoption and enforcement of effective management regimes. To the extent possible, NMFS will make such investments in coordination with other Federal agencies and non–Federal partners to improve their effectiveness and will seek to provide measures of the success of such projects.

Balance between Incentives and Penalties

Comment 10: Commenters suggested that NMFS take a balanced approach in its rulemaking towards working with nations to emphasize capacity building activities and imposing trade restrictions and penalties to bring nations into compliance.

Response: In its implementation of requirements outlined in the Moratorium Protection Act, NMFS will emphasize bilateral and multilateral cooperation with other nations to address IUU fishing and bycatch of PLMRs.

To the extent that international cooperation and assistance is effective in addressing these activities, NMFS will work bilaterally and multilaterally through RFMOs and other relevant international organizations. When recommending actions to the U.S. President to be taken against identified nations that have received a negative certification, the Secretary of Commerce will recommend appropriate measures, including trade restrictive measures, the relevant IUU fishing activity and/or PLMR bycatch. Furthermore, trade restrictive measures will be implemented in accordance with international law, including the World Trade Organization (WTO) Agreement, and therefore be implemented in a fair, transparent, and non–discriminatory manner.

Classification

This proposed rule is published under the authority of the Moratorium Protection Act, 16 U.S.C. 1826d–1826k.

Under NOAA Administrative Order (NAO 216–6), the promulgation of regulations that are procedural and administrative in nature is subject to a categorical exclusion from the requirement to prepare an Environmental Assessment. However, as a component of public involvement in the development of the proposed certification procedures, NMFS has determined that an EA for this proposed action is appropriate for two reasons. First, although the proposed action does not change any underlying fishery management conventions for IUU fishing and PLMR bycatch, the EA provides the public with a context for reviewing the proposed certification action by exploring the impacts associated with IUU fishing and bycatch. Second, because future certification determinations would not require individual NEPA analysis, this EA enhances NOAA's capacity to seek public input on the proposed approach for such certifications.

This proposed rulemaking has been determined to be significant for the purposes of Executive Order 12866.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the RFA. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. NMFS is specifically seeking comments on whether it may be appropriate at the final rule stage to certify to the Small Business Administration that the rule will not have a significant economic impact on a substantial number of small entities.

A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the SUMMARY section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**). This proposed rule does not apply directly to any U.S. small business as the rulemaking is aimed at foreign nations whose vessels engage in fishing activities. The universe of potentially indirectly affected industries includes the following: U.S. ports and U.S. seafood harvesters, processors, wholesalers, and importers. Ports generate economic activity across many sectors including surface transportation; maritime services; cargo handling; federal, state, and local governments; port authorities; importers and consignees; and the banking and insurance sectors. Maritime services include pilots, handlers (food and other supplies), towing, bunkering (fuel), marine surveyors, and shipyard and marine construction. Cargo handling services include longshoremen, stevedoring, terminal operators, warehouse operators, and container leasing and repair.

No U.S. industry is directly affected by the rulemaking, although indirect effects may cause short term disruptions in the flow of seafood imports potentially impacting U.S. businesses. NMFS does not anticipate that national net benefits and costs would change significantly in the long term as a result of the implementation of the proposed alternatives.

The alternatives described in section 2.2. and 2.3 of the Environmental Assessment provide options for certification procedures for IUU fishing and bycatch separately. To meet the purpose and need, NMFS will select of one alternative for IUU fishing and one alternative for bycatch.

The Alternatives for Certification for nations whose vessels are engaged, or have been engaged in, IUU fishing

activities are as follows: Under Alternative I–1, the No Action Alternative, NMFS would not develop any new procedures to address the certification of nations identified in the biennial report to Congress (called for in section 609(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding two calendar years, in IUU fishing activities. Under Alternative I–2, the Secretary would provide a positive certification to a nation identified in the biennial report to Congress (called for in section 609(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding two calendar years, in IUU fishing activities, if such nation has taken corrective action against the offending vessels, or the relevant RFMO has implemented measures that are effective in ending the IUU fishing activities by vessels of the identified nation. Under Alternative I–3, the Secretary would provide a positive certification to a nation identified the biennial report to Congress (called for in section 609(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding two calendar years, in IUU fishing activities, if such nation has taken corrective action against the offending vessels, and the relevant RFMO has implemented measures that are effective in ending the IUU fishing activities by vessels of the identified nation.

The Alternatives for Certification for nations whose vessels are engaged, or have been engaged in, bycatch of PLMRs are as follows: Under Alternative B–1, the No action alternative, NMFS would not develop any new procedures to address certification of nations identified in the biennial report to Congress (called for in section 610(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding calendar year in bycatch of PLMRs. Under Alternative B–2, to receive a positive certification from the Secretary of Commerce, nations identified in the biennial report to Congress (called for in section 610(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding calendar year in bycatch of PLMRs must provide documentary evidence of their adoption of a regulatory program governing the conservation of the PLMR that is comparable in effectiveness with that of the United States, taking into account different conditions, and establish a management plan that will assist in species–specific data collection to support international stock assessments and conservation enforcement efforts for the PLMR. Under Alternative B–3, identified nations must provide documentary evidence of the adoption of a regulatory program, by the identified nation and the relevant international organization for the conservation and protection of the PLMRs or the international/regional fishery organization (and proof of the identified nation's participation with such organization) governing the conservation of the PLMRs, if such organization exists, that is comparable with that of the United States, taking into account different conditions, and establish a management plan that will assist in species–specific data collection to support international stock assessments and conservation efforts, including but not limited to enforcement efforts for PLMRs.

Overall IUU Alternative I–3 may produce more socioeconomic benefits than IUU Alternative I–2. Likewise for the bycatch alternatives, Alternative B–3 may produce more benefits than Alternative B–2. Due to the consultative nature of this rulemaking, it may be possible for the costs to be ameliorated by new port state controls, substituting different transportation modes, or substituting different products all together. As a result, it is difficult to know if costs will also be higher moving from the less restrictive IUU Alternative I–2 or bycatch Alternative B–2 to IUU Alternative 1–3 or bycatch Alternative B–3. This proposed rule would implement Alternatives I–2 and B–2.

This proposed rule contains collection–of–information requirements for §§ 300.205(b)(2), 300.206(c), and 300.207(c) subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This package is being developed by NMFS and will be submitted to OMB for approval.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS Office of International Affairs at the **ADDRESSES** above, and by e–mail to *David_Rostker@omb.eop.gov* or fax to (202) 395–7285.

List of Subjects in 50 CFR Part 300

Bycatch, Fisheries, Fishing, Fishing vessels, Foreign relations, Illegal, unreported or unregulated fishing, Protected living marine resources.

Dated: January 9, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 300 as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart N is revised to read as follows:

Subpart N—Identification and Certification of Nations

Sec.
300.200 Purpose and scope.
300.201 Definitions.
300.202 Identification and certification of nations engaged in illegal, unreported, or unregulated fishing activities.
300.203 Identification and certification of nations engaged in bycatch of protected living marine resources.
300.204 Effect of certification.
300.205 Denial of port privileges and import restrictions on fish or fish products.
300.206 Alternative procedures for IUU fishing activities.
300.207 Alternative procedures for bycatch of PLMRs.

Subpart N—Identification and Certification of Nations

Authority: 16 U.S.C. 1826d *et seq.*

§ 300.200 Purpose and scope.

The purpose of this subpart is to implement the requirements in the High Seas Driftnet Fishing Moratorium Protection Act (''Moratorium Protection Act'') to identify and certify nations whose vessels are engaged in illegal, unreported, or unregulated fishing or whose fishing activities result in bycatch of protected living marine resources. This language applies to vessels entitled to fly the flag of the nation in question. Identified nations that do not receive a positive certification may be subject to trade restrictive measures for certain fishery products. The Moratorium Protection Act also authorizes cooperation and assistance to nations that are taking action to combat illegal, unreported, or unregulated fishing or reduce bycatch of protected living marine resources.

§ 300.201 Definitions.

For the purposes of the Moratorium Protection Act:

Bycatch means: the discarded catch of any living marine resource and/or mortality or serious injury of such resource due to an encounter with fishing gear that does not result in the capture of that resource.

Fishing vessel means: any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for–

(1) Fishing; or

(2) Any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing, bunkering or purchasing catch, or aiding or assisting one or more vessels at sea in the performance of such activity.

Illegal, unreported, or unregulated (IUU) fishing means:

(1) Fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including but not limited to catch limits or quotas, capacity restrictions, and bycatch reduction requirements;

(2) Overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; or,

(3) Fishing activity that has a significant adverse impact on seamounts, hydrothermal vents, cold water corals and other vulnerable marine ecosystems located beyond any national jurisdiction, for which there are no applicable conservation or management measures, including those in areas with no applicable international fishery management organization or agreement.

International agreement means: an agreement between two or more States, agencies of two or more States, or intergovernmental organizations which is legally binding and governed by international law.

International fishery management agreement means: any bilateral or multilateral treaty, convention, or agreement that governs direct harvest of fish and/or directly governs bycatch of fish, sea turtles, or marine mammals.

International fishery management organization means: an international organization established by any bilateral or multilateral treaty, convention, or agreement for the conservation and management of fish.

Protected living marine resources (PLMRs) means: non–target fish, sea turtles, or marine mammals that are protected under United States law or international agreement, including the Marine Mammal Protection Act, the Endangered Species Act, the Shark Finning Prohibition Act, and the Convention on International Trade in Endangered Species of Wild Flora and Fauna; but they do not include species, except sharks, that are managed under the Magnuson–Stevens Fishery Conservation and Management Act, the Atlantic Tunas Convention Act, or by any international fishery management organization.

§ 300.202 Identification and certification of nations engaged in illegal, unreported, or unregulated fishing activities.

(a) *Procedures to identify nations whose fishing vessels are engaged in IUU fishing.* (1) NMFS will identify and list, in a biennial report to Congress, nations whose fishing vessels are engaged, or have been engaged at any point during the preceding two calendar years, in IUU fishing.

(2) When determining whether to identify a nation as having fishing vessels engaged in IUU fishing, NMFS will take into account all relevant matters, including but not limited to the history, nature, circumstances, extent, duration, and gravity of the IUU fishing activity in question, and any measures that the nation has implemented to address the IUU fishing activity. NMFS will also take into account whether an international fishery management organization exists with a mandate to regulate the fishery in which the IUU activity in question takes place. If such an organization exists, NMFS will consider whether the nation whose fishing vessels are engaged, or have been engaged, in IUU fishing is a party to, or maintains cooperating status, with the organization. NMFS will also consider whether the relevant international fishery management organization has adopted measures that are effective at addressing the IUU fishing activity in question and, if the nation whose fishing vessels are engaged, or have been engaged, in IUU fishing is a party to, or maintains cooperating status with, the organization, and whether the nation has implemented, and is enforcing, such measures.

(b) *Notification of nations identified as having fishing vessels engaged in IUU fishing.* Upon identifying a nation whose vessels have been engaged in IUU fishing activities in the biennial report to Congress, the Secretary of Commerce will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will:

(1) Notify nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding two calendar years, in IUU fishing activities;

(2) Notify identified nations of the requirements under the Moratorium Protection Act and this subpart; and

(3) Notify any relevant international fishery management organization of actions taken by the United States to identify nations whose fishing vessels are engaged in IUU fishing and initiate consultations with such nations.

(c) *Consultation with nations identified as having fishing vessels engaged in IUU fishing.* Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will initiate consultations with nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding two calendar years, in IUU fishing activities for the purpose of encouraging such nations to take appropriate corrective action with respect to the IUU fishing activities described in the biennial report.

(d) *Procedures to certify nations identified as having fishing vessels engaged in IUU fishing.* Each nation that is identified as having fishing vessels engaged in IUU fishing shall receive either a positive or a negative certification from the Secretary of Commerce. A positive certification indicates that a nation has taken appropriate corrective action to address the IUU fishing activity described in the biennial report. A negative certification indicates that a nation has not taken appropriate corrective action.

(1) The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that such nation has taken appropriate corrective action to address the activities for which such nation has been identified in the biennial report to Congress. When making such determination, the Secretary shall take into account the following:

(i) Whether the government of the nation identified pursuant to subsection (a) has provided evidence documenting that it has taken corrective action to effectively address the IUU fishing activity described in the biennial report; or

(ii) Whether the relevant international fishery management organization has adopted and, if applicable, the

identified member nation has implemented and is enforcing, measures to effectively address the IUU fishing activity of the identified nation's fishing vessels described in the biennial report.

(2) The Secretary of Commerce will issue a negative certification to an identified nation if such nation fails to provide information sufficient to establish that appropriate corrective action has been taken to address the IUU fishing activities described in the biennial report.

(3) Nations will be notified prior to a formal certification determination and will be provided with an opportunity to support and/or refute preliminary certification determinations, and communicate any corrective actions taken to address the activities for which such nations were identified. The Secretary of Commerce shall consider any information received during the course of these consultations when making the subsequent certification determinations.

§ 300.203 Identification and certification of nations engaged in bycatch of protected living marine resources.

(a) *Procedures to identify nations whose fishing vessels are engaged in PLMR bycatch.* (1) NMFS will identify and list nations in the biennial report to Congress whose fishing vessels are engaged, or have been engaged during the preceding calendar year prior to publication of the biennial report to Congress, in fishing activities or practices either in waters beyond any national jurisdiction that result in bycatch of a PLMR, or in waters beyond the U.S. exclusive economic zone (EEZ) that result in bycatch of a PLMR that is shared by the United States. When determining whether to identify nations as having fishing vessels engaged in PLMR bycatch, NMFS will take into account all relevant matters including, but not limited to, the history, nature, circumstances, extent, duration, and gravity of the bycatch activity in question. NMFS will also take into account whether there is an international organization with jurisdiction over the conservation and protection of the relevant PLMRs. If such organization exists, NMFS will consider whether the organization has adopted, and is enforcing, measures to effectively end or reduce bycatch of such species; and if the nation whose fishing vessels are engaged, or have been engaged during the preceding calendar year prior to publication of the biennial report to Congress, in bycatch of PLMRs is a party to or maintains cooperating status with the relevant international organization.

(2) When determining whether to identify nations as having fishing vessels engaged in bycatch of PLMRs, NMFS will also take into account if the nation has implemented measures designed to end or reduce such bycatch that are comparable in effectiveness to U.S. regulatory requirements. In considering whether a nation has implemented measures that are comparable in effectiveness to those of the United States, NMFS will evaluate if different conditions exist that could bear on the feasibility and efficiency of such measures to end or reduce bycatch of the pertinent PLMRs.

(b) *Notification of nations identified as having fishing vessels engaged in PLMR bycatch.* Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will:

(1) Notify nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged during the preceding calendar year, in fishing activities or practices either in waters beyond any national jurisdiction that result in bycatch of a PLMR, or in waters beyond the U.S. EEZ that result in bycatch of a PLMR shared by the United States; and

(2) Notify, as soon as possible, identified nations about the requirements under the Moratorium Protection Act and this subpart.

(c) *Consultations and negotiations.* Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will:

(1) Initiate consultations as soon as possible with the governments of identified nations for the purposes of entering into bilateral and multilateral treaties with such nations to protect the PLMRs from bycatch activities described in the biennial report; and

(2) Seek agreements through the appropriate international organizations calling for international restrictions on the fishing activities or practices described in the biennial report that result in bycatch of PLMRs and, as necessary, initiate the amendment of any existing international treaty to which the United States is a party for the protection and conservation of the PLMRs in question to make such agreements consistent with this subpart.

(d) *Procedures to certify nations identified as having fishing vessels engaged in PLMR bycatch.* Each nation that is identified as having fishing vessels engaged in PLMR bycatch shall receive either a positive or a negative certification from the Secretary of Commerce. A positive certification indicates that a nation has taken appropriate corrective action to address the PLMR bycatch activity described in the biennial report. A negative certification indicates that a nation has not taken appropriate corrective action.

(1) The Secretary of Commerce will also issue a negative certification for the identified nation in the absence of information from such nation that sufficient action has been taken to address the bycatch activities described in the biennial report.

(2) The Secretary of Commerce shall issue a positive certification to nation identified for having vessels engaged in bycatch of a PLMR when:

(i) Such nation has provided documentary evidence of implementation, and enforcement, of a regulatory program to conserve such PLMRs that is comparable in effectiveness to regulatory measures required under U.S. law to address bycatch in the relevant fisheries, accounting for different conditions that could bear on the feasibility and efficiency of these measures, and includes, in the case of an identified nation with fishing vessels engaged in pelagic longline fishing, the mandatory use of circle hooks, careful handling and release equipment, training and observer programs; and

(ii) Such nation has established a management plan that will assist in the collection of species–specific data on PLMR bycatch to support international stock assessments and conservation efforts for PLMRs.

(3) Nations will be notified prior to a formal certification determination and will be provided with an opportunity to support and/or refute preliminary certification determinations, and communicate any corrective actions taken to address the activities for which such nations were identified. The Secretary of Commerce shall consider any information received during the course of these consultations when making the subsequent certification determinations.

§ 300.204 Effect of certification.

(a) If an identified nation does not receive a positive certification under this subpart (i.e., the nation receives a negative certification or no certification is made), the fishing vessels of such nation are, to the extent consistent with international law, subject to the denial of entry into any place in the United States and to the navigable waters of the United States. At the recommendation of the Secretary of Commerce, certain fish or fish products from fishing vessels

of such nation may be subject to import prohibitions.

(b) If certain fish or fish products from the vessels of such nation are prohibited from entering the United States, within six months after the imposition of the prohibition, the Secretary of Commerce shall determine whether the prohibition is insufficient to cause that nation to effectively address the IUU fishing described in the biennial report, or that nation has retaliated against the United States as a result of that prohibition. The Secretary of Commerce shall certify to the President each affirmative determination that an import prohibition is insufficient to cause a nation to effectively address such IUU fishing activity or that a nation has taken retaliatory action against the United States. Upon receipt of any such subsequent certification, any product from the nation may be prohibited from import for such duration as the President determines appropriate and to the extent that such prohibition is consistent with obligations under international trade agreements, including the World Trade Organization Agreement.

(c) *Positive certification.* (1) If a nation identified in the biennial report to Congress as having fishing vessels engaged in IUU fishing activity is positively certified by the Secretary of Commerce, the nation is deemed to have taken appropriate corrective action in accordance with this subpart to address the IUU fishing activity of its fishing vessels, or the relevant international fishery management organization is deemed to have adopted measures to effectively address the IUU fishing activity of the identified nation's fishing vessels.

(2) If a nation identified in the biennial report to Congress as having fishing vessels engaged in PLMR bycatch is positively certified by the Secretary of Commerce, the nation is deemed to have taken appropriate corrective action in accordance with this subpart to address the PLMR bycatch of its fishing vessels.

(d) *Negative certification or absence of certification.* If a nation identified in the biennial report to Congress as having fishing vessels engaged in IUU fishing activity is not positively certified by the Secretary of Commerce, the nation is deemed not to have taken appropriate corrective action in accordance with this subpart to address the IUU fishing activity of its fishing vessels, including by failing to implement or enforce measures adopted by the relevant international fishery management organization to effectively address the IUU fishing activity of the identified nation's fishing vessels. If a nation identified in the biennial report to Congress as having fishing vessels engaged in the PLMR bycatch is not positively certified by the Secretary of Commerce, the nation is deemed not to have adopted and implemented a regulatory program that is comparable in effectiveness to that of the United States and the nation has not established a management plan in accordance with this subpart to reduce the bycatch of PLMRs by the identified nation's fishing vessels.

(e) *Duration of certification.* Any nation identified in the biennial report to Congress and negatively certified will remain negatively certified until the Secretary of Commerce determines that the nation has taken appropriate corrective action to address the IUU fishing activity and/or bycatch of PLMRs of its vessels. Receipt of a positive certification determination will demonstrate that appropriate corrective action has been taken by a nation to address the relevant IUU fishing activity and/or bycatch of PLMRs.

(f) *Certification determinations.* Certification determinations will be published in the biennial report to Congress.

(g) *Consultations.* Once certification determinations are published in the biennial report, NMFS will, working through or in consultation with the Department of State, continue consultations with the affected nations and provide them an opportunity to take corrective action with respect to the IUU fishing activities or bycatch of PLMRs described in the biennial report to Congress. The Secretary of Commerce shall take the results of such consultations into consideration when making a subsequent certification determination for such nation. A nation that has not received a positive certification shall be eligible for a positive certification when such nation has demonstrated that it has taken appropriate corrective action to address the activities for which it was identified in the biennial report to Congress.

§ 300.205 Denial of port privileges and import restrictions on fish or fish products.

(a) *Scope of Applicability.* (1) If a nation identified in the biennial report under § 300.202(a) or 300.203(a) is not positively certified by the Secretary of Commerce, and the fishing vessels of the nation are allowed entry to any place in the United States and to the navigable waters of the United States under this subpart, those vessels will be subject to inspection and may be prohibited from landing, processing, or transshipping fish and fish products. Services, including the refueling and re–supplying of such fishing vessels, may be prohibited, with the exception of services essential to the safety, health, and welfare of the crew. Fishing vessels will not be denied port access or services in cases of force majeure or distress.

(2) For nations identified in the biennial report under § 300.202(a) that are not positively certified, the Secretary of Commerce shall recommend import prohibitions only with respect to fish or fish products managed under the applicable international fishery agreement. If there is no applicable international fishery agreement, the Secretary of Commerce shall not recommend import prohibitions that would apply to fish or fish products caught by vessels not engaged in IUU fishing. For nations identified under § 300.203(a) that are not positively certified, the Secretary of Commerce shall not recommend import prohibitions that would apply to fish or fish products caught by vessels not engaged in IUU fishing.

(b) *Imposition of import restrictions*—(1) *Notification.* Where the Secretary of Commerce cannot make positive certifications for identified nations, and the U.S. President determines that certain fish and fish products from such nations are ineligible for entry into the United States and U.S. territories, the Secretary of Commerce, with the concurrence of the Secretary of State and in cooperation with the Secretary of Treasury, will file with the Office of the Federal Register for publication a finding to that effect. Such finding may include a requirement that fish or fish products from such nations be accompanied by documentation of admissibility.

(2) *Documentation of admissibility.* The finding in paragraph(b)(1) of this section may include a requirement that fish or fish products not subject to the import restrictions from such nations be accompanied by documentation of admissibility. Such documentation must be submitted to NMFS by electronic facsimile (fax), or once available, via the Internet, to a number or website designated by NMFS. The documentation of admissibility must be executed by a duly authorized official of the country named in the finding and the documentation of admissibility must be validated by a responsible official(s) designated by NMFS.

(3) *Effective date of import restrictions.* Effective upon the date of publication of such finding, shipments of fish or fish products found to be ineligible will be denied entry to the United States. Entry will not be denied

for any such shipment that, on the date of publication, was in transit to the United States on board a vessel operating as a common carrier.

(4) *Removal of import restrictions.* Upon a determination by the Secretary of Commerce that an identified nation that was not certified positively has satisfactorily met the conditions in this subpart and that nation has been positively certified, the provisions of § 300.205 shall no longer apply. The Secretary of Commerce, with the concurrence of the Secretary of State and in cooperation with the Secretary of Treasury, will notify such nations and will file with the Office of the Federal Register for publication notification of the removal of the import restrictions effective on the date of publication.

§ 300.206 Alternative procedures for IUU fishing activities.

(a) The alternative procedures in this section apply to the certification of fish or fish products from a nation identified under § 300.202 in the event that the Secretary cannot reach a certification determination for such identified nation by the time of the next biennial report. These alternative procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this subpart. Under these alternative procedures, the Secretary of Commerce may allow entry of fish or fish products on a shipment–by–shipment, shipper–by–shipper, or other basis as long as the following conditions are met.

(b) To qualify for the alternative certification procedures, NMFS must determine that:

(1) The vessel has not engaged in IUU fishing in violation of an international fishery management agreement to which the U.S. is a party; or

(2) The vessel is not identified by an international fishery management organization as participating in IUU fishing activities.

(c) Fish or fish products offered for entry under this section must be accompanied by a completed documentation of admissibility form, which is available from NMFS. Such documentation must be submitted to NMFS by electronic facsimile (fax), or once available, via the Internet, to a number or website designated by NMFS. The documentation of admissibility must be executed by a duly authorized official of the country named in the finding and the documentation of admissibility must be validated by a responsible official(s) designated by NMFS.

§ 300.207 Alternative procedures for bycatch of PLMRs.

(a) The alternative procedures in this section apply to the certification of fish or fish products from a nation identified under § 300.203 in the event that the Secretary cannot reach a certification determination for such identified nation by the time of the next biennial report. These alternative procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this subpart. Under these alternative procedures, the Secretary of Commerce may allow entry of fish or fish products on a shipment–by–shipment, shipper–by–shipper, or other basis as long as the following conditions are met.

(b) To qualify for the alternative certification procedures, NMFS must determine that imports were harvested by practices that do not result in bycatch of a protected marine species, or were harvested by practices that:

(1) Are comparable to those of the United States, taking into account different conditions, and which, in the case of pelagic longline fisheries, the regulatory program of an identified nation includes mandatory use of circle hooks, careful handling and release equipment, and training and observer programs; and

(2) Include the gathering of species specific data that can be used to support international and regional stock assessments and conservation efforts for protected living marine resources.

(c) Fish or fish products offered for entry under this section must be accompanied by a completed documentation of admissibility form, which is available from NMFS. Such documentation must be submitted to NMFS by electronic facsimile (fax), or once available, via the Internet, to a number or website designated by NMFS. The documentation of admissibility must be executed by a duly authorized official of the country named in the finding and the documentation of admissibility must be validated by a responsible official(s) designated by NMFS.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 0812311655–81657–01]

RIN 0648–AX44

Pacific Halibut Fisheries; Catch Sharing Plan

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

ACTION: Proposed rule.

SUMMARY: NMFS proposes to approve and implement changes to the Pacific Halibut Catch Sharing Plan (Plan) for the International Pacific Halibut Commission's (IPHC or Commission) regulatory Area 2A off Washington, Oregon, and California (Area 2A). NMFS proposes to implement the portions of the Plan and management measures that are not implemented through the IPHC, which includes tribal regulations and the sport fishery allocations and management measures for Area 2A. These actions are intended to enhance the conservation of Pacific halibut, to provide greater angler opportunity where available, and to protect yelloweye rockfish and other overfished groundfish species from being incidentally caught in the halibut fisheries.

DATES: Comments on the proposed changes to the Plan and on the proposed domestic Area 2A halibut management measures must be received no later than 5 p.m., local time on February 1, 2009.

ADDRESSES: Copies of the Plan and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA) are available from D. Robert Lohn, Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070. Electronic copies of the Plan, including proposed changes for 2009, and of the draft RIR/IRFA are also available at the NMFS Northwest Region website: *http://www.nwr.noaa.gov*, click on ''Groundfish & Halibut.''

You may submit comments, identified by RIN 0648–AX44, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- Fax: 206–526–6736, Attn: Sarah Williams.
- Mail: D. Robert Lohn, Administrator, Northwest Region,

NMFS, Attn: Sarah Williams, 7600 Sand Point Way NE, Seattle, WA 98115–0070.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments, enter N/A in the required fields if you wish to remain anonymous. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Sarah Williams, telephone (206)526–4646.

SUPPLEMENTARY INFORMATION: The Northern Pacific Halibut Act (Halibut Act) of 1982, at 16 U.S.C. 773c, gives the Secretary of Commerce (Secretary) general responsibility for implementing the provisions of the Halibut Convention between the United States and Canada (Halibut Convention). It requires the Secretary to adopt regulations as may be necessary to carry out the purposes and objectives of the Halibut Convention and the Halibut Act. Section 773c of the Halibut Act authorizes the regional fishery management councils to develop regulations governing the Pacific halibut catch in their corresponding U.S. Convention waters that are in addition to, but not in conflict with, regulations of the IPHC. Each year between 1988 and 1995, the Pacific Fishery Management Council (Pacific Council) developed a catch sharing plan in accordance with the Halibut Act to allocate the total allowable catch (TAC) of Pacific halibut between treaty Indian and non-treaty harvesters and among non-treaty commercial and sport fisheries in Area 2A.

In 1995, NMFS implemented the Pacific Council-recommended long-term Plan (60 FR 14651, March 20, 1995). In each of the intervening years between 1995 and the present, minor revisions to the Plan have been made to adjust for the changing needs of the fisheries. The Plan allocates 35 percent of the Area 2A TAC to Washington treaty Indian tribes in Subarea 2A–1 and 65 percent to non-tribal fisheries in Area 2A.

The allocation to non-tribal fisheries is divided into three shares, with the Washington sport fishery (north of the Columbia River) receiving 36.6 percent, the Oregon/California sport fishery receiving 31.7 percent, and the commercial fishery receiving 31.7 percent. The commercial fishery is further divided into a directed commercial fishery that is allocated 85 percent of the commercial allocation and an incidental catch in the salmon troll fishery that is allocated 15 percent of the commercial allocation. The directed commercial fishery in Area 2A is confined to southern Washington (south of 46°53.30' N. lat.), Oregon, and California. North of 46°53.30' N. lat. (Pt. Chehalis), the Plan allows for incidental halibut retention in the primary limited entry longline sablefish fishery when the overall Area 2A TAC is above 900,000 lb (408.2 mt). The Plan also divides the sport fisheries into six geographic subareas, each with separate allocations, seasons, and bag limits.

The Area 2A TAC will be set by the IPHC at its annual meeting on January 13–16, 2009, in Vancouver, BC. Preliminary estimates of the Area 2A TAC are lower than the 2008 TAC. NMFS requests public comments on the Pacific Council's recommended modifications to the Plan and the proposed domestic fishing regulations by February 6, 2009. This allows the public the opportunity to consider the final Area 2A TAC before submitting comments on the proposed rule. The States of Washington and Oregon will conduct public workshops shortly after the IPHC meeting to obtain input on the sport season dates. After the final Area 2A TAC is known and after NMFS reviews public comments and comments from the states, NMFS will issue a final rule for the Area 2A Pacific halibut fisheries concurrent with its publication of the IPHC regulations for the 2009 Pacific halibut fisheries.

Pacific Council Recommended Changes to the Plan and Domestic Fishing Regulations

Each year, the states (Washington Department of Fish and Wildlife (WDFW) and Oregon Department of Fish and Wildlife (ODFW)) and the tribes with treaty fishing rights for halibut consider whether changes to the Plan are needed or desired by their fishery participants. Fishery managers from the states hold public meetings before both the September and November Pacific Council meetings to get public input on revisions to the Plan. At the September 2008 Pacific Council meeting, NMFS, WDFW and ODFW recommended several changes to the Plan, and the tribes announced that they had no proposals for revising the Plan in 2009. Following the meeting, the states again reviewed their proposals with the public and drafted their recommended revisions for review and recommendation by the Pacific Council.

At its November 3–7, 2008, meeting in San Diego, CA, the Pacific Council considered the results of state-sponsored workshops on the proposed changes to the Plan, NMFS-proposed changes to the Plan, and public comments, and made final recommendations for modifications to the Plan and implementing regulations as follows:

1. Remove the provision that divides the Washington North Coast subarea quota between May and June;
2. Change the Washington North Coast subarea to a 2-day per week fishery, Thursday and Saturday, from a 3-day per week fishery;
3. Change the June re-opening date in the Washington North Coast subarea to the first Thursday in June, from the status-quo of the first Tuesday and Thursday after June 16;
4. Clarify that the nearshore set-aside in the Washington South Coast subarea is 10 percent of the subquota, or 2,000 pounds, whichever is less, rather than a straight 10 percent of the subquota;
5. Set the Washington South Coast subarea to open the first Sunday in May and continue to be open on Sundays and Tuesdays in May, except that beginning the third week in May the fishery would be open on Sunday only until the quota for the primary season is reached. Under status-quo the fishery was open 2 days a week until the quota was achieved;
6. Set the nearshore fishery in the Washington South Coast subarea as a 3-day per week fishery, open Thursday, Friday, and Saturday, in addition to days on which the primary fishery is open, during the primary season. After the primary season, the nearshore fishery is open Thursday through Sunday. Under status-quo the nearshore fishery was open only after the primary fishery was closed, leaving a large amount of unfished quota, in 2008 only 158 pounds out of the 4460 pound quota was caught;
7. Specify that in addition to the South Coast Yelloweye Rockfish Conservation Area (YRCA), recreational fishing for groundfish and halibut will be prohibited in the newly created Westport Offshore YRCA;
8. Change the Columbia River subarea spring fishery to a 3-day per week fishery, open Thursday, Friday and Saturday, until 70 percent of the subarea allocation is taken or until the third Sunday in July, whichever is earlier. Under status-quo this was a 7-day per week fishery;
9. Specify that in the Oregon Central Coast subarea Pacific cod may be

retained with a halibut on the vessel during the all-depth openings. Under status-quo Pacific cod retention was not allowed. The change is intended to make retention consistent in the areas north and south of Cape Falcon and Pacific cod are rarely encountered south of Cape Falcon;

10. Add the Nooksack tribe to the definition of ''Treaty Indian tribes'' in the Federal regulations;

11. Add the Nooksack tribal fishing area boundaries to the Federal regulations.

Proposed Changes to the Plan

NMFS is proposing to approve the Pacific Council recommendations and to implement the above-described changes by making the following changes to the current Plan, which can be found at *http://www.nwr.noaa.gov/Groundfish-Halibut/Pacific-Halibut/Index.cfm* :

In section (f) of the Plan, Sport Fisheries, revise section (1)(ii), Washington north coast subarea, to read as follows:

This sport fishery subarea is allocated 62.2 percent of the first 130,845 lb (59.4 mt) allocated to the Washington sport fishery, and 32 percent of the Washington sport allocation between 130,845 lb (59.4 mt) and 224,110 lb (101.7 mt) except as provided in section (e)(3) of this Plan. This subarea is defined as all U.S. waters west of the mouth of the Sekiu River, as defined above in paragraph (f)(1)(i), and north of the Queets River (47°31.70' N. lat.). The management objective for this subarea is to provide a quality recreational fishing opportunity during May and June. The fishery will open on the first Thursday between May 9 and 15, and continue 2 days per week (Thursday, and Saturday) in May as scheduled pre-season, unless there is a quota management closure. If there is no quota management closure in May, the fishery will reopen on the first Thursday of June as an all depth fishery on Thursdays and Saturdays as long as sufficient quota remains. This schedule allows adequate public notice of any inseason action before each Thursday opening. If there is not sufficient quota for an all-depth day, the fishery would reopen in the nearshore areas described below:

A. WDFW Marine Catch Area 4B, which is all waters west of the Sekiu River mouth, as defined by a line extending from 48°17.30' N. lat., 124°23.70' W. long. north to 48°24.10' N. lat., 124°23.70' W. long., to the Bonilla-Tatoosh line, as defined by a line connecting the light on Tatoosh Island, WA, with the light on Bonilla Point on Vancouver Island, British Columbia (at 48°35.73' N. lat., 124°43.00' W. long.) south of the International Boundary between the U.S. and Canada (at 48° 29.62' N. lat., 124° 43.55' W. long.), and north of the point where that line intersects with the boundary of the U.S. territorial sea.

B. Shoreward of the recreational halibut 30–fm boundary line, a modified line approximating the 30 fm depth contour from the Bonilla-Tatoosh line south to the Queets River. Coordinates for the closed area will be specifically defined annually in Federal halibut regulations published in the **Federal Register**.

No sport fishing for halibut is allowed after September 30. If the fishery is closed prior to September 30, and there is insufficient quota remaining to reopen the nearshore areas for another fishing day, then any remaining quota may be transferred inseason to another Washington coastal subarea by NMFS via an update to the recreational halibut hotline. The daily bag limit in all fisheries is one halibut per person with no size limit.

Recreational fishing for groundfish and halibut is prohibited within the North Coast Recreational Yelloweye Rockfish Conservation Area (YRCA). The North Coast Recreational YRCA is a C-shaped area off the northern Washington coast and is defined by straight lines connecting latitude and longitude coordinates. Coordinates for the North Coast Recreational YRCA are specified in groundfish regulations at 50 CFR 660.390 and will be specifically defined annually in federal halibut regulations published in the **Federal Register**.

In section (f) of the Plan, Sport Fisheries, revise section (iii), Washington south coast subarea, to read as follows: This sport fishery is allocated 12.3 percent of the first 130,845 lb (59.4 mt) allocated to the Washington sport fishery, and 32 percent of the Washington sport allocation between 130,845 lb (59.4 mt) and 224,110 lb (101.7 mt) (except as provided in section (e) (3) of this Plan). This subarea is defined as waters south of the Queets River (47°31.70' N. lat.) and north of Leadbetter Point (46°38.17' N. lat.). The structuring objective for this subarea is to maximize the season length, while maintaining a quality fishing experience. The south coast subarea quota will be allocated as follows: 10% or 2,000 pounds, whichever is less, will be set aside for the nearshore fishery with the remaining amount allocated to the primary fishery. The fishery will open on the first Sunday in May. The primary fishery will be open two days per week, Sunday and Tuesday, in all areas, except where prohibited. Starting the third week in May, the primary fishery will be open on Sundays only until the quota for the primary fishery season is reached or September 30, whichever is earlier. If there is insufficient quota remaining to reopen the primary fishery for another fishing day, the remaining primary fishery quota will be added to the nearshore quota. The nearshore fishery takes place, in the area from 47°25.00' N. lat. south to 46°58.00' N. lat. and east of 124°30.00' W. long. During the primary season the nearshore fishery will be open three days per week, Thursday, Friday and Saturday, in addition to any days on which the primary fishery is open. Subsequent to the closure of the primary fishery, the nearshore fishery will continue on Thursdays, Fridays, Saturdays and Sundays until the remaining quota is projected to be taken. If the fishery is closed prior to September 30, and there is insufficient quota remaining to reopen the nearshore areas for another fishing day, then any remaining quota may be transferred inseason to another Washington coastal subarea by NMFS via an update to the recreational halibut hotline. The daily bag limit is one halibut per person, with no size limit.

Recreational fishing for groundfish and halibut is prohibited within two YRCAs off Washington's southern coast. The South Coast Recreational YRCA and the Westport Offshore YRCA are defined by straight lines connecting latitude and longitude coordinates. Coordinates for these Recreational YRCAs are specified in groundfish regulations at 50 CFR 660.390 and will be specifically defined annually in Federal halibut regulations published in the **Federal Register**.

In section (f) of the Plan, Sport Fisheries, revise the fourth sentence of section (iv), Columbia River subarea, to read as follows: The fishery will open on the first Thursday in May or May 1 if it is a Friday or Saturday, 3 days per week, Thursday through Saturday until 70 percent of the subarea allocation is taken or until the third Sunday in July, whichever is earlier.

In section (f) of the Plan, Sport Fisheries, revise the last sentence in the first paragraph in section (v), Oregon central coast, to read as follows: During days open to all-depth halibut fishing, no groundfish may be taken and retained, possessed or landed, except sablefish and Pacific cod when allowed by groundfish regulations, if halibut are on board the vessel.

Proposed 2008 Sport Fishery Management Measures

NMFS is proposing sport fishery management measures that are

necessary to implement the Plan in 2009. The 2009 TAC for Area 2A will be determined by the IPHC at its annual meeting on January 13–16, 2009, in Vancouver, BC. Because the final 2009 TAC has not yet been determined, these proposed sport fishery management measures use the IPHC staff's preliminary 2009 Area 2A TAC recommendation of 860,000 lb (390 mt), which is lower than the 2008 TAC of 1,220,000 lb (553 mt). Where season dates are not indicated, those dates will be provided in the final rule, following determination of the 2009 TAC and consultation with the states and the public. In Section 8 of the annual domestic management measures, ''Fishing Periods'', paragraph (2) is proposed to read as follows:

(1) * * *

(2) Each fishing period in the Area 2A directed fishery shall begin at 0800 hours and terminate at 1800 hours local time on (*insert season dates*) unless the Commission specifies otherwise.

In section 26 of the annual domestic management measures, ''Sport Fishing for Halibut,'' paragraph 1(a)-(b) will be updated with 2009 total allowable catch limits in the final rule. In section 26 of the annual domestic management measures, ''Sport Fishing for Halibut'' paragraph (8) is proposed to read as follows:

(8) * * *

(a) The area in Puget Sound and the U.S. waters in the Strait of Juan de Fuca, east of a line extending from 48°17.30' N. lat., 124°23.70' W. long. north to 48°24.10' N. lat., 124°23.70' W. long., is not managed in-season relative to its quota. This area is managed by setting a season that is projected to result in a catch of 54,384 lb (24.6 mt).

(i) The fishing season in eastern Puget Sound (east of 123°49.50' W. long., Low Point) is (*insert season dates*), and the fishing season in western Puget Sound (west of 123°49.50' W. long., Low Point) is (*insert season dates*), 5 days a week (Thursday through Monday).

(ii) The daily bag limit is one halibut of any size per day per person.

(b) The quota for landings into ports in the area off the north Washington coast, west of the line described in paragraph (2)(a) of section 26 and north of the Queets River (47°31.70' N. lat.), is 104,985 lb (92.8 mt).

(i) The fishing seasons are:

(A) Commencing on May 14 and continuing 2 days a week (Thursday, and Saturday) until 104,985 lb (92.8 mt) are estimated to have been taken and the season is closed by the Commission or until May 24.

(B) If sufficient quota remains the fishery will reopen on June 4 in the entire north coast subarea, continuing 2 days per week (Thursday and Saturday) until there is not sufficient quota for another full day of fishing and the area is closed by the Commission. When there is insufficient quota remaining to reopen the entire north coast subarea for another day, then the nearshore areas described below will reopen for 2 days per week (Thursday and Saturday), until the overall quota of 104,985 lb (92.8 mt) is estimated to have been taken and the area is closed by the Commission, or until September 30, whichever is earlier. After May 24, any fishery opening will be announced on the NMFS hotline at 800–662–9825. No halibut fishing will be allowed after May 24 unless the date is announced on the NMFS hotline. The nearshore areas for Washington's North Coast fishery are defined as follows:

(*1*) WDFW Marine Catch Area 4B, which is all waters west of the Sekiu River mouth, as defined by a line extending from 48°17.30' N. lat., 124°23.70' W. long. north to 48°24.10' N. lat., 124°23.70' W. long., to the Bonilla-Tatoosh line, as defined by a line connecting the light on Tatoosh Island, WA, with the light on Bonilla Point on Vancouver Island, British Columbia (at 48°35.73' N. lat., 124°43.00' W. long.) south of the International Boundary between the U.S. and Canada (at 48°29.62' N. lat., 124°43.55' W. long.), and north of the point where that line intersects with the boundary of the U.S. territorial sea.

(*2*) Shoreward of the recreational halibut 30–fm boundary line, a modified line approximating the 30–fm depth contour from the Bonilla-Tatoosh line south to the Queets River. The recreational halibut 30–fm boundary line is defined by the following coordinates in the order listed:

(1) 48°24.79' N. lat., 124°44.07' W. long.;

(2) 48°24.80' N. lat., 124°44.74' W. long.;

(3) 48°23.94' N. lat., 124°44.70' W. long.;

(4) 48°23.51' N. lat., 124°45.01' W. long.;

(5) 48°22.59' N. lat., 124°44.97' W. long.;

(6) 48°21.75' N. lat., 124°45.26' W. long.;

(7) 48°21.23' N. lat., 124°47.78' W. long.;

(8) 48°20.32' N. lat., 124°49.53' W. long.;

(9) 48°16.72' N. lat., 124°51.58' W. long.;

(10) 48°10.00' N. lat., 124°52.58' W. long.;

(11) 48°05.63' N. lat., 124°52.91' W. long.;

(12) 47°56.25' N. lat., 124°52.57' W. long.;

(13) 47°40.28' N. lat., 124°40.07' W. long.; and

(14) 47°1.70' N. lat., 124°37.03' W. long.

(ii) The daily bag limit is one halibut of any size per day per person.

(iii) Recreational fishing for groundfish and halibut is prohibited within the North Coast Recreational Yelloweye Rockfish Conservation Area (YRCA). It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the North Coast Recreational YRCA. A vessel fishing in the North Coast Recreational YRCA may not be in possession of any halibut. Recreational vessels may transit through the North Coast Recreational YRCA with or without halibut on board. The North Coast Recreational YRCA is a C-shaped area off the northern Washington coast intended to protect yelloweye rockfish. The North Coast Recreational YRCA is defined by straight lines connecting the following specific latitude and longitude coordinates in the order listed:

(1) 48°18.00' N. lat.; 125°18.00' W. long.;

(2) 48°18.00' N. lat.; 124°59.00' W. long.;

(3) 48°11.00' N. lat.; 124°59.00' W. long.;

(4) 48°11.00' N. lat.; 125°11.00' W. long.;

(5) 48°04.00' N. lat.; 125°11.00' W. long.;

(6) 48°04.00' N. lat.; 124°59.00' W. long.;

(7) 48°00.00' N. lat.; 124°59.00' W. long.;

(8) 48°00.00' N. lat.; 125°18.00' W. long.;

and connecting back to 48°18.00' N. lat.; 125°18.00' W. long.

(c) The quota for landings into ports in the area between the Queets River, WA (47°31.70' N. lat.) and Leadbetter Point, WA (46°38.17' N. lat.), is 39,694 lb (18 mt).

(i) This subarea is divided between the all-waters fishery (the Washington South coast primary fishery), and the incidental nearshore fishery in the area from 47°25.00' N. lat. south to 46°58.00' N. lat. and east of 124°30.00' W. long. (the Washington South coast, northern nearshore area). The south coast subarea quota will be allocated as follows: 37,693 lb (17.1 mt), for the primary fishery, and 2,000 lb(1.8 mt), for the nearshore fishery. The primary fishery commences on May 3 and continues 2 days a week (Sunday and Tuesday) until May 24. Beginning on May 24 the primary fishery will be open 1 day per

week (Sunday) until the quota for the south coast subarea primary fishery is taken and the season is closed by the Commission, or until September 30, whichever is earlier. The fishing season in the nearshore area commences on May 3 and, and during the primary season, continues 3 days a week (Thursday, Friday and Saturday) in addition to the days open in the primary fishery. Subsequent to closure of the primary fishery the nearshore fishery is open on Thursdays, Fridays, Saturdays and Sundays, until 39,694 lb (18 mt)is projected to be taken by the two fisheries combined and the fishery is closed by the Commission or September 30, whichever is earlier. If the fishery is closed prior to September 30, and there is insufficient quota remaining to reopen the northern nearshore area for another fishing day, then any remaining quota may be transferred in-season to another Washington coastal subarea by NMFS via an update to the recreational halibut hotline.

(ii) The daily bag limit is one halibut of any size per day per person.

(iii) Recreational fishing for groundfish and halibut is prohibited within the South Coast Recreational YRCA and Westport Offshore YRCA. It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the South Coast Recreational YRCA and Westport Offshore YRCA. A vessel fishing in the South Coast Recreational YRCA and/or Westport Offshore YRCA may not be in possession of any halibut. Recreational vessels may transit through the South Coast Recreational YRCA and Westport Offshore YRCA with or without halibut on board. The South Coast Recreational YRCA and Westport Offshore YRCA are areas off the southern Washington coast intended to protect yelloweye rockfish. The South Coast Recreational YRCA is defined by straight lines connecting the following specific latitude and longitude coordinates in the order listed:

(1) 46°58.00’ N. lat., 124°48.00’ W. long.;

(2) 46°55.00’ N. lat., 124°48.00’ W. long.;

(3) 46°55.00’ N. lat., 124°49.00’ W. long.;

(4) 46°58.00’ N. lat., 124°49.00’ W. long.;

and connecting back to 46°58.00’ N. lat., 124°48.00’ W. long.

The Westport Offshore YRCA is defined by straight lines connecting the following specific latitude and longitude coordinates in the order listed:

(1) 46°54.30’ N. lat., 124°53.40’ W. long.;

(2) 46°54.30’ N. lat., 124°51.00’ W. long.;

(3) 46°53.30’ N. lat., 124°51.00’ W. long.;

(4) 46°53.30’ N. lat., 124°53.40’ W. long.;

and connecting back to 46°54.30’ N. lat., 124°53.40’ W. long.

(d) The quota for landings into ports in the area between Leadbetter Point, WA (46°38.17’ N. lat.) and Cape Falcon, OR (45°46.00’ N. lat.), is 14,427 lb (6.5 mt).

(i) The fishing season commences on May 1, and continues 3 days a week (Thursday, Friday and Saturday) until 10,099 lb(4.6 mt) are estimated to have been taken and the season is closed by the Commission or until July 19, whichever is earlier. The fishery will reopen on August 7 and continue 3 days a week (Friday through Sunday) until 4,328 lb (1.96 mt) have been taken and the season is closed by the Commission, or until September 30, whichever is earlier. Subsequent to this closure, if there is insufficient quota remaining in the Columbia River subarea for another fishing day, then any remaining quota may be transferred in-season to another Washington and/or Oregon subarea by NMFS via an update to the recreational halibut hotline. Any remaining quota would be transferred to each state in proportion to its contribution.

(ii) The daily bag limit is one halibut of any size per day per person.

(iii) Pacific Coast groundfish may not be taken and retained, possessed or landed, except sablefish and Pacific cod when allowed by Pacific Coast groundfish regulations, when halibut are on board the vessel.

(e) The quota for landings into ports in the area off Oregon between Cape Falcon (45°46.00’ N. lat.) and Humbug Mountain (42°40.50’ N. lat.), is 163,027 lb (73.94 mt).

(i) The fishing seasons are:

(A) The first season (the ‘‘inside 40–fm’’ fishery) commences May 1 and continues 7 days a week through October 31, in the area shoreward of a boundary line approximating the 40–fm (73–m) depth contour, or until the sub-quota for the central Oregon ‘‘inside 40–fm’’ fishery (13,042 lb 5.9 mt)) or any in-season revised subquota is estimated to have been taken and the season is closed by the Commission, whichever is earlier. The boundary line approximating the 40–fm (73–m) depth contour between 45°46.00’ N. lat. and 42°40.50’ N. lat. is defined by straight lines connecting all of the following points in the order stated:

(1) 45°46.00’ N. lat., 124°04.49’ W. long.;

(2) 45°44.34’ N. lat., 124°05.09’ W. long.;

(3) 45°40.64’ N. lat., 124°04.90’ W. long.;

(4) 45°33.00’ N. lat., 124°04.46’ W. long.;

(5) 45°32.27’ N. lat., 124°04.74’ W. long.;

(6) 45°29.26’ N. lat., 124°04.22’ W. long.;

(7) 45°20.25’ N. lat., 124°04.67’ W. long.;

(8) 45°19.99’ N. lat., 124°04.62’ W. long.;

(9) 45°17.50’ N. lat., 124°04.91’ W. long.;

(10) 45°11.29’ N. lat., 124°05.19’ W. long.;

(11) 45°05.79’ N. lat., 124°05.40’ W. long.;

(12) 45°05.07’ N. lat., 124°05.93’ W. long.;

(13) 45°03.83’ N. lat., 124°06.47’ W. long.;

(14) 45°01.70’ N. lat., 124°06.53’ W. long.;

(15) 44°58.75’ N. lat., 124°07.14’ W. long.;

(16) 44°51.28’ N. lat., 124°10.21’ W. long.;

(17) 44°49.49’ N. lat., 124°10.89’ W. long.;

(18) 44°44.96’ N. lat., 124°14.39’ W. long.;

(19) 44°43.44’ N. lat., 124°14.78’ W. long.;

(20) 44°42.27’ N. lat., 124°13.81’ W. long.;

(21) 44°41.68’ N. lat., 124°15.38’ W. long.;

(22) 44°34.87’ N. lat., 124°15.80’ W. long.;

(23) 44°33.74’ N. lat., 124°14.43’ W. long.;

(24) 44°27.66’ N. lat., 124°16.99’ W. long.;

(25) 44°19.13’ N. lat., 124°19.22’ W. long.;

(26) 44°15.35’ N. lat., 124°17.37’ W. long.;

(27) 44°14.38’ N. lat., 124°17.78’ W. long.;

(28) 44°12.80’ N. lat., 124°17.18’ W. long.;

(29) 44°09.23’ N. lat., 124°15.96’ W. long.;

(30) 44°08.38’ N. lat., 124°16.80’ W. long.;

(31) 44°08.30’ N. lat., 124°16.75’ W. long.;

(32) 44°01.18’ N. lat., 124°15.42’ W. long.;

(33) 43°51.60’ N. lat., 124°14.68’ W. long.;

(34) 43°42.66’ N. lat., 124°15.46’ W. long.;

(35) 43°40.49’ N. lat., 124°15.74’ W. long.;

(36) 43°38.77' N. lat., 124°15.64' W. long.;
(37) 43°34.52' N. lat., 124°16.73' W. long.;
(38) 43°28.82' N. lat., 124°19.52' W. long.;
(39) 43°23.91' N. lat., 124°24.28' W. long.;
(40) 43°20.83' N. lat., 124°26.63' W. long.;
(41) 43°17.96' N. lat., 124°28.81' W. long.;
(42) 43°16.75' N. lat., 124°28.42' W. long.;
(43) 43°13.98' N. lat., 124°31.99' W. long.;
(44) 43°13.71' N. lat., 124°33.25' W. long.;
(45) 43°12.26' N. lat., 124°34.16' W. long.;
(46) 43°10.96' N. lat., 124°32.34' W. long.;
(47) 43°05.65' N. lat., 124°31.52' W. long.;
(48) 42°59.66' N. lat., 124°32.58' W. long.;
(49) 42°54.97' N. lat., 124°36.99' W. long.;
(50) 42°53.81' N. lat., 124°38.58' W. long.;
(51) 42°50.00' N. lat., 124°39.68' W. long.;
(52) 42°49.14' N. lat., 124°39.92' W. long.;
(53) 42°46.47' N. lat., 124°38.65' W. long.;
(54) 42°45.60' N. lat., 124°39.04' W. long.;
(55) 42°44.79' N. lat., 124°37.96' W. long.;
(56) 42°45.00' N. lat., 124°36.39' W. long.;
(57) 42°44.14' N. lat., 124°35.16' W. long.;
(58) 42°42.15' N. lat., 124°32.82' W. long.; and
(59) 42°40.50' N. lat., 124°31.98' W. long.;

(B) The second season (spring season), which is for the ''all-depth'' fishery, is open on (*insert dates beginning with May 1*). The projected catch for this season is 112,488 lb (51 mt). If sufficient unharvested catch remains for additional fishing days, the season will re-open. Dependent on the amount of unharvested catch available, the potential season re-opening dates will be: (*insert dates no later than July 31*). If NMFS decides in-season to allow fishing on any of these re-opening dates, notice of the re-opening will be announced on the NMFS hotline (206) 526–6667 or (800) 662–9825. No halibut fishing will be allowed on the re-opening dates unless the date is announced on the NMFS hotline.

(C) If sufficient unharvested catch remains, the third season (summer season), which is for the ''all-depth'' fishery, will be open on (insert dates beginning with August 1) or until the combined spring season and summer season quotas in the area between Cape Falcon and Humbug Mountain, OR, totaling 37,496 lb (17 mt), are estimated to have been taken and the area is closed by the Commission, or October 31, whichever is earlier. NMFS will announce on the NMFS hotline in July whether the fishery will re-open for the summer season in August. No halibut fishing will be allowed in the summer season fishery unless the dates are announced on the NMFS hotline. Additional fishing days may be opened if a certain amount of quota remains after August 9 and August 23. If after August 9, greater than or equal to 60,000 lb (27.2 mt) remains in the combined all-depth and inside 40–fm (73–m) quota, the fishery may re-open every Friday through Sunday, beginning August 14–16, and ending October 31. If after September 6, greater than or equal to 30,000 lb (13.6 mt) remains in the combined all-depth and inside 40–fm (73–m) quota, and the fishery is not already open every Friday through Sunday, the fishery may re-open every Friday through Sunday, beginning September 11–13, and ending October 31. After September 6, the bag limit may be increased to two fish of any size per person, per day. NMFS will announce on the NMFS hotline whether the summer all-depth fishery will be open on such additional fishing days, what days the fishery will be open and what the bag limit is.

(ii) The daily bag limit is one halibut of any size per day per person, unless otherwise specified. NMFS will announce on the NMFS hotline any bag limit changes.

(iii) During days open to all-depth halibut fishing, no Pacific Coast groundfish may be taken and retained, possessed or landed, except sablefish and Pacific cod, when allowed by Pacific Coast groundfish regulations, if halibut are on board the vessel.

(iv) When the all-depth halibut fishery is closed and halibut fishing is permitted only shoreward of a boundary line approximating the 40–fm (73–m) depth contour, halibut possession and retention by vessels operating seaward of a boundary line approximating the 40–fm (73–m) depth contour is prohibited.

(v) Recreational fishing for groundfish and halibut is prohibited within the Stonewall Bank YRCA. It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the Stonewall Bank YRCA. A vessel fishing in the Stonewall Bank YRCA may not be in possession of any halibut. Recreational vessels may transit through the Stonewall Bank YRCA with or without halibut on board. The Stonewall Bank YRCA is an area off central Oregon, near Stonewall Bank, intended to protect yelloweye rockfish. The Stonewall Bank YRCA is defined by straight lines connecting the following specific latitude and longitude coordinates in the order listed:
(1) 44°37.46 N. lat.; 124°24.92 W. long.;
(2) 44°37.46 N. lat.; 124°23.63 W. long.;
(3) 44°28.71 N. lat.; 124°21.80 W. long.;
(4) 44°28.71 N. lat.; 124°24.10 W. long.;
(5) 44°31.42 N. lat.; 124°25.47 W. long.;
and connecting back to 44°37.46 N. lat.; 124°24.92 W. long.

(f) The area south of Humbug Mountain, Oregon (42°40.50' N. lat.) and off the California coast is not managed in-season relative to its quota. This area is managed on a season that is projected to result in a catch of 5,316 lb (2.4 mt).

(i) The fishing season will commence on May 1 and continue 7 days a week until October 31.

(ii) The daily bag limit is one halibut of any size per day per person.

Classification

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

NMFS has prepared an RIR/IRFA on the proposed changes to the Plan and annual domestic Area 2A halibut management measures. Copies of these documents are available from NMFS (see **ADDRESSES**). NMFS prepared an IRFA that describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. The IRFA is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows:

A fish-harvesting business is considered a ''small'' business by the Small Business Administration (SBA) if it has annual receipts not in excess of $4.0 million. For related fish-processing businesses, a small business is one that employs 500 or fewer persons. For wholesale businesses, a small business is one that employs not more than 100 people. For marinas and charter/party boats, a small business is one with annual receipts not in excess of $6.5

million. All of the businesses that would be affected by this action are considered small businesses under Small Business Administration guidance.

The proposed changes to the Plan, which allocates the catch of Pacific halibut among users in Washington, Oregon and California, would: (1)Remove the provision that divides the Washington North Coast subarea quota between May and June; (2)Change the Washington North Coast subarea to a 2–day per week fishery, Thursday and Saturday, from a 3–day per week fishery; (3)Change the June re-opening date in the Washington North Coast subarea to the first Thursday in June, from the status-quo of the first Tuesday and Thursday after June 16;(4)Clarify that the nearshore set-aside in the Washington South Coast subarea is 10 percent of the subquota, or 2,000 pounds, whichever is less, rather than a straight 10 percent of the subquota; (5)Set the Washington South Coast subarea to open the first Sunday in May and continue to be open on Sundays and Tuesdays in May, except that beginning on the third week in May the fishery would be open on Sunday only until the quota for the primary season is reached. Under status-quo the fishery was open 2 days a week until the quota was achieved;(6)Set the nearshore fishery in the Washington South Coast subarea as a 3–day per week fishery, open Thursday, Friday, and Saturday, during and after the primary season. Under status-quo the nearshore fishery was open only after the primary fishery was closed, leaving a large amount of unfished quota, in 2008 only 158 pounds out of the 4460 pound quota was caught; (7)Specify that in addition to the South Coast Yelloweye Rockfish Conservation Area (YRCA), recreational fishing for groundfish and halibut will be prohibited in the newly created Westport Offshore YRCA; (8) Change the Columbia River subarea spring fishery to a 3–day per week fishery, open Thursday, Friday and Saturday, until 70 percent of the subarea allocation is taken or until the third Sunday in July, whichever is earlier. Under status-quo this was a 7–day per week fishery; (9) Specify that in the Oregon Central Coast subarea Pacific cod may be retained with a halibut on the vessel during the all-depth openings. Under status-quo Pacific cod retention was not allowed. The change is intended to make retention consistent in the areas north and south of Cape Falcon and Pacific cod are rarely encountered south of Cape Falcon; (10) Add the Nooksack tribe to the definition of ''Treaty Indian tribes'' in the federal regulations; (11)Add the Nooksack tribal fishing area boundaries to the federal regulations. NMFS also proposes to implement the portions of the Plan and management measures that are not implemented through the IPHC, which includes the sport fishery management measures for Area 2A. These actions are intended to enhance the conservation of Pacific halibut, to provide greater angler opportunity where available, and to protect yelloweye rockfish and other overfished groundfish species from incidental catch in the halibut fisheries.

As mentioned in the preamble, WDFW held state meetings and crafted alternatives to adjust management of the sport halibut fisheries in their state. These alternatives were then narrowed by the state and brought to the Council at the Council's September and November 2008 meetings. Generally, by the time the alternatives reach the Council, and because they have been through the state public review process, they are narrowed down into the proposed action and status quo. The Council and the States considered the full range of alternatives that could have similarly improved angler enjoyment of an participation in the fisheries while simultaneously protecting halibut and co-occurring groundfish species from overharvest.

In 2008, 570 vessels were issued IPHC licenses to retain halibut. IPHC issues licenses for: the directed commercial fishery in Area 2A, including licenses issued to retain halibut caught incidentally in the primary sablefish fishery (296 licenses in 2008); incidental halibut caught in the salmon troll fishery (135 licenses in 2008); and the charterboat fleet (139 licenses in 2008). No vessel may participate in more than one of these three fisheries per year. Individual recreational anglers and private boats are the only sectors that are not required to have an IPHC license to retain halibut.

Specific data on the economics of halibut charter operations is unavailable. However, in January 2004, the Pacific States Marine Fisheries Commission (PSMFC) completed a report on the overall West Coast charterboat fleet. In surveying charterboat vessels concerning their operations in 2000, the PSMFC estimated that there were about 315 charterboat vessels in operation off Washington and Oregon. In 2000, IPHC licensed 130 vessels to fish in the halibut sport charter fishery. Comparing the total charterboat fleet to the 130 and 142 IPHC licenses in 2000 and 2007, respectively, approximately 41 to 45 percent of the charterboat fleet could participate in the halibut fishery. The PSMFC has developed preliminary estimates of the annual revenues earned by this fleet and they vary by size class of the vessels and home state. Small charterboat vessels range from 15 to 30 ft (4.572 to 9.144 m), and typically carry 5 to 6 passengers. Medium charterboat vessels range from 31 to 49 ft (9.44 to 14.93 m) in length and typically carry 19 to 20 passengers. (Neither state has large vessels of greater than 49 ft (14.93 m) in their fleet.) Average annual revenues from all types of recreational fishing, whalewatching and other activities ranged from $7,000 for small Oregon vessels to $131,000 for medium Washington vessels. Estimates from the RIR show the recreational halibut fishery generated approximately $2.5 million in personal income to West Coast communities, while the non-tribal commercial halibut fishery generated approximately $2.2 million in income impacts. Because these estimated impacts for the entire halibut fishery overall are less than the SBA criteria for individual businesses, these data confirm that charterboat and commercial halibut vessels qualify as small entities under the Regulatory Flexibility Act (RFA).

These changes are authorized under the Pacific Halibut Act, implementing regulations at 50 CFR 300.60 through 300.65, and the Pacific Council process of annually evaluating the utility and effectiveness of Area 2A Pacific halibut management under the Plan. Given the TAC, the proposed sport management measures implement the Plan by managing the recreational fishery to meet the differing fishery needs of the various areas along the coast according to the Plan's objectives. The measures will be very similar to last year's management measures. The changes to the Plan and domestic management measures are minor changes and are intended to help prolong the halibut season, provide increased recreational harvest opportunities, or clarify sport fishery management for fishermen and managers. There are no large entities involved in the halibut fisheries; therefore, none of these changes to the Plan and domestic management measures will have a disproportionate negative effect on small entities versus large entities.

These changes do not include any reporting or recordkeeping requirements. These changes will also not duplicate, overlap or conflict with other laws or regulations. Consequently, these changes to the Plan and annual domestic Area 2A halibut management measures are not expected to meet any of the RFA tests of having a

''significant'' economic impact on a ''substantial number'' of small entities. Nonetheless, NMFS has prepared an IRFA. Through this proposed rule, NMFS is requesting comments on these conclusions.

Pursuant to Executive Order 13175, the Secretary recognizes the sovereign status and co-manager role of Indian tribes over shared Federal and tribal fishery resources. At section 302(b)(5), the Magnuson-Stevens Fishery Conservation and Management Act establishes a seat on the Pacific Council for a representative of an Indian tribe with federally recognized fishing rights from California, Oregon, Washington, or Idaho.

The U.S. Government formally recognizes that the 13 Washington Tribes have treaty rights to fish for Pacific halibut. In general terms, the quantification of those rights is 50 percent of the harvestable surplus of Pacific halibut available in the tribes' usual and accustomed (U and A) fishing areas (described at 50 CFR 300.64). Each of the treaty tribes has the discretion to administer their fisheries and to establish their own policies to achieve program objectives. Accordingly, tribal allocations and regulations, including the proposed changes to the Plan, have been developed in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

List of Subjects in 50 CFR Part 300

Fishing, Fisheries, and Indian fisheries.

Dated: January 7, 2009.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 300 is proposed to be amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

1. In § 300.61, the definition of ''Treaty Indian tribes'' is proposed to read as follows:

§ 300.61 Definitions.

* * * * *

Treaty Indian tribes means the Hoh, Jamestown S'Klallam, Lower Elwha S'Klallam, Lummi, Makah, Port Gamble S'Klallam, Quileute, Quinault, Skokomish, Suquamish, Swinomish, Tulalip, and Nooksack tribes.

2. In § 300.64, the following entry is added to the table in alphabetical order to read as follows:

§ 300.64 Fishing by U.S. treaty Indian tribes.

* * * * *

Tribe	Boundaries
* *	* * *
Nooksack	Those locations in the Strait of Juan de Fuca and Puget Sound as determined in or in accordance with Final Decision No. 1 and subsequent orders in *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), and particularly at 459 F. Supp. 1049, to be places at which the Nooksack Tribe may fish under rights secured by treaties with the United States.
* *	* * *

[FR Doc. E9–494 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 74, No. 9

Wednesday, January 14, 2009

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

January 8, 2009.

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.

Food and Nutrition Service

Title: The Integrity Program (TIP) Data Collection.

OMB Control Number: 0584–0401.

Summary of Collection: The basis for this data collection and reporting system is Part 246.5 of the Women, Infant, and Children (WIC) Program regulations, which requires State agencies to report annually on their vendor monitoring efforts. The data collected from the States serves as a management tool to provide Congress, the Office of the Inspector General, senior program managers, as well as the general public, assurances that program funds are being spent appropriately and that every reasonable effort is being made to prevent, detect and eliminate fraud, waste and abuse.

Need and Use of the Information: The Food and Nutrition Service will collect information using form FNS 698, Profile of Integrity Practices and Procedures; FNS 699, the Integrity Profile Report Form; and FNS 700, TIP Data Entry Form. The collected information from the forms will be analyzed and a report is prepared by FNS annually that (1) assesses State agency progress in eliminating abusive vendors, (2) assesses the level of activity that is being directed to ensuring program integrity, and (3) analyzes trends over a 5-year period. The information is used at the national level in formulating program policy and regulations. At the FNS regional office level, the data is reviewed to identify possible vendor management deficiencies so that technical assistance can be provided to States, as needed. At the State level, the information is used to provide assurances to the Governor's office, and other interested parties, that WIC issues are being addressed. Without the information it would take long to identify and correct State agency program deficiencies and to implement corrective actions.

Description of Respondents: State, Local or Tribal Government.

Number of Respondents: 90.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 38.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E9–576 Filed 1–13–09; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Agricultural Water Enhancement Program

AGENCY: Commodity Credit Corporation and Natural Resources Conservation Service, Department of Agriculture (USDA).

ACTION: Notice of request for proposals.

SUMMARY: Section 2510 of the Food, Conservation, and Energy Act of 2008 (2008 Act) established the Agricultural Water Enhancement Program (AWEP) by amending section 1240I of the Food Security Act of 1985. The Secretary of Agriculture delegated the authority for AWEP to the Chief of the Natural Resources Conservation Service (NRCS), who is a vice president of the Commodity Credit Corporation (CCC). NRCS is an agency of the U.S. Department of Agriculture (USDA). Up to $58.4 million in AWEP financial assistance is expected to be available in fiscal year 2009 for NRCS to enter into contracts with producers. The purpose of this notice is to inform agricultural producers of the availability of AWEP funds and to solicit proposals from potential partners who seek to enter into partnership agreements with the Chief to promote the conservation of ground and surface water and the improvement of water quality.

DATES: Proposals must be postmarked by *March 2, 2009*.

ADDRESSES: Proposals should be submitted to the Chief (Attn: Financial Assistance Programs Division), Natural Resources Conservation Service, USDA, AWEP Proposals, P.O. Box 2890, Washington, DC 20013 by *March 2, 2009. Applicants also must send their proposal to the appropriate State Conservationist(s) postmarked, or dated if electronic, no later than March 2, 2009.* To submit your application electronically, visit *http://www.grants.gov/apply* and follow the on-line instructions.

FOR FURTHER INFORMATION CONTACT: Greg Johnson, Director, Financial Assistance Programs Division, NRCS; phone: (202) 720–1845; fax: (202) 720–4265; or e-mail: *AWEP2008@wdc.usda.gov*; Subject: AWEP Proposal; or via Internet. Users can access the NRCS homepage at *http://www.nrcs.usda.gov/*; select the *Farm Bill* link from the menu; select the *Notices* link from beneath the **Federal Register** *Notices Index* title. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: (202) 720–2600 (voice and TDD).

Catalogue of Federal Domestic Assistance (CFDA) Number: 10.912.

SUPPLEMENTARY INFORMATION:

Availability of Funding:

Effective on the publication date of this notice, the CCC announces the availability, until September 30, 2009, of up to $58.4 million for AWEP financial assistance. NRCS will implement AWEP by entering into partnership agreements with eligible entities to conserve ground and surface water or improve water quality, or both, in their region. Partners submit complete proposals, as described in this notice, to the Chief, NRCS. Partnership agreement selection will be based on the criteria established in this notice. Once the Chief selects a partner's proposal, agricultural producers within the selected partner's project area may work through the partner to submit an AWEP contract application or submit a contract application directly to NRCS.

Entities are eligible to enter into partnership agreements. These entities include, but are not limited to, federally recognized Indian Tribes, States, units of local government, agricultural or silvicultural associations, other groups of such producers, such as an irrigation association, agricultural land trust, or other nongovernmental organization that has experience working with agricultural producers. All Federal funds awarded through this request for proposals (RFP) will be paid to producers. No Federal funding may be used to cover administrative expenses of partners. Administrative activities include any indirect or direct costs relating to submitting or implementing the project proposal.

Definitions:

Agricultural land means cropland, grassland, rangeland, pasture, and other agricultural land, on which agricultural and forest-related products or livestock are produced and resource concerns may be addressed. Other agricultural lands may include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock.

Agricultural water enhancement activity means the following, which are conducted in accordance with State water law:

- Water quality or water conservation plan development, including resource condition assessment and modeling.
- Water conservation restoration or enhancement projects, including the conversion to the production of less water-intensive agricultural commodities or dryland farming.
- Water quality or quantity restoration or enhancement projects.
- Irrigation system improvement and irrigation efficiency enhancements.
- Activities designed to mitigate the effects of drought, (*e.g.*, construction, improvement, or maintenance of irrigation ponds, small on-farm reservoirs, or other agricultural water impoundment structures, which are designed to capture surface water runoff).
- Related activities that the Chief determines will help achieve water quality or water conservation benefits on agricultural land.

Chief means the Chief of NRCS, USDA.

Conservation practice means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management practices, and other improvements that are planned and applied according to NRCS standards and specifications.

Contract means a legal document that specifies the rights and obligations of any participant accepted to participate in the program. An AWEP contract is an agreement for the transfer of assistance from USDA to the participant to share in the costs of applying conservation practices.

Environmental Quality Incentives Program (EQIP) means a program administered by NRCS in accordance with 7 CFR 1466, which provides for the installation and implementation of conservation practices on agricultural and nonindustrial private forest land.

Exceptional Drought (D–4) means, as defined by the National Oceanic and Atmospheric Administration, exceptional widespread crop/pasture losses; exceptional fire risk; shortages of water in reservoirs, streams, and wells, creating water emergencies.

Field Office Technical Guide means the official local NRCS source of resource information and interpretation of guidelines, criteria, and requirements 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 land is an inclusive term describing all lands held in trust by the United States for individual Indians or Tribes, or all lands, titles to which are held by individual Indians or Tribes, subject to Federal restrictions against alienation or encumbrance, or all lands which are subject to the rights of use, occupancy and/or benefit of certain Tribes. For purposes of this notice, the term Indian land also includes land for which the title is held in fee status by Indian Tribes, and the U.S. Government-owned land under Bureau of Indian Affairs jurisdiction.

Indian Tribe means any Indian Tribe, band, nation, 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.*) that is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Partner means an entity that enters into a partnership agreement with the Chief to carry out an agricultural water enhancement project. Partners that are eligible to participate in AWEP include, but are not limited to, federally recognized Indian Tribes, States, units of local government, agricultural or silvicultural associations, or other such groups of agricultural producers.

Partnership agreement means an agreement between the Chief and the partner that describes the duties and obligations of NRCS and the partner. It does not transfer financial assistance to a partner.

Payment means financial assistance provided to the participant for the estimated costs incurred for performing or implementing conservation practices, including costs for: planning, materials, equipment, labor, design and installation, maintenance, management, or training, as well as the estimated income foregone by the producer for designated conservation practices.

Producer means a person, legal entity, or joint operation who has an interest in the agricultural operation, according to 7 CFR 1400, or who is engaged in agricultural production or forest management.

Projects of Special Environmental Significance means projects, as determined by the Chief, which meet the following criteria:

- Site-specific evaluations have been completed, documenting that the project

will have substantial positive impacts on critical resources in or near the project area (*e.g.*, impaired water bodies, at-risk species, or air quality attainment);

• The project clearly addresses a national priority and State, Tribal, or local priorities, as applicable; and

• The project assists the participant in complying with Federal, State, and local regulatory requirements.

State Conservationist means the NRCS employee who is authorized to implement conservation programs, administered by NRCS, and who directs and supervises NRCS activities in a State, the Caribbean Area, or the Pacific Islands Area.

State Technical Committee means a committee established by the Secretary in a State pursuant to 16 U.S.C. 3861.

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, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and 2) technical infrastructure, including activities, 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, in accordance with 7 CFR 652, to provide technical services to program participants in lieu of or on behalf of NRCS.

Overview of the Agricultural Water Enhancement Program

Background

The Agricultural Water Enhancement Program (AWEP) is a voluntary conservation program that provides financial and technical assistance to agricultural producers to implement agricultural water enhancement activities on agricultural land for the purposes of conserving surface and ground water and improving water quality. As part of the Environmental Quality Incentives Program (EQIP), AWEP operates through contracts with producers to plan and implement conservation practices to conserve ground and surface water and improve water quality in project areas established through partnership agreements. Producers may participate individually in AWEP, or collectively through a partnership project. For example, the role of the partner may be to facilitate the submission of producers' applications, or it may be to provide additional technical or financial assistance to participating agricultural producers. AWEP funding will be delivered to producers; no AWEP funding may be used to cover the administrative expenses of partners.

Producer Applications and Contracts

Agricultural producers in selected project areas may apply for available AWEP funds at their local United States Department of Agriculture (USDA) service center or on-line at: *http://www.grants.gov/apply,* using the on-line instructions. Once an application is selected, an eligible agricultural producer will enter into a contract with NRCS to implement agricultural water enhancement activities. Through these contracts, NRCS provides payments to agricultural producers for implementing conservation practices. The contract term will be for a minimum duration of one year after completion of the last practice, but not more than 10 years. In States with water quantity concerns, where the partner proposal includes the conversion of agricultural land from irrigated farming to dryland farming, NRCS may enter into contracts, through which a producer receives payments for such activity for up to five years, when applying through a State partner and such activities are consistent with State law. An agricultural producer may elect to use a technical service provider for technical assistance. A participant may not receive, directly or indirectly, payments that, in the aggregate, exceed $300,000. NRCS may waive this limitation up to $450,000 for projects of special environmental significance, as determined by the Chief. All agricultural producers receiving assistance through AWEP must meet EQIP eligibility requirements and will be subject to EQIP payment limitations. Participating AWEP producers are not required to have an existing EQIP contract, although they must be determined eligible for EQIP assistance prior to entering into an AWEP contract. For information on the limitations and benefits that apply to land and agricultural producers enrolled in the AWEP program, please consult EQIP's authorizing legislation (16 U.S.C. 3839aa) and regulation (7 CFR 1466) (*http://www.nrcs.usda.gov/programs/eqip*).

Submitting Partnership Proposals

Potential partners must submit proposals that contain the information set forth in ''Proposal Requirements'' to receive consideration for entering into partnership agreements. The potential partner must submit a complete proposal, including letters of review from the appropriate State Conservationists, to the Chief, as specified in this notice. In providing letters of review for partner proposals, the State Conservationist may consult with the State Technical Committee (established pursuant to 16 U.S.C. 3861) to evaluate the merits of the proposals.

The Chief will review and evaluate the proposals based on the criteria provided in this notice. Incomplete proposals and those that do not meet the requirements set forth in this notice will not be considered, and notification of elimination will be mailed to the applicant.

Entity and Land Eligibility

Entities that are eligible to enter into AWEP partnership agreements include, but are not limited to, federally recognized Indian Tribes, States, units of local government, agricultural or silvicultural associations, or other groups of such producers, such as an irrigation association, agricultural land trust, or other nongovernmental organization that has experience working with agricultural producers. The following land is eligible for enrollment in the AWEP:

• Private agricultural land:

• For agricultural lands not irrigated for two of the previous five years, the construction, improvement, or maintenance of irrigation ponds, small on-farm reservoirs, or other agricultural water impoundment structures, which are designed to capture surface water runoff, are eligible only in an area that is experiencing or has experienced exceptional drought conditions between June 18, 2006 and June 18, 2008.

• Indian land; and

• Publicly owned land where:

• The conservation practices to be implemented on the public land are necessary and will contribute to an improvement in the identified resource concern that is on private land; and

• The land is a working component of the participant's agricultural and forestry operation; and

• The participant has control of the land for the term of the contract.

Partnership Proposal Requirements

To participate in AWEP, a potential partner must submit a proposal to the Chief. The proposal must contain the

information set forth below in order to receive consideration:

1. *Partnership capacity:* Potential partners must describe their project and their record of working with agricultural producers to address water quality and quantity issues.

Information provided in the proposal must:

(a) Demonstrate a commitment by the partner to the long-term conservation of surface and ground water or water quality improvement;

(b) Demonstrate the ability to coordinate water quality and quantity efforts among agricultural producers;

(c) Demonstrate the availability of non-Federal matching funds or other resources being contributed;

(d) Demonstrate the ability to monitor and evaluate project effects on natural resources;

(e) Demonstrate the capacity to deliver a final project performance report;

(f) Identify potential criteria to be used by NRCS to prioritize and rank agricultural producers' AWEP applications in the project area;

(g) Describe the partners collaborating to achieve the project objectives and the roles, responsibilities, and capabilities of each partner;

(h) Describe the proposed agricultural water enhancement activities to be applied within the designated five-year timeframe;

(i) Describe the amount of funds needed annually for producer contracts;

(j) Describe the amount and source of non-Federal funds or other resources that are anticipated to be leveraged by AWEP;

(k) Identify the project funding NRCS is requested to provide through AWEP; and

(l) Provide a project implementation schedule.

2. *Lands to be treated:* The proposal should describe the geographic area to be covered by the partnership agreement. Specifically, the proposal should include:

(a) A map showing the proposed project area(s);

(b) A description of the agricultural water quality or water conservation issues to be addressed by the partnership agreement;

(c) A description of the agricultural water enhancement objectives to be achieved through the partnership;

(d) The total number of acres anticipated to need conservation treatment; and

(e) The proposed agricultural water enhancement activities that may be implemented.

3. *Producer Information:* The partner must identify:

(a) The number of agricultural producers that are likely to participate in the project; and

(b) The total number of agricultural producers in the project area.

4. *Letter of review:* Potential partners must include a copy of the cover letter showing that the proposal was sent to the appropriate State Conservationist(s) for review. *If a project is multi-state in scope, all State Conservationists in the project area must be sent the proposal for review.* The State Conservationist(s) will review the proposal for potential duplication of efforts, consistency with overall EQIP objectives, and the expected benefits to EQIP implementation in their State(s). *Applicants must send their proposal to the appropriate State Conservationist in accordance with the proposals submission instructions.* State Conservationist(s) must submit letters to NRCS National Headquarters by March 2, 2009. A list of NRCS State Office addresses and phone numbers is included at the end of this notice. Potential partners are encouraged to consult with the appropriate State Conservationist(s) during proposal development to discuss the letter of review.

5. Potential partners should submit project action plans and schedules, not to exceed five years, detailing activities, including timeframes related to project milestones and monitoring and evaluation activities. The project action plan should describe how often the potential partner plans to monitor and evaluate the project and how it plans to quantify the results of the project for the final project performance report.

Ranking Considerations

The Chief will evaluate the proposals using a competitive process. The Chief may give a higher priority to proposals that:

- Include high percentages of agricultural land and producers in a region or other appropriate area;
- Result in high levels of applied agricultural water quality and water conservation activities;
- Significantly enhance agricultural activity;
- Allow for monitoring and evaluation;
- Assist agricultural producers in meeting a regulatory requirement that reduces the economic scope of the producer's operation;
- Achieve the project's land and water treatment objectives within five years or less;
- For proposals from states with water quantity concerns:
- Assist producers in states with water quantity concerns, as determined by the Chief;
- Include the conversion of agricultural land from irrigated farming to dryland farming;
- Leverage Federal funds provided under the program with funds provided by partners; or
- Are located in the following regions: Eastern Snake Plain Aquifer, Puget Sound, Ogallala Aquifer, Sacramento River Watershed, Upper Mississippi River Basin, Red River of the North Basin, or Everglades.

Partnership Agreements

The Chief will enter into a partnership agreement with a selected partner. The partnership agreement will not obligate funds, but will address:

- Agricultural water enhancement activities anticipated to be applied;
- The role of NRCS;
- The responsibilities of the partner related to the monitoring and evaluation of project performance;
- The frequency and duration of the monitoring and evaluation of project performance;
- The content and format of the final project performance report that is required as a condition of the agreement;
- The specified project schedule; and
- Other requirements deemed necessary by NRCS to achieve the purposes of AWEP.

Once the Chief has entered into a partnership agreement with a partner, NRCS will enter into contracts directly with agricultural producers participating in the project and other eligible producers within the project area. Participating producers must meet all EQIP eligibility requirements (7 CFR 1466.8).

Waiver Authority

To assist in the implementation of agricultural water enhancement activities under the program, the Chief may waive the applicability of the Adjusted Gross Income Limitation (AGI), on a case-by-case basis in accordance with policy and processes promulgated in 7 CFR 1400. Such waiver requests must be submitted to the Chief at the address listed in this notice.

Signed in Washington, DC on January 8, 2009.

Arlen L. Lancaster,

Vice President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.

NRCS State Conservationists

Alabama: Gary Kobylski, 3381 Skyway Drive, Post Office Box 311, Auburn,

AL 36830, Phone: (334) 887–4535, Fax: (334) 887–4551, *gary.kobylski@al.usda.gov.*

Alaska: Robert Jones, Atrium Building, Suite 100, 800 West Evergreen, Palmer, AK 99645–6539, Phone: (907) 761–7760, Fax: (907) 761–7790, *robert.jones@ak.usda.gov.*

Arizona: David McKay, 230 N. First Avenue, Suite 509, Phoenix, AZ 85003–1733, Phone: (602) 280–8801, Fax: (602) 280–8809, *david.mckay@az.usda.gov.*

Arkansas: Kalven L. Trice, Federal Building, Room 3416, 700 West Capitol Avenue, Little Rock, AR 72201–3228, Phone: (501) 301–3100, Fax: (501) 301–3194, *kalven.trice@ar.usda.gov.*

California: Lincoln E. Burton, Suite 4164, 430 G Street, Davis, CA 95616–4164, Phone: (530) 792–5600, Fax: (530) 792–5790, *ed.burton@ca.usda.gov.*

Caribbean Area: Juan A. Martinez, Director, IBM Building, Suite 604, 654 Munoz Rivera Avenue, Hato Rey, PR 00918–4123, Phone: (787) 766–5206, Fax: (787) 766–5987, *juan.martinez@pr.usda.gov.*

Colorado: James Allen Green, Room E200C, 655 Parfet Street, Lakewood, CO 80215–5521, Phone: (720) 544–2810, Fax: (720) 544–2965, *allen.green@co.usda.gov.*

Connecticut: Douglas Zehner, 344 Merrow Road, Suite A, Tolland, CT 06084, Phone: (860) 871–4011, Fax: (860) 871–4054, *doug.zehner@ct.usda.gov.*

Delaware: Russell Morgan, Suite 100, 1221 College Park Drive, Dover, DE 19904–8713, Phone: (302) 678–4160, Fax: (302) 678–0843, *russell.morgan@de.usda.gov.*

Florida: Carlos Suarez, 2614 N.W. 43rd Street, Gainesville, FL 32606–6611, Phone: (352) 338–9500, Fax: (352) 338–9574, *carlos.suarez@fl.usda.gov.*

Georgia: James Tillman, Federal Building, Stop 200, 355 East Hancock Avenue, Athens, GA 30601–2769, Phone: (706) 546–2272, Fax: (706) 546–2120, *james.tillman@ga.usda.gov.*

Pacific Islands Area: Lawrence T. Yamamoto, Room 4–118, 300 Ala Moana Boulevard, Honolulu, HI 96850–0002, Phone: (808) 541–2600, Ext. 100, Fax: (808) 541–1335, *larry.yamamoto@hi.usda.gov.*

Idaho: Jeff Burwell, Suite C, 9173 West Barnes Drive, Boise, ID 83709, Phone: (208) 378–5700, Fax: (208) 378–5735, *jeffery.burwell@id.usda.gov.*

Illinois: William J. Gradle, 2118 W. Park Court, Champaign, IL 61821, Phone: (217) 353–6600, Fax: (217) 353–6676, *bill.gradle@il.usda.gov.*

Indiana: Jane E. Hardisty, 6013 Lakeside Blvd., Indianapolis, IN 46278–2933, Phone: (317) 290–3200, Fax: (317) 290–3225, *jane.hardisty@in.usda.gov.*

Iowa: Richard Sims, 693 Federal Building, Suite 693, 210 Walnut Street, Des Moines, IA 50309–2180, Phone: (515) 284–6655, Fax: (515) 284–4394, *richard.sims@ia.usda.gov.*

Kansas: Eric Banks, 760 South Broadway, Salina, KS 67401–4642, Phone: (785) 823–4500, Fax: (785) 452–3369, *eric.banks@ks.usda.gov.*

Kentucky: Tom Perrin, Suite 210, 771 Corporate Drive, Lexington, KY 40503–5479, Phone: (859) 224–7350, Fax: (859) 224–7399, *tom.perrin@ky.usda.gov.*

Louisiana: Kevin Norton, 3737 Government Street, Alexandria, LA 71302, Phone: (318) 473–7751, Fax: (318) 473–7626, *kevin.norton@la.usda.gov.*

Maine: Joyce Swartzendruber, Suite 3, 967 Illinois Avenue, Bangor, ME 04401, Phone: (207) 990–9100, Ext. 3, Fax: (207) 990–9599, *joyce.swartzendruber@me.usda.gov.*

Maryland: Jon Hall, John Hanson Business Center, Suite 301, 339 Busch's Frontage Road, Annapolis, MD 21409–5543, Phone: (410) 757–0861 Ext. 315, Fax: (410) 757–6504, *jon.hall@md.usda.gov.*

Massachusetts: Christine Clarke, 451 West Street, Amherst, MA 01002–2995, Phone: (413) 253–4351, Fax: (413) 253–4375, *christine.clarke@ma.usda.gov.*

Michigan: Garry Lee, Suite 250, 3001 Coolidge Road, East Lansing, MI 48823–6350, Phone: (517) 324–5270, Fax: (517) 324–5171, *garry.lee@mi.usda.gov.*

Minnesota: William Hunt, Suite 600, 375 Jackson, St. Paul, MN 55101–1854, Phone: (651) 602–7900, Fax: (651) 602–7913, *william.hunt@mn.usda.gov.*

Mississippi: Homer L. Wilkes, Suite 1321, Federal Building, 100 West Capitol Street, Jackson, MS 39269–1399, Phone: (601) 965–5205 ext.130, Fax: (601) 965–4940, *homer.wilkes@ms.nrcs.usda.gov.*

Missouri: Roger A. Hansen, Parkade Center, Suite 250, 601 Business Loop 70 West, West Columbia, MO 65203–2546, Phone: (573) 876–0901, Fax: (573) 876–0913, *roger.hansen@mo.usda.gov.*

Montana: Jon Hempel, Acting, Federal Building, Room 443, 10 East Babcock Street, Bozeman, MT 59715–4704, Phone: (406) 587–6811, Fax: (406) 587–6761, *jon.hempel@one.usda.gov.*

Nebraska: Stephen K. Chick, Federal Building, Room 152, 100 Centennial Mall N., Lincoln, NE 68508–3866, Phone: (402) 437–5300, Fax: (402) 437–5327, *steve.chick@ne.usda.gov.*

Nevada: Bruce Petersen, 1365 Corporate Blvd, Reno, NV 89502, Phone: (775) 857–8500 x. 102, Fax: (775) 857–8524, *bruce.petersen@nv.usda.gov.*

New Hampshire: George W. Cleek, IV, Federal Building, 2 Madbury Road, Durham, NH 03824–2043, Phone: (603) 868–9931, Ext. 125, Fax: (603) 868–5301, *george.cleek@nh.usda.gov.*

New Jersey: Thomas Drewes, 220 Davidson Avenue, 4th Floor, Somerset, NJ 08873–3157, Phone: (732) 537–6040, Fax: (732) 537–6095, *thomas.drewes@nj.usda.gov.*

New Mexico: Dennis Alexander, Suite 305, 6200 Jefferson Street, NE., Albuquerque, NM 87109–3734, Phone: (505) 761–4400, Fax: (505) 761–4481, *dennis.alexander@nm.usda.gov.*

New York: Astor Boozer, Suite 354, 441 South Salina Street, Syracuse, NY 13202–2450, Phone: (315) 477–6504, Fax: (315) 477–6560, *astor.boozer@ny.usda.gov.*

North Carolina: Mary K. Combs, 4407 Bland Road, Suite 117, Raleigh, NC 27609–6293, Phone: (919) 873–2101, Fax: (919) 873–2156, *mary.combs@nc.usda.gov.*

North Dakota: J.R. Flores, Jr., Federal Building Room 270, 220 E. Rosser Avenue, Bismarck, ND 58501–1458, Phone: (701) 530–2000, Fax: (701) 530–2110, *jr.flores@nd.usda.gov.*

Ohio: Terry Cosby, Room 522, 200 North High Street, Columbus, OH 43215–2478, Phone: (614) 255–2472, Fax: (614) 255–2548, *terry.cosby@oh.usda.gov.*

Oklahoma: Ronald L. Hilliard, 100 USDA, Suite 206, Stillwater, Oklahoma 74074–2655, Phone: (405) 742–1204, Fax: (405) 742–1126, *ron.hilliard@ok.usda.gov.*

Oregon: Ron Alvarado, 1201 NE Lloyd Blvd., Suite 900, Portland, OR 97232, Phone: (503) 414–3200, Fax: (503) 414–3103, *ron.alvarado@or.usda.gov.*

Pennsylvania: Craig Derickson, Suite 340, One Credit Union Place, Harrisburg, PA 17110–2993, Phone: (717) 237–2203, Fax: (717) 237–2238, *craig.derickson@pa.usda.gov.*

Rhode Island: Paul Sweeney, Acting, Suite 46, 60 Quaker Lane, Warwick, RI 02886–0111, Phone: (401) 828–1300 ext. 844, Fax: (401) 828–0433, *michelle.moore@ri.usda.gov.*

South Carolina: Niles Glasgow, Strom Thurmond Federal Building, Room 950, 1835 Assembly Street, Columbia, SC 29201–2489, Phone: (803) 253–3935, Fax: (803) 253–3670, *niles.glasgow@sc.usda.gov.*

South Dakota: Janet L. Oertly, 200 Fourth Street SW., Huron, SD 57350–

2475, Phone: (605) 352–1200, Fax: (605) 352–1288, *janet.oertly@sd.usda.gov.*
Tennessee: J. Kevin Brown, 675 U.S. Courthouse, 801 Broadway, Nashville, TN 37203–3878, Phone: (615) 277–2531, Fax: (615) 277–2578, *kevin.brown@tn.usda.gov.*
Texas: Salvador Salinas, Acting, W.R. Poage Federal Building, 10l South Main Street, Temple, TX 76501–7602, Phone: (254) 742–9800, Fax: (254) 742–9819, *salvador.salinas@tx.usda.gov.*
Utah: Sylvia Gillen, W.F. Bennett Federal Building, Room 4402, 125 South State Street, Salt Lake City, UT 84138–1100, Phone: (801) 524–4555, Fax: (801) 524–4403, *sylvia.gillen@ut.usda.gov.*
Vermont: Judith Doerner, Suite 105, 356 Mountain View Drive, Colchester, VT 05446, Phone: (802) 951–6795 ext. 228, Fax: (802) 951–6327, *judy.doerner@vt.usda.gov.*
Virginia: Jack Bricker, Culpeper Building, Suite 209, 1606 Santa Rosa Road, Richmond, VA 23229–5014, Phone: (804) 287–1691, Fax: (804) 287–1737, *jack.bricker@va.usda.gov.*
Washington: Roylene Rides at the Door, Rock Pointe Tower II, Suite 450, W. 316 Boone Avenue, Spokane, WA 99201–2348, Phone: (509) 323–2900, Fax: (509) 323–2909, *roylene.rides-at-the-door@wa.usda.gov.*
West Virginia: Kevin Wickey, Room 301, 75 High Street, Morgantown, WV 26505, Phone: (304) 284–7540, Fax: (304) 284–4839, *kevin.wickey@wv.usda.gov.*
Wisconsin: Patricia S. Leavenworth, 8030 Excelsior Drive, Suite 200, Madison, WI 53717, Phone: (608) 662–4422, Fax: (608) 662–4430, *pat.leavenworth@wi.usda.gov.*
Wyoming: Xavier Montoya, P.O. Box 33124, Casper, WY 82602, Phone: (307) 233–6750, Fax: (307) 233–6753, *xavier.montoya@wy.usda.gov.*

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DEPARTMENT OF AGRICULTURE

Forest Service

Fresno County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Fresno County Resource Advisory Committee will meet in Prather, California. The purpose of the meeting is to discuss the amended and reauthorized Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 110–343) for expenditure of Payments to States Fresno County Title II finds.

DATES: The meeting will be held on January 20, 2009 from 6:30 p.m. to 8:30 p.m.

ADDRESSES: The meeting will be held at the High Sierra Ranger District, 29688 Auberry Road, Prather California, 93651. Send written comments to Robbin Ekman, Fresno County Resource Advisory Committee Coordinator, c/o Sierra National Forest, High Sierra Ranger District, 29688 Auberry Road, Prather, CA 93651 or electronically to *rekman@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Robbin Ekman, Fresno County Resource Advisory Committee Coordinator, (559) 855–5355 ext. 3341.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring Payments to States Fresno County Title II project matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Agenda items to be covered include: (1) Changes to Act (2) Funding and (3) Project submission and voting timelines.

Dated: January 6, 2009.

Ray Porter,

District Ranger.

[FR Doc. E9–449 Filed 1–13–09; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Glenn-Colusa County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Glenn-Colusa County Resource Advisory Committee (RAC) will meet in Willows, California. Agenda items to be covered include: (1) Introductions, (2) Report from Designated Federal Official, (3) Public Comment, (4) 2009 Meeting Schedule, (5) Report on Media Releases, (6) General Discussion, (7) Next Agenda.

DATES: The meeting will be held on February 23, 2009 from 1 p.m. and end at approximately 4:30 p.m.

ADDRESSES: The meeting will be held at the Forest Service Grindstone Ranger Station Office located at 825 N. Humboldt Ave., Willows, CA. Individuals wishing to speak or propose agenda items must send their names and proposals to Eduardo Olmedo, Designated Federal Official (DFO), 825 N. Humboldt Ave., Willows, CA 95988.

FOR FURTHER INFORMATION CONTACT: Eduardo Olmedo, DFO, USDA, Mendocino National Forest, Grindstone Ranger District, 825 N. Humboldt Ave., Willows, CA 95988. (530) 934–3316; e-mail *eolmedo@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by February 7, 2009 will have the opportunity to address the committee at those sessions.

Dated: January 6, 2009.

Eduardo Olmedo,

Designated Federal Official.

[FR Doc. E9–455 Filed 1–13–09; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: The Rural Housing Service, USDA.

ACTION: Proposed collection; Comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's (RHS) intention to request an extension for a currently approved information collection in support of the program for ''Self-Help Technical Assistance Grants'' (7 CFR 1944–I).

DATES: Comments on this notice must be received by March 16, 2009 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Nica Mathes, Senior Loan Specialist, Single Family Housing Direct Loan Division, RHS, U.S. Department of Agriculture, Stop 0783, 1400 Independence Ave., SW., Washington DC 20250–0783, Telephone (202) 205–3656.

SUPPLEMENTARY INFORMATION:

Title: 7 CFR 1944–I, Self-Help Technical Assistance Grants.

OMB Number: 0575–0043.

Expiration Date of Approval: May 31, 2009.

Type of Request: Extension of currently approved information collection.

Abstract: This subpart set forth the policies and procedures and delegates authority for providing technical assistance funds to eligible applicants to finance programs of technical and supervisory assistance for self-help housing, as authorized under section 523 of the Housing Act of 1949 loan program under 42 U.S.C 1472. This financial assistance may pay part of all of the cost of developing, administering or coordinating program of technical and supervisory assistance to aid very low- and low-income families in carrying out self-help housing efforts in rural areas. The primary purpose is to locate and work with families that otherwise do not qualify as homeowners, are below the 50 percent of median incomes, and living in substandard housing.

RHS will be collecting information from non-profit organizations to enter into grant agreements. These non-profit organizations will give technical and supervisory assistance, and in doing so, they must develop a final application for section 523 grant funds. This application includes Agency forms that contain essential information for making a determination of eligibility.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 6 hours per response.

Respondents: Public or private nonprofit organizations, State, Local or Tribal Governments.

Estimated Number of Respondents: 160.

Estimated Number of Responses per Respondent: 20.54.

Estimated Number of Responses: 3,287.

Estimated Total Annual Burden on Respondents: 4,372.

Copies of this information collection can be obtained from Brigitte Sumter, Regulations and Paperwork Management Branch, Support Services Division at (202) 692–0042.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the RHS, including whether the information will have practical utility; (b) the accuracy of RHS's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on 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. Comments may be sent to Brigitte Sumter, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: January 5, 2009.

Russell T. Davis,

Administrator, Rural Housing Service.

[FR Doc. E9–572 Filed 1–13–09; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 73–2008]

Foreign-Trade Zone 123—Denver, Colorado, Application for Expansion

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the City and County of Denver, Colorado, grantee of Foreign-Trade Zone 123, requesting authority to expand its zone to include the jet fuel storage and distribution facilities (79 acres) of the Denver International Airport within the Denver Customs and Border Protection port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on December 24, 2008.

FTZ 123 was approved by the Board on August 16, 1985 (Board Order 311, 50 FR 34729, 8/27/85) and expanded on April 10, 2007 (Board Order 1509, 72 FR 19879–19880, 4/20/07). The general–purpose zone currently consists of three sites in the Denver, Colorado area: *Site 1*: (6 acres, 200,000 sq. ft.) located at 11075 East 40th Avenue, Denver; *Site 2*: (7 acres, 116,000 sq. ft.) located at the South Air Cargo development area along East 75th Avenue within the Denver International Airport; and, *Site 3*: (766 acres) located within the Great Western Industrial Park bordered by Eastman Park Drive and County Road 23, Windsor.

The applicant is now requesting authority to expand the general-purpose zone to include the jet fuel storage and distribution facilities (79 acres) within the Denver International Airport. The new site will be designated as Site 4. The site is owned by the City and County of Denver and leased to Aircraft Service International Inc., who will be the operator.

No specific manufacturing requests are being made at this time. Such requests would be made to the Board on a case-by-case basis.In accordance with the Board's regulations, Claudia Hausler of the FTZ Staff is designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 16, 2009. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to March 30, 2009).

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations:

U.S. Department of Commerce, Export Assistance Center, 1625 Broadway, Suite 680, Denver, CO 80202

Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Room 2111, 1401 Constitution Avenue, NW, Washington, DC 20230

For further information contact Claudia Hausler at Claudia__Hausler@ita.doc.gov or (202) 482–1379.

Dated: December 29, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–621 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Information Systems Technical Advisory Committee; Notice of Partially Closed Meeting

The Information Systems Technical Advisory Committee (ISTAC) will meet on January 28 and 29, 2009, 9 a.m., at the NASA Ames Research Conference Center, 500 Severyns Road, Building 3, NASA Ames Research Center, Moffett Field, CA 94035.

The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to information systems equipment and technology.

Wednesday, January 28

Open Session

1. Welcome and Introduction
2. HPC Clusters
3. Laser Interferometry
4. Industry Presentations, Telecomm
5. LVS for 3A002
6. Working Group Reports

Thursday, January 29

Closed Session

7. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov*, no later than January 23, 2009.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that public presentation materials or comments be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on December 8, 2008, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § (10)(d)), that the portion of the meeting concerning trade secrets and commercial or financial information deemed privileged or confidential as described in 5 U.S.C. 552b(c)(4) and the portion of the meeting concerning matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: January 8, 2009.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. E9–681 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Allocation of Tariff Rate Quotas (TRQ) on the Import of Certain Cotton Woven Fabrics for Calendar Year 2009

AGENCY: Department of Commerce, International Trade Administration.

ACTION: Notice of allocation of 2009 cotton fabric tariff rate quota.

SUMMARY: The Department of Commerce (Department) has determined the allocation for Calendar Year 2009 of imports of certain cotton fabrics under tariff rate quotas established by Division B, Title IV of the Tax Relief and Health Care Act of 2006 (Public Law No. 109–432). The companies that are being provided an allocation are listed below.

FOR FURTHER INFORMATION CONTACT: Laurie Mease, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

BACKGROUND:

On December 20, 2006, President Bush signed into law the Tax Relief and Health Care Act of 2006 (Public Law No. 109-432) (''the Act''). Under Division C, Title IV, section 406(b)(1) of the Act, the Secretary of Commerce is required to allocate tariff rate quotas on the import of certain cotton woven fabrics through December 31, 2009. Section 406(b)(1) authorizes the Secretary of Commerce to issue licenses to eligible manufacturers under headings 9902.52.08 through 9902.52.19 of the Harmonized Tariff Schedule of the United States (HTS), specifying the restrictions under each such license on the quantity of cotton woven fabrics that may be entered each year on behalf of the manufacturer. Section 406(a)(1) of the Act created an annual tariff rate quota providing for temporary reductions through December 31, 2009 in the import duties of cotton woven fabrics suitable for making cotton shirts (new HTS headings 9902.52.08, 9902.52.09, 9902.52.10, 9902.52.11, 9902.52.12, 9902.52.13, 9902.52.14, 9902.52.15, 9902.52.16, 9902.52.17, 9902.52.18, and 9902.52.19). Section 406(a)(2) provides that the reduction in duty is limited to 85 percent of the total square meter equivalents of all imported woven fabrics of cotton containing 85 percent or more by weight cotton used by manufacturers in cutting and sewing men's and boys' cotton shirts in the United States and purchased by such manufacturers during calendar year 2000.

The Act requires that the tariff rate quotas be allocated to persons or entities who, during calendar year 2000, were manufacturers cutting and sewing men's and boys' cotton shirts in the United States from imported woven fabrics of cotton containing 85 percent or more by weight of cotton of the kind described in HTS 9902.52.08 through 9902.52.19 purchased by such manufacturer during calendar year 2000. On July 10, 2008, the Department published a final rule establishing procedures for allocating the TRQ (73 FR 39585, 15 CFR 336).

On September 25, 2008 the Department published a notice in the Federal Register (73 FR 55500) soliciting applications for an allocation of the 2009 tariff rate quotas with a closing date of October 27, 2008. The Department received timely applications from 7 firms. All applicants were determined eligible for an allocation. Most applicants submitted data on a business confidential basis. As allocations to firms were determined on the basis of this data, the Department considers individual firm allocations to be business confidential.

FIRMS THAT RECEIVED ALLOCATIONS: HTS HEADINGS 9902.52.08, 9902.52.09, 9902.52.10, 9902.52.11, 9902.52.12, 9902.52.13, 9902.52.14, 9902.52.15, 9902.52.16, 9902.52.17, 9902.52.18, AND 9902.52.19, WOVEN FABRICS OF COTTON CONTAINING 85 PERCENT OR MORE BY WEIGHT COTTON, USED BY MANUFACTURERS IN CUTTING AND SEWING MEN'S AND BOYS' COTTON SHIRTS IN THE UNITED STATES.

Amount allocated: 3,116,090 square meters.

Companies Receiving Allocation:

The Hancock Company, DBA Gitman & Company - Ashland, PA
Individualized Shirt Company - Perth Amboy, NJ
Kenneth Gordon/IAG, Inc. - Franklin, TN
The Pickett Co., DBA Measure Up - Lafayette, TN
Retail Brand Alliance - Enfield, CT
Gambert Shirt - Newark, NJ
Maus & Hoffman - Fort Lauderdale, FL

Dated: January 7, 2009.

Janet E. Heinzen,

Acting Deputy Assistant Secretary for Textiles and Apparel.

[FR Doc. E9–627 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–DS

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–807]

Notice of Initiation and Preliminary Results of Changed-Circumstances Antidumping Duty Review: Certain Carbon Steel Butt-Weld Pipe Fittings From Thailand

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) received a request from Awaji Materia (Thailand) Co., Ltd. (AMT), for initiation of a changed-circumstances review of the antidumping duty order on certain carbon steel butt-weld pipe fittings (pipe fittings) from Thailand. After reviewing this request, we preliminarily determine that AMT is the successor-in-interest to Awaji Sangyo (Thailand) Co., Ltd. (AST), and, as a result, should be accorded the same treatment previously accorded to AST with respect to the antidumping duty order on pipe fittings from Thailand. Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* January 14, 2009.

FOR FURTHER INFORMATION CONTACT: Edythe Artman or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3931 and (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 6, 1992, the Department published an antidumping duty order on pipe fittings from Thailand in which it stated that AST was excluded from the order due to its *de minimis* margin in the less-than-fair-value investigation. See *Antidumping Duty Order; Certain Carbon Steel Butt-Weld Pipe Fittings From Thailand*, 57 FR 29702 (July 6, 1992); see also *Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from Thailand*, 57 FR 21065 (May 18, 1992).[1] On November 18, 2008, the Department received a request for a changed-circumstances review of this order from AMT to determine if, for purposes of the antidumping law, AMT is the successor-in-interest to AST. On December 4, 2008, we received a letter from Weldbend Corporation, a domestic producer of pipe fittings, in which it expressed support for AMT's request.

Scope of the Order

The scope of the order covers certain pipe fittings from Thailand. They are defined as carbon steel butt-weld pipe fittings, having an inside diameter of less than 14 inches, imported in either finished or unfinished form. These formed or forged pipe fittings are used to join sections in piping systems where conditions require permanent, welded connections, as distinguished from fittings based on other fastening methods (*e.g.*, threaded, grooved, or bolted fittings). These imports are currently classifiable under subheading 7307.93.30 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description remains dispositive as to the scope of the order.

Initiation and Preliminary Results of Changed-Circumstances Review

Pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.216, the Department will conduct a changed-circumstances review upon receipt of information concerning, or a request from an interested party for review of, an antidumping duty order which shows changed circumstances sufficient to warrant a review of the order. The Department finds that the documentation that AMT submitted with its November 18, 2008 request constitutes sufficient evidence of changed circumstances to warrant such a review. Thus, in accordance with section 751(b) of the Act, the Department is initiating a changed-circumstances review to determine whether AMT is the successor-in-interest to AST for purposes of determining antidumping duty liability with respect to imports of pipe fittings from Thailand.

Furthermore, 19 CFR 351.221(c)(3)(ii) permits the Department to combine the notice of initiation of a changed-circumstances review and the notice of preliminary results for the review in a single notice if the Department concludes that expedited action is warranted. As explained below, we find that the evidence provided by AMT is sufficient to preliminarily determine that this company is the successor-in-interest to AST.

In making a successor-in-interest determination, the Department examines several factors including but not limited to changes in the following: (1) Management; (2) production facilities; (3) supplier relationships; and (4) customer base. See, *e.g., Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber From Japan*, 67 FR 58 (January 2, 2002), and *Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review*, 57 FR 20460, 20461 (May 13, 1992). While no single factor or combination of factors will necessarily provide a dispositive indication of a successor-in-interest relationship, generally the Department will consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor. See, *e.g., Fresh and Chilled Atlantic Salmon from Norway; Final Results of Changed Circumstances Antidumping Duty Administrative Review*, 64 FR 9979 (March 1, 1999) (*Salmon from Norway*), and *Industrial Phosphoric Acid from Israel; Final Results of Changed Circumstances Review*, 59 FR 6944, 6945 (February 14, 1994). Thus, if the record evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, the Department may assign the new company the cash-deposit rate of its predecessor. See, *e.g., Salmon from Norway*, 64 FR at 9980.

In accordance with 19 CFR 351.221(3), we preliminarily determine that AMT is the successor-in-interest to AST. In its November 18, 2008 filing, AMT provided evidence supporting its claim to be the successor-in-interest to AST. Specifically, it provided the following documentation:

(1) A declaration of the executive vice president of AMT in which the official states that the name change of the company from AST to AMT did not result in changes in management, production, facilities, supplier relationships or changes to the customer base;

(2) Certifications of incorporation of both AST and AMT filed with the Thai Ministry of Commerce;

(3) Copies of tax identification cards for AST and AMT that show the

[1] As observed in the November 18, 2008 request from AMT, exports of subject merchandise of AST were also the subject of a subsequent investigation in which the International Trade Commission concluded that the exports did not result in the material injury or threat of material injury to the U.S. industry or in material retardation of the establishment of an industry in the United States. See *Certain Carbon Steel Butt-Weld Pipe Fittings From France, India, Israel, Malaysia, The Republic of Korea, Thailand, The United Kingdom, and Venezuela*, 60 FR 18611 (April 12, 1995).

companies were assigned the same taxpayer identification numbers;

(4) A statement from a Thai bank confirming the change of the company account name from AST to AMT in August 2006;

(5) Company outlines dated before and after the name change that demonstrate no changes in management or facilities between the two points in time;

(6) A notice published by the European Union Commission recognizing the name change from AST to AMT for antidumping-duty purposes; and

(7) Copies of letters AST sent to customers announcing the name change.

In summary, AMT has presented evidence to establish a *prima facie* case of its successorship status. AST's name change to AMT has not changed the operations of the company in a meaningful way. AMT's management, production facilities, supplier relationships, and customer base are substantially unchanged from those of AST. The record evidence demonstrates that the new entity essentially operates in the same manner as the predecessor company. Consequently, we preliminarily determine that AMT should be assigned the same antidumping-duty treatment as AST, *i.e.*, exclusion from the order. See *Antidumping Duty Order; Certain Carbon Steel Butt-Weld Pipe Fittings From Thailand*, 57 FR 29702 (July 6, 1992).

Public Comment

Interested parties are invited to comment on these preliminary results. Written comments may be submitted no later than 14 days after the date of publication of these preliminary results. Rebuttals to written comments, limited to issues raised in such comments, may be filed no later than 21 days after the date of publication. The Department will issue the final results of this changed-circumstances review, which will include the results of its analysis raised in any such written comments, no later than 270 days after the date on which this review was initiated or within 45 days if all parties agree to our preliminary results. See 19 CFR 351.216(e).

This notice is published in accordance with sections 751(b)(1) and 777(i) of the Act and 19 CFR 351.216 and 351.221.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–632 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–552–801)

Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Extension of Time Limit for Final Results of Changed Circumstances Review

EFFECTIVE DATE: January 14, 2009.

FOR FURTHER INFORMATION CONTACT: Javier Barrientos, 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) 482–2243.

Extension of Time Limit for Final Results

On August 10, 2007, the Department of Commerce (''Department'') issued its preliminary results for the changed circumstances review of the antidumping duty order of certain frozen fish fillets from the Socialist Republic of Vietnam (''Vietnam''). *See Certain Frozen Fish Fillets from Vietnam: Notice of Initiation and Preliminary Results of Changed Circumstances Review*, 72 FR 46604 (August 21, 2007) (*Preliminary Results*). In it, we stated we would issue the final results within 270 days after the date on which the changed circumstances review was initiated. We subsequently postponed that deadline until December 5, 2008. *See Certain Frozen Fish Fillets from Vietnam: Extension of Time Limit for Final Results of Changed Circumstances Review*, 73 FR 60240 (October 10, 2008). However, the Department now finds that it is not practicable to complete this review by December 5, 2008. Subsequent to the *Preliminary Results* and receipt of Vinh Hoan Co., Ltd./Corporation's and Petitioners' (the Catfish Farmers of America and individual U.S. catfish processors) case briefs, the Department requested and received new information from Vinh Hoan. Moreover, Vinh Hoan requested an extension to the time limit for submission of this new information. As a result, additional time is needed to review the information and prepare the results. Consequently, in accordance with 19 CFR 351.302(b), the Department is extending the time period for issuing the final results until February 18, 2009.

This notice is published in accordance with section 771(i) of the Tariff Act of 1930, as amended.

Dated: December 5, 2008.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Operations.

[FR Doc. E9–623 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–929]

Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: January 14, 2009.

SUMMARY: The Department of Commerce (the Department) has determined that small diameter graphite electrodes from the People's Republic of China (PRC) are being, or are likely to be, sold in the United States at less than fair value (LTFV) as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The final dumping margins for this investigation are listed in the ''Final Determination Margins'' section below. The period covered by the investigation is July 1, 2007, through December 31, 2007 (the POI).

FOR FURTHER INFORMATION CONTACT: Magd Zalok or Drew Jackson, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230; telephone: (202) 482–4162 and 482–4406, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department published its preliminary determination of sales at LTFV on August 21, 2008. *See Small Diameter Graphite Electrodes From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances, in Part*, 73 FR 49408 (August 21, 2008) (*Preliminary Determination*). On August 25, 2008, the Department received ministerial error allegations from petitioners[1] and one

[1] The petitioners in this investigation are SGL Carbon LLC and Superior Graphite Co.

respondent, the Fangda Group.[2] On August 26, 2008, petitioners submitted a ministerial error allegation with respect to Fushun Jinly Petrochemical Carbon Co., Ltd. (Fushun Jinly), another respondent in the investigation. On August 28, 2008, in response to the Department's request, petitioners submitted information regarding the effect the alleged errors have on the dumping margin calculated for the Fangda Group. After reviewing the allegations, the Department determined that the *Preliminary Determination* included significant ministerial errors with regard to the Fangda Group. On September 22, 2008, the Department published its amended preliminary determination of sales at LTFV. *See Small Diameter Graphite Electrodes from the People's Republic of China: Amended Preliminary Determination of Sales at Less Than Fair Value*, 73 FR 54561 (September 22, 2008) (*Amended Preliminary Determination*).

On September 22, 2008, M. Brashem, Inc. (Brashem), a U.S. importer of small diameter graphite electrodes, requested that the Department correct its amended preliminary determination by applying the Fangda Group's cash deposit rate to Hefei Carbon, one of the companies in the Fangda Group. *See* Brashem's September 22, 2008 submission to the Department. On October 8, 2008, the Department issued a memorandum stating that it would not further amend its *Preliminary Determination* because Brashem's allegation did not constitute a ministerial error. See Memorandum from Magd Zalok, International Trade Compliance Analyst, to Abdelali Elouaradia, Director, Office 4, dated October 8, 2008.

Between August 25, 2008, and September 18, 2008, the Department conducted verifications of the following companies in the Fangda Group: Fushun Carbon, Fangda Carbon, Chengdu Rongguang and Beijing Fangda. *See* the ''Verification'' section below for additional information.

On August 25, 2008, Fushun Jinly filed an untimely and unsolicited submission with the Department in which it made substantial revisions to its factors of production (FOP) database. In response to requests from the Department, on August 27, 2008, and September 3, 2008, Fushun Jinly filed submissions with the Department explaining the untimely revisions. In a letter issued to Fushun Jinly on September 9, 2008, the Department rejected the untimely new database, as well as the August 27, 2008 and September 3, 2008 submissions, and informed Fushun Jinly of the Department's intention not to verify any of its information because the untimely submission raised serious questions as to the credibility of its previously reported information. *See* Letter to Fushun Jinly, dated September 9, 2008 (September 9, 2008 Letter).

On October 6, 2008, the petitioners requested that the Department issue an amended preliminary scope determination to include connecting pin joining systems (connecting pins) in the scope of the investigation.

In response to the Department's invitation to comment on the *Preliminary Determination*, on November 3, 2008, the petitioners, the Fangda Group and Fushun Jinly filed case briefs. The petitioners, the Fangda Group and Fushun Jinly filed rebuttal briefs on November 10, 2008. Upon requests from the petitioners, the Fangda Group and Fushun Jinly, on November 20, 2008, the Department held a public hearing.

Analysis of Comments Received

All of the issues raised in the case and rebuttal briefs submitted in this investigation are addressed in the ''Issues and Decision Memorandum for the Final Determination in the Less–Than-Fair–Value Investigation of Small Diameter Graphite Electrodes from the People's Republic of China,'' dated January 5, 2009, which is hereby adopted by this notice (Issues and Decision Memorandum). Appendix I to this notice contains a list of the issues addressed in the Issues and Decision Memorandum. The Issues and Decision Memorandum, which is a public document, is on file in the Central Records Unit (CRU) at the Main Commerce Building, Room 1117, and is accessible on the Web at *http://ia.ita.doc.gov/frn*. The paper copy and electronic version of the memorandum are identical in content.

Changes Since the Preliminary Determination

Based on our analysis of the comments received, we have made the following changes to our preliminary determination:

1. We based our determination with respect to Fushun Jinly on total adverse facts available (AFA) because its questionnaire responses were not verifiable and because Fushun Jinly failed to cooperate to the best of its ability with this investigation. As total AFA, we found Fushun Jinly to be part of the PRC–wide entity.
2. We assigned the Fangda Group a dumping margin based on total AFA because we found its FOP data to be unreliable and because the Fangda Group failed to cooperate to the best of its ability with this investigation. As total AFA, we assigned the Fangda Group the highest margin in this proceeding.
3. We have determined that critical circumstances exist with respect to the Fangda Group, the separate rate companies, and the PRC–wide entity, including Fushun Jinly.
4. We have assigned the separate rate companies a dumping margin equal to the simple average of the margins alleged in the petition. *See* the Antidumping Petition for Small Diameter Graphite Electrodes for the Peoples Republic of China, dated January 17, 2008, and amendment to Petition, dated January 30, 2008.
5. We determined that connecting pins are covered by the scope of the investigation.

Scope of Investigation

The merchandise covered by this investigation includes all small diameter graphite electrodes of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware. The merchandise covered by this investigation also includes graphite pin joining systems for small diameter graphite electrodes, of any length, whether or not finished, of a kind used in furnaces, and whether or not the graphite pin joining system is attached to, sold with, or sold separately from, the small diameter graphite electrode. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes are most commonly used in primary melting, ladle metallurgy, and specialty furnace applications in industries including foundries, smelters, and steel refining operations. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes that are subject to this investigation are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheading 8545.11.0000. The HTSUS number is provided for convenience and customs purposes, but the written description of the scope is dispositive.

[2] The following companies comprise the Fangda Group: Fushun Carbon Co., Ltd. (Fushun Carbon), Fangda Carbon New Material Co., Ltd. (Fangda Carbon), Chengdu Rongguang Carbon Co., Ltd. (Chengdu Rongguang), Beijing Fangda Carbon Tech Co., Ltd. (Beijing Fangda), and Hefei Carbon Co., Ltd. (Hefei Carbon).

Scope Comments

In their October 6, 2008, submission, as well as their November 3, 2008, case brief, the petitioners argued that the scope of this investigation should include all connecting pins for small diameter graphite electrodes, whether or not they are sold separately from the graphite electrodes, and requested that the Department amend its preliminary determination to include connecting pins in the scope of the investigation. The respondents argued that connecting pins are within the scope of the investigation when they are sold with graphite electrodes (either attached to the electrode or unattached), but not when they are sold separately from the graphite electrodes (*i.e.*, when the connecting pins are not part of an electrode order). For the reasons discussed in the Issues and Decision Memorandum, the Department has determined that all connecting pins are included in the scope of this investigation. The scope description found in the ''Scope of Investigation'' section above reflects this determination. *See* Issues and Decision Memorandum at Comment 2.

Verification

As provided in section 782(i) of the Act, we conducted verifications of the Fangda Group's information. *See* the Department's verification reports for the Fangda Group, on file in the CRU. In conducting the verifications, we used standard verification procedures, including examination of relevant accounting and production records, as well as original source documents provided by the respondent.

Adverse Facts Available

Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act allows the Department, subject to section 782(e) of the Act, to disregard all or part of a deficient or untimely response from a respondent.

Pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act authorizes the Department to use an adverse inference with respect to an interested party if the Department finds that the party failed to cooperate by not acting to the best of its ability to comply with a request for information.

A. Total Adverse Facts Available for Fushun Jinly

On August 25, 2008, after the preliminary determination, and on the same day that the verification of the Fangda Group began, Fushun Jinly filed untimely and unsolicited new information consisting of substantial revisions to its FOP database, and other previously undisclosed information. In its untimely submission and subsequent submissions explaining the untimely submission, Fushun Jinly: (1) revealed for the first time that it sold by–products during the POI, although it had repeatedly stated that it reused its by–products; (2) admitted for the first time that the subcontractors who performed graphitization would not provide any documents to support the FOP data they had submitted; (3) reported substantial reductions to consumption quantities for major graphitization inputs consumed by the same subcontractors whose records could not be verified; (4) provided company records which call into question the number of subcontractors reportedly used in the graphitization process during the POI, and whether Fushun Jinly accurately and fully reported to the Department its FOP data for such a process; (5) provided production documents indicating that it could have reported the FOP data using control number (CONNUM) characteristics in addition to power level, which it had repeatedly denied it was able to do prior to the preliminary determination; and (6) reported FOP data for certain graphite electrodes and connecting pins separately, contrary to its repeated contention that it could not do so. On September 9, 2008, the Department rejected Fushun Jinly's untimely August 25, 2008, FOP submission. *See* September 9, 2008 Letter. In rejecting the untimely FOP database, the Department stated that the untimely database and subsequent related submissions: (1) indicated that Fushun Jinly had previously failed to properly report significant FOP data for one of the two types of electrodes sold during the POI; (2) called into question the accuracy and verifiability of the FOP data reported for graphitization; (3) called into question claims regarding the number of subcontractors used during the POI and the level of product specificity to which FOP data could have been reported; (4) indicated that Fushun Jinly may have purchased graphitized semi–finished products in addition to the graphitized semi–finished products supplied by subcontractors. *See id*. Given the foregoing concerns, the Department stated that it would not be appropriate to verify any of the information reported by Fushun Jinly. *See id* .

Fushun Jinly's untimely FOP submission contained information that the Department had repeatedly sought throughout the investigation, yet Fushun Jinly repeatedly failed to provide the requested information by the deadlines established for submitting such information. Thus, we have determined that Fushun Jinly's actions significantly impeded the proceeding. Moreover, Fushun Jinly's untimely FOP submission and subsequent related submissions demonstrated that important elements of the FOP data on the record were either inaccurate, improperly reported, and/or could not be verified. Additionally, Fushun Jinly's actions demonstrate that it failed to cooperate by not acting to the best of its ability to comply with requests from the Department. Accordingly, pursuant to sections 776(a)(2)(A), (B), (C) and (D) and 776(b) of the Act, we have used AFA in reaching our final determination with respect to Fushun Jinly. Specifically, we have treated Fushun Jinly as part of the PRC–wide entity and assigned Fushun Jinly the PRC–wide rate of 159.64 percent.[3] *See* the sections entitled ''The PRC–Wide Rate'' and ''Corroboration,'' below, for a discussion of the selection and corroboration of the PRC–Wide rate. *See also* the accompanying Issues and Decision Memorandum at Comment 1 for details.

Total Adverse Facts Available for the Fangda Group

During verification of the Fangda Group's responses, the Department found that the Fangda Group: (1) failed to report FOP data for Hefei Carbon, one of the companies within the Fangda Group that produced small diameter graphite electrodes with characteristics that matched the CONNUM

[3] The Department incorrectly listed 159.34 percent as the highest petition margin in the *Preliminary Determination*. In fact, the highest margin alleged in the Petition is 159.64 percent. *See* the Petition, and Enclosure 4 of petitioners' January 30, 2008, addendum to Petition.

characteristics reported for certain U.S. sales; (2) failed to identify the existence of, and report FOP data for, a number of tollers that performed significant processes on small diameter graphite electrodes with characteristics that matched the CONNUM characteristics reported for certain U.S. sales; and (3) had production records that could have been used to report factor quantities using more of the CONNUM criteria then were used, despite repeated claims to the contrary. The missing information noted above had been previously requested by the Department. Thus, the record shows that the Fangda Group withheld information requested by the Department and significantly impeded the proceeding. Moreover, given the importance of the missing information, we have determined that we lack reliable data to calculate normal value. Consequently, pursuant to sections 776(a)(2)(A), and (C) of the Act, we have determined that the Fangda Group's dumping margin should be based on total facts available.

Furthermore, the Fangda Group possessed the information needed to report FOP data for Hefei Carbon and the production records that could have been used to report factor quantities using more of the CONNUM criteria then were used. Thus, the Fangda Group could have reported to the Department the FOP data for Hefei Carbon and factor quantities that were more CONNUM–specific. Moreover, the Fangda Group never informed the Department of the existence of the unreported tollers, nor is there any indication on the record that the Fangda Group ever attempted to obtain any data from the unreported tollers. Accordingly, we find that the Fangda Group failed to act to the best of its ability in this investigation, and, pursuant to section 776(b) of the Act, the use of an adverse inference is warranted.

Section 776(b) of the Act authorizes the Department to use, as AFA: information derived from: (1) the petition; (2) the final determination from the LTFV investigation; (3) a previous administrative review; or (4) any other information placed on the record. In selecting a rate for AFA, the Department selects one that is sufficiently adverse ''as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909 (February 23, 1998). It is the Department's practice to select, as AFA, the higher of: (a) the highest margin alleged in the petition or (b) the highest calculated rate for any respondent in the investigation. *See Final Determination of Sales at Less Than Fair Value: Certain Cold–Rolled Flat–Rolled Carbon Quality Steel Products From the People's Republic of China*, 65 FR 34660 (May 31, 2000) and accompanying Issues and Decisions Memorandum at Facts Available (*Cold–Rolled Flat–Rolled Steel From the PRC*). The highest margin alleged in the Petition is 159.64 percent. Since the highest dumping margin derived from the Petition is higher than the weighted–average margins calculated in this case, we have, as AFA, assigned the Fangda Group the highest margin alleged in the Petition, 159.64 percent. *See* the Petition, and Enclosure 4 of petitioners' January 30, 2008, addendum to Petition.

In addition, because the shipment data reported by the Fangda Group in connection with critical circumstances were not reported on the basis of shipment date as required by the Department, and could not be verified, we have found, as AFA, that imports were massive with respect to the Fangda Group. *See* the section of this notice entitled ''Critical Circumstances,'' below, for a discussion of our critical circumstances determination and the section of this notice entitled ''Corroboration,'' below, for a discussion of the corroboration of the highest petition rate. *See*, *also*, the accompanying Issues and Decision memorandum at Comment 3 for details.

Critical Circumstances

In the *Preliminary Determination*, the Department found that there was reason to believe or suspect that critical circumstances exist for imports of subject merchandise from the Fangda Group and the separate rate companies because: (1) in accordance with section 733(e)(1)(A)(ii) of the Act, the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales; and (2) in accordance with section 733(e)(1)(B) of the Act, the Fangda Group and the separate rate companies had massive imports during a relatively short period. However, the Department did not preliminarily find that there was reason to believe or suspect that critical circumstances existed for imports of subject merchandise from Fushun Jinly or the PRC–wide entity. *See Preliminary Determination*. In their case briefs, the petitioners argued that because the application of total AFA to both Fushun Jinly and the Fangda Group is warranted, the Department should find that critical circumstances exist with respect to these companies as well as the separate rate companies and the PRC–wide entity. If the Department does not apply total AFA to Fushun Jinly and the Fangda Group, the petitioners argue that, as partial AFA, the Department should find a massive increase in subject imports from these companies and determine the critical circumstances exist with respect to Fushun Jinly as well as the Fangda Group and the separate rate companies. Fushun Jinly and the Fangda Group contend that the Department's critical circumstances determination should be based on their reported export data, rather than AFA. If, however, the Department determines, as AFA, that massive imports exist, the respondents argue that the Department should not find critical circumstances for any party if the dumping margins are less than 25 percent for the Fangda Group and the separate rate companies, including Fushun Jinly. In any case, the respondents maintain that the Department should not rely upon import statistics for HTSUS number 8545.11.00.00 to determine whether massive subject imports exist since this HTSUS number includes imports of non–subject merchandise (*i.e.*, large diameter graphite electrodes).

As noted above, the Department was not able to verify the shipment data reported by the Fangda Group in connection with critical circumstances because the data were not reported on the basis of shipment date as required by the Department. Since the shipment data provided by the Fangda Group could not be verified, we find that the Fangda Group failed to cooperate by not acting to the best of its ability to provide the requested shipment data. Accordingly, we have based our determination of whether there were massive imports with respect to the Fangda Group on AFA (*see* section 776 (a)(2)(D) and 776 (b) of the Act). The Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H.R. Doc. 103–316, Vol. 1 (1994) at 870, notes that the Department may employ adverse inferences in selecting from among the facts available ''to ensure that the party does not obtain a more favorable result by failing to cooperate fully.'' The SAA also instructs the Department to consider, in employing adverse inferences, ''the extent to which a party may benefit from its own lack of cooperation.'' *Id*. Based on the shipment

data reported by the Fangda Group in connection with critical circumstances, in the *Preliminary Determination* the Department found massive imports with respect to the Fangda Group. To ensure that the Fangda Group does not obtain a more favorable result by failing to cooperate, for this final determination, we continue to find, as AFA, that imports of subject merchandise were massive for the Fangda Group.

In addition, based on our comparison of the unadjusted volume of imports of graphite electrodes from the PRC reported by the International Trade Commission's (ITC) DataWeb for the periods February 2008 through July 2008 and August 2007 through January 2008, we found that imports were massive for the separate rate companies and the PRC–wide entity, including Fushun Jinly. We did not reduce the ITC's DataWeb import volumes by shipment volumes reported by the Fangda Group and Fushun Jinly, or rely upon these companies' shipment volumes in determining whether massive imports exist for the separate rate companies because the shipment data submitted by Fushun Jinly and the Fangda Group were not verified. Thus, these data are no longer reliable for purposes of our final critical circumstances analysis. Moreover, because the dumping margins applied to all interested parties in this investigation exceed 25 percent, we find that importers should have known that graphite electrodes were being sold at LTFV. We also continue to find the ITC's preliminary injury determination in the instant investigation is sufficient to impute knowledge of material injury to the importers. Accordingly, the Department finds that critical circumstances exist for the Fangda Group, the separate rate applicants, and the PRC–wide entity, including Fushun Jinly. For further details, see Comment 4 of the Issues and Decision Memorandum.

Surrogate Country

In the *Preliminary Determination*, we selected India as the appropriate surrogate country noting that it was on the Department's list of countries that are at a level of economic development comparable to the PRC and that: (1) India is a significant producer of merchandise comparable to subject merchandise; and, (2) reliable Indian data for valuing factors of production are readily available. *See Preliminary Determination*. No party has commented on our selection of India as the appropriate surrogate country. For the final determination, we continue to find India to be the appropriate surrogate country in this investigation.

Separate Rates

In proceedings involving non–market-economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (*Sparklers*), as amplified by *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*); *see also* 19 C.F.R. § 351.107(d).

In the *Preliminary Determination*, the Department granted separate–rate status to Fushun Jinly, Fushun Carbon, Fangda Carbon, Beijing Fangda, Chengdu Rongguang, and the following separate rate applicants: Jilin Carbon Import and Export Company (Jilin Carbon); Guanghan Shida Carbon Co., Ltd. (Guanghan Shida); Nantong River–East Carbon Joint Stock Co., Ltd. (Nantong River); Xinghe County Muzi Carbon Co. Ltd. (Muzi Carbon); Brilliant Charter Limited (Brilliant Charter); Shijiazhuang Huanan Carbon Factory (Huanan Carbon); Shenyang Jinli Metals & Minerals Imp & Exp Co., Ltd. (Shenyang Jinli); Shanghai Jinneng International Trade Co., Ltd. (Shanghai Jinneng); Dalian Thrive Metallurgy Import and Export Co., Ltd.; GES (China) Co., Ltd. (Dalian Thrive); and Qingdao Haosheng Metals & Minerals Imp & Exp Co., Ltd. (Qingdao Metal). As discussed above, the Department decided, as AFA, to treat Fushun Jinly as part of the PRC–wide entity. Moreover, we note that the information that Fushun Jinly provided to the Department to demonstrate the absence of *de facto* and *de jure* control was not verified. Consequently we have not granted Fushun Jinly a separate rate. Although we are basing the Fangda Group's margin on total AFA, the Department was able to verify the Fangda Group's separate rate information (*e.g.*, ownership, selection of management process, *etc.*) for Fushun Carbon, Fangda Carbon, Beijing Fangda, and Chengdu Rongguang. Thus, we are continuing to find that the evidence placed on the record of this investigation by the Fangda Group demonstrates both a *de jure* and *de facto* absence of government control, with respect to Fushun Carbon, Fangda Carbon, Beijing Fangda, and Chengdu Rongguang, exports of the merchandise under investigation and thus they are eligible for separate–rate status. Because no parties commented on its separate–rate status of the other separate–rate applicants, we continue to find the other separate–rate applicants are eligible for separate–rate status. Since we assigned the Fangda Group a dumping margin based on total AFA, and we are considering Fushun Jinly to be part of the PRC–wide entity, we do not have any mandatory respondents in this investigation whose dumping margin is not based on total AFA. Thus, we have assigned the other separate rate companies a dumping margin equal to the simple average of the margins alleged in the petition.

The PRC–Wide Rate

In the *Preliminary Determination*, the Department considered certain non–responsive PRC producers/exporters to be part of the PRC–wide entity because they did not respond to our requests for information and did not demonstrate that they operated free of government control over their export activities. No additional information regarding these entities has been placed on the record since the publication of the *Preliminary Determination*. Since the PRC–wide entity did not provide the Department with requested information, pursuant to section 776(a)(2)(A) of the Act (which covers situations where an interested party withholds requested information), we continue to find it appropriate to base the PRC–wide rate on facts available. Moreover, given that the PRC–wide entity did not respond to our request for information, we continue to find that it failed to cooperate to the best of its ability to comply with a request for information. Thus, pursuant to section 776(b) of the Act, we have continued to use an adverse inference in selecting from among the facts otherwise available. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold–Rolled Flat–Rolled Carbon–Quality Steel Products from the Russian Federation*, 65 FR 5510, 5518 (February 4, 2000) (a case in which the Department applied an adverse inference in determining the Russia–wide rate); *Final Determination of Sales at Less Than Fair Value: Certain Artists Canvas from the People's Republic of China*, 71 Fed. Reg. 16116, 16118–19 (March 30, 2006) (a case in which the Department applied an adverse inference in determining the PRC–wide rate).

Pursuant to section 776(b) of the Act, the Department may select, as AFA information derived from: (1) the petition; (2) the final determination from the LTFV investigation; (3) a previous administrative review; or (4) any other information placed on the record. As noted above, in order to induce respondents to provide the Department with complete and accurate information in a timely manner, the Department's practice is to select, as AFA, the higher of: (a) the highest margin alleged in the petition or (b) the highest calculated rate for any respondent in the investigation. *See Cold–Rolled Flat–Rolled Steel From the PRC*. The highest margin alleged in the Petition is 159.64 percent. Since the dumping margin derived from the Petition is higher than the weighted–average margins calculated in this case, we have continued to assign the PRC–wide entity a dumping margin of 159.64 percent. *See* the Petition, and Enclosure 4 of petitioners' January 30, 2008, addendum to Petition.

Since we begin with the presumption that all companies within an NME country are subject to government control and only the exporters listed under the ''Final Determination Margins'' section below have overcome that presumption, we are applying a single antidumping rate (*i.e.*, the PRC–wide rate) to all exporters of subject merchandise from the PRC, other than the exporters listed in the ''Final Determination Margins'' section of this notice. *See, e.g.*, *Synthetic Indigo from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value*, 65 FR 25706 (May 3, 2000) (applying the PRC–wide rate to all exporters of subject merchandise in the PRC based on the presumption that the export activities of the companies that failed to respond to the Department's questionnaire were controlled by the PRC government).

Corroboration

Section 776(c) of the Act provides that, when the Department relies on secondary information in using the facts otherwise available, it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. We have interpreted ''corroborate'' to mean that we will, to the extent practicable, examine the reliability and relevance of the information submitted. *See Certain Cold–Rolled Flat–Rolled Carbon–Quality Steel Products From Brazil: Notice of Final Determination of Sales at Less Than Fair Value*, 65 FR 5554, 5568 (February 4, 2000); *see, e.g.*, *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996).

To corroborate the 159.64 percent margin used as AFA for the PRC–wide entity, we relied upon our pre–initiation analysis of the adequacy and accuracy of the information in the Petition. *See Small Diameter Graphite Electrodes from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 73 FR 8287 (February 13, 2008) (*Initiation Notice*); *see also Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 FR 31970, 31972 (June 5, 2008) (where the Department relied upon pre–initiation analysis to corroborate the highest margin alleged in the petition). During the initiation stage, we examined evidence supporting the calculations in the petition and the supplemental information provided by petitioners to determine the probative value of the margins alleged in the Petition. During our pre–initiation analysis, we examined the information used as the basis of export price and normal value (NV) in the Petition, and the calculations used to derive the alleged margins. Also, during our pre–initiation analysis, we examined information from various independent sources provided either in the Petition or, based on our requests, in supplements to the Petition, which corroborated key elements of the export price and NV calculations. *Id.* Since the initiation, the Department has found no other corroborating information available in this case, and received no comments from interested parties as to the relevance or reliability of this secondary information. Based on the above, for the final determination, the Department finds that the rates derived from the Petition are corroborated to the extent practicable for purposes of the AFA rate assigned to the PRC–wide entity and the Fangda Group.

Combination Rates

In the *Initiation Notice*, the Department stated that it would calculate combination rates for certain respondents that are eligible for a separate rate in this investigation. *See Initiation Notice*. This change in practice is described in *Policy Bulletin 05.1*:

> {w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non–investigated firms receiving the weighted–average of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash–deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question and produced by a firm that supplied the exporter during the period of investigation.''

See Policy Bulletin 05.1, ''Separate Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non–Market Economy Countries.''

Final Determination Margins

We determine that the following weighted–average dumping margins exist for the period July 1, 2007, through December 31, 2007:

Exporter & Producer	Weighted–Average Margin
Fushun Carbon Co., Ltd. Produced by: Fushun Carbon Co., Ltd.	159.64%
Fangda Carbon New Material Co., Ltd. Produced by: Fangda Carbon New Material Co., Ltd.	159.64%
Beijing Fangda Carbon Tech Co., Ltd. Produced by: Chengdu Rongguang Carbon Co., Ltd.; Fangda Carbon New Material Co., Ltd.; or Fushun Carbon Co., Ltd.	159.64 %
Chengdu Rongguang Carbon Co., Ltd. Produced by: Chengdu Rongguang Carbon Co., Ltd.	159.64%
Jilin Carbon Import and Export Company Produced by: Sinosteel Jilin Carbon Co., Ltd.	132.90%

Exporter & Producer	Weighted–Average Margin
Guanghan Shida Carbon Co., Ltd. Produced by: Guanghan Shida Carbon Co., Ltd.	132.90%
Nantong River–East Carbon Joint Stock Co., Ltd. Produced by: Nantong River–East Carbon Co., Ltd.; or Nantong Yangzi Carbon Co., Ltd.	132.90%
Xinghe County Muzi Carbon Co. Ltd. Produced by: Xinghe County Muzi Carbon Co., Ltd.	132.90%
Brilliant Charter Limited Produced by: Nantong Falter New Energy Co., Ltd.; or Shanxi Jinneng Group Co., Ltd.	132.90%
Shijiazhuang Huanan Carbon Factory Produced by: Shijiazhuang Huanan Carbon Factory	132.90%
Shenyang Jinli Metals & Minerals Imp & Exp Co., Ltd. Produced by: Shenyang Jinli Metals & Minerals Imp. & Exp. Co., Ltd.	132.90%
Shanghai Jinneng International Trade Co., Ltd. Produced by: Shanxi Jinneng Group Datong Energy Development Co., Ltd.	132.90%
Dalian Thrive Metallurgy Import and Export Co., Ltd. Produced by: Linghai Hongfeng Carbon Products Co., Ltd.; Tianzhen Jintian Graphite Electrodes Co., Ltd.; Jiaozuo Zhongzhou Carbon Products Co., Ltd.; Heilongjiang Xinyuan Carbon Products Co., Ltd.; Xuzhou Jianglong Carbon Manufacture Co., Ltd.; or Xinghe Xinyuan Carbon Products Co., Ltd.	132.90%
GES (China) Co., Ltd. Produced by: Shanghai GC Co., Ltd.; Fushun Jinli Petrochemical Carbon Co., Ltd.; Xinghe County Muzi Carbon Plant and Linyi County Lubei Carbon Co., Ltd. Shandong Province	132.90%
Qingdao Haosheng Metals & Minerals Imp & Exp Co., Ltd. Produced by: Sinosteel Jilin Carbon Co., Ltd.	132.90%
PRC–Wide Entity	159.64%

Disclosure

We will disclose to parties the calculations performed within five days of the date of public announcement of this determination in accordance with 19 C.F.R. § 351.224(b).

Continuation of Suspension of Liquidation

In the *Preliminary Determination*, the Department found that critical circumstances exist with respect to imports of subject merchandise from the Fangda Group and the separate rate companies but the Department found that critical circumstances did not exist with respect to Fushun Jinly and the PRC–wide entity. As noted above, for the final determination, the Department has found that critical circumstances exist with respect to imports of subject merchandise from the Fangda Group, the separate rate companies, and the PRC–wide entity, including Fushun Jinly. Thus, in accordance with section 735(c)(1)(B) of the Act, we are directing U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all imports of subject merchandise from the Fangda Group and the separate rate applicants[4] entered, or withdrawn from warehouse, for consumption on or after May 23, 2008, which is 90 days prior to the date of publication of the *Preliminary Determination* in the **Federal Register**. For the PRC wide entity, including Fushun Jinly, we will instruct CBP to suspend liquidation of all entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after May 23, 2008, pursuant to section 735(c)(4)(B) of the Act. We will instruct CBP to continue to require a cash deposit or the posting of a bond for all companies based on the estimated weighted–average dumping margins shown above. The suspension of liquidation instructions will remain in effect until further notice.

[4] As noted above, the separate rate applicants are Jilin Carbon; Guanghan Shida Carbon Co., Ltd; Nantong River East Carbon Co. Ltd.; Xinghe County Muzi Carbon Co. Ltd.; Brilliant Charter Limited; Shijiazhuang Huanan Carbon Factory; Shenyang Jinli Metals & Minerals Imp & Exp Co., Ltd.; Shanghai Jinneng International Trade Co., Ltd.; Dalian Thrive Metallurgy Import and Export Co., Ltd.; GES (China) Co., Ltd.; and Qingdao Haosheng Metals & Minerals Imp & Exp Co., Ltd..

ITC Notification

In accordance with section 735(d) of the Act, we have notified ITC of our final determination of sales at LTFV. As our final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will determine whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of the subject merchandise within 45 days of this final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

Notification Regarding APO

This notice also serves as a reminder to the parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 C.F.R. § 351.305. Timely notification of return or 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 determination and notice are issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: January 5, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I

Comment 1: Whether Fushun Jinly's Dumping Margin Should be Based on Adverse Facts Available
Comment 2: Whether Graphite Connecting Pins are Covered by the Scope of the Investigation
Comment 3: Whether the Fangda Group's Dumping Margin Should be Based on Adverse Facts Available
Comment 4: Whether Critical Circumstances Exist for the Fangda Group, Fushun Jinly, the Separate Rate Applicants, and the PRC–Wide Entity

[FR Doc. E9–699 Filed 1–13–09; 8:45 am]
BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture from the People's Republic of China: Amended Final Results Pursuant to a Final Court Decision

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 10, 2008, the United States Court of International Trade (''CIT'') sustained the Department of Commerce's (''Department'') final results of redetermination pursuant to the Department's voluntary remand, wherein the Department granted separate–rate status to Macau Youcheng Trading Co./Zhongshan Youcheng Wooden Arts & Crafts Co., Ltd. (collectively ''Youcheng'').[1] The period of review (''POR'') is June 24, 2004, through December 31, 2005. As there is now a final and conclusive court decision in this case, the Department is amending the final results of the first administrative review of wooden bedroom furniture (''WBF'') from the People's Republic of China (''PRC''), to reflect this determination pursuant to a request by the Department for the CIT to grant a remand in this case. *See Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China*, 72 FR 46957 (August 22, 2007) (''Amended Final Results''); and *Second Amended Final Results of Antidumping Duty Administrative Review: Wooden Bedroom Furniture From the People's Republic of China*, 72 FR 62834 (November 7, 2007) (''*2nd Amended Final Results*'').

EFFECTIVE DATE: January 14, 2009.

FOR FURTHER INFORMATION CONTACT: Frances Veith, 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) 482–4295.

SUPPLEMENTARY INFORMATION: On August 22, 2007, the Department published its final results in the first administrative review of the antidumping duty order on WBF from the PRC covering the period June 24, 2004, through December 31, 2005, and on November 7, 2007, it published its amended final results.[2] *See Amended Final Results* and *2nd Amended Final Results*, respectively. In the Amended Final Results, Youcheng was denied a separate rate, because it failed to demonstrate that it made a sale of subject merchandise during the POR, a determination which remained unchanged in the *2nd Amended Final Results*.

On September 4, 2007, Youcheng filed a summons and complaint with the CIT challenging the Department's denial of a separate rate to Youcheng. On June 19, 2008, the Department requested a voluntary remand so that the Department could further analyze the record, explain its decision, and take such action as may be appropriate pertaining to the denial of separate–rate status to Youcheng. On June 20, 2008, the CIT granted the Department's voluntary remand motion. On August 22, 2008, we issued our draft redetermination to interested parties for comment. On September 12, 2008, Petitioners[3] and Youcheng provided comments on the Department's draft redetermination results.

On October 3, 2008, the Department filed with the CIT its final results of redetermination pursuant to *Youcheng v. United States*, granting Youcheng a separate rate. On October 10, 2008, the CIT sustained the final results of redetermination on remand. On November 13, 2008, the Department notified the public that the final judgment in this case is not in harmony with the *Amended Final Results* and the *2nd Amended Final Results*. *See Wooden Bedroom Furniture from the People's Republic of China: Notice of Court Decision Not in Harmony With Final Results of Administrative Review*, 73 FR 67133 (November 13, 2008). The deadline to appeal the redetermination pursuant to remand was December 9, 2008, 60 days after the date the CIT sustained the final results of redetermination on remand (*i.e.*, October 10, 2008). The time period for appealing the CIT's decision has expired and no party has appealed the CIT's decision to the Court of Appeals for the Federal Circuit. Because there is now a final and conclusive court decision in this case, the Department is amending the final results with respect to Youcheng.

Amended Final Results of Review

The remand redetermination explained that, in accordance with the CIT's instructions, the Department analyzed the record and determined to grant separate–rate status to Youcheng. Based on this reconsideration, Youcheng's status changed from an entity considered as part of the PRC–wide entity, and subject to the PRC–wide rate, to an entity eligible for separate–rate status and having a separate rate. Therefore, we are amending the final results for Youcheng, a company that was not selected for individual review. Accordingly, we are applying to Youcheng a dumping margin equal to the weighted average of the calculated rates for the companies selected for individual review, as detailed below, for the period June 24, 2004, through December 31, 2005.

WBF FROM THE PRC

Separate–Rate Applicant Exporter 1st Administrative Review	Margin (Percent)
Macau Youcheng Trading Co./Zhongshan Youcheng Wooden Arts & Crafts Co., Ltd.	35.78

Cash Deposit Requirements

Pursuant to the final court decision, the following cash deposit rate will be effective upon publication of these amended final results, for all shipments of subject merchandise exported by Youcheng entered or withdrawn from warehouse, for consumption on or after publication date of this notice. A 35.78 percent cash deposit will be required for subject merchandise exported by Youcheng. Youcheng's cash deposit rate will remain in effect until further notice.

Assessment

The Department has determined, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries covered by this amended final results, pursuant to the final court decision. The Department intends to issue assessment

[1] *See Macau Youcheng Trading Co. and Zhongshan Youcheng Wooden Arts & Crafts Co., Ltd. v. United States Court No. 07-00322: Final Results Of Redetermination Pursuant To Voluntary Remand*, dated October 3, 2008 (''*Youcheng v. United States*'').

[2] As a result of an inadvertent error, the unpublished version of this notice released to interested parties on August 8, 2007, contained the appendix from the investigation of this proceeding, rather than the appendix intended for the first administrative review. The amended final results corrected this error. Because this error was discovered prior to publication in the Federal Register, the amended final results were published in place of the original version released on August 8, 2007.

[3] American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc.

instructions to CBP 15 days after the publication date of these amended final results, pursuant to the final court decision. In accordance with 19 CFR 351.212(b)(1), for Youcheng, a company that was not selected for individual review, the assessment rate is based on the weighted average of the cash deposit rates calculated for the companies selected for individual review pursuant to section 735(c)(5)(A) of the Tariff Act of 1930, as amended (''Act''). For further details, *see* the *Amended Final Results* and the *2nd Amended Final Results*.

Notification to Interested Parties

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. Pursuant to 19 CFR 351.402(f)(3), failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a 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 and as explained in the APO itself. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: January 7, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–631 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Mission Statement; Jordan and Egypt Business Development Mission; February 14–19, 2009

AGENCY: Department of Commerce.

ACTION: Notice.

Mission Description

The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service is organizing a trade mission to Amman, Jordan and Cairo, Egypt, February 14–19, 2009. The mission will include representatives from U.S. firms offering equipment and services in a variety of industry sectors, including, but not limited to, the following: Aerospace, automotive parts, construction, education and training, energy and power generation, environmental, food processing, franchising, hotel and restaurant, medical, oil and gas field machinery, packaging, petrochemical, pharmaceutical, port development, railroad, real estate development, security, telecommunications, and water and wastewater treatment. All U.S. companies are eligible to apply.

Commercial Setting

Jordan

Jordan continues to take steps to transform itself into an outward-oriented, internationally competitive market-based economy, and has made considerable progress toward achieving macroeconomic stability and in implementing economic reform, especially in the areas of privatization and investment. Key reforms have been undertaken in the information technology, pharmaceuticals, tourism, and services sectors. Foreign and domestic investment laws grant specific incentives to industry, agriculture, hotels, hospitals, transportation, recreation projects, convention centers, and pipeline distribution of water, gas, and oil. Having worked closely with the International Monetary Fund and practiced careful monetary policy, Jordan now stands out in its region as a model of sound investor-friendly economic policy.

Jordan's government liberalized its trade regime to guarantee its membership in the World Trade Organization (April 2000), and the U.S.-Jordan Free Trade Agreement (FTA), which entered into enforcement December 2001, will eliminate virtually all trade barriers between the two countries over a period of 10 years, heightening advantages for U.S. exporters as tariff rates fall year-by-year. Jordan and the United States have also concluded a treaty to protect bilateral investment.

The Jordanian market has enjoyed two years of gross domestic product (GDP) growth averaging 7 percent and is expected to see continued expansion. Reforms to customs, taxation, and investment laws have improved the business climate. Investors continue to show interest in Jordan's Qualifying Industrial Zones (QIZs), duty-free export portals that, since 1999, have attracted over $450 million in capital investments and created more than 55,000 new jobs, of which about 15,000 are held by Jordanians—57 percent by Jordanian women. Jordanian imports from the United States reached $857 million in 2007, a 31.8 percent increase over the previous year. Important market opportunities exist for U.S. firms in a variety of sectors, and there are niche markets for pharmaceuticals, laboratory equipment, real estate management services, and renewable energy, among others.

Egypt

At 78.8 million, Egypt is by far the largest Arab country by population and has a reasonably well-educated labor force. Egypt's economy, traditionally associated with agriculture, has become increasingly diversified. While tourism is its single largest foreign exchange earner, Egypt is also a major oil and gas producer, ranking among the world's top ten gas exporters. The clothing and textile sector is the largest industrial employer and a major foreign exchange earner. Other leading industries include steel, cement, chemicals, pharmaceuticals, and light consumer goods. Agriculture, although shrinking as a percentage of GDP, still employs almost 30 percent of the population.

Egypt's economy has improved considerably since 2005, due mainly to a new reformist government that has successfully floated the Egyptian pound, eliminated foreign exchange shortages along with the black market, reduced tariffs and simplified the tariff structure, moved to reform the financial sector, introduced measures to simplify the tax structure while lowering rates, and reduced the red tape necessary to conduct business. Supported by sustained reforms, Egypt's economy marked a year of impressive performance in 2007, receiving record foreign investment (FDI), along with official reserves exceeding $30 billion. The Gross Domestic Product (GDP) grew by 7.1 percent, and is expected to expand at a similar rate in 2008. Most of the FDI has gone into construction and manufacturing, resulting in lower unemployment. The government has also inked agreements with China, Jordan, Russia, Turkey and Qatar to construct industrial zones. Receipts from the Suez Canal and tourism brought in more than $11 billion in the first three quarters of last year. The Egyptian stock market has been one of the best performers in the region.

Egypt's government is putting in place an institutional framework for private-public partnerships (PPPs). PPP projects

in the pipeline include building and maintaining 2,100 public schools, four hospitals, several potable and wastewater stations, and two freeways. Unmet demand for housing construction is estimated to be 200,000 units annually. Telecommunications is another bright spot in the economy. Mobile penetration rates by three mobile operators stand at 28 million, or about 35 percent of the population. The government is expected to grant a second fixed-line license in 2008. Other significant sectors of interest to U.S. companies include steel, cement, chemicals, pharmaceuticals, and light consumer goods. In addition, tourism, employing more than 10 percent of Egyptian workers, continues to offer strong possibilities, as expansion of Red Sea resorts and new development along the Mediterranean drive demand for hotel equipment and environmental management services. Airports and other infrastructure projects being built to serve the new resorts represent additional opportunities for U.S. firms offering project management and building systems and equipment.

Mission Goals

The mission will assist representatives of American companies responsible for business activity in the Middle East and North Africa (MENA) with their efforts to identify profitable opportunities and new markets for their respective U.S. companies and to increase their export potential. The mission will actively market and recruit New-to-Export (NTE) and New-to-Market (NTM) firms. Results expected from the mission include matches between U.S. participants and potential partners, agents and distributors, and joint venture partners; and market knowledge for future expansion.

Mission Scenario

The mission will include commercial briefings, matchmaking appointments with local firms, and networking receptions in Amman, Jordan and Cairo, Egypt. Activities are scheduled to take place within a single work week, beginning Sunday in Jordan and ending Thursday in Egypt.

Proposed Mission Timetable

The precise schedule will depend on the availability of local government and business officials and the specific goals of the mission participants. The tentative trip itinerary will be as follows:

Saturday, February 14, 2009

—Arrive Amman, Jordan
—Ice Breaker Reception

Sunday, February 15, 2009

—Commercial Briefing
—Networking Lunch
—Matchmaking Meetings

Monday, February 16, 2009

—Matchmaking Meetings at the hotel
—Mission Networking Reception

Tuesday, February 17, 2009

—Depart Amman, Jordan
—Arrive in Cairo, Egypt
—Ice Breaker Reception

Wednesday, February 18, 2009

—Commercial Briefing
—Networking Lunch
—Matchmaking Meetings

Thursday, February 19, 2009

—Matchmaking Meetings at the hotel
—Networking Lunch/Mission Wrap-Up

Criteria for Participation and Selection

All parties interested in participating in the Jordan and Egypt Business Development Mission must complete and submit an application package for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 5 and a maximum of 15 companies will be selected to participate in the mission from the applicant pool. U.S. companies already doing business in the MENA region, as well as U.S. companies seeking to enter the region for the first time, may apply.

Fees and Expenses

After a company has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee will be $3,000 for a small or medium-sized enterprise (SME) * and $3,575 for large firms. The fee for each additional firm representative (SME or large firm) is $300. Expenses for travel, lodging, most meals, and incidentals will be the responsibility of each mission participant. Delegation members will be able to take advantage of Embassy rates for hotel rooms.

Eligibility: Participating companies must be incorporated or otherwise organized in the United States.

* An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (see *http://www.sba.gov/services/contracting opportunities/sizestandardstopics/index.html*). Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (for additional information see *http://www.export.gov/newsletter/march2008/initiatives.html*).

Conditions for participation:

- An applicant must submit a completed and signed application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.
- Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least 51 percent U.S. content of the value of the finished product or service.

Selection Criteria:

Selection will be based on the following criteria:

- Suitability of the company's products or services to the Jordan and Egypt markets.
- Applicant's potential for business in Jordan and Egypt, including likelihood of exports resulting from the mission.
- Consistency of the applicant's goals and objectives with the stated scope of the mission. Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including posting on the Commerce Department trade missions' calendar—*http://www.ita.doc.gov/doctm/tmcal.html*—and other Internet Web sites, publication in domestic trade publications and association newsletters, direct outreach, and announcements at industry meetings, symposia, conferences, and trade shows. The mission will also be promoted by the ITA ANESA Team members in U.S. Export Assistance Centers.

Recruitment for the mission will begin immediately and conclude no later than January 14, 2009. The mission will open on a first come first served basis. Applications received after January 14, 2009 will be considered only if space and scheduling constraints permit.

Contact Information

Sheryl Maas, Commercial Counselor, U.S. Commercial Service, American Embassy—Amman, Phone: (962) (6) 590–6632, E-mail: *Sheryl.Pinckney-maas@.mail.doc.gov* and *muna.farkouh@mail.doc.gov.*

Cherine Maher, Commercial Specialist, U.S. Embassy Cairo, Telephone: +20 (2) 2797–2688/2689, E-mail: *Mark.Russell@mail.doc.gov* or *cherine.maher@mail.doc.gov.*

Nyamusi K. Igambi, Senior International Trade Specialist, Houston U.S. Export Assistance Center, Phone: 713–209–3112, E-mail: *Nyamusi.Igambi@mail.doc.gov.*

Dated: January 7, 2009.

Nyamusi Igambi,

Senior International Trade Specialist, U.S. Department of Commerce, Houston, TX 77002.

[FR Doc. E9–630 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations; Extension of Time To Comment

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Extension of comment period.

SUMMARY: On December 10, 2008, the Department of Commerce (''the Department'') published a notice in the **Federal Register** requesting comments regarding the Department's withdrawal of the regulatory provisions governing targeted dumping in antidumping duty investigations. The Department is extending the comment period to January 23, 2009.

DATES: To be assured of consideration, written comments must be received no later than January 23, 2009.

ADDRESSES: Written comments (original and two copies) should be sent to Import Administration, Central Records Unit, Room 1870, U.S. Department of Commerce, 14th Street & Pennsylvania Ave., NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Michael Rill, telephone (202) 482–3058.

Submission of Comments

The Department is extending the deadline for submitting comments to January 23, 2009. The Department will consider all comments received before the close of the comment period. Consideration of comments received after the end of the comment periods cannot be assured.

Persons wishing to comment should submit a signed original and two copies of each set of comments, along with a cover letter identifying the commentator's name and address, by the date specified above. The Department will not accept comments accompanied by a request that a part or all of the material be treated confidentially due to business proprietary concerns or for any other reason. The Department will return such comments and materials to the persons submitting the comments and will not consider them.

The Department also requests submission of comments in electronic form to accompany the required paper copies. Comments filed in electronic form should be submitted either by e-mail to the Webmaster below, or on CD–ROM, as comments submitted on diskettes are likely to be damaged by postal radiation treatment.

Comments received in electronic form will be made available to the public in Portable Document Format (PDF) on the Internet at the Import Administration Web site at the following address: *http://ia.ita.doc.gov.*

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Andrew Lee Beller, Import Administration Webmaster, at (202) 482–0866, e-mail address: *webmaster-support@ita.doc.gov.*

Dated: January 7, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–624 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Sea Grant Advisory Board

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of public meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Sea Grant Advisory Board (Board). Board members will discuss and provide advice on the National Sea Grant College Program in the areas of program evaluation, strategic planning, education and extension, science and technology programs, and other matters as described in the Agenda below.

DATES: The announced meeting is scheduled for Wednesday, February 11 and Thursday, February 12, 2009.

ADDRESSES: The meeting will be held at the offices of the Consortium for Oceanographic Research and Education (CORE), 1201 New York Ave, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Melissa Pearson, National Sea Grant College Program, National Oceanic and Atmospheric Administration, 1315 East-West Highway, Room 11717, Silver Spring, Maryland 20910, 301–713–1083.

SUPPLEMENTARY INFORMATION: The Board, which consists of a balanced representation from academia, industry, state government and citizens groups, was established by Section 209 of the Sea Grant Program Improvement Act of 1976 (Pub. L. 94–461, 33 U.S.C. 1128). The duties of the Board were amended by the National Sea Grant College Program Amendments Act of 2008 (Pub. L. 110–394). The Board advises the Secretary of Commerce and the Director of the National Sea Grant College Program with respect to operations under the Act, and such other matters as the Secretary refers to them for review and advice.

The agenda for the meeting can be found at *http://www.seagrant.noaa.gov/leadership/advisory_board.html.*

Dated: January 8, 2009.

Mark E. Brown,

Chief Financial Officer/Chief Administrator Officer, Office of Oceanic and Atmospheric Research.

[FR Doc. E9–617 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–KA–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration National Sea Grant Advisory Board

Notice

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of solicitation for nominations for potential Sea Grant Advisory Board members and notice of public meeting.

SUMMARY: This notice responds to Section 209 of the Sea Grant Program Improvement Act of 1976 (Pub. L. 94–461, 33 U.S.C. 1128), which requires the Secretary of Commerce to solicit

nominations at least once a year for membership on the Sea Grant Advisory Board, and advisory committee provides advice on the implementation of the National Sea Grant College Program. This notice also sets forth the schedule and proposed agenda of a forthcoming meeting of the Sea Grant Advisory Board.

DATES: Solicitation of nominations is open ended: resumes may be sent to the address specified at any time. The announced meeting is scheduled for Wednesday, February 11 and Thursday, February 12, 2009.

ADDRESSES: Nominations should be sent to Dr. Jim D. Murray; Designated Federal Official, Sea Grant Advisory Board; Deputy Director, National Sea Grant College Program; 1315 East-West Highway, Room 11841; Silver Spring, Maryland 20910. The February meeting will be held at the office of the Consortium for Oceanographic Research and Education (CORE), 1201 New York Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Melissa Pearson, National Sea Grant College Program, National Oceanic and Atmospheric Administration, 1315 East-West Highway, Room 11717, Silver Spring, Maryland 20910, 301–713–1083.

SUPPLEMENTARY INFORMATION: Established by Section 209 of the Act and as amended the National Sea Grant College Program Amendments Act of 2008 (Pub. L. 110–394), the duties of the Board are as follows:

(1) In general.—The Board shall advise the Secretary and the Director concerning—

(A) Strategies for utilizing the sea grant college program to address the Nation's highest priorities regarding the understanding, assessment, development, management, utilization, and conservation of ocean, coastal, and Great Lakes resources;

(B) The designation of sea grant colleges and sea grant institutes; and

(C) Such other matters as the Secretary refers to the Board for review and advice.

(2) Biennial Report—The Board shall report to the Congress every two years on the state of the National Sea Grant College Program. The Board shall indicate in each such report the progress made toward meeting the priorities identified in the strategic plan in effect under section 204(c). The Secretary shall make available to the Board such information, personnel, and administrative services and assistance as it may reasonably require to carry out its duties under this title. The Secretary shall make available to the Board such information, personnel, and administrative services and assistance as it may reasonably require to carry out its duties.

The Board shall consist of 15 voting members who shall be appointed by the Secretary. The Director and a director of a sea grant program who is elected by the various directors of sea grant programs shall serve as nonvoting members of the Board. Not less than 8 of the voting members of the Board shall be individuals who, by reason of knowledge, experience, or training, are especially qualified in one or more of the disciplines and fields included in marine science. The other voting members shall be individuals who, by reason of knowledge, experience, or training, are especially qualified in, or representative of, education, marine affairs and resource management, coastal management, extension services, State government, industry, economics, planning, or any other activity which is appropriate to, and important for, any effort to enhance the understanding, assessment, development, management, utilization, or conservation of ocean, coastal, and Great Lakes resources. No individual is eligible to be a voting member of the Board if the individual is (A) the director of a sea grant college or sea grant institute; (B) an applicant for, or beneficiary (as determined by the Secretary) of, any grant or contract under section 205 [33 U.S.C. 1124]; or (C) a full-time officer or employee of the United States.

The Director of the National Sea Grant College Program and one Director of a Sea Grant Program also serve as non-voting members. Board members are appointed for a 4-year term.

The agenda for the meeting can be found at *http://www.seagrant.noaa.gov/leadership/advisory_board.html.*

Dated: January 8, 2009.

Mark E. Brown,

Chief Financial Officer/Chief Administrator Officer, Office of Oceanic and Atmospheric Research.

[FR Doc. E9–626 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–KA–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket No. 090109011–9012–01]

Privacy Act of 1974; System of Records

AGENCY: National Telecommunications and Information Administration (NTIA), Department of Commerce.

ACTION: Notice.

SUMMARY: The National Telecommunications and Information Administration (NTIA) publishes this notice to announce the effective date of an amendment to a Privacy Act System of Records entitled COMMERCE/NTIA–1, Applications Related to Coupons for Digital-to-Analog Converter Boxes. NTIA is amending this system of records for applications related to coupons for the Digital-to-Analog Converter Box program to allow for the collection of additional personally identifiable information, namely the collection of the name of the nursing home facility. 47 C.F.R. § 301; *see also* 73 Fed. Reg. 54,325 (Sept. 19, 2008).

DATES: The amendment to the system of records will be effective on January 14, 2009.

ADDRESSES: For a copy of the original and amended system of records notices please mail requests to Stacy Cheney, Attorney-Advisor, Office of the Chief Counsel, National Telecommunications and Information Administration, Room 4713, 1401 Constitution Avenue, N.W., Washington, DC 20231. A copy of these notices are also available on NTIA's website at: http://www.ntia.doc.gov/ntiahome/frnotices/2007/System Records__112007.pdf and http://www.ntia.doc.gov/frnotices/2008/FR__DTV records__081202.pdf.

FOR FURTHER INFORMATION CONTACT: Stacy Cheney, Attorney-Advisor, Office of the Chief Counsel, National Telecommunications and Information Administration, Room 4713, 1401 Constitution Avenue, N.W., Washington, DC 20231.

SUPPLEMENTARY INFORMATION: On December 2, 2008, NTIA published in the **Federal Register** a notice requesting comments on a proposed amendment to the Privacy Act System of Records entitled COMMERCE/NTIA–1, Applications Related to Coupons for Digital-to-Analog Converter Boxes. *See*, 73 Fed. Reg. 73,244 (Dec. 2, 2008). NTIA is amending this system of records for applications related to coupons for the Digital-to-Analog Converter Box program to allow for the collection of additional personally identifiable information, namely the collection of the name of the nursing home facility. 47 C.F.R. § 301; see also 73 Fed. Reg. 54,325 (Sept. 19, 2008). No comments were received in response to the request for comments. By this notice, NTIA is adopting the proposed amendments to the system of records as final without changes effective on January 14, 2009.

Dated: January 9, 2009.

Brenda Dolan,

Freedom of Information/Privacy Act Officer, U.S. Department of Commerce.

[FR Doc. E9–663 Filed 1–13–09; 8:45 am]

BILLING CODE 3510–60–S

DEPARTMENT OF DEFENSE

Department of the Army; Army Corps of Engineers

Intent To Prepare a Joint Environmental Impact Statement/Environmental Impact Report for the River Mile 208, Sacramento River Bank Protection Project, CA

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers, Sacramento District, intends to prepare a joint environmental impact statement/environmental impact report (EIS/EIR) for the construction of bank protection at River Mile 208 on the Sacramento River to prevent continued bank erosion and potential outflanking of the Glenn-Colusa Irrigation District Hamilton City Pumping Plant (HCPP), near Hamilton City, CA. The proposed action is being conducted under the HCPP Fish Screen Improvement Project.

DATES: A public scoping meeting is being held on Thursday, January 29, 2009, 7 to 9 pm at the Hamilton City High School (620 Canal Street, Hamilton City). Send written comments by February 16, 2009 to (see **ADDRESSES**).

ADDRESSES: Written comments and suggestions concerning this project may be submitted to Mr. Matt Davis, U.S. Army Corps of Engineers, Sacramento District, Attn: CESPK–PD–R, 1325 J Street, Sacramento, CA 95814–2922. Requests to be placed on the mailing list should also be sent to this address.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and EIS/EIR should be addressed to the Corps: Matt Davis at (916) 557–6708, by e-mail *Matthew.G.Davis@usace.army.mil*, by fax (916) 557–7856; or to GCID: William Menke at (530) 934–8881, by e-mail *bmenke@gcid.net.*

SUPPLEMENTARY INFORMATION: The U.S. Army Corps of Engineers, Sacramento District (Corps) is the federal lead agency for compliance with the National Environmental Policy Act (NEPA) for the Proposed Action. The Glenn-Colusa Irrigation District (GCID) is the state lead agency for compliance with the California Environmental Quality Act (CEQA) for the Proposed Action.

1. *Proposed Action*. The Corps and GCID are preparing an EIS/EIR to analyze the impacts of constructing bank protection on the east bank of the Sacramento River at River Mile 208. The purpose of the proposed bank protection work is to prevent continued bank erosion and potential outflanking of GCID's Hamilton City Pumping Plant (HCPP). Maintaining the river's alignment upstream of the HCPP is important for the continued functioning of the pumping plant. The HCPP Fish Screen Improvement Project was constructed in 2000 to minimize losses of all fish from operation of the HCPP and to restore GCID's capability to divert the full quantity of water it is entitled to divert to meet its water supply delivery obligations. GCID supplies water to 140,000 acres of farmland, over 20,000 acres of federal wildlife refuge, and 40,000 acres of other lands and wetlands from diversions at the HCPP.

2. *Alternatives*. The EIS/EIR will address the No Action alternative and four action alternatives including three different types of bank protection alternatives and a levee setback alternative. The three types of bank protection alternatives differ from one another in the amount and extent of rock protection placed and the environmental features (*e.g.*, vegetation and instream woody material) incorporated in the design.

3. *Scoping Process*.

a. A public scoping meeting will be held on Thursday, January 29, 2009 to present information to the public and to receive comments from the public. The meeting is intended to initiate the process to involve concerned individuals, and local, State, and Federal agencies.

b. Significant issues to be analyzed in depth in the EIS/EIR include effects on hydraulics, wetlands and other waters of the U.S., river meander, vegetation and wildlife resources, special-status species, aesthetics, cultural resources, recreation, land use, fisheries, water quality, air quality, noise, transportation, visual resources, and socioeconomics; and cumulative effects of related projects in the study area.

c. The Corps will consult with the State Historic Preservation Officer to comply with the National Historic Preservation Act and the U.S. Fish and Wildlife Service and National Marine Fisheries Service to comply with the Endangered Species Act. The Corps is also coordinating with the U.S. Fish and Wildlife Service to comply with the Fish and Wildlife Coordination Act.

d. A 45-day public review period will be provided for individuals and agencies to review and comment on the draft EIS/EIR. All interested parties are encouraged to respond to this notice and provide a current address if they wish to be notified of the draft EIS/EIR circulation.

4. *Availability*. The draft EIS/EIR is scheduled to be available for public review and comment in November 2009.

Dated: December 23, 2008.

Thomas C. Chapman,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. E9–584 Filed 1–13–09; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The following inventions are assigned to the U.S. Government as represented by the Secretary of the Navy and are available for licensing by the Department of the Navy.

U.S. Patent Application Serial Number 11/417,291 entitled ''Method of Making Functionalized Carbon Nanotubes''; U.S. Patent Application Serial Number 11/417,294 entitled ''Functionalization of Carbon Nanotubes''; U.S. Patent Application Serial Number 11/894,628 entitled ''MEMS Fuse Using a Micro-Detonator''; U.S. Patent Application Serial Number 11/894,629 entitled ''MEMS Electronic Initiator for a Micro-Detonator''; U.S. Patent Application Serial Number 11/894,630 entitled ''MEMS Mechanical Initiator for a Micro-Detonator''; U.S. Patent Application Serial Number 10/637,090 entitled ''Perfluoroalkyl Passivated Aluminum''; U.S. Patent Application Serial Number 12/284,475 entitled ''Self-Regulating Power Supply for Micro Electronic Mechanical Systems Thermal Actuators''; U.S. Patent Application Serial Number 12/221,148 entitled ''A Novel Lightning Locating System''; U.S. Patent Application Serial Number 11/973,993 entitled ''Flow Driven Piezoelectric Energy Havesting Device''; U.S. Patent Application Serial Number 11/650,759 entitled ''Programmable Microtransformer''; U.S. Patent Application Serial Number 11/076,456 entitled ''Method for Deposition of Steel Protective Coating''; U.S. Patent Application Serial Number 11/387,081

entitled ''Automatically Interlocking Pallets, and Shipping and Storage Systems Employing the Same.'' U.S. Patent Application Serial Number 11/387,082 entitled ''Interlocking Pallets, and Shipping and Storage Systems Employing the Same.'' U.S. Patent Application Serial Number 11/387,084 entitled ''Shipping and Storage System''; U.S. Patent Application Serial Number 12/669,001 entitled ''Hermetically Packaged MEMS G-Switch'';

ADDRESSES: Requests for copies of the Patent Applications cited should be directed to Dr. J. Scott Deiter, Head, Technology Transfer Office, Code CAB, Naval Surface Warfare Center, 3824 Strauss Avenue, Suite 107, 1st Floor, Indian Head, MD 20640–5152.

DATES: Requests should be made prior to January 30, 2009.

FOR FURTHER INFORMATION CONTACT: Dr. J. Scott Deiter, Head, Technology Transfer Office, Code CAB, Naval Surface Warfare Center, 3824 Strauss Avenue, Suite 107, 1st Floor, Indian Head, MD 20640–5152, telephone: 301–744–6111.

Dated: January 7, 2009.

A.M. Vallandingham,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E9–581 Filed 1–13–09; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

State Energy Advisory Board

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

ACTION: Notice of open teleconference.

SUMMARY: This notice announces a teleconference of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act (Pub. L. 92–463; 86 Stat. 770) requires that public notice of these teleconferences be announced in the **Federal Register**.

DATES: January 21, 2009 at 1–2 p.m. EDT.

FOR FURTHER INFORMATION CONTACT: Gary Burch, STEAB Designated Federal Officer, Division Director, Office of Commercialization & Project Management, Golden Field Office, U.S. Department of Energy, 1617 Cole Boulevard, Golden, CO 80401, Telephone 303/275–4801.

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* To make recommendations to the Assistant Secretary for the Office of Energy Efficiency and Renewable Energy regarding goals and objectives of programs carried out in this sector, to make programmatic recommendations as appropriate, to encourage transfer of results of the energy efficiency and renewable energy activities carried out by DOE to non-DOE users, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. 101–440).

Tentative Agenda: Update members on routine business matters.

Public Participation: The teleconference is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Gary Burch at the address or telephone number listed above. Requests to make oral comments must be received five days prior to the conference call; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the call in a fashion that will facilitate the orderly conduct of business. This notice is being published less than 15 days before the date of the meeting due to programmatic issues that had to be resolved prior to publication.

Notes: The notes of the teleconference will be available for public review and copying within 60 days on the STEAB Web site, *http://www.steab.org.*

Issued at Washington, DC, on January 9, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–616 Filed 1–13–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13281–000]

Alaska Power & Telephone Company; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

January 7, 2009.

On August 19, 2008, and supplemented on November 12, 2008, Alaska Power & Telephone Company filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Lake Shelokum Hydroelectric Project (Lake Shelokum). Lake Shelokum would be located on Lake Shelokum in the Prince of Wales—Outer Ketchikan Census Area, First Judicial District, Unincorporated Borough, Alaska. The proposed project would be located within the Tongass National Forest, whose lands are administered by the U.S. Forest Service.

The proposed Lake Shelokum project would consist of: (1) A proposed 100-foot-long, 15-foot-high concrete-faced, rock filled dam; (2) an existing reservoir having a proposed surface area of 400 acres and a storage capacity of 10,000 acre-feet and normal water surface elevation of 370 feet above mean low sea level (msl); (3) a proposed 2,500-foot-long, 7-foot diameter steel penstock; (4) a proposed powerhouse containing two generating units having an installed capacity of 10-megawatts; (5) a proposed 12-mile-long, 34.5-kilovault transmission line; and (6) appurtenant facilities. The proposed Lake Shelokum Project would have an average annual generation of 40-gigawatt-hours.

FERC Contact: Patricia W. Gillis, 202–502–8735.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13281) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–544 Filed 1–13–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[P–5596–015]

City of Bedford, VA; Notice of Application for Non-Capacity Related Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

January 7, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Request to amend the Bedford Hydropower Project license to allow a variance from the minimum flow requirement during low-inflow/drought conditions and upon consultation with the Virginia Department of Game and Inland Fisheries and the Virginia Department of Environmental Quality.

b. *FERC Project No.:* 5596–015.

c. *Date Filed:* December 15, 2008.

d. *Applicant:* City of Bedford, Virginia.

e. *Name of Project:* Bedford Hydroelectric Project (P–5596).

f. *Location:* The Bedford Hydroelectric Project is located on the James River in the counties of Bedford and Amherst, Virginia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–09825r.

h. *Applicant Contact:* Mr. Charles Kolakowski, City of Bedford, 215 East Main Street, Bedford, Virginia 25423, Tel: (540) 587–6002.

i. *FERC Contact:* Ms. Rachel Price, (202) 502–8907; e-mail: *rachel.price@ferc.gov.*

j. *Deadline for filing comments, motions to intervene and protests:* February 9, 2009.

Please include the project number with the extension 015 (P–5596–015) on any comments or motions filed. All documents should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet, 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 electronic filings. In lieu of electronic filing, an original and eight copies of all documents may be mailed to the Secretary at the address above.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* The City of Bedford is requesting a non-capacity amendment to its license for the Bedford Hydroelectric Project in order to allow a variance from the existing minimum instream flow of 400 cubic feet per second (cfs) in the bypass reach during low flow conditions in the James River. The amendment would allow the following project operations depending on flow conditions in the James River as measured at the U.S. Geological Survey gaging station no. 02025500: (1) At flows of 1000 cfs or greater, a minimum instream flow of 400 cfs would be released in the bypass reach; (2) at flows between 800 and 1000 cfs, 600 cfs would go through the turbines for power generation and the remainder (between 200 and 400 cfs) would be released in the bypass reach; and (3) at flows less than 800 cfs, generation would cease and all flows would be released in the bypass reach. In addition, the amendment would require the City of Bedford to notify the Virginia Department of Game and Inland Fisheries (VDGIF) and the Virginia Department of Environmental Quality (VDEQ) if flows in the James River are less than 1000 cfs for five consecutive days, and consult with the VDEQ regarding the continuation of the variance.

l. *Location of the Application:* The filing is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426 or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docsfiling/esubscription.asp* to be notified vial e-mail or new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *ferconlinesupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filing must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. 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 at *http://www.ferc.gov* under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–539 Filed 1–13–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13126–001]

MARMC Enterprises, LLC; Notice of Application for Amendment of Preliminary Permit Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

January 7, 2009.

On October 20, 2008, MARMC Enterprises, LLC filed an amendment to

their preliminary permit application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of Algiers Cutoff Project. The proposed project would be located on the Mississippi River in Orleans Parish, Louisiana. The project uses no dam or impoundment.

The proposed description of the amendment: After performing cursory hydrology and bathymetric studies, the permittee determined that the proposed area might not be the optimal site for deployment of the project. The permittee is requesting to extend the upstream boundary to mile marker to 92.5.

FERC Contact: Patricia W. Gillis, 202–502–8735.

Deadline for filing comments or motions to intervene: 30 days from the issuance of this notice. Comments and motions to intervene may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13126–001) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–543 Filed 1–13–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–40–000 PF08–16–000]

Southeast Supply Header, LLC & Southern Natural Gas Company; Notice of Application

January 7, 2009.

Take notice that on December 19, 2008, Southeast Supply Header, LLC (SESH), 5400 Westheimer Court, Houston, Texas 77056 and Southern Natural Gas Company (Southern), P.O. Box 2563, Birmingham, Alabama 35202–2563 filed in the above referenced docket a joint application pursuant to section 7(c) of the NGA and Part 157 of the Commission's regulations, for a certificate of public convenience and necessity to expand by compression a portion of their jointly owned pipeline facilities approved in Docket Nos. CP07–44–000 and CP07–45–000 (JPE Phase II Project), all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Specifically, SESH/Southern propose to install one additional 15,000 horsepower (HP) compressor and appurtenances at both the Delhi Compressor Station in Richland Parish, Louisiana and the Gwinville Compressor Station in Jefferson Davis County, Mississippi. The applicants state that the JPE Phase II Project will provide an additional 360,000 Dth/d of capacity for Southern on their jointly owned pipeline facilities. The applicants estimate that the expansion will cost Phase II Project is $67,687,059 and propose an in-service date of June 1, 2011.

Any questions concerning this application may be directed to Brian O'Neill, Dewey & LeBoeuf LLP, 1101 New York Avenue, NW., Washington, DC 20005–4213 at (202) 346–8000.

On April 4, 2008, the Commission staff granted SESH's request to utilize the Pre-Filing Process and assigned Docket No. PF08–16–000 to staff activities involved the JPE Phase II Project. Now as of the filing the December 19, 2008 application, the Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP09–40–000, as noted in the caption of this Notice.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC. 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 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: January 28, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–541 Filed 1–13–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–36–000 PF08–13–000]

Southern Natural Gas Company; Notice of Application

January 7, 2009.

Take notice that on December 15, 2008, Southern Natural Gas Company (Southern), P.O. Box 2563, Birmingham, Alabama 35202–2563, filed in the above referenced docket an application pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations for a certificate of public convenience and necessity authorizing the construction, installation, and operation of certain pipeline, compression, measurement, interconnection, and appurtenant facilities in the states of Alabama, Mississippi, and Georgia, and the abandonment and replacement of certain other sections of its pipeline system in the state of Georgia (SSEIII Project), all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Specifically, Southern proposes to: (a) Construct 65.35 miles of pipeline loop, (b) replace 22.6 miles of pipeline with larger diameter pipeline; and (c) install 17,310 horsepower of compression at existing compressor stations in order to provide an additional 375,000 Dth/day of firm transportation for Southern Company Services to provide fuel for Georgia Power Company's Plant McDonough electric generation facility in Cobb County, Georgia. Southern estimates that the proposed facilities will cost approximately $352 million and proposes to recover the costs through a new levelized incremental rate under its FERC Gas Tariff Rate Schedule FT. Southern proposes to construct the SSEIII Project in three phases. Phase I will consist of one new meter station, looping of one pipeline segment, and abandonment and replacement of one pipeline segment, with the meter station to be completed and in service on May 1, 2010, and the pipeline segments to be completed and in service on January 1, 2011. Phase II will consist of modifications at one of Southern's existing compressor stations and looping of two pipeline segments, all to be completed and in service on June 1, 2011. Finally, Phase III will consist of modifications at one of Southern's existing compressor stations, looping of two pipeline segments, and abandonment and replacement of one pipeline segment, all to be completed and in service on June 1, 2012.

Any questions concerning this application may be directed to John C. Griffin, Senior Counsel, Southern Natural Gas Company, P.O. Box 2563, Birmingham, Alabama 35202–2563 at (205) 325–7133.

On March 14, 2008, the Commission staff granted Southern's request to utilize the Pre-Filing Process and assigned Docket No. PF08–13–000 to staff activities involved in the SSEIII Project. Now as of the filing of the December 15, 2008 application, the Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP09–36–000, as noted in the caption of this Notice.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 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: January 28, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–540 Filed 1–13–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL08–80–002]

Corporation Commission of the State of Oklahoma v. American Electric Power Company, Inc., American Electric Power Service Corporation, and Public Service Company of Oklahoma; Notice of Filing

January 7, 2009.

Take notice that on December 29, 2008, American Electric Power Service Corporation submitted an amendment to the West Agreement in compliance with the Commission's November 26, 2008 Order on Complaint, 125 FERC ¶ 61,237 (2008).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 20, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–542 Filed 1–13–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP01–415–019]

East Tennessee Natural Gas, LLC; Notice of Motion To Vacate Certificate in Part

January 7, 2009.

Take notice that on December 23, 2008, East Tennessee Natural Gas, LLC (East Tennessee), 5400 Westheimer Court, Houston, Texas 77056–5310, filed in Docket No. CP01–415–019, a motion to vacate a portion of the certificate authority granted on November 20, 2002, (November 20 Order) [1] allowing East Tennessee (a) to construct and operate 93.6 miles of new mainline pipeline, 82.3 miles of pipeline looping, a new 7-mile lateral pipeline, and five new compressor stations; (b) modify nine existing compressor stations; and (c) to uprate 76.7 miles of pipeline (Patriot Project). East Tennessee states that because Henry County Power, LLC and Duke Energy Wythe, LLC, do not plan to proceed with the construction of natural gas fired electric generation facilities, East Tennessee no longer plans to construct and operate associated facilities authorized by the Commission in the November 20 Order. East Tennessee has reduced the scope of the Patriot Project facilities authorized by the Commission and has completed the construction of only those facilities required to serve shippers that require firm transportation service.

Specifically, East Tennessee requests that the Commission vacate the authority previously granted in the November 20 Order to construct:

(1) 7.04 miles of 16-inch lateral pipeline in Rockingham County, North Carolina, and Pittsylvania and Henry Counties, Virginia;

(2) 8.96 miles of 24-inch pipeline loop (Loop C) in Knox County, Tennessee;

(3) 8.74 miles of 20-inch pipeline loop (TVA Loop 3) in Moore and Franklin Counties, Tennessee;

(4) 4.12 miles of 20-inch pipeline loop (Loop 2) in Franklin and Grundy Counties, Tennessee;

(5) 6.08 miles of 20-inch pipeline loop (Loop 3A) in Sequatchie and Hamilton Counties, Tennessee;

(6) 6.06 miles of uprated pipeline (part of Uprate C) in Roane County, Tennessee;

(7) 5.44 miles of uprated pipeline (TVA Uprate) in Franklin County, Tennessee;

(8) 14.87 miles of uprated pipeline (Uprate D) in Hamilton County, Tennessee;

(9) 7.0 miles of uprated pipeline (Uprate 2) in Grundy County, Tennessee;

(10) 18.65 miles of uprated pipeline (Uprate L) in Greene and Washington Counties, Tennessee;

(11) New compressor station 3212 in Hamilton County, Tennessee;

(12) New compressor station 3303 in Jefferson County, Tennessee;

(13) Additional compression at compressor stations 3110, 3206, 3308, and 3309 in Morgan, Marshal, and Sullivan Counties, Tennessee;

(14) Replacement of the aerodynamic assembly at compressor stations 3206, 3209, and 3309 in Marshal, Franklin, and Sullivan Counties, Tennessee;

(15) DENA Wythe meter station in Wythe County, Virginia;

(16) Henry County meter station in Henry County, Virginia.

The motion is on file with the Commission and open for public inspection. This motion 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, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any questions concerning this motion to vacate may be directed to Christine M. Pallenik, Associate General Counsel, East Tennessee Natural Gas, LLC, P.O. Box 1642, Houston, Texas 77251–1642, or via telephone at (713) 627–5241.

There are two ways to become involved in the Commission's review of East Tennessee's request. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory

[1] *East Tennessee Natural Gas, LLC*, 101 FERC ¶ 61,188 (2002) (''November 20 Order''), *order on reh'g*, 102 FERC ¶ 61,225 (2003).

Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to East Tennessee's project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only in support of or in opposition to East Tennessee's request should submit an original and two copies of their comments to the Secretary of the Commission. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the applicant. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

Comment Date: January 28, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–545 Filed 1–13–09; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2008–0288; FRL–8762–1]

Agency Information Collection Activities; Submission for OMB Review and Approval; Comment Request; NESHAP for Miscellaneous Metal Parts and Products (Renewal), ICR Number 2056.03, OMB Number 2060–0486

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. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before February 13, 2009.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2008–0288, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2201T, 1200 Pennsylvania Avenue, 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: Leonard Lazarus, Compliance Assessment and Media Programs Division (CAMPD), Office of Compliance, Mail Code: 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–6369; fax number: (202) 564–0050; e-mail address: *lazarus.leonard@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 May 30, 2008, (73 FR 31088), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on 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 number EPA–HQ–OECA–2008–0288, which is available for public viewing online at *http://www.regulations.gov*, in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

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 docket, and to access those documents in the 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 at *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. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: NESHAP for Miscellaneous Metal Parts and Products (Renewal).

ICR Numbers: EPA ICR Number 2056.03, OMB Control Number 2060–0486.

ICR Status: This ICR is scheduled to expire on January 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This National Emission Standards for Hazardous Air Pollutants (NESHAP) requires initial notification,

performance tests, and periodic reports. Owners or operators also are required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance and are required, in general, of all sources subject to NESHAP.

Any owner or operator subject to the provisions of this part shall maintain a file of these documents, and retain the file for at least five years following the date of such notifications, reports, and records. All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 63, subpart MMMM as authorized in Sections 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined not to be private.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, and are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 233 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; to 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; to adjust the existing ways to comply with any previously applicable instructions and requirements; to train personnel to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information.

Respondents/Affected Entities: Miscellaneous metal parts and products surface coating facilities.

Estimated Number of Respondents: 4,991.

Frequency of Response: Initial, Semiannually, On Occasion.

Estimated Total Annual Hour Burden: 2,328,603 hours.

Estimated Total Annual Costs: $212,456,370, which includes: $211,456,370 in Labor costs, $1,000,000 in annual O&M costs, and no annualized capital/startup costs.

Changes in the Estimates: There is an increase in burden of 1,653,553 hours from the most recently approved ICR, due to an adjustment. This increase is not due to any program changes. The increase is due to two factors: (1) There is a more accurate count of number of facilities affected; and (2) there is a change in the burden and cost estimates because the standard has been in effect for more than three years, and the requirements are different during initial compliance (new facilities) as compared to on-going compliance (existing facilities). The previous ICR reflected those burdens and costs associated with the initial activities for subject facilities. This includes purchasing monitoring equipment, conducting performance tests, and establishing recordkeeping systems. This ICR reflects the on-going burden and costs for existing facilities. Activities for existing sources include continuous monitoring of pollutants and the submission of semiannual reports.

Capital/Startup and Operation and Maintenance (O&M) costs have also been revised to reflect add-on controls installed by the small portion of industry that does not reformulate its coating materials in order to comply with the rule.

Dated: January 8, 2009.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E9–689 Filed 1–13–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP–2008–0894; FRL–8395–5]

Pesticide Emergency Exemptions; Agency Decisions and State and Federal Agency Crisis Declarations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted emergency exemptions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for use of pesticides as listed in this notice. The exemptions were granted during the period July 1, 2008 through September 30, 2008 to control unforeseen pest outbreaks.

FOR FURTHER INFORMATION CONTACT: See each emergency exemption for the name of a contact person. The following information applies to all contact persons: Team Leader, Emergency Response Team, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9366.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the emergency exemption of interest.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0894. Publicly available docket materials are available either electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. Background

EPA has granted emergency exemptions to the following State and Federal agencies. The emergency exemptions may take the following form: Crisis, public health, quarantine, or specific.

Under FIFRA section 18, EPA can authorize the use of a pesticide when emergency conditions exist. Authorizations (commonly called emergency exemptions) are granted to State and Federal agencies and are of four types:

1. A ''specific exemption'' authorizes use of a pesticide against specific pests on a limited acreage in a particular State. Most emergency exemptions are specific exemptions.

2. ''Quarantine'' and ''public health'' exemptions are a particular form of specific exemption issued for quarantine or public health purposes. These are rarely requested.

3. A ''crisis exemption'' is initiated by a State or Federal agency (and is confirmed by EPA) when there is insufficient time to request and obtain EPA permission for use of a pesticide in an emergency.

EPA may deny an emergency exemption: If the State or Federal agency cannot demonstrate that an emergency exists, if the use poses unacceptable risks to the environment, or if EPA cannot reach a conclusion that the proposed pesticide use is likely to result in ''a reasonable certainty of no harm'' to human health, including exposure of residues of the pesticide to infants and children.

If the emergency use of the pesticide on a food or feed commodity would result in pesticide chemical residues, EPA establishes a time-limited tolerance meeting the ''reasonable certainty of no harm standard'' of the Federal Food, Drug, and Cosmetic Act (FFDCA).

In this document, EPA identifies the State or Federal agency granted the exemption, the type of exemption, the pesticide authorized and the pests, the crop or use for which authorized, number of acres (if applicable), and the duration of the exemption. EPA also gives the **Federal Register** citation for the time-limited tolerance, if any.

III. Emergency Exemptions

A. U. S. States and Territories

California

Environmental Protection Agency, Department of Pesticide Regulation

Public Health: On August 15, 2008, for the use of d-phenothrin over agricultural fields to control mosquitoes that vector West Nile virus, St Louis Encephalitis, and Western Equine Encephalitis. Contact: Princess Campbell.

Delaware

Department of Agriculture

Specific exemption: EPA authorized the use of spiromesifen on soybeans to control spider mites; August 13, 2008 to September 15, 2008. Contact: Andrea Conrath.

Florida

Department of Agriculture and Consumer Services

Quarantine exemption: On September 25, 2008, for the use of naled to eradicate tephritid fruit flies, responsive to the attractant, methyl eugenol. Contact: Princess Campbell.

Idaho

Department of Agriculture

Specific exemption: EPA authorized the use of endothall in agricultural irrigation canals in Twin Falls County to control various aquatic weeds; September 30, 2008 to October 31, 2008. Contact: Andrea Conrath.

Illinois

Department of Agriculture

Specific exemption: EPA authorized the use of chlorantraniliprole on sweet corn to control corn earworm; July 1, 2008 to October 10, 2008. Contact: Marcel Howard.

Indiana

Office of Indiana State Chemist

Specific exemption: EPA authorized the use of chlorantraniliprole on sweet corn to control corn earworm; August 5, 2008 to October 15, 2008. Contact: Marcel Howard.

Minnesota

Department of Agriculture

Specific exemption: EPA authorized the use of chlorantraniliprole on sweet corn to control corn earworm; July 1, 2008 to September 30, 2008. Contact: Marcel Howard.

Crisis: On August 15, 2008, for the use of lamda-cyhalothrin on wild rice to control rice worm. This program ended on August 29, 2008. Contact: Andrew Ertman.

North Dakota

Department of Agriculture

Crisis: On July 24, 2008, for the use of tebuconazole on sunflowers to control rust (Puccinia helianthi). This program ended on August 8, 2008. Contact: Libby Pemberton.

Ohio

Department of Agriculture

Specific exemption: EPA authorized the use of chlorantraniliprole on sweet corn to control corn earworm; July 22, 2008 to September 30, 2008. Contact: Marcel Howard.

Oregon

Department of Agriculture

Crisis: On June 30, 2008, for the use of diflubenzuron on alfalfa grown for seed to control grasshoppers and mormon crickets. This program ended on July 15, 2008. Contact: Libby Pemberton.

Pennsylvania

Department of Agriculture

Specific exemption: EPA authorized the use of chlorantraniliprole on sweet corn to control corn earworm; August 8, 2008 to October 30, 2008. Contact: Marcel Howard.

Wisconsin

Department of Agriculture, Trade, and Consumer Protection

Specific exemption: EPA authorized the use of chlorantraniliprole on sweet corn to control corn earworm; July 22, 2008 to September 30, 2008. Contact: Marcel Howard.

Crisis: On August 30, 2008, for the use of chlorpyrifos on ginseng to control soil larvae. This program ended on November 15, 2008. Contact: Stacey Groce.

B. Federal Departments and Agencies

Agriculture Department

Animal and Plant Health Inspector Service

Specific exemption: EPA authorized the use of diflubenzuron on alfalfa grown for hay to control Mormon Crickets (*Anabrus simplex*) and Grasshoppers (various spp.) (Family *Acrididae*); July 2, 2008 to October 1, 2008. This request was granted on the basis that diflubenzuron is preferable to registered alternatives in potential impacts on pollinators of the Spalding's catchfly, a threatened plant species endemic to the proposed treatment area in Montana. Contact: Libby Pemberton.

Defense Department

Quarantine exemption: On September 30, 2008, for the use of paraformaldehyde to decontaminate biological containment areas to prevent the release of infectious microorganisms. Contact: Princess Campbell.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: January 2, 2009.

P.V. Shah,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E9–502 Filed 1–13–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0880; FRL–8394–1]

Pesticide Experimental Use Permit; Receipt of Application; Comment Request

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's receipt of an application, 85004-EUP-R, from MacIntosh and Associates, Incorporated (on behalf of Pasteuria Bioscience, Incorporated) requesting an experimental use permit (EUP) for the microbial nematicide, *Pasteuria usgae*. The Agency has determined that the permit may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments must be received on or before February 13, 2009.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0880, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington,VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2008–0880. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line 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 regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the 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 docket are listed in the docket index available 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Jeannine Kausch, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347-8920; e-mail address: kausch.jeannine@*epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to food and pesticide manufacturers, growers, or those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws,

regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

II. What Action is the Agency Taking?

Under Section 5 of the FIFRA, 7 U.S.C. 136c, EPA can allow manufacturers to field test pesticides under development. Manufacturers are required to obtain an EUP before testing new pesticides or new uses of pesticides if they conduct experimental field tests on 10 acres or more of land or one acre or more of water.

Pursuant to 40 CFR 172.11(a), the Agency has determined that the following EUP application may be of regional and national significance, and therefore is seeking public comment on the EUP application:

Submitter: MacIntosh and Associates, Incorporated on behalf of Pasteuria Bioscience, Incorporated; (85004-EUP-R).

Pesticide chemical: *Pasteuria usgae*.

Summary of request: MacIntosh and Associates, Incorporated, 1203 Hartford Avenue, Saint Paul, MN 55116-1622, on behalf of Pasteuria Bioscience, Incorporated, 12085 Research Drive, Suite 185, Alachua, FL 32615, is requesting an EUP to apply *Pasteuria usgae* on strawberries and turf grasses on 385 acres in certain Florida, Alabama, Georgia, Mississippi, and North Carolina counties. The total quantity of product proposed for use with this EUP is 59,675 pounds of formulated product or 3,273 pounds of active ingredient. This microbial nematicide, *Pasteuria usgae*, currently has pending FIFRA section 3 registrations for a manufacturing-use product and an end-use product. The proposed shipment/use dates for the EUP are September 1, 2009 through August 31, 2010 and the trial protocols include efficacy of *Pasteuria usgae* to control sting nematode (*Belonolaimus longicaudatus*) and agronomic observation. The registrant has concurrently requested a temporary exemption from the requirement of a tolerance for the proposed EUP on strawberries.

A copy of the application and any information submitted is available for public review in the docket established for this EUP application as described under **ADDRESSES**.

Following the review of the application and any comments and data received in response to this solicitation, EPA will decide whether to issue or deny the EUP request, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

List of Subjects

Environmental protection, Experimental use permits.

Dated: December 29, 2008.

W. Michael McDavit,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E9–205 Filed 1–13–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0525; FRL–8399–2]

Carbaryl; Notice of Receipt of Requests to Voluntarily Cancel or to Terminate Uses of Certain Pesticide Registrations; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

SUMMARY: EPA issued a notice in the **Federal Register** of August 20, 2008, concerning requests from registrants to voluntarily amend their registrations to terminate uses of certain carbaryl products, or eliminate certain application methods for carbaryl products. This document is being issued to correct a typographical error.

FOR FURTHER INFORMATION CONTACT: Christina Scheltema, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308-2201; e-mail address: scheltema.christina@*epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

The Agency included in the notice a list of those who may be potentially affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0525. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. What Does this Correction Do?

FR Doc. E8-19171 published in the **Federal Register** of August 20, 2008 (73 FR 49184) (FRL–8379–4) is corrected as follows:

On page 49189, under Unit VI. ''Provisions for Disposition of Existing Stocks,'' in the second paragraph, the last sentence is corrected to read as follows: ''Provided that these stocks bear labels previously approved by EPA, registrants may sell and distribute existing stocks of the affected products for 18 months from the effective date of the Agency's termination order, with the exception of Scotts Ortho Business Group and Matson LLC, who may sell and distribute existing stocks of EPA Registration Numbers 239-2514 and 8119-5, respectively, in Table 1 of Unit III for 24 months from the effective date of the Agency's termination order.

List of Subjects

Environmental protection, Pesticides and pests, Carbaryl, SEVIN®.

Dated: January 6, 2009.

Richard P. Keigwin,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E9–594 Filed 1–13–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0650; FRL–8398–6]

Petition for Rulemaking Requesting EPA Regulate Nanoscale Silver Products as Pesticides; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: EPA issued a notice in the **Federal Register** of November 19, 2008, concerning a petition for rulemaking and collateral relief filed by the International Center for Technology Assessment (ICTA) and others. In general, the petition requests that the Agency classify nanoscale silver as a pesticide, require formal pesticide registration of all products containing nanoscale silver, analyze the potential human health and environmental risks of nanoscale silver, take regulatory actions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) against existing products that contain nanoscale silver, and take other regulatory actions under FIFRA as appropriate for nanoscale silver products. This document extends the comment period for 60 days from January 20, 2009 to March 20, 2009.

DATES: Comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0650, must be received on or before March 20, 2009.

ADDRESSES: Follow the detailed instructions as provided under **ADDRESSES** in the **Federal Register** document of November 19, 2008 (73 FR 69644).

FOR FURTHER INFORMATION CONTACT: Nathanael R. Martin, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 703-305-6475; e-mail address: *martin.nathanael@epa.gov*.

SUPPLEMENTARY INFORMATION: This document extends the public comment period established in a notice that was published in the **Federal Register** of November 19, 2008 (73 FR 69644) (FRL–8386–4). In that document, the Agency made the petition submitted by ICTA et al., available for review and asked for public comment on the same. On December 12, 2008, EPA received a request from ICTA to extend the comment period on the petition. EPA is hereby extending the comment period, which was set to end on January 20, 2009, to March 20, 2009.

To submit comments, or access the public docket, please follow the detailed instructions as provided under **ADDRESSES** in the November 19, 2008 **Federal Register** document. If you have questions, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Nanotechnology, Pesticides and pests.

Dated: January 8, 2009.

Martha Monell,

Acting Director, Office of Pesticide Programs.

[FR Doc. E9–622 Filed 1–13–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8762–2]

Request for Amendment of Designation Prohibiting Discharges of Dredged or Fill Material to the Bayou aux Carpes Clean Water Act Section 404(c) Site, Louisiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Public Hearing and Request for Comments.

SUMMARY: In 1985, EPA prohibited the discharge of dredged or fill material to wetlands in the Bayou aux Carpes Swamp pursuant to Section 404(c) of the Clean Water Act (CWA). On November 4, 2008, the New Orleans District of the U.S. Army Corps of Engineers (Corps) requested that EPA modify that designation to accommodate discharges to the Bayou aux Carpes wetlands associated with post-Katrina upgrades to the West Bank and Vicinity Hurricane Protection Levee system in Jefferson Parish, Louisiana. EPA solicits written public comment on that request and will hold a public hearing for receipt of comments.

Public Hearing: The public hearing will be held in the District Assembly Room at the U.S. Army Corps of Engineers New Orleans District office, 7400 Leake Avenue, New Orleans, LA 70118. The public hearing will commence at 6 p.m. on February 11, 2009, and will end when all comments have been received. During the hearing, any member of the public may submit written comments or present comments verbally.

Public Comments: In addition to providing comments at the public hearing, written comments on the CWA Section 404(c) modification request may be submitted to EPA for 30 days following the date of this notice. Comments should be addressed to Ms. Barbara Keeler (6WQ–EC), EPA Region 6, 1445 Ross Avenue, Dallas, TX 75202–2733. All comments should directly address whether the 1985 Bayou aux Carpes CWA Section 404(c) EPA Final Determination should be modified as requested by the Corps.

FOR FURTHER INFORMATION CONTACT: For information regarding this matter, contact Ms. Barbara Keeler by phone at (214) 665–6698 or by e-mail at *keeler.barbara@epa.gov*. Copies of the modification request and supporting documentation are available online at: *http://www.nolaenvironmental.gov/nola_public_data/projects/usace_levee/docs/original/ModificationLetterToEPA4Oct08.pdf*. Additional project information may be found at: *http://www.nolaenvironmental.gov/projects/usace_levee/IER.aspx?IERID=12*.

SUPPLEMENTARY INFORMATION: The Bayou aux Carpes CWA Section 404(c) site is located approximately ten miles south of New Orleans, Louisiana, on the West Bank of Jefferson Parish. The site covers approximately 3200 acres, including about 3000 acres of wetlands subject to federal jurisdiction under the CWA. The area is bounded on the north by the east-west Old Estelle Pumping Station Outfall Canal, on the east by Bayou Barataria (Gulf Intracoastal Waterway), on the south by Bayou Barataria and Bayou des Familles, and on the west by State Highway 3134 and the ''V-Levee.'' Immediately across State Highway 3134 to the west of the site is the Barataria Unit of Jean Lafitte National Historical Park and Preserve.

Section 404(c) of the CWA authorizes EPA to restrict or prohibit the use of a wetland area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. EPA published a CWA Section 404(c) Final Determination prohibiting, with three exceptions, future discharges of dredged or fill material to wetlands in the Bayou aux Carpes site at 50 FR 47267 (November 15, 1985). Since then, the Agency has received two other requests for modification.

In connection with initial construction of the West Bank Hurricane Protection Levee, the Corps requested that EPA modify its CWA Section 404(c) designation to allow extension of the toe of the ''V-Levee''

into the protected Bayou aux Carpes area. The Corps stated that such a modification would result in significant cost savings to the government and would affect only a relatively small part of the area protected by the Section 404(c) designation. EPA summarily denied that request and in 1988 the Corps modified the levee alignment to avoid discharges to the Bayou aux Carpes CWA Section 404(c) area.

In 1992, Shell Pipeline Corporation requested that EPA amend the designation to allow the discharge of dredged and fill material to wetlands in the Bayou aux Carpes CWA Section 404(c) area in connection with emergency reconstruction of a leaking pipeline. After notifying interested parties of the request via **Federal Register** publication and coordinating with the Corps and other agencies, EPA granted the request, publishing the decision at 57 FR 3757 (January 31, 1992). EPA concluded that relocating the pipeline to non-wetlands was infeasible from the perspectives of engineering and public safety, and that the work would have only minimal and temporary effects on the wetlands at issue.

The request noticed today was submitted by the Corps and is associated with proposed improvements to the West Bank and Vicinity Hurricane Protection Levee system. By way of a letter dated November 8, 2008, the Corps requested that the designation be modified to allow construction of an earthen berm and floodwall in an area disturbed by dredged material discharges predating the 1985 404(c) designation. The construction area is located along the west bank of the Gulf Intracoastal Waterway, or Bayou Barataria, from its junction with the Old Estelle Pumping Station Outfall Canal to a point at which the Corps proposes to construct a sector gate across the Waterway. As described in the modification request, the berm and floodwall would be 14 to 16 feet high and would occupy an area no greater than 4,200 linear feet by 100 linear feet. No more than ten acres of wetlands in the Bayou aux Carpes CWA Section 404(c) site would be affected and other design and construction features have been incorporated to minimize impacts to the wetlands.

The Corps is currently gathering baseline data to evaluate potential wetland mitigation options and other project features to improve the existing hydrology of the Bayou aux Carpes site. The Corps has committed to constructing those features if the analyses indicate that they would be ecologically beneficial. Discharges of dredged or fill material associated with such construction would require no additional modification to the CWA Section 404(c) designation, which contains an exception for approved habitat enhancement projects.

Additional information on the Corps project and its relationship to the Bayou aux Carpes site may be found in the alternative National Environmental Policy Act document, known as Individual Environmental Report #12 (IER #12), which is posted online at: *http://www.nolaenvironmental.gov/projects/usace_levee/IER.aspx?IERID=12*.

The public hearing referenced above will be jointly conducted by EPA Region 6 and the Corps. At the hearing, EPA will receive comments on the Corps request to EPA to modify the Bayou aux Carpes CWA Section 404(c) designation and the Corps will receive comments on IER #12.

After considering all comments submitted, EPA Region 6 will transmit to the EPA Office of Water in Washington, DC, a written recommendation on whether the CWA Section 404(c) modification request should be granted or denied. The Assistant Administrator for Water will make the final decision and publish a notice of its availability in the **Federal Register**.

Dated: January 6, 2009.

Richard E. Greene,

Regional Administrator, EPA Region 6.

[FR Doc. E9–690 Filed 1–13–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

January 8, 2009.

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. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information 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; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before March 16, 2009. 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, (202) 395–5887, or via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to *Judith-B.Herman@fcc.gov*, Federal Communications Commission, or an e-mail to *PRA@fcc.gov*. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review'', (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, 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: For additional information, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0755.

Title: Sections 59.1 through 59.4, Infrastructure Sharing.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 75 respondents; 1,275 responses.

Estimated Time per Response: 2–24 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 these information collections are contained in 47 U.S.C. Sections 259 of the Communications Act of 1934, as amended.

Total Annual Burden: 2,175 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting respondents to submit confidential information to the Commission. If the Commission requests respondents submit information which respondents believe is confidential, respondents may request confidential treatment of such information under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the on occasion and third party disclosure requirement). There is a decrease in the total number of responses; and a decrease of 150 hours for the total annual burden hours due to a recalculation of the estimates for each reporting or third party disclosure requirement.

The three reporting and third party disclosure requirements are under Section 259 of the Communications Act of 1934, as amended, are: (1) Filing of tariffs, contracts or arrangements; (2) information concerning deployment of new services and equipment; and (3) notice upon termination of section 259 agreements.

The information collected by the Commission will: (1) Under the requirement that incumbent that LECs who file any tariffs, contracts or other arrangements for infrastructure sharing will be made available for public inspection; (2) that LECs provide timely information on planned deployments of new services and equipment will be provided to third parties (qualifying carriers); and (3) providing incumbent LECs furnish 60 days notice prior to termination of a section 259 sharing agreement will be provided to third parties (qualifying carriers) to protect customers from sudden changes in service.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–697 Filed 1–13–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

The open meeting scheduled for Thursday, January 8, 2009, was cancelled.

DATE & TIME: Tuesday, January 13, 2009, At 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED: Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

DATE & TIME: Thursday, January 15, 2009, at 10 a.m.

PLACE: 999 E street, N.W., Washington, DC (ninth floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED: Correction and Approval of Minutes.

DRAFT ADVISORY OPINION 2008–18: Mid-Atlantic Benefits, by Michael Dupay.

DRAFT ADVISORY OPINION 2008–19: Texans for Lamar Smith, by Pike Powers, Treasurer.

Explanation and Justification for Rules on Lobbyist Bundling of Contributions. Management and Administrative Matters.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Mary Dove, Commission Secretary, at (202) 694–1040, at least 72 hours prior to the hearing date.

PERSON TO CONTACT FOR INFORMATION: Judy Ingram, Press Officer, *Telephone:* (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. E9–404 Filed 1–13–09; 8:45 am]

BILLING CODE 6715–01–M

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 license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants

Mercury Worldwide Services Inc. dba Mercury Maritime, 61–36 233rd Street, Bayside, NY 11364, Officers: George Matthes, Secretary, (Qualifying Individual), Adam Chi, President.

Eagle Maritime, Inc., 1421 Witherspoon Street, Rahway, NJ 07065, Officer: Dasharath Patade, President, (Qualifying Individual).

Export Auto USA Corp., 6811 S. 78 Street, RiverView, FL 33578, Officer: Lina Vilkialis, President, (Qualifying Individual).

La Republica Cargo Express Corp., 30 Lawrence Street, Yonkers, NY 10705, Officer: Edgar Camacho, President, (Qualifying Individual).

Ever Since International Logistics Co., Ltd., 205½ S. Bushnell Ave., Alhambra, CA 91801, Officers: Wayne W. Gu, Vice President, (Qualifying Individual), Wen J. Chen, President.

PAL Shipping Line, Inc., 125 318th Ave., Princeton, MN 55371, Officer: Scott A. Frane, President, (Qualifying Individual).

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

Tucker Company Worldwide, Inc., 900 Dudley Ave., Cherry Hill, NJ 08002, Officers: JoAnn M. Matczak, Asst. V. Pres. Operations, (Qualifying Individual), Jeffrey G. Tucker, President.

Round-The-World Logistics (U.S.A.) Corp., 230–59 Int'l Airport Center Blvd., Ste. 225, Jamaica, NY 11413, Officer: Hung Aka Alan, Cheng Li, COO, (Qualifying Individual).

Upward Logistics, LLC, 760 Atlanta South Parkway, Atlanta, GA 30349,

Officers: Valentine D. Heger, V. Pres. International, (Qualifying Individual), Nick Byers, President.
America Global Logistics, LLC, 1335 NW 98th Court, Doral, FL 33172, Officers: Christian M. Ollino, Managing Member, (Qualifying Individual), Alejo J. Aguilar, Director.
Rax International, Inc., 2600 71st Street, North Bergen, NJ 07047, Officer: Sungkyu Chae, President, (Qualifying Individual).
Global Forwarding Enterprises Limited Liability Co., 49 Hedgerow Lane, Manalapan, NJ 07726, Officers: Marty A. Kavanagh, Manager, (Qualifying Individual), Pavel Kapelnikov, Gen. Manager.
Encompas Global Logistics LLC, 17890 Castleton Street, Ste. 368, City of Industry, CA 91748, Officer: Asa Cheng, President, (Qualifying Individual).

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

Integrated Alliance Corp., 61–36 233rd Street, Bayside, NY 11364, Officers: George Matthes, Secretary, (Qualifying Individual), Adam Chi, President.
Fettig & Donalty, Inc., 1225 Eye St., NW., Ste. 1200, Washington, DC 20006, Officers: Michael S. Lagoon, Director, (Qualifying Individual), Shaikh Hamid, Vice President.
Deaking Trans-Global Logistics, LLC, 6817 South Point Parkway, Jacksonville, FL 32216, Officers: Iris M. Starling, Vice President, (Qualifying Individual), John P. Deakins, President.

Dated: *January 9, 2009.*

Karen V. Gregory,

Secretary.

[FR Doc. E9–700 Filed 1–13–09; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 30, 2009.

A. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. Marshall Truman Reynolds and Douglas Vernon Reynolds, both of Huntington, West Virginia, Samuel George Kapourales, Williamson, West Virginia, and Todd R. Fry, Barboursville, West Virginia; to retain 6.64 percent of the outstanding shares of American Gateway Financial Corporation, Port Allen, Louisiana, and its subsidiary, American Gateway Bank, Baton Rouge, Louisiana.

Board of Governors of the Federal Reserve System, January 9, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–589 Filed 1–13–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 9, 2009.

A. Federal Reserve Bank of Chicago (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Tygris Commercial Financial Group, Inc., Parsippany, New Jersey; to become a bank holding company by acquiring 100 percent of the voting shares of Texico Bancshares Corporation, Texico, Illinois, and thereby indirectly acquire Texico State Bank, Texico, Illinois.

In connection with this proposal, applicant also has applied to engage in lending and leasing activities through Tygris Vendor Finance, Inc., Parsippany, New Jersey; Tygris Asset Finance, Inc., Chicago, Illinois; Tygris Corporate Finance, Inc., Wilton, Connecticut; TAF Funding I, LLC, Chicago, Illinois; USXL Funding I, LLC, Parsippany, New Jersey; USXL Funding II, LLC, Parsippany, New Jersey; and Pro-Lease, Inc., Parsipany, New Jersey, pursuant to section 225.28 (b)(1), (2) and (3) of Regulation Y.

Board of Governors of the Federal Reserve System, January 9, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–590 Filed 1–13–09; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the National Vaccine Advisory Committee

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science.

ACTION: Notice of meeting.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) is hereby giving notice that the National Vaccine Advisory Committee (NVAC) will hold a meeting. The meeting is open to the public. Pre-registration is required for both public attendance and comment. Any individual who wishes to attend the meeting and/or participate in the public comment session should e-mail *nvpo@hhs.gov* or call 202–690–5566.

Audio conferencing will be available for the second day of the meeting.

DATES: The meeting will be held on February 5, 2009, from 8:30 a.m. to 6:30 p.m. and on February 6, 2009, from 8 a.m. to 3:30 p.m.

ADDRESSES: Department of Health and Human Services; Hubert H. Humphrey Building, Room 800; 200 Independence Avenue, SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Ms. Andrea Krull, National Vaccine Program Office, Department of Health and Human Services, Room 443-H, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. Phone: (202) 690–5566; Fax: (202) 260–1165; e-mail: *nvpo@hhs.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 2101 of the Public Health Service Act (42 U.S.C. Section 300aa-1), the Secretary of Health and Human Services was mandated to establish the National Vaccine Program to achieve optimal prevention of human infectious diseases through immunization and to achieve optimal prevention against adverse reactions to vaccines. The National Vaccine Advisory Committee was established to provide advice and make recommendations to the Director of the National Vaccine Program, on matters related to the Program's responsibilities. The Assistant Secretary for Health serves as Director of the National Vaccine Program.

Topics to be discussed at the meeting on Thursday, February 5, 2009 include vaccine financing, vaccine safety, vaccine stockpile, seasonal influenza and related issues, vaccine development, and the National Vaccine Plan. Updates will be given by the NVAC Financing, Adult Immunization, and Safety working groups. The meeting on Friday, February 6, 2009 is a full day stakeholders' meeting to discuss the draft strategic National Vaccine Plan. The draft plan can be viewed at the following Web site: *http://www.hhs.gov/nvpo/vacc_plan/*. The meeting will begin with a plenary session to provide an overview of the day's agenda followed by break-out sessions for each of the five draft strategic National Vaccine Plan goals. Audio-conferencing will be available for the stakeholders' meeting on February 6, 2009 for the plenary as well as break-out sessions. Call-in numbers for the meeting are as follows: plenary sessions on February 6: (888) 390–3413 (passcode: 60302); goal 1: research (888) 469–1340 (passcode 27271); goal 2: safety (888) 989–4406 (passcode 41520); goal 3: communication (800) 779–6844 (passcode 19562); goal 4: supply (888) 994–8791 (passcode 37886); and goal 5: global health (888) 989–4717 (passcode 12377). Agendas for each day of the meeting will be posted on the NVAC Web site: *www.hhs.gov/nvpo/nvac* by January 21, 2009.

Public attendance at the meeting is limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the designated contact person at least one week prior to the meeting. Members of the public will have the opportunity to provide comments at the meeting. Public comment will be limited to five minutes per speaker. Individuals who would like to submit written statements should e-mail or fax their comments to the National Vaccine Program Office at least five business days prior to the meeting. A separate **Federal Register** Notice will be issued with detailed instructions for submitting comments about the draft strategic National Vaccine Plan. Any members of the public who wish to have printed material distributed to NVAC members should submit materials to the Executive Secretary, NVAC, through the contact person listed above prior to close of business January 30, 2009.

Dated: January 5, 2009.

Bruce Gellin,

Deputy Assistant Secretary for Health, Director, National Vaccine Program Office.

[FR Doc. E9–498 Filed 1–13–09; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Decision To Evaluate a Petition To Designate a Class of Employees for the Piqua Organic Moderated Reactor Site, Piqua, Ohio, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees for the Piqua Organic Moderated Reactor site, Piqua, Ohio, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Piqua Organic Moderated Reactor site.

Location: Piqua, Ohio.

Job Titles and/or Job Duties: All employees associated with reactor activities who worked within and around the Reactor Dome.

Period of Employment: January 1, 1963 through December 31, 1966.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

Dated: January 6, 2009.

Christine M. Branche,

Acting Director, National Institute for Occupational Safety and Health.

[FR Doc. E9–571 Filed 1–13–09; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Solicitation of Written Comments on Draft Strategic National Vaccine Plan

AGENCY: Department of Health and Human Services, Office of the Secretary.

ACTION: Notice.

SUMMARY: On behalf of the National Vaccine Advisory Committee (NVAC), the National Vaccine Program Office (NVPO) is soliciting public comment on the draft strategic National Vaccine Plan.

DATES: All comments on the draft strategic National Vaccine Plan should be received no later than 5 p.m. on January 30, 2009.

ADDRESSES: Electronic responses are preferred and may be addressed to *NVPComments@hhs.gov.* Written responses should be addressed to National Vaccine Program Office, Department of Health and Human Services, 200 Independence Avenue, SW., Room 443–H, Washington, DC 20201, Attention: National Vaccine Plan RFI.

FOR FURTHER INFORMATION CONTACT: CAPT Raymond A. Strikas, M.D., National Vaccine Program Office, Department of Health and Human Services, 200 Independence Avenue, SW., Room 443–H, Washington, DC 20201; (202) 690–5566; fax 202–260–1165; e-mail *nvpo@hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The National Vaccine Program was established in 1986 to achieve optimal prevention of infectious diseases through immunization and optimal prevention of adverse reactions to vaccines. NVPO is located within the Office of Public Health and Science within the Office of the Secretary, HHS, and has responsibility for coordinating and ensuring collaboration among the many Federal agencies involved in vaccine and immunization activities as part of the National Vaccine Program. NVAC is a statutory Federal advisory committee that provides advice and makes recommendations to the Director of the National Vaccine Program on matters related to the Program. The purpose of the National Vaccine Plan is to promote achievement of the National Vaccine Program mission by providing strategic direction and promoting coordinated action by vaccine and immunization enterprise stakeholders.

Federal involvement in civilian and military vaccination programs is longstanding, including in research and development, regulation, vaccine delivery and the evaluation of the impacts of immunizations. This draft strategic National Vaccine Plan builds on the many achievements of the vaccine and immunization enterprise prior to and since the establishment of the National Vaccine Program in 1986 and the completion of the first National Vaccine Plan in 1994. Both the draft strategic National Vaccine Plan and the 1994 National Vaccine Plan are available at *http://www.hhs.gov/nvpo/vacc_plan/*. New vaccines have been developed and licensed; many of these new vaccines are now recommended for children, adolescents and adults. These new vaccines have expanded the number of infections that can be prevented, and more effectively and safely prevent some diseases for which earlier generation vaccines already existed. Opportunities exist to improve protection against vaccine-preventable diseases by (1) developing improved vaccines based on new adjuvants and better understanding of the immune system, and (2) developing a variety of delivery systems for vaccines, such as intradermal, oral, and immunostimulant patches. In addition, federal immunization financing programs have reduced or eliminated many financial barriers to immunizations, particularly for children. The number of infections prevented by vaccination has decreased significantly while coverage for many vaccines has reached record levels. More robust systems have been developed to identify adverse events following immunization and to assess potential associations of those events with vaccination. Globally, the United States has worked with multilateral and bilateral partners and non-governmental organizations in contributing to improvements in child health status and the prevention of hundreds of thousands of child deaths each year through improved vaccine coverage and introduction of new vaccines. Of the fourteen anticipated outcomes included in the 1994 National Vaccine Plan, most were substantially or fully realized.

Despite these successes, however, many of the challenges that stimulated establishment of the National Vaccine Program and the development of the 1994 National Vaccine Plan remain relevant today. Vaccine shortages have frequently been experienced for many routinely recommended vaccines. Despite improved vaccination coverage among children, the occurrence of several recent vaccine preventable disease outbreaks serves as a reminder that these diseases still occur. Among older adults both vaccination coverage and the effectiveness of some routinely recommended vaccines remain sub-optimal. As the number of vaccines has increased and vaccine preventable diseases have declined, vaccine safety concerns are expressed more prominently today and may be more widely shared. Enhancing the current vaccine safety system is important to keep pace with several factors influencing it: an increasing number of vaccines and vaccine combinations, expanding target populations, and a better understanding of human biology, especially the human immune system. As the cost of vaccination has increased, financial barriers to vaccination have emerged for health departments, health care providers, and the public. Significant scientific challenges remain in the development of safe and effective vaccines against existing global health threats, such as HIV, TB, malaria, and influenza (developing vaccines with broader protection). Vaccines that have been developed and are in use in industrialized countries have the potential to make major contributions to health in developing countries, but are underutilized. Additionally, emerging and pandemic infections and bioterrorist threats pose new challenges for vaccine development and manufacturing, vaccine delivery, regulation, and access in the U.S. and abroad.

The Plan is built around the achievement of five broad goals:

Goal 1: Develop new and improved vaccines.

Goal 2: Enhance the safety of vaccines and vaccination practices.

Goal 3: Support informed vaccine decision-making by the public, providers, and policy-makers.

Goal 4: Ensure a stable supply of recommended vaccines and achieve better use of existing vaccines to prevent disease, disability and death in the United States.

Goal 5: Increase global prevention of death and disease through safe and effective vaccination.

These goals will be achieved by pursuing objectives and strategies that address each of the key determinants of those outcomes. Success in achieving these goals will be assessed by tracking progress in achieving measurable outcomes (''indicators'') associated with each goal. Final definition of the indicators and the development of specific numeric targets will occur through further consultation with stakeholders and the IOM Committee.

The current draft strategic National Vaccine Plan is based largely on input received from Federal Departments and agencies. Recognizing that success can best be achieved through a national plan that includes coordinated action by public and private sector stakeholders in pursuit of the Plan's goals, extensive outreach and consultation will be implemented as the Plan is finalized. A committee empanelled by the National Academy of Sciences' Institute of Medicine (IOM) reviewed the 1994 National Vaccine Plan and provided guidance on the development of the updated Plan (see *http://www.iom.edu/CMS/3793/55143.aspx*). The IOM committee is also holding a series of national meetings focused around each of the goals in which perspectives from many of the stakeholders will be obtained. Following these meetings, the IOM committee will prepare a report that includes conclusions and recommendations about priority actions within major components of the Plan. The National Vaccine Advisory Committee (NVAC), a Federal advisory committee that includes representatives from many of the key vaccine and immunization enterprise stakeholders, is also implementing a process to obtain input from a wide range of stakeholder groups. This input will include comments on this draft Plan and additional strategies that they can contribute to achieve Plan goals. The NVAC will devote its meeting on February 6, 2009 to stakeholder and public comments on the draft Plan. In addition, input from the public will also be solicited to identify priority areas from their perspective in a series of meetings planned for later in 2009,

locations to be determined. This draft Plan will serve as the basis for the development of the updated National Vaccine Plan and based on this range of input, indicators of measurable outcomes will be determined and priorities will be presented. In addition, an implementation plan will be drafted that identifies specific actions that will be undertaken by government and other vaccine and immunization enterprise stakeholders to achieve the objectives and strategies in the plan and milestones will be established that will allow progress to be measured. The draft Plan has a ten-year horizon, and thereby balances a strategic vision, which requires development and implementation of new initiatives, with the recognition that changing circumstances and new opportunities and challenges will occur over the next decade. The ten-year horizon also allows incorporation of the HealthyPeople 2020 objectives once those are established by the Department of Health and Human Services (see *http://www.healthypeople.gov*). Annual monitoring of progress and a mid-course review will promote both accountability and flexibility. The updated National Vaccine Plan is expected to be completed by early 2010.

Through this Request for Information, HHS is seeking broad comment from stakeholders and the general public. Comments received will be available for public viewing and will be summarized in an open meeting on February 6, 2009, to the NVAC in Washington, DC. If you wish to attend the meeting in person or by audioconference, please reply to *nvpo@hhs.gov*, or to 202–690–5566.

II. Information Request

NVPO, on behalf of the NVAC requests information in four broad areas. Responders may address one or more of the areas below.

(1) *Comments on priorities for the National Vaccine Plan for a ten-year period:* What do you recommend be the top priorities for vaccines and the immunization enterprise in the United States and globally? Why are those priorities most important to you? [Provide up to 3 pages for an answer to these questions].

(2) *Comments on the goals, objectives, and strategies for the National Vaccine Plan for a ten-year period:* Please comment on the existing goals, objectives, and strategies in the draft Plan, and suggest specific goals, objectives, or strategies to be added to it, if the existing ones do not address your concerns. Are there any goals, objectives or strategies in the draft strategic Plan that should be discarded or revised? Which ones, and why? [Provide up to 3 pages for an answer to these questions].

(3) *Comments on the indicators for the National Vaccine Plan for a ten-year period:* Please comment on the existing indicators in the draft Plan, and suggest target estimates for them. Please suggest new indicators to be added to it, if the existing ones do not address your concerns. Are there any indicators in the draft strategic Plan that should be discarded or revised? Which ones, and why? [Provide up to 3 pages for an answer to these questions].

(4) *Comments on stakeholders' roles in the National Vaccine Plan:* Please identify which stakeholders you believe should have responsibility for enacting the objectives and strategies listed in the draft Plan, as well as for any new objectives and strategies you suggest. Specifically identify roles your organization can play in the Plan. [Provide up to 3 pages for an answer to these questions].

III. Potential Responders

HHS invites input from a broad range of individuals and organizations that have interests in vaccines and the immunization enterprise. Some examples of these organizations include, but are not limited to, the following:

- General public.
- Advocacy groups and public interest organizations.
- State, local, and tribal governments and public health agencies.
- State and local public health departments.
- Vaccine manufacturing industry, distributors, investors, and other businesses.
- Health care professional societies and organizations.
- Academic researchers and groups.
- Health care payers and plans.
- International organizations.
- Non-governmental organizations.
- Philanthropic organizations.
- Travel industry.

The submission of written materials in response to the RFI should not exceed 12 pages (3 pages for each of the four broad topics), not including appendices and supplemental documents. Responders may submit other forms of electronic materials to demonstrate or exhibit concepts of their written responses. Any information you submit will be made public. Consequently, do not send proprietary, commercial, financial, business confidential, trade secret, or personal information that you do not wish to be made public. Information and comments will not be considered nor made publicly available, if it is not signed by, or attributed to, an individual, or an individual representing an organization.

Public Access: Responses to this RFI will be available to the public on the NVPO Web site at *http://www.hhs.gov/nvpo/vacc_plan/*. You may access public comments received from this RFI by going to the above Web site.

Dated: January 7, 2009.

Bruce Gellin,

Deputy Assistant Secretary for Health, Director, National Vaccine Program Office, U.S. Department of Health and Human Services.

[FR Doc. E9–495 Filed 1–13–09; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10161, CMS–1882, CMS–437A and B, CMS–1557 and CMS–10036]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* New Freedom Initiative—Web-based Reporting System for Grantees; *Use:* CMS currently awards competitive grants to States and other eligible entities for the purpose of designing and implementing effective and enduring improvements in community-based long-term services

and support systems. CMS currently requires grantees to report on a quarterly, semi-annual, and or annual basis depending upon the grant type. CMS requires the information obtained through web-based grantee reporting for two reasons: (1) In order to effectively monitor the grants; and, (2) To report to Congress and other interested stakeholders the progress and obstacles experienced by the grantees. The grantees are the respondents to the web-based reporting system. *Form Number:* CMS–10161 (OMB# 0938–0979); *Frequency:* annually, semi-annually, and quarterly; *Affected Public:* State, Local or Tribal Governments; *Number of Respondents:* 171; *Total Annual Responses:* 428; *Total Annual Hours:* 3,764.

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Request for Certification as a Supplier of Portable X-ray Services and Portable X-ray Survey Report Form under the Medicare/Medicaid Program and Supporting Regulations in 42 CFR 486.100–486.110; *Use:* The Medicare program requires portable X-ray suppliers to be surveyed for health and safety standards. The CMS–1882 is the survey form that records survey results. The CMS–1880 is used by the surveyor to determine if a portable X-ray applicant meets the eligibility requirements. *Form Numbers:* CMS–1880/1882 (OMB# 0938–0027); *Frequency:* Occasionally; *Affected Public:* State, Local or Tribal Governments; *Number of Respondents:* 544; *Total Annual Responses:* 68; *Total Annual Hours:* 4,760.

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Rehabilitation Hospital Criteria Worksheet and Rehabilitation Hospital Criteria Worksheet; *Use:* The rehabilitation hospital and rehabilitation unit criteria worksheets are necessary to verify that these facilities/units comply and remain in compliance with the exclusion criteria for the Medicare prospective payment system. *Form Number:* CMS–437A and 437B (OMB# 0938–0986); *Frequency:* Annually; *Affected Public:* Business or other for-profit; *Number of Respondents:* 1,227; *Total Annual Responses:* 1,227; *Total Annual Hours:* 307.

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Survey Report Form for Clinical Laboratory Improvement Amendments (CLIA) and Supporting Regulations in 42 CFR 493.1–493.2001; *Use:* This form is used by the State to determine a laboratory's compliance with CLIA. This information is needed for a laboratory's CLIA certification and recertification. *Form Number:* CMS–1557 (OMB# 0938–0544); *Frequency:* Biennially; *Affected Public:* Business or other for-profit, Not-for-profit institutions, State, Local or Tribal Governments and Federal Government; *Number of Respondents:* 21,000; *Total Annual Responses:* 10,500; *Total Annual Hours:* 5,248.

5. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Inpatient Rehabilitation Facility Patient Assessment Instrument (IRF–PAI) data and Supporting Regulations in 42 CFR 412 Subpart P; *Use:* This instrument with its supporting manual is needed to permit the Secretary of Health and Human Services, and CMS, to implement Section 1886(j) of the Social Security Act. The statute requires the Secretary to develop a prospective payment system for inpatient rehabilitation facility services for the Medicare program. This payment system is to cover both operating and capital costs for inpatient rehabilitation facility services. It applies to inpatient rehabilitation hospitals as well as rehabilitation units of acute care hospitals. CMS implemented the inpatient rehabilitation facility prospective payment system for cost reporting periods beginning on or after January 1, 2002.

Form Number: CMS–10036 (OMB# 0938–0842); *Frequency:* Annually; *Affected Public:* Business or other for-profit, Not-for-profit institutions, State, Local or Tribal Governments and Federal Government; *Number of Respondents:* 1,202; *Total Annual Responses:* 396,660; *Total Annual Hours:* 337,161.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *February 13, 2009:* OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, New Executive Office Building, Room 10235, Washington, DC 20503, Fax Number: (202) 395–6974.

Dated: January 8, 2009.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. E9–687 Filed 1–13–09; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0544]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Record Retention Requirements for the Soy Protein and Risk of Coronary Heart Disease Health Claim

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by February 13, 2009.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0428. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Record Retention Requirements for the Soy Protein and Risk of Coronary Heart Disease Health Claim—(OMB Control Number 0910–0428—Extension)

Section 403(r)(3)(A)(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(r)(3)(A)(i)) provides for the use of food label statements characterizing a relationship of any nutrient of the type required to be in the label or labeling of the food to a disease or a health-related condition only where that statement meets the requirements of the regulations issued by the Secretary of Health and Human Services to authorize the use of such a health claim. Section 101.82 (§ 101.82) of FDA's regulations authorizes a health claim for food labels about soy protein and the risk of coronary heart disease. To bear the soy protein/coronary heart disease health claim, foods must contain at least 6.25 grams of soy protein per reference amount customarily consumed. Analytical methods for measuring total protein can be used to quantify the amount of soy protein in foods that contain soy as the sole source of protein. However, at the present time there is no validated analytical methodology available to quantify the amount of soy protein in foods that contain other sources of protein. For these latter foods, FDA must rely on information known only to the manufacturer to assess compliance with the requirement that the foods contain the qualifying amount of soy protein. Thus, FDA requires manufacturers to have and keep records to substantiate the amount of soy protein in a food that bears the health claim and contains sources of protein other than soy, and to make such records available to appropriate regulatory officials upon written request. The information collected includes nutrient databases or analyses, recipes or formulations, purchase orders for ingredients, or any other information that reasonably substantiates the ratio of soy protein to total protein.

In the **Federal Register** of October 23, 2008 (73 FR 63157), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
101.82(c)(2)(ii)(B)	25	1	25	1	25

[1] There are no capital costs or operating and maintenance costsassociated with this collection of information.

Based upon the agency's experience with the use of health claims, FDA estimates that only about 25 firms would be likely to market products bearing a soy protein/coronary heart disease health claim and that only, perhaps, one of each firm's products might contain non-soy sources of protein along with soy protein. The records required to be retained by § 101.82(c)(2)(ii)(B) are the records, e.g., the formulation or recipe, that a manufacturer has and maintains as a normal course of its doing business. Thus, the burden to the food manufacturer is that involved in assembling and providing the records to appropriate regulatory officials for review or copying.

Dated: January 7, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–573 Filed 1–13–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0653]

Agency Information Collection Activities; Proposed Collection; Comment Request; Filing Objections and Requests for a Hearing on a Regulation or Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on requirements for filing objections and requests for a hearing on a regulation or order.

DATES: Submit written or electronic comments on the collection of information by March 16, 2009.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice

of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Filing Objections and Requests for a Hearing on a Regulation or Order—21 CFR Part 12 (OMB Control Number 0910–0184)—Extension

The regulations in 21 CFR 12.22, issued under section 701(e)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 371(e)(2)), set forth the instructions for filing objections and requests for a hearing on a regulation or order under § 12.20(d) (21CFR 12.20(d)). Objections and requests must be submitted within the time specified in § 12.20(e). Each objection, for which a hearing has been requested, must be separately numbered and specify the provision of the regulation or the proposed order. In addition, each objection must include a detailed description and analysis of the factual information and any other document, with some exceptions, supporting the objection. Failure to include this information constitutes a waiver of the right to a hearing on that objection. FDA uses the description and analysis to determine whether a hearing request is justified. The description and analysis may be used only for the purpose of determining whether a hearing has been justified under 21 CFR 12.24 and do not limit the evidence that may be presented if a hearing is granted.

Respondents to this information collection are those parties that may be adversely affected by an order or regulation.

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
12.22	5	1	5	20	100

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

The burden estimate for this collection of information is based on past filings. Agency personnel, responsible for processing the filing of objections and requests for a public hearing on a specific regulation or order, estimate approximately five requests are received by the agency annually, with each requiring approximately 20 hours of preparation time.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: January 7, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–574 Filed 1–13–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Pulmonary-Allergy Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Pulmonary-Allergy Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on February 4, 2009, from 8:30 a.m. to 5 p.m.

Location: Hilton Washington DC North/ Gaithersburg, The Ballrooms, 620 Perry Pkwy., Gaithersburg, MD. The hotel telephone number is 301–977–8900.

Contact Person: Kristine T. Khuc, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5630 Fishers Lane (for express delivery, 5630 Fishers Lane,rm. 1093), Rockville, MD 20857, 301–827–7001, Fax: 301–827–6776, e-mail: *Kristine.Khuc@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512545. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss biologics license application (BLA) No. 125277, KALBITOR, for ecallantide injection by Dyax Corp., for the proposed indication of treatment of acute attacks of hereditary angioedema.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the

year 2009 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before January 23, 2009. Oral presentations from the public will be scheduled approximately between 1 p.m. and 2 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before January 21, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by January 22, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kristine T. Khuc at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: January 8, 2009.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E9–686 Filed 1–13–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, January 26, 2009, 2 p.m. to January 26, 2009, 4 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on December 31, 2008, 73 FR 80417–80418.

The meeting has been changed to an AED meeting starting January 26, 2009, 8 a.m. to January 27, 2009, 5 p.m. The meeting title has been changed to ''Coagulation and Thrombosis''. The meeting is closed to the public.

Dated: January 6, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–403 Filed 1–13–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the NIH Advisory Board for Clinical Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended to discuss personnel matters, the disclosure of which would constitute a clearly unwarranted invasion of privacy.

Name of Committee: NIH Advisory Board for Clinical Research.

Date: January 26, 2009.

Open: 10 a.m. to 1:15 p.m.

Agenda: To review the strategic and operational issues of the NIH Intramural Research Program, including the Clinical Center.

Place: National Institutes of Health, Building 10, 10 Center Drive, CRC Medical Board Room 4–2551, Bethesda, MD 20892,

Closed: 1:15 p.m. to 2 p.m.

Agenda: To discuss personnel matters.

Place: National Institutes of Health, Building 10, 10 Center Drive, CRC Medical Board Room 4–2551, Bethesda, MD 20892.

Contact Person: Maureen E. Gormley, Executive Secretary, Mark O. Hatfield Clinical Research Center, National Institutes of Health, Building 10, Room 6–2551, Bethesda, MD 20892, 301/496–2897.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Dated: January 7, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–515 Filed 1–13–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Cancer Institute Board of Scientific Advisors.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: National Cancer Institute Board of Scientific Advisors.

Date: March 2–3, 2009.

Time: March 2, 2009, 8 a.m. to 6 p.m.

Agenda: Director's Report: Ongoing and New Business; Reports of Program Review Group(s); and Budget Presentations; Reports of Special Initiatives; RFA and RFP Concept Reviews; and Scientific Presentations.

Place: National Institutes of Health, Building 31, 31 Center Drive, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Time: March 3, 2009, 8:30 a.m. to 12 p.m.

Agenda: Reports of Special Initiatives; RFA and RFP Concept Reviews; and Scientific Presentations.

Place: National Institutes of Health, Building 31, 31 Center Drive, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Contact Person: Paulette S. Gray, PhD, Executive Secretary, Director, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 8th Floor, Rm. 8001, Bethesda, MD 20892, 301–496–5147, *grayp@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/bsa.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 7, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–512 Filed 1–13–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Cancer Institute Clinical Trials Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: National Cancer Institute Clinical Trials Advisory Committee.

Date: March 4, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: Update on the progress of the implementation of the Clinical Trials Working Group and the Translational Research Working Group reports.

Place: National Institutes of Health, Building 31, 31 Center Drive, 6th Floor, C-Wing, Conf. Room 10, Bethesda, MD 20892.

Contact Person: Sheila A. Prindiville, MD, Director, Coordinating Center for Clinical Trials, Office of the Director, National Cancer Institute, National Institutes of Health, 6120 Executive Blvd., Suite 507, Bethesda, MD 20892, 301–451–5048, *prindivs@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 7, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–513 Filed 1–13–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of meetings of the National Advisory Allergy and Infectious Diseases Council.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Allergy and Infectious Diseases Council.

Date: January 26, 2009.

Open: 10:30 a.m. to 11:40 a.m.

Agenda: Report from the Institute Director.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms E1/E2, Bethesda, MD 20892.

Closed: 11:40 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms E1/E2, Bethesda, MD 20892.

Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council, Acquired Immunodeficiency Syndrome Subcommittee.

Date: January 26, 2009.

Closed: 8:30 a.m. to 10:15 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Room A, Bethesda, MD 20892.

Open: 1 p.m. to adjournment.

Agenda: Program advisory discussions and reports from division staff.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms E1/E2, Bethesda, MD 20892.

Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaidnih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council, Allergy, Immunology and Transplantation Subcommittee.

Date: January 26, 2009.

Closed: 8:30 a.m. to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Room D, Bethesda, MD 20892.
Open: 1 p.m. to Adjournment.
Agenda: Reports from the Division Director and other staff.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Room D, Bethesda, MD 20892.
Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council, Microbiology and Infectious Diseases Subcommittee.
Date: January 26, 2009.
Closed: 8:30 a.m to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms F1/F2, Bethesda, MD 20892.
Open: 1 p.m. to Adjournment.
Agenda: Reports from the Division Director and other staff.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms F1/F2, Bethesda, MD 20892.
Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700 B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council.
Date: May 18, 2009.
Open: 10:30 a.m. to 11:40 a.m.
Agenda: Report from the Institute Director and the Director of the Vaccine Research Center.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms E1/E2, Bethesda, MD 20892.
Closed: 11:40 a.m. to 12 p.m.
Agenda: To review and evaluate grant applications and/or proposals.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms E1/E2, Bethesda, MD 20892.
Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council, Allergy, Immunology and Transplantation Subcommittee.
Date: May 18, 2009.
Closed: 8:30 a.m. to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Room D, Bethesda, MD 20892.
Open: 1 p.m. to Adjournment.
Agenda: Reports from the Division Director and other staff.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Room D, Bethesda, MD 20892.
Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council, Acquired Immunodeficiency Syndrome Subcommittee.
Date: May 18, 2009.
Closed: 8:30 a.m. to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Room A, Bethesda, MD 20892.
Open: 1 p.m. to Adjournment.
Agenda: Program advisory discussions and reports from division staff
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms E1/E2, Bethesda, MD 20892.
Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council, Microbiology and Infectious Diseases Subcommittee.
Date: May 18, 2009.
Closed: 8:30 a.m. to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms F1/F2, Bethesda, MD 20892.
Open: 1 p.m. to Adjournment.
Agenda: Reports from the Division Director and other staff.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms F1/F2, Bethesda, MD 20892.
Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council.
Date: September 14, 2009.
Open: 10:30 a.m. to 11:40 a.m.
Agenda: Report from the Institute Director.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms E1/E2, Bethesda, MD 20892.
Closed: 11:40 a.m. to 12 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892.
Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council, Microbiology and Infectious Diseases Subcommittee.
Date: September 14, 2009.
Closed: 8:30 a.m. to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms F1/F2, Bethesda, MD 20892.
Open: 1 p.m. to Adjournment.
Agenda: Reports from the Division Director and other staff.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms F1/F2, Bethesda, MD 20892.
Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council, Allergy, Immunology and Transplantation Subcommittee.
Date: September 14, 2009.
Closed: 8:30 a.m. to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Room D, Bethesda, MD 20892.
Open: 1 p.m. to Adjournment.
Agenda: Reports from the Division Director and other staff.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Room D, Bethesda, MD 20892.
Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Name of Committee: National Advisory Allergy and Infectious Diseases Council, Acquired Immunodeficiency Syndrome Subcommittee.
Date: September 14, 2009.
Closed: 8:30 a.m. to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Natcher Building, 45 Center Drive Conference Room A, Bethesda, MD 20892.
Open: 1 p.m. to Adjournment.
Agenda: Program advisory discussion and reports division staff.
Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Rooms E1/E2, Bethesda, MD 20892.

Contact Person: Marvin R. Kalt, Ph.D., Director, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301–496–7291, *kaltmr@niaid.nih.gov*.

Information is also available on the Institute's/Center's home page: *http://www.niaid.nih.gov/facts/facts.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 5, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–271 Filed 1–13–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Beeson Review.

Date: February 3–4, 2009.

Time: 4 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: William Cruce, Ph.D., Scientific Review Officer, National Institute on Aging, Scientific Review Branch, Gateway Building 2C–212, 7201 Wisconsin Ave., Bethesda, MD 20814, 301–402–7704, *crucew@nia.nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel Social Neuroscience RFA.

Date: February 23–24, 2009.

Time: 4 p.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Jeannette L Johnson, Ph.D., Scientific Review Officer, National Institutes on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7705, *JOHNSONJ9@NIA.NIH.GOV*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 6, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–402 Filed 1–13–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

National Protection and Programs Directorate; Submission for Review: Infrastructure Protection Data Call 1670—NEW

AGENCY: National Protection and Programs Directorate, Infrastructure Protection, DHS.

ACTION: 30-Day Notice and request for comments.

SUMMARY: The Department of Homeland Security (DHS) invites the general public and other federal agencies the opportunity to comment on new information collection request 1670—NEW, Infrastructure Protection Data Call. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), DHS is soliciting comments for this collection. The information collection was previously published in the **Federal Register** on July 23, 2008 at 73 FR 42820 allowing for a 60-day public comment period. No comments were received on this existing information collection. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until February 13, 2009. This process is conducted in accordance with 5 CFR 1320.1.

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, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for National Protection and Programs Directorate, DHS or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for National Protection and Programs Directorate, DHS or via electronic mail to *oira_submission@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget is particularly interested in comments that:

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.

Analysis

Agency: Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Protection.

Title: Infrastructure Protection Data Call.

OMB Number: 1670—NEW.

Frequency: Once.

Affected Public: State, Local, Tribal.

Number of Respondents: 138.

Estimated Time per Respondent: 2 hours.

Total Burden Hours: 276 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintaining): None.

Description: The U.S. Department of Homeland Security (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 the Office of Infrastructure Protection (IP) in the National Protection and Programs Directorate (NPPD). Beginning 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. This list provides a common basis for DHS and its security partners during the undertaking of CIKR protective planning efforts to keep our Nation safe. Collection of this information is directed and supported by Public Law 110–53 ''Implementing Recommendations of the 9/11 Commission Act of 2007,'' August 3, 2007; and Homeland Security Presidential Directive (HSPD) 7, ''Critical Infrastructure Identification, Prioritization, and Protection,'' December 17, 2003.

Dated: September 25, 2008.

Chase Garwood,

Chief Information Officer, National Protection and Programs Directorate, Department of Homeland Security.

Editorial Note: This document was received in the Office of the Federal Register on Thursday, January 8, 2009.

[FR Doc. E9–567 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

National Protection and Programs Directorate; Submission for Review: Critical Infrastructure and Key Resources Asset Protection Technical Assistance Program (CAPTAP) Train the Trainer Survey 1670—NEW

AGENCY: National Protection and Programs Directorate, Infrastructure Protection, DHS.

ACTION: 30-Day Notice and request for comments.

SUMMARY: The Department of Homeland Security (DHS) invites the general public and other federal agencies to comment on new information collection request 1670—NEW, CAPTAP Train the Trainer Survey. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), DHS is soliciting comments for this collection. The information collection was previously published in the **Federal Register** on August 1, 2008 at 73 FR 45025 allowing for a 60-day public comment period. No comments were received on this existing information collection. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until February 13, 2009. This process is conducted in accordance with 5 CFR 1320.1.

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, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for National Protection and Programs Directorate, DHS or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for National Protection and Programs Directorate, DHS or via electronic mail to *oira_submission@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget is particularly interested in comments that:

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.

Analysis

Agency: Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Protection.

Title: CAPTAP Train the Trainer Survey.

OMB Number: 1670—NEW.

Frequency: Once.

Affected Public: State, Local, Tribal.

Number of Respondents: 150.

Estimated Time per Respondent: 12 minutes.

Total Burden Hours: 30 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintaining): None.

Description: The C/ACAMS program uses the CAPTAP Train the Trainer survey to assess participant satisfaction with the training. The survey supports decision-making by identifying actionable training data to reallocate resources to address it. The Train the Trainer survey collects data about participants' satisfaction with the instructors, materials, course curriculum, activities and applicability to effect cost savings by prioritizing training improvements.

Dated: November 6, 2008.

Chase Garwood,

Chief Information Officer, National Protection and Programs Directorate Department of Homeland Security.

[FR Doc. E9–570 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2008–0196]

Homeland Security Science and Technology Advisory Committee

AGENCY: Science and Technology Directorate, DHS.

ACTION: Committee Management; Notice of Closed Federal Advisory Committee Meeting.

SUMMARY: The Homeland Security Science and Technology Advisory Committee will meet January 26–28, 2009 at Johns Hopkins University/Applied Physics Laboratory in Laurel, MD. The meeting will be closed to the public.

DATES: The Homeland Security Science and Technology Advisory Committee will meet January 26, 2009, from 2 p.m. to 4:30 p.m., January 27, 2009, from 8:30 a.m. to 4:30 p.m. and on January 28, 2009, from 8 a.m. to 12 p.m.

ADDRESSES: The meeting will be held at Johns Hopkins University/Applied Physics Laboratory, 11100 Johns Hopkins Road, Laurel, MD. Requests to have written material distributed to each member of the committee prior to the meeting should reach the contact person at the address below by Friday, January 16, 2009. Send written material to Ms. Deborah Russell, Science and Technology Directorate, Department of Homeland Security, 245 Murray Lane, Bldg. 410, Washington, DC 20528. Comments must be identified by DHS–

2008–0196 and may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: HSSTAC@dhs.gov.* Include the docket number in the subject line of the message.
- *Fax:* 202–254–6173.
- *Mail:* Ms. Deborah Russell, Science and Technology Directorate, Department of Homeland Security, 245 Murray Lane, Bldg. 410, Washington, DC 20528.

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.

Docket: For access to the docket to read background documents or comments received by the Homeland Security Science and Technology Advisory Committee, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Russell, Science and Technology Directorate, Department of Homeland Security, 245 Murray Lane, Bldg. 410, Washington, DC 20528 202–254–5739.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463).

The committee will meet for the purpose of receiving classified and sensitive Homeland Security and classified briefings on Maritime Improvised Explosive Devices (IEDs), Cyber Security and Science and Technology Programs.

Basis for Closure: In accordance with Section 10(d) of the Federal Advisory Committee Act, it has been determined that the Science and Technology Advisory Committee meeting concerns sensitive Homeland Security information and classified matters within the meaning of 5 U.S.C. 552b(c)(1) and (c)(9)(B) which, if prematurely disclosed, would significantly jeopardize national security and frustrate implementation of proposed agency actions.

Dated: January 6, 2009.

Jay M. Cohen,

Under Secretary for Science and Technology.

[FR Doc. E9–569 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

National Communications System

[Docket No. NCS–2008–0004]

President's National Security Telecommunications Advisory Committee

AGENCY: National Communications System, DHS.

ACTION: Notice of Partially Closed Advisory Committee Meeting.

SUMMARY: The President's National Security Telecommunications Advisory Committee (NSTAC) will be meeting by teleconference; the meeting will be partially closed to the public.

DATES: February 10, 2009, from 2 p.m. until 3 p.m.

ADDRESSES: The meeting will take place by teleconference. For access to the conference bridge and meeting materials, contact Ms. Sue Daage at (703) 235–5526 or by e-mail at *sue.daage@dhs.gov* by 5 p.m. February 1, 2009. If you desire to submit comments regarding the February 10, 2009, meeting they must be submitted by February 17, 2009. Comments must be identified by NCS–2008–0004 and may be submitted by one of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E-mail: NSTAC1@dhs.gov. Include docket number in the subject line of the message.

Mail: Office of the Manager, National Communications System (Customer Service Branch), Department of Homeland Security, 1100 Hampton Park Blvd., Capitol Heights, MD 20743;

Fax: 1–866–466–5370.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and NCS–2008–0004, the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the NSTAC, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Sue Daage, Customer Service Branch at (703) 235–5526, e-mail: *sue.daage@dhs.gov* or write the Deputy Manager, National Communications System, Department of Homeland Security, 1100 Hampton Park Blvd., Capitol Heights, MD 20743.

SUPPLEMENTARY INFORMATION: NSTAC advises the President on issues and problems related to implementing national security and emergency preparedness telecommunications policy. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), Public Law 92–463 (1972), as amended appearing in 5 U.S.C. App. 2.

At the upcoming meeting, between 2 p.m. and 2:15 p.m., the conference call will include government stakeholder feedback on NSTAC initiatives, and a status report on NSTAC Recommendations. This portion of the meeting will be open to the public.

Between 2:15 p.m. and 3 p.m., the NSTAC will discuss and vote on the Global Resiliency Report and receive three updates from the identity management, cybersecurity and satellite network task forces. This portion of the meeting will be closed to the public.

Persons with disabilities who require special assistance should indicate this when arranging access to the teleconference and are encouraged to identify anticipated special needs as early as possible.

Basis for Closure: During the portion of the meeting to be held from 2:15 p.m. to 3 p.m., the NSTAC will discuss core assurance and physical security of the cyber network, cybersecurity collaboration between the Federal government and the private sector, identity management issues and cyber-related vulnerabilities of the satellite network. Such discussions will likely include internal agency personnel rules and practices, specifically, identification of vulnerabilities in the Federal government's cyber network, along with strategies for mitigating those vulnerabilities and other sensitive law enforcement or homeland security information of a predominantly internal nature which, if disclosed, would significantly risk circumvention of DHS regulations or statutes. NSTAC members will likely inform the discussion by contributing confidential and voluntarily-provided commercial information relating to private sector network vulnerabilities that they would not customarily release to the public. Disclosure of this information can be reasonably expected to frustrate DHS's ongoing cybersecurity programs and initiatives and could be used to exploit vulnerabilities in the Federal government's cyber network. Accordingly, the relevant portion of this meeting will be closed to the public

pursuant to 5 U.S.C. 552b(c)(2), (4) and (9)(B).

James Madon,

Deputy Manager, National Communications System.

[FR Doc. E9–568 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

United States Immigration and Customs Enforcement

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection under Review; Secure Communities IDENT/IAFIS Interoperability State and Local Agency Assessment; OMB Control No. 1653–0040.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (USICE), is submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on November 7, 2008, Vol. 73 No. 217 66249, allowing for a 60 day comment period. No comments were received on 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 for thirty days until February 13, 2009.

Written comments and suggestions from the public and affected agencies regarding items contained in this notice and especially with regard to the estimated public burden and associated response time should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to OMB Desk Officer, for United States Immigration and Customs Enforcement, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of currently approved information collection.

(2) *Title of the Form/Collection:* Secure Communities IDENT/IAFIS Interoperability State and Local Agency Assessment.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form 70–003 and Form 70–004, U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State and Local Correctional Facilities. 8 U.S.C. 1231(a) gives the Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) authority to remove criminal aliens who have been ordered as such. DHS/ICE is improving community safety by transforming the way the federal government cooperates with state and local law enforcement agencies to identify, detain, and remove all criminal aliens held in custody. Secure Communities (SC) revolutionizes immigration enforcement by using technology to share information between law enforcement agencies and by applying risk-based methodologies to focus resources on assisting all local communities with removing high-risk criminal aliens. In order for the Secure Communities Initiative to meet its goals, ICE must collect detailed business requirements and input from its state and local law enforcement partners. ICE will interview law enforcement officials at a combined 7,000 state and local jails across the United States as part of the Secure Communities Initiative. The collection instruments are transitioning from the currently approved paper based format to the implementation of technology permitting electronic submissions of responses. This assessment determines the fingerprint procedures and technological capabilities of state and local jails governance, as well as basic jail booking statistics. This information is used in order to prioritize local sites and deliver the implementation strategy of the Secure Communities Initiative.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 7,000 responses at 20 minutes (0.3333333333333333 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 2,334 annual burden hours.

Requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be directed to: Joseph M. Gerhart, Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., Room 3138, Washington, DC 20024; (202) 732–6337.

Dated: January 8, 2009.

Joseph M. Gerhart,

Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. E9–601 Filed 1–13–09; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

United States Immigration and Customs Enforcement

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review; Form I–352, Immigration Bond; OMB Control No. 1653–0022.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (USICE), is submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on November 3, 2008 Vol. 73 No. 213 65390, allowing for a 60 day public comment period. No comments were received on 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 for thirty days February 13, 2009. Written comments

and suggestions from the public and affected agencies regarding items contained in this notice and especially with regard to the estimated public burden and associated response time should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to OMB Desk Officer, for United States Immigration and Customs Enforcement, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Immigration Bond.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–352. U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households and Businesses. The data collected through this collection instrument is used by U.S. Immigration and Customs Enforcement to ensure that the person or company posting the bond is aware of the duties and responsibilities associated with the bond. The collection instrument serves the purpose of instruction in the completion of the form, together with an explanation of the terms and conditions of bond. Sureties will have the capability of accessing, completing and submitting a bond electronically through ICE's eBonds initiative which encompasses the I–352, while individuals and households will still be required to complete the bond form manually.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 25,000 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 12,500 annual burden hours.

Requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be directed to: Joseph M. Gerhart, Chief, Records Management Branch; U.S. Immigration and Customs Enforcement, 500 12th Street, SW., Room 3138, Washington, DC 20024; (202) 732–6337.

Dated: January 8, 2009.

Joseph M. Gerhart,

Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. E9–602 Filed 1–13–09; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14891–B; AK–964–1410–KC–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Bean Ridge Corporation. The lands are in the vicinity of Manley Hot Springs, Alaska, and are located in:

Fairbanks Meridian, Alaska

T. 1 N., R. 14 W.,
Tract R;
Secs. 34, 35, and 36.

Containing approximately 1,486 acres.

T. 2 N., R. 14 W.,
Secs. 28 and 33.

Containing approximately 1,264 acres.

T. 3 N., R. 14 W.,
Secs. 11 and 12;
Secs. 14 and 15;
Sec. 21.

Containing approximately 3,200 acres.

T. 2 N., R. 16 W.,
Secs. 1 and 2;
Secs. 11 and 12.

Containing approximately 2,519 acres.

T. 2 N., R. 17 W.,
Sec. 25, lot 2;
Sec. 26, lot 2;
Sec. 33, lots 2 and 3;
Sec. 34, lots 1, 3, and 4;
Sec. 35.

Containing approximately 1,249 acres.

T. 1 S., R. 14 W.,
Secs. 1, 2, and 3.

Containing approximately 1,221 acres.

Aggregating approximately 10,938 acres.

The subsurface estate in these lands will be conveyed to Doyon, Limited, when the surface estate is conveyed to Bean Ridge Corporation. Notice of the decision will also be published four times in the Fairbanks Daily News-Miner.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until February 13, 2009 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION, CONTACT: The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov.* Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

Barbara Opp Waldal,

Land Law Examiner, Land Transfer Adjudication I.

[FR Doc. E9–580 Filed 1–13–09; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWYD04000.L14300000.EU0000, WYW128340]

Notice of Realty Action: Direct Sale of Public Lands in Sublette County, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The Bureau of Land Management (BLM) proposes to sell a 29.42-acre parcel of public land in Sublette County, Wyoming, for the appraised fair market value to Magagna Bros Inc., to resolve an unintentional unauthorized use of public lands.

DATES: Comments regarding the proposed sale must be received by the BLM at the address below not later than March 2, 2009.

ADDRESSES: Send all written comments concerning this proposed sale to the Field Manager, BLM-Rock Springs Field Office, 280 Highway 191 North, Rock Springs, Wyoming 82901. Comments received in electronic form, such as e-mail or facsimile, will not be considered.

FOR FURTHER INFORMATION CONTACT: Teri Deakins, Environmental Protection Specialist, at the above address or at 307–352–0211.

SUPPLEMENTARY INFORMATION: In accordance with the provisions of 43 CFR Part 2710, the following described public land is proposed to be sold pursuant to the authority provided in Section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended (43 U.S.C. 1713):

Sixth Principal Meridian, Sublette County, Wyoming

T. 27 N., R. 103 W.,
sec. 4, lot 6.

The area described contains 29.42 acres more or less.

The appraised market value for this parcel is $4,000. The proposed sale is consistent with the objectives, goals and decision of the BLM Green River Resource Management Plan, dated August 8, 1997, and the land is not required for other Federal purposes. The direct sale of this land to Magagna Bros Inc. will resolve an unintentional, unauthorized occupancy of public land managed by the BLM including residences and agricultural buildings. In accordance with 43 CFR 2710.0–6(c)(3)(iii) and 43 CFR 2711.3–3(a), direct sale procedures are appropriate to resolve an inadvertent unauthorized occupancy of the land or to protect existing equities in the land. The sale, when completed, would protect the improvements involved and resolve the inadvertent encroachment. The parcel is the minimum size possible to ensure that all the improvements are included. Magagna Bros Inc. will be allowed 30 days from the receipt of a written offer to submit a deposit of at least 20 percent of the appraised value of the parcel, and 180 days thereafter to submit the balance.

On November 3, 2008 the above described land was segregated from appropriation under the public land laws, including the mining laws. The segregative effect of this notice shall terminate upon issuance of a patent, upon publication in the **Federal Register** of a termination of the segregation, or 2 years from date of segregation, whichever comes first.

The following reservations, rights, and conditions will be included in the patent that may be issued for the above parcel of Federal land:

1. A reservation of all minerals to the United States;
2. A right-of-way thereon for ditches or canals constructed by the authority of the United States pursuant to the Act of August 30, 890 (43 U.S.C. 945);
3. All valid existing rights of record, including those documented on the official public land records at the time of patent issuance. Detailed information concerning the proposed land sale, including sale procedures, appraisal, planning and environmental documents, and a mineral report is available for review at the BLM, Rock Springs Field Office at the above address. Normal business hours are 7:45 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

For a period of 45 days from the date of publication of this notice in the **Federal Register**, the general public and interested parties may submit written comments to the BLM Field Manager at the above address. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Any adverse comments will be reviewed by the State Director, who may sustain, vacate, or modify this realty action. In the absence of timely filed objections, this realty action will become the final determination of the Department of the Interior.

The land will not be offered for sale prior to March 16, 2009.

(Authority: 43 CFR 2711.1–2(a))

Dated: December 22, 2008.

Lance C. Porter,

Field Manager.

[FR Doc. E9–582 Filed 1–13–09; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Colorado: Filing of Plats of Survey

December 31, 2008.

SUMMARY: The plats of survey of the following described land will be officially filed in the Colorado State Office, Bureau of Land Management, Lakewood, Colorado, effective 10 a.m., December 31, 2008. All inquiries should be sent to the Colorado State Office (CO–956), Bureau of Land Management, 2850 Youngfield Street, Lakewood, Colorado 80215–7093.

The plat, and field notes, of the dependent resurveys and surveys in Township 4 North, Range 72 West, Sixth Principal Meridian, Colorado, were accepted on October 30, 2008.

The supplemental plat of Sections 28 and 33 in Township 5 South, Range 99 West, Sixth Principal Meridian, Colorado, was accepted on October 10, 2008.

The plats and field notes, of the dependent resurvey of certain lines in Township 8 North, Range 100 West and Township 9 North, Range 101 West, Sixth Principal Meridian, Colorado, were accepted on November 20, 2008.

The plat, and field notes, of the dependent resurvey, in Township 8 North, Range 95 West, Sixth Principal Meridian, Colorado, were accepted on December 9, 2008.

The plat, of the entire record, of the corrective dependent resurvey, in Township 2 South, Range 98 West, Sixth Principal Meridian, Colorado, was accepted on December 17, 2008.

The plat, and field notes, of the dependent resurvey and section subdivision of Sections 27 and 28, Township 46 North, Range 8 East, New Mexico Principal Meridian, Colorado, were accepted on December 22, 2008.

The plat and field notes, of the dependent resurvey of the east boundary and a portion of the subdivisional lines in Township 42 North, Range 13 West, New Mexico

Principal Meridian, Colorado, were accepted on December 22, 2008.

Randall M. Zanon,

Chief Cadastral Surveyor for Colorado.

[FR Doc. E9–514 Filed 1–13–09; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

[Docket No. MMS–2008–MRM–0019]

Agency Information Collection Activities: Proposed Collection, Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of an extension of a currently approved information collection (OMB Control Number 1010–0162).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to the Office of Management and Budget (OMB) an information collection request (ICR) to renew approval of the paperwork requirements under the Chief Financial Officers Act of 1990 (CFO). This notice also provides the public a second opportunity to comment on the paperwork burden of the regulatory requirements. This ICR is titled ''Accounts Receivable Confirmations.''

DATES: Submit written comments on or before *February 13, 2009.*

ADDRESSES: Submit written comments by either FAX (202) 395–6566 or e-mail (*OIRA_Docket@omb.eop.gov*) directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of the Interior (OMB Control Number 1010–0162).

Please submit copies of your comments to MMS by one of the following methods:

- Electronically go to *http://www.regulations.gov.* In the ''Comment or Submission'' column, enter ''MMS–2008–MRM–0019'' to view supporting and related materials for this ICR. Click on ''Send a comment or submission'' link to submit public comments. Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link. All comments submitted will be posted to the docket.
- Mail comments to Hyla Hurst, Regulatory Specialist, Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 302B2, Denver, Colorado 80225. Please reference ICR 1010–0162 in your comments.
- Hand-carry comments or use an overnight courier service. Our courier address is Building 85, Room A–614, Denver Federal Center, West 6th Ave. and Kipling St., Denver, Colorado 80225. Please reference ICR 1010–0162 in your comments.

FOR FURTHER INFORMATION CONTACT: Hyla Hurst, telephone (303) 231–3495, or e-mail *hyla.hurst@mms.gov.* You may also contact Hyla Hurst to obtain copies, at no cost, of (1) the ICR, (2) any associated forms, and (3) the regulations that require the subject collection of information.

SUPPLEMENTARY INFORMATION: *Title:* Accounts Receivable Confirmations.

OMB Control Number: 1010–0162.

Bureau Form Number: None.

Abstract: The Secretary of the U.S. Department of the Interior is responsible for mineral resource development on Federal and Indian lands and the Outer Continental Shelf (OCS). The Secretary is required by various laws to manage mineral resource production on Federal and Indian lands and the OCS, collect the royalties and other mineral revenues due, and distribute the funds in accordance with those laws. Applicable laws pertaining to mineral leases on Federal and Indian lands are posted on our Web site at *http://www.mrm.mms.gov/Laws_R_D/PublicLawsAMR.htm.*

The Secretary also has a trust responsibility to manage Indian lands and seek advice and information from Indian beneficiaries. The MMS performs the minerals revenue management functions and assists the Secretary in carrying out the Department's trust responsibility for Indian lands.

When a company or an individual enters into a lease to explore, develop, produce, and dispose of minerals from Federal or Indian lands, that company or individual agrees to pay the lessor a share in an amount or value of production from the leased lands. The lessee is required to report various kinds of information to the lessor relative to the disposition of the leased minerals. Such information is generally available within the records of the lessee or others involved in developing, transporting, processing, purchasing, or selling of such minerals. The information collected includes data necessary to ensure that the royalties are accurately valued and appropriately paid.

Every year, under the CFO, the Department's Office of Inspector General, or its agent (agent), audits the Department's financial statements. The Department's goal is to receive an unqualified opinion. Accounts receivable confirmations are a common practice in the audit business. Due to continuously increasing scrutiny on financial audits, third-party confirmation on the validity of MMS financial records is necessary. Companies submit financial information on Form MMS–2014, Report of Sales and Royalty Remittance (OMB Control Number 1010–0140, expires November 30, 2009) and on Form MMS–4430, Solid Minerals Production and Royalty Report (OMB Control Number 1010–0120, expires December 31, 2010).

As part of CFO audits, the agent requests, by a specified date, third-party confirmation responses confirming that MMS accounts receivable records agree with royalty payor records, for the following items: Customer identification; royalty/invoice number; payor-assigned document number; date received; original amount reported; and remaining balance due MMS as of a specified date. In order to meet this requirement, MMS must mail letters on MMS letterhead, signed by the Deputy Associate Director for Minerals Revenue Management, to royalty payors selected by the agent at random, asking them to respond to the agent, confirming the accuracy and/or validity of selected royalty receivable items and amounts. Verifying the amounts reported and the balances due requires time for research and analysis by payors.

This collection does not require proprietary, trade secret, or other confidential information not protected by agency procedures. No items of a sensitive nature are collected. The requirement to respond is voluntary.

The MMS is requesting OMB's approval to continue to collect this information. Failure to collect this information would limit the Secretary's ability to discharge the duties of the office. Failure to collect this information could be considered a scope limitation for CFO audits.

Frequency: Annually.

Estimated Number and Description of Respondents: 100 Federal and Indian oil and gas and solid mineral royalty payors.

Estimated Annual Reporting and Recordkeeping ''Hour'' Burden: 25 hours.

We estimate that each response will take 15 minutes for payors to complete. There are no additional recordkeeping costs associated with this information collection. We have not included in our estimates certain requirements performed in the normal course of

business and considered usual and customary.

Estimated Annual Reporting and Recordkeeping ''Non-hour'' Cost Burden:

We have identified no ''non-hour'' cost burden associated with the collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501 *et seq.*) provides that 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.

Comments: Section 3506(c)(2)(A) of the PRA requires each agency to ''* * * publish a 60-day notice in the **Federal Register** * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *.'' Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

To comply with the public consultation process, we published a notice in the **Federal Register** on April 29, 2008 (73 FR 23269), announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day comment period. We received no comments in response to the notice.

If you wish to comment in response to this notice, you may send your comments to the offices listed under the **ADDRESSES** section of this notice. The OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days. Therefore, to ensure maximum consideration, OMB should receive public comments by February 13, 2009.

Public Comment Policy: We will post all comments in response to this notice at *http://www.mrm.mms.gov/Laws_R_D/FRNotices/FRInfColl.htm.* We also will post all comments, including names and addresses of respondents, at *http://www.regulations.gov.* Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

MMS Information Collection Clearance Officer: Arlene Bajusz (202) 208–7744.

Dated: December 4, 2008.

Greg Gould,

Associate Director for Minerals Revenue Management.

[FR Doc. E9–575 Filed 1–13–09; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service (MMS)

Outer Continental Shelf (OCS) Central Planning Area (CPA) Gulf of Mexico (GOM) Oil and Gas Lease Sale 208

AGENCY: Minerals Management Service, Interior.

ACTION: Final Notice of Sale (NOS) 208.

SUMMARY: On Wednesday, March 18, 2009, the MMS will open and publicly announce bids received for blocks offered in CPA Oil and Gas Lease Sale 208, pursuant to the OCS Lands Act (43 U.S.C. 1331–1356, as amended) and the regulations issued thereunder (30 CFR Part 256). The Final Notice of Sale 208 Package (Final NOS 208 Package) contains information essential to bidders, and bidders are charged with the knowledge of the documents contained in the Package.

DATES: Public bid reading for the CPA Oil and Gas Lease Sale 208 will begin at 9 a.m., Wednesday, March 18, 2009, at the Louisiana Superdome, 1500 Sugarbowl Drive, New Orleans, Louisiana 70112. The lease sale will be held in the St. Charles Club Room on the second floor (Loge Level). Entry to the Superdome will be on the Poydras Street side of the building through Gate A on the Ground or Plaza Level, and parking should be available at Garage 6. All times referred to in this document are local New Orleans times, unless otherwise specified.

ADDRESSES: Bidders can obtain a Final NOS 208 Package containing this Notice of Sale and several supporting and essential documents referenced herein from the MMS Gulf of Mexico Region Public Information Unit, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, (504) 736–2519 or (800) 200–GULF, or via the MMS GOM Homepage Address on the Internet at: *http://www.gomr.mms.gov.*

Filing of Bids: Bidders must submit sealed bids to the Regional Director (RD), MMS Gulf of Mexico Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, between 8 a.m. and 4 p.m. on normal working days, and from 8 a.m. to the Bid Submission Deadline of 10 a.m. on Tuesday, March 17, 2009, the day before the lease sale. If bids are mailed, please address the envelope containing all of the sealed bids as follows: Attention: Supervisor, Sales and Support Unit (MS 5422), Leasing Activities Section, MMS Gulf of Mexico Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394.

Contains Sealed Bids for CPA Oil and Gas Lease Sale 208 Please Deliver to Ms. Nancy Kornrumpf, 6th Floor, Immediately

Please note: Bidders mailing bid(s) are advised to call Ms. Nancy Kornrumpf immediately after putting their bid(s) in the mail at (504) 736–2726.

If the RD receives bids later than the time and date specified above, he will return those bids unopened to bidders. Should an unexpected event such as flooding or travel restrictions be significantly disruptive to bid submission, the MMS Gulf of Mexico Region may extend the Bid Submission Deadline. Bidders may call (504) 736–0557 or access our Web site at: *http://www.gomr.mms.gov* for information about the possible extension of the Bid Submission Deadline due to such an event.

Areas Offered for Leasing: The MMS is offering for leasing in CPA Oil and Gas Lease Sale 208, all blocks and partial blocks listed in the document ''List of Blocks Available for Leasing'' included in the Final NOS 208 Package. All of these blocks are shown on the following leasing maps and Official Protraction Diagrams (OPD's):

Outer Continental Shelf Leasing Maps—Louisiana Map Numbers 1 through 12 (These 30 Maps Sell for $2.00 each)

LA1 West Cameron Area (Revised November 1, 2000)
LA1A West Cameron Area, West Addition (Revised February 28, 2007)
LA1B West Cameron Area, South Addition (Revised February 28, 2007)
LA2 East Cameron Area (Revised November 1, 2000)
LA2A East Cameron Area, South Addition (Revised November 1, 2000)
LA3 Vermilion Area (Revised November 1, 2000)
LA3A South Marsh Island Area (Revised November 1, 2000)
LA3B Vermilion Area, South Addition (Revised November 1, 2000)

LA3C South Marsh Island Area, South Addition (Revised November 1, 2000)
LA3D South Marsh Island Area, North Addition (Revised November 1, 2000)
LA4 Eugene Island Area (Revised November 1, 2000)
LA4A Eugene Island Area, South Addition (Revised November 1, 2000)
LA5 Ship Shoal Area (Revised November 1, 2000)
LA5A Ship Shoal Area, South Addition (Revised November 1, 2000)
LA6 South Timbalier Area (Revised November 1, 2000)
LA6A South Timbalier Area, South Addition (Revised November 1, 2000)
LA6B South Pelto Area (Revised November 1, 2000)
LA6C Bay Marchand Area (Revised November 1, 2000)
LA7 Grand Isle Area (Revised November 1, 2000)
LA7A Grand Isle Area, South Addition (Revised February 17, 2004)
LA8 West Delta Area (Revised November 1, 2000)
LA8A West Delta Area, South Addition (Revised November 1, 2000)
LA9 South Pass Area (Revised November 1, 2000)
LA9A South Pass Area, South and East Additions (Revised November 1, 2000)
LA10 Main Pass Area (Revised November 1, 2000)
LA10A Main Pass Area, South and East Additions (Revised November 1, 2000)
LA10B Breton Sound Area (Revised November 1, 2000)
LA11 Chandeleur Area (Revised November 1, 2000)
LA11A Chandeleur Area, East Addition (Revised November 1, 2000)
LA12 Sabine Pass Area (Revised February 28, 2007)

Outer Continental Shelf Official Protraction Diagrams (These 19 Diagrams Sell for $2.00 Each)

NG15–02 Garden Banks (Revised February 28, 2007)
NG15–03 Green Canyon (Revised November 1, 2000)
NG15–05 Keathley Canyon (Revised February 28, 2007)
NG15–06 Walker Ridge (Revised November 1, 2000)
NG15–08 Sigsbee Escarpment (Revised February 28, 2007)
NG15–09 Amery Terrace (Revised October 25, 2000)
NG16–01 Atwater Valley (Revised November 1, 2000)
NG16–02 Lloyd Ridge (Revised August 1, 2008)
NG16–04 Lund (Revised November 1, 2000)
NG16–05 Henderson (Revised August 1, 2008)
NG16–07 Lund South (Revised November 1, 2000)
NG16–08 Florida Plain (Revised February 28, 2007)
NH15–12 Ewing Bank (Revised November 1, 2000)
NH16–04 Mobile (Revised November 1, 2000)
NH16–05 Pensacola (Revised February 28, 2007)
NH16–07 Viosca Knoll (Revised November 1, 2000)
NH16–08 Destin Dome (Revised February 28, 2007)
NH16–10 Mississippi Canyon (Revised November 1, 2000)
NH16–11 De Soto Canyon (Revised August 1, 2008)

Bidders are advised that the Central-Eastern Planning Area Boundary has been revised to match the Federal OCS Administrative Boundary for the DeSoto Canyon, Lloyd Ridge, and Henderson Areas. The new boundary splits blocks that were formerly ''stair-stepped'' and can be seen on the ''Stipulations and Deferred Blocks'' or ''Lease Terms and Economic Conditions'' maps, included in the Final NOS 208 Package. The boundaries along the Pensacola, Destin Dome, and Florida Plain Areas will remain ''stair-stepped'' for this lease sale. The administrative boundaries can also be viewed at: *http://www.mms.gov/ld/AdminBoundaries.htm*.

Please note: A CD–ROM (in ARC/INFO and Acrobat (.pdf) format) containing all of the GOM leasing maps and OPD's, except for those not yet converted to digital format, is available from the MMS Gulf of Mexico Region Public Information Unit for a price of $15. These GOM leasing maps and OPD's are also available for free online in .pdf and .gra format at: *http://www.gomr.mms.gov/homepg/lsesale/map_arc.html*.

For the current status of all CPA leasing maps and OPD's, please refer to 66 FR 28002 (published May 21, 2001), 69 FR 23211 (published April 28, 2004), 72 FR 27590 (published May 16, 2007), 72 FR 35720 (published June 29, 2007), and 73 FR 63505 (October 24, 2008). In addition, Supplemental Official OCS Block Diagrams (SOBD's) are available for blocks which contain the ''U.S. 200 Nautical Mile Limit'' line and the ''U.S.-Mexico Maritime Boundary'' line. These SOBD's are also available from the MMS Gulf of Mexico Region Public Information Unit. For additional information, please call Ms. Tara Montgomery at (504) 736–5722.

All blocks are shown on these leasing maps and OPD's. The available Federal acreage of all whole and partial blocks in this lease sale is shown in the document ''List of Blocks Available for Leasing'' included in the Final NOS 208 Package. Some of these blocks may be partially leased or deferred, or transected by administrative lines such as the Federal/state jurisdictional line. A bid on a block must include all of the available Federal acreage of that block. Also, information on the unleased portions of such blocks is found in the document ''Central Planning Area Lease Sale 208—Unleased Split Blocks and Available Unleased Acreage of Blocks with Aliquots and Irregular Portions Under Lease or Deferred'' included in the Final NOS 208 Package.

Areas not Available for Leasing: The following whole and partial blocks are not offered for lease in this lease sale:

Blocks with bid decisions currently under appeal (although currently unleased, the bid decisions on the following blocks are under appeal and bids will not be accepted):

Mississippi Canyon (OPD NH16–10)

Block 943

West Delta Area (Leasing Map LA8)

Block 50

Whole blocks and portions of blocks which lie within the former Western Gap portion of the 1.4 nautical mile buffer zone north of the continental shelf boundary between the United States and Mexico:

Amery Terrace (OPD NG 15–09)

Whole Blocks: 280, 281, 318 through 320, and 355 through 359
Portions of Blocks: 235 through 238, 273 through 279, and 309 through 317

Sigsbee Escarpment (OPD NG 15–08)

Whole Blocks: 239, 284, 331 through 341
Portions of Blocks: 151, 195, 196, 240, 241, 285 through 298, 342 through 349

Whole blocks and portions of blocks, which are adjacent to or beyond the United States Exclusive Economic Zone, in or adjacent to the area known as the Northern portion of the Eastern Gap. Please note that an additional one block setback is being deferred, starting with this Sale:

Lund South (OPD NG 16–07)

Whole Blocks: 128, 129, 169 through 173, 209 through 217, 248 through 261, 293 through 305, and 349

Henderson (OPD NG 16–05)

Whole Blocks: 466, 508 through 510, 551 through 554, 594 through 599, 637 through 643, 679 through 687, 722 through 731, 764 through 775, 807 through 819, 849 through 862, 891 through 905, 933 through 949, and 975 through 992

Portions of Blocks: 467, 511, 555, 556, 600, 644, 688, 732, 776, 777, 820, 821, 863, 864, 906, 907, 950, 993, and 994

Florida Plain (OPD NG 16–08)

Whole Blocks: 5 through 23, 46 through 66, 89 through 109, 133 through 153, 177 through 196, 221 through 239, 265 through 282, 309 through 326, and 363 through 369
Portions of Blocks: 24, 25, 67, 68, 110, 111, 154, 197, 198, 240, 241, 283, 284, 327, 370, and 371

Whole blocks and portions of blocks deferred by Gulf of Mexico Energy Security Act:

Pensacola (OPD NH 16–05)

Blocks: 751 through 754, 793 through 798, 837 through 842, 881 through 886, 925 through 930, 969 through 975

Destin Dome (OPD NH 16–08)

Whole Blocks: 1 through 7, 45 through 51, 89 through 96, 133 through 140, 177 through 184, 221 through 228, 265 through 273, 309 through 317, 353 through 361, 397 through 405, 441 through 450, 485 through 494, 529 through 538, 573 through 582, 617 through 627, 661 through 671, 705 through 715, 749 through 759, 793 through 804, 837 through 848, 881 through 892, 925 through 936, and 969 through 981

DeSoto Canyon (OPD NH 16–11)

Whole Blocks: 1 through 15, 45 through 59, and 92 through 102
Portions of Blocks: 16, 60, 61, 89 through 91, 103 through 105, and 135 through 147

Henderson (OPD NG 16–05)

Portions of Blocks: 114, 158, 202, 246, 290, 334, 335, 378, 379, 422, and 423

Whole blocks and portions of blocks above the Sale 181 area but beyond 100 miles from the Florida coast:

DeSoto Canyon (OPD NH 16–11)

Whole Blocks: 148, and 185 through 192
Portion of Blocks: 89, 90, 91, 103 through 105, 141 through 147, 149, and 193

Statutes and Regulations: Each lease issued in this lease sale is subject to the OCS Lands Act of August 7, 1953; 43 U.S.C. 1331 *et seq.*, as amended, hereinafter called ''the Act;'' all regulations issued pursuant to the Act and in existence upon the Effective Date of the lease; all regulations issued pursuant to the Act in the future which provide for the prevention of waste and conservation of the natural resources of the OCS and the protection of correlative rights therein; and all other applicable statutes and regulations.

Lease Terms and Conditions: Initial periods, extensions of initial periods, minimum bonus bid amounts, rental rates, escalating rental rates for leases with an approved extension of the initial 5-year period, royalty rate, minimum royalty, and royalty suspension provisions, if any, applicable to this sale are noted below. Depictions of related areas are shown on the map ''Final, Central Planning Area, Lease Sale 208, March 18, 2009, Lease Terms and Economic Conditions,'' for leases resulting from this lease sale.

Initial Periods: 5 years for blocks in water depths of less than 400 meters; 8 years for blocks in water depths of 400 to less than 800 meters (pursuant to 30 CFR 256.37, commencement of an exploratory well is required within the first 5 years of the initial 8-year term to avoid lease cancellation); and 10 years for blocks in water depths of 800 meters or deeper.

Extensions of Initial Periods: The 5-year initial period for a lease in water depths of less than 400 meters and issued from this sale may be extended to 8 years if a well, targeting hydrocarbons below 25,000 feet true vertical depth subsea (TVD SS), is spudded within the first 5 years of the initial period. The 3-year extension may be granted in cases where the well is drilled to a target below 25,000 feet TVD SS and also in cases where the well does not reach a depth below 25,000 feet TVD SS due to mechanical or safety reasons.

In order for the 5-year initial period to be extended to 8 years, the lessee is required to submit to the Regional Supervisor for Production and Development, within 30 days after completion of the drilling operation, a letter providing the well number, spud date, information demonstrating the target below 25,000 feet TVD SS, and, if applicable, any safety or mechanical problems encountered that prevented the well from reaching a depth below 25,000 feet TVD SS. The Regional Supervisor must concur in writing that the conditions have been met to extend the lease term 3 years. The Regional Supervisor will provide written confirmation of any lease extension within 30 days of receipt of the letter provided.

For any lease that has a well spudded in the first 5 years of the initial period with a hydrocarbon target below 25,000 feet TVD SS, the regulations found at 30 CFR 250.175(a), (b), and (c) *will not* be applicable at the end of the 5th year. For any lease that does not have a well spudded in the first 5 years of the initial period which targets hydrocarbons below 25,000 feet TVD SS, the regulations found at 30 CFR 250.175(a), (b), and (c) will be applicable, but the 3-year extension *will not* be available. At the end of the 8th year, the lessee is free to use all lease-term extension provisions under the regulations.

Minimum Bonus Bid Amounts: A bonus bid will not be considered for acceptance unless it provides for a cash bonus in the amount of $25 or more per acre or fraction thereof for blocks in water depths of less than 400 meters, or $37.50 or more per acre or fraction thereof for blocks in water depths of 400 meters or deeper; to confirm the exact calculation of the minimum bonus bid amount for each block, see ''List of Blocks Available for Leasing'' which is contained in the Final NOS 208 Package. Please note that bonus bids must be in whole dollar amounts (i.e., any cents will be disregarded by the MMS).

Rental Rates: Rentals for leases issued in this sale are to be paid at the rental rates summarized in the following table on or before the 1st day of each lease year until determination of well producibility is made, then at the expiration of each lease year until the start of royalty-bearing production.

SALE 208 RENTAL RATES PER ACRE OR FRACTION THEREOF

Water depth in meters	Years 1–5	Years 6, 7, & 8	Years 9–10
0 to <200	$7.00	$14.00, $21.00, & $28.00 (if a lease extension is approved)	N/A
200 to <400	11.00	$22.00, $33.00, & $44.00 (if a lease extension is approved)	N/A
400 to <800	11.00	$16.00 (if exploratory well drilled per 30 CFR 256.37)	N/A
800+	11.00	$16.00	$16.00

Escalating Rental Rates for leases with an approved extension of the initial 5-year period: Any lease in water depths less than 400 meters and granted a 3-year extension beyond the 5-year initial period as provided above will pay an escalating rental rate as indicated in the previous table and as set out in the following table, to be paid on or before the 1st day of each lease year until determination of well producibility is made, then at the expiration of each lease year until the start of royalty-bearing production. However, the escalating rental rates after the 5th year for blocks in up to 400 meters will become fixed and no longer escalate if another well is spudded during the 3-year extended term of the lease that targets hydrocarbons below 25,000 feet TVD SS, and MMS concurs that this has occurred. In this case the rental rate will become fixed at the rental rate in effect during the lease year in which the additional well was spudded.

Extended lease year No.	Escalating annual rental rate for a lease in: less than a 200–meter water depth	Escalating annual rental rate for a lease in a: 200– to less than 400–meter water depth
6	$14.00 per acre or fraction thereof	$22.00 per acre or fraction thereof.
7	$21.00 per acre or fraction thereof	$33.00 per acre or fraction thereof.
8	$28.00 per acre or fraction thereof	$44.00 per acre or fraction thereof.

Royalty Rate: 18¾ percent royalty rate for blocks in all water depths, except during periods of royalty suspension, to be paid monthly on the last day of the month following the month during which the production is obtained.

Minimum Royalty: $7.00 per acre or fraction thereof per year for blocks in water depths of less than 200 meters and $11.00 per acre or fraction thereof per year for blocks in water depths of 200 meters or deeper regardless of the year of the lease and notwithstanding any royalty relief volume. Minimum royalty is to be paid at the expiration of each lease year beginning in the year in which royalty bearing production commences, and continuing thereafter regardless of either the lease year or whether any royalty suspension may apply. A credit will be applied for any actual royalty paid on the lease during the lease year in which minimum royalty is owed on the lease. If the actual royalty paid on the lease for a given lease year exceeds the minimum royalty otherwise owed, then no minimum royalty payment is due.

Royalty Suspension Provisions: Leases with royalty suspension volumes (RSV), are authorized under existing MMS rules at 30 CFR Parts 203 and 260. There are no circumstances under which a single lease could receive a royalty suspension both for deep gas production and for deepwater production.

Section 344 of the EPAct05 extends existing deep gas incentives in two ways. First, it mandates a RSV of at least 35 billion cubic feet of natural gas for certain wells completed in a drilling depth category (20,000 feet TVD SS or deeper) for leases in 0 to less than 400 meters of water. Second, section 344 directs that RSV's no lower than those in shallower water (prior to the application of price thresholds) be applied to leases in 200 to less than 400 meters of water. Section 345 of the Energy Policy Act of 2005 (EPAct05) directs continuation of the MMS deepwater incentive program utilized since 2001 in the GOM for leases issued between August 8, 2005, and August 8, 2010, and provides for an increase in RSV from 12 million barrels of oil equivalent (MMBOE) to 16 MMBOE for leases in water depths greater than 2,000 meters.

Deep Gas Royalty Suspensions

A lease issued as a result of this sale may be eligible for royalty relief for deep and ultra-deep wells mandated by section 344 of EPAct 05. The MMS published a final rule in the November 18, 2008, **Federal Register** (73 FR 69490), Royalty Relief—Ultra-Deep Gas Wells and Deep Gas Wells on Leases in the Gulf of Mexico (Incentives for Natural Gas Production from Deep Wells in the Shallow Waters of the GOM) implementing section 344 of EPAct05. If a lease is eligible, it is subject to the provisions of this rule, including the price threshold provisions. The royalty relief is in the form of the Royalty Suspension Provisions cited below.

A. The Following Royalty Suspension Provisions Apply To Qualifying Deep Wells on Leases at Least Partly in Water Depths Up to 200 Meters

Such wells require a perforated interval the top of which is from 15,000 to less than 20,000 feet TVD SS. Suspension volumes, conditions, and requirements prescribed in 30 CFR 203.41 through 203.47 and any amendments or successor regulations apply to deep gas production from a lease in this water depth range issued as a result of this sale. Definitions that apply to this category of royalty relief are found in 30 CFR 203.0. To receive this category of royalty relief, production from a qualified well or drilling of a certified unsuccessful well must commence before May 3, 2009.

B. The Following Royalty Suspension Provisions Apply To Qualifying Deep Wells on Leases Entirely in Water Depths More Than 200 But Less Than 400 Meters

Such wells require a perforated interval the top of which is from 15,000 to less than 20,000 feet TVD SS. The EPAct05 requires granting RSV to leases entirely in water depths more than 200 but less than 400 meters that will be calculated using the same methodology as is currently employed for leases at least partly in water depth up to 200 meters. Deep wells on leases in the 200 to less than 400 meter water depth range issued in Sale 208 are eligible for royalty relief as prescribed in the final rule (73 FR 69490) implementing section 344 of the EPAct05.

C. The Following Royalty Suspension Provisions Apply To Qualifying Ultra Deep Wells on Leases Entirely in Water Depths Less Than 400 Meters

Ultra deep wells (i.e., wells completed with a perforated interval the top of which is 20,000 feet TVD SS or deeper) on leases entirely in water depths less than 400 meters issued in Sale 208 are eligible for the royalty relief as prescribed in the final rule (73 FR 69490) implementing section 344 of the EPAct05.

Deepwater Royalty Suspensions

The following Royalty Suspension Provisions apply to deepwater oil and gas production:

A lease issued as a result of this sale may be eligible for deepwater royalty relief mandated by section 345 of EPAct05. The following Royalty Suspension Provisions for deepwater oil and gas production apply to a lease issued as a result of this sale. These provisions are similar to, and mean the same as the language used in recent sales except for some clarifying text and updated examples. In addition to these provisions, and the EPAct05, refer to 30

CFR 218.151 and applicable provisions of sections 260.120–260.124 for regulations on how royalty suspensions relate to field assignment, product types, rental obligations, and supplemental royalty relief.

1. A lease in water depths of 400 meters or more will receive a royalty suspension as follows, according to the water depth range in which the lease is located:

400 meters to less than 800 meters: 5 MMBOE800.

800 meters to less than 1,600 meters: 9 MMBOE.

1,600 meters to 2,000 meters: 12 MMBOE.

Greater than 2,000 meters: 16 MMBOE.

2. In any calendar year during which the arithmetic average of the daily closing prices for the nearby delivery month on the New York Mercantile Exchange (NYMEX) for the applicable product exceeds the adjusted product price threshold, the lessee must pay royalty on production that would otherwise receive royalty relief under 30 CFR Part 260 or supplemental relief under 30 CFR Part 203, and such production will count towards the RSV.

(a) The base level price threshold for light sweet crude oil is $36.39 per barrel in 2007. The adjusted oil price threshold in any subsequent calendar year is computed by changing the price threshold applicable in the immediately preceding calendar year by the percentage by which the implicit price deflator for the gross domestic product has changed during the calendar year.

(b) The base level price threshold for natural gas is $4.55 per million British thermal units (MMBTU) in 2007. The adjusted gas price threshold in any subsequent calendar year is computed by changing the price threshold applicable in the immediately preceding calendar year by the percentage by which the implicit price deflator for the gross domestic product has changed during the calendar year.

(c) As an example, if the implicit price deflator indicates that inflation is 3 percent in 2008, then the price threshold in calendar year 2008 would become $37.48 per barrel for oil and $4.69 for gas. Therefore, royalty on oil production in calendar year 2008 would be due if the average of the daily closing prices for the nearby delivery month on the NYMEX in 2008 exceeds $37.48 per barrel, and royalty on gas production in calendar year 2008 would be due if the average of the daily closing prices for the nearby delivery month on the NYMEX in 2008 exceeds $4.69 per MMBTU.

(d) The MMS provides notice in March of each year when adjusted price thresholds for the preceding year were exceeded. Once this determination is made, based on the then-most-recent implicit price deflator information, it will not be revised regardless of any subsequent adjustments in the implicit price deflator published by the U.S. Government for the preceding year. Information on price thresholds is available at the MMS Web site at: *http://www.mms.gov/econ/*.

(e) In cases where the actual average price for the product exceeds the adjusted price threshold in any calendar year, royalties must be paid no later than 90 days after the end of the year (see 30 CFR 260.122(b)(2) for more detail) and royalties must be paid provisionally in the following calendar year (see 30 CFR 260.122(c) for more detail).

(f) Full royalties are owed on all production from a lease after the RSV is exhausted, beginning on the first day of the month following the month in which the RSV is exhausted.

Lease Stipulations: The map ''Final, Central Planning Area, Lease Sale 208, March 18, 2009, Stipulations and Deferred Blocks'' depicts the blocks on which one or more of 13 lease stipulations apply: (1) Topographic Features; (2) Live Bottoms; (3) Military Areas; (4) Evacuation; (5) Coordination; (6) Blocks South of Baldwin County, Alabama; (7) Law of the Sea Convention Royalty Payment; (8) Protected Species; (9) Limitation on Use of Seabed and Water Column in the Vicinity of the Approved Port Pelican Offshore Liquefied Natural Gas (LNG) Deepwater Port Receiving Terminal, Vermilion Area, Blocks 139 and 140; (10) Below Seabed Operations on Mississippi Canyon, Block 920; (11) Limitation on Use of Seabed and Water Column in the Vicinity of the Approved Gulf Landing Offshore LNG Deepwater Port Receiving Terminal, West Cameron Area, Block 213; (12) Below Seabed Operations on a Portion of Mississippi Canyon, Block 650 and (13) Below Seabed Operations on a Portion of Walker Ridge, Blocks 293 and 294.

The texts of the stipulations are contained in the document ''Lease Stipulations, Central Planning Area, Oil and Gas Lease Sale 208, Final Notice of Sale'' included in the Final NOS 208 Package. In addition, the ''List of Blocks Available for Leasing'' contained in the Final NOS 208 Package identifies for each block listed the lease stipulations applicable to that block.

Information to Lessees: The Final NOS 208 Package contains an ''Information to Lessees'' document that provides detailed information on certain specific issues pertaining to this proposed oil and gas lease sale.

Method of Bidding: For each block bid upon, a bidder must submit a separate signed bid in a sealed envelope labeled ''Sealed Bid for Oil and Gas Lease Sale 208, not to be opened until 9 a.m., Wednesday, March 18, 2009.'' The submitting company's name, its GOM company number, the map name, map number, and block number should be clearly identified on the outside of the envelope.

Please refer to the sample bid envelope included within the Final NOS 208 Package. The total amount of the bid must be in a whole dollar amount; any cent amount above the whole dollar will be ignored by the MMS. Details of the information required on the bid(s) and the bid envelope(s) are specified in the document ''Bid Form and Envelope'' contained in the Final NOS 208 Package. A blank bid form has been provided for your convenience which may be copied and filled in.

Please also refer to the Telephone Numbers/Addresses of Bidders Form included within the Final NOS 208 Package. We are requesting that you provide this information in the format suggested for each lease sale. Please provide this information prior to or at the time of bid submission. Do not enclose this form inside the sealed bid envelope.

The MMS published in the **Federal Register** a list of restricted joint bidders, which applies to this lease sale, at 73 FR 59649 on October 9, 2008. Please also refer to joint bidding provisions at 30 CFR 256.41 for additional information. All bidders must execute all documents in conformance with signatory authorizations on file in the MMS Gulf of Mexico Region Adjudication Unit. Designated signatories must be authorized to bind their respective legal business entities (e.g., a corporation, partnership, or LLC) and must have an incumbency certificate setting forth the authorized signatories on file with the GOM Region Adjudication Office. Bidders submitting joint bids must include on the bid form the proportionate interest of each participating bidder, stated as a percentage, using a maximum of five decimal places (e.g., 33.33333 percent). The MMS may require bidders to submit other documents in accordance with 30 CFR 256.46. The MMS warns bidders against violation of 18 U.S.C. 1860 prohibiting unlawful combination or intimidation of bidders. Bidders are advised that the MMS considers the signed bid to be a legally binding

obligation on the part of the bidder(s) to comply with all applicable regulations, including payment of the one-fifth bonus bid amount on all high bids. A statement to this effect must be included on each bid (see the document ''Bid Form and Envelope'' contained in the Final NOS 208 Package).

Withdrawal of Bids: Once submitted, bid(s) may not be withdrawn unless the RD receives a written request for withdrawal from the company who submitted the bid(s), prior to 10 a.m. on Tuesday, March 17, 2009. This request must be typed on company letterhead and must contain the submitting company's name, its company number, the map name/number and block number of the bid(s) to be withdrawn. The request must be in conformance with signatory authorizations on file in the MMS Gulf of Mexico Region Adjudication Office. Signatories must be authorized to bind their respective legal business entities (e.g., a corporation, partnership, or LLC) and must have an incumbency certificate setting forth the authorized signatories on file with the MMS GOM Region Adjudication Office. The name and title of said signatory must be typed under the signature block on the withdrawal letter. Upon the RD's, or his designee's, approval of such requests, he will indicate his approval by affixing his signature and date to the submitting company's request for withdrawal.

Rounding: The following procedure must be used to calculate the minimum bonus bid, annual rental, and minimum royalty: Round up to the next whole acre if the block acreage contains a decimal figure prior to calculating the minimum bonus bid, annual rental, and minimum royalty amounts. The appropriate rate per acre is applied to the whole (rounded up) acreage. The bonus bid must be in whole dollar amounts (i.e., any cents will be disregarded by the MMS) and greater than or equal to the minimum bonus bid. The appropriate minimum bid per acre rate is applied to the whole (rounded up) acreage and the resultant calculation is rounded up to the next whole dollar amount if the calculation results in any cents. The minimum bonus bid calculation, including all rounding, is shown in the document ''List of Blocks Available for Leasing'' included in the Final NOS 208 Package.

Bonus Bid Deposit: Each bidder submitting an apparent high bid must submit a bonus bid deposit to the MMS equal to one-fifth of the bonus bid amount for each such bid. All payments must be electronically deposited into an interest-bearing account in the U.S. Treasury (account information provided in the Electronic Funds Transfer (EFT) instructions) by 11 a.m. Eastern Time the day following bid reading. Under the authority granted by 30 CFR 256.46(b), the MMS requires bidders to use electronic funds transfer procedures for payment of one-fifth bonus bid deposits for Lease Sale 208, following the detailed instructions contained in the document ''Instructions for Making EFT Bonus Payments,'' which can be found on the MMS Web site at: *http://www.gomr.mms.gov/homepg/lsesale/208/cgom208.html.* Such a deposit does not constitute and shall not be construed as acceptance of any bid on behalf of the United States. If a lease is awarded, however, MMS requests that only one transaction be used for payment of the four-fifths bonus bid amount and the first year's rental.

Please note: *Certain bid submitters* (i.e., those that are NOT currently an OCS mineral lease record titleholder or designated operator OR those that have ever defaulted on a one-fifth bonus bid payment (EFT or otherwise)) *are required to guarantee (secure) their one-fifth bonus bid payment prior to the submission of bids.* For those who must secure the EFT one-fifth bonus bid payment, one of the following options may be used: (1) Provide a third-party guarantee; (2) amend bond coverage; (3) provide a letter of credit; or (4) provide a lump sum payment in advance via EFT. The EFT instructions specify the requirements for each option.

Withdrawal of Blocks: The United States reserves the right to withdraw any block from this lease sale prior to issuance of a written acceptance of a bid for the block.

Acceptance, Rejection, or Return of Bids: The United States reserves the right to reject any and all bids. In any case, no bid will be accepted, and no lease for any block will be awarded to any bidder, unless the bidder has complied with all requirements of this Notice, including the documents contained in the associated Final NOS 208 Package and applicable regulations; the bid is the highest valid bid; and the amount of the bid has been determined to be adequate by the authorized officer. Any bid submitted which does not conform to the requirements of this Notice, the Act, and other applicable regulations may be returned to the bidder submitting that bid by the RD and not considered for acceptance. The Attorney General may also review the results of the lease sale prior to the acceptance of bids and issuance of leases. To ensure that the Government receives a fair return for the conveyance of lease rights for this lease sale, high bids will be evaluated in accordance with MMS bid adequacy procedures. A copy of current procedures, ''Modifications to the Bid Adequacy Procedures'' at 64 FR 37560 on July 12, 1999, can be obtained from the MMS Gulf of Mexico Region Public Information Unit or via the MMS Gulf of Mexico Region Internet Web site at: *http://www.gomr.mms.gov/homepg/lsesale/bidadeq.html.*

Successful Bidders: As required by the MMS, each company that has been awarded a lease must execute all copies of the lease (Form MMS–2005 (March 1986) as amended), pay by EFT the balance of the bonus bid amount and the first year's rental for each lease issued in accordance with the requirements of 30 CFR 218.155; and satisfy the bonding requirements of 30 CFR 256, subpart I, as amended.

Also, in accordance with regulations at 2 CFR Parts 180 and 1400, the lessee shall comply with the U.S. Department of the Interior's nonprocurement debarment and suspension requirements, and agrees to communicate this requirement to comply with these regulations to persons with whom the lessee does business as it relates to this lease by including this term as a condition to enter into their contracts and other transactions.

Affirmative Action: The MMS requests that, prior to bidding, Equal Opportunity Affirmative Action Representation Form MMS 2032 (June 1985) and Equal Opportunity Compliance Report Certification Form MMS 2033 (June 1985) be on file in the MMS Gulf of Mexico Region Adjudication Unit. This certification is required by 41 CFR Part 60 and Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967. In any event, prior to the execution of any lease contract, both forms are required to be on file in the MMS Gulf of Mexico Region Adjudication Unit.

Geophysical Data and Information Statement: Pursuant to 30 CFR 251.12, the MMS has a right to access geophysical data and information collected under a permit in the OCS. Every bidder submitting a bid on a block in Sale 208, or participating as a joint bidder in such a bid, must submit a Geophysical Data and Information Statement (GDIS) identifying any enhanced or reprocessed geophysical data and information generated or used as part of the decision to bid or participate in a bid on the block. The data identified in the GDIS should clearly identify whether the data or information are non-exclusive data sets available from geophysical contractors or exclusive data specially processed for

or by bidders. In addition, the GDIS should clearly identify the data type (2–D or 3–D, pre-stack or post-stack and time or depth); data extent (i.e., number of line miles for 2D or number of blocks for 3D) and migration algorithm of the data and information. The statement must also include the name and phone number of a contact person, and an alternate, who are both knowledgeable about the information and data listed and available for 30 days post-sale, the processing company, date processing completed, owner of the original data, original data survey name and permit number. The MMS reserves the right to query about alternate data sets and to quality check and compare the listed and alternative data sets to determine which data set most closely meets the needs of the fair market value determination process.

The statement must also identify each block upon which a bidder bid, or participated in a bid, but for which it did not use processed or reprocessed pre- or post-stack geophysical data and information as part of the decision to bid or to participate in the bid. The GDIS must be submitted, even if no enhanced geophysical data and information were used for bid preparation of the tract.

In the event your company supplies any type of data to the MMS, in order to get reimbursed, your company must be registered with the Central Contractor Registration (CCR) provided via Web site at: *http://www.ccr.gov.* This is a requirement that was implemented on October 1, 2003, and requires all entities doing business with the Government to complete a business profile in CCR and update it annually. Payments are made electronically based on the information contained in CCR. Therefore, if your company is not actively registered in CCR, the MMS will not be able to reimburse or pay your company for any data supplied.

Please also refer to the Final NOS 208 Package for more detail concerning submission of the GDIS, making the data available to the MMS following the lease sale, preferred format, reimbursement for costs, and confidentiality.

Force Majeure: The Regional Director of the MMS Gulf of Mexico Region has the discretion to change any date, time, and/or location specified in the Final NOS 208 Package in case of a force majeure event which the Regional Director deems may interfere with the carrying out of a fair and proper lease sale process. Such events may include, but are not limited to, natural disasters (e.g., earthquakes, hurricanes, floods), wars, riots, acts of terrorism, fire, strikes, civil disorder or other events of a similar nature. In case of such events, bidders should call (504) 736–0557 or access our Web site at: *http://www.gomr.mms.gov* for information about any changes.

Dated: January 6, 2009.

Randall B. Luthi,

Director, Minerals Management Service.

[FR Doc. E9–695 Filed 1–13–09; 8:45 am]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–624]

In the Matter of: Certain Systems for Detecting and Removing Viruses or Worms, Components Thereof, and Products Containing Same; Notice of a Commission Determination Not To Review an Initial Determination Terminating the Investigation Based on a Cross-Licensing Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 26) of the presiding administrative law judge (''ALJ'') terminating the above-captioned investigation based on a cross-licensing agreement.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., telephone 202–708–2310, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on December 31, 2007, based on a complaint filed on November 21, 2007, by Trend Micro Incorporated (''Trend Micro'') of Cupertino, California. 72 FR 74329–30. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain systems for detecting and removing viruses or worms, components thereof, and products containing same by reason of infringement of claims 2 and 4–22 of U.S. Patent No. 5,623,600 (''the '600 patent''). The complaint named three respondents: Barracuda Networks, Inc. of Campbell, CA (''Barracuda''); Panda Software International S.L. of Spain; and Panda Distribution, Inc. of Glendale, CA (collectively ''Panda''). The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337.

On March 14, 2008, the Commission issued notice of its determination not to review an ID granting Trend Micro's and Panda's joint motion to terminate the investigation as to Panda on the basis of a settlement agreement. On July 11, 2008, the Commission issued notice of its determination not to review an ID granting Trend Micro's motion to terminate the investigation in part on the basis of withdrawal of claims 2, 5–8, 12, 16–17, 20, and 22 of the '600 patent. On September 29, 2008, the Commission issued notice of its determination not to review an ID granting Trend Micro's motion to terminate the investigation in part on the basis of withdrawal of claims 14, and 18–19 of the '600 patent.

On October 16, 2008, Trend Micro and Barracuda filed a joint motion to terminate the investigation on the basis of a cross-licensing agreement.

The ALJ issued the subject ID on December 10, 2008, granting the joint motion to terminate. No party petitioned for review of the ID pursuant to 19 CFR 210.43(a), and the Commission found no basis for ordering a review on its own initiative pursuant to 19 CFR 210.44. The Commission has determined not to review the ID, and to terminate the investigation in its entirety.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.21(a) and 210.42(h)(3) of the Commission's Rules of Practice and Procedure (19 CFR 210.21(a), 210.42(h)(3)).

By order of the Commission.

Issued: January 8, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–559 Filed 1–13–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–666]

In the Matter of Certain Cold Cathode Fluorescent Lamp (''CCFL'') Inverter Circuits and Products Containing Same; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 15, 2008, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of O2 Micro International Ltd. of the Cayman Islands and O2 Micro Inc. of Santa Clara, California. A letter supplementing the complaint was filed on December 24, 2008. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cold cathode fluorescent lamp (''CCFL'') inverter circuits and products containing same that infringe certain claims of U.S. Patent Nos. 7,417,382; 6,856,519; 6,809,938; and 7,120,035. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue exclusion orders and cease and desist orders.

ADDRESSES: The complaint and supplement, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: David O. Lloyd, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2576.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2008).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on January 8, 2009, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain cold cathode fluorescent lamp (''CCFL'') inverter circuits or products containing same that infringe one or more of claims 1, 2, 4, 6–9, 11, 13, and 14 of U.S. Patent No. 7,417,382; claim 7 of U.S. Patent No. 6,856,519; claims 1–3 and 6 of U.S. Patent No. 6,809,938; and claim 4 of U.S. Patent No. 7,120,035, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are —

O2 Micro International Ltd., Grand Pavilion Commercial Centre, West Bay Road, Grand Cayman KY1–1209, Cayman Islands.

02 Micro Inc., 3118 Patrick Henry Drive, Santa Clara, CA 95054.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Monolithic Power Systems Inc., 6409 Guadalupe Mines Road, San Jose, CA 95120.

Microsemi Corporation, 2381 Morse Avenue, Irvine, CA 92614.

ASUSTeK Computer Inc., No. 15, Li-Te Road Peitou, Taipei, Taiwan.

ASUSTeK Computer International America, 800 Corporate Way, Fremont, CA 94539.

LG Electronics, LG Twin Towers 20,Yoido-dong, Youngdungpo-gu Seoul, Korea 150–721.

LG Electronics U.S.A., 1000 Sylvan AvenueEnglewood Cliffs, NJ 07632.

LG Display Co., Ltd., West Tower, LG Twin Towers, 20,Yoido-dong, Youngdungpo-gu, Seoul, Korea 150–721.

LG Display America, Inc., 150 East Brokaw Road, San Jose, CA 95112.

BenQ Corporation, 16 Jihu Road, Neihu, Taipei 114, Taiwan.

BenQ America Corp., 15375 BarrancaSuite A205Irvine, CA 92618.

(c) The Commission investigative attorney, party to this investigation, is David O. Lloyd, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Issued: January 8, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–561 Filed 1–13–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–09–001]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: January 21, 2009 at 2 p.m.

PLACE: Room 101, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: None.
2. Minutes.
3. Ratification List.
4. Inv. No. 731–TA–1020 (Review) (Barium Carbonate from China)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before January 30, 2009.)
5. Outstanding Action Jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission:

Issued: January 8, 2009.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. E9–533 Filed 1–13–09; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Judgment Pursuant to Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that on January 7, 2009, a proposed Consent Decree in *United States* v. *Alcan Aluminum Corp.,* Civil No. 7:09cv9, was lodged with the United States District Court for the Northern District of New York.

The proposed Consent Decree resolves cost recovery and civil penalty claims by the United States, on behalf of the U.S. Environmental Protection Agency (''EPA''), against Alcan under sections 106(b)(1) and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. 9606(b)(1) and 9607(a), in connection with the Sealand Restoration Superfund Site in Lisbon, New York. The proposed Consent Decree provides for Alcan to pay $1,200,000 in reimbursement of EPA's response costs at the Site and $100,000 in civil penalties for Alcan's failure to comply with a CERCLA section 106 administrative order requiring specified cleanup actions at the Site.

The Department of Justice will receive for a period of 30 days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Alcan Aluminum Corp.,* Civil No. 7:09cv9, D.J. Ref. No. 90–11–3–06953/2.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Northern District of New York, 100 South Clinton Street, Syracuse, New York 13261, and at the United States Environmental Protection Agency, Region II, 290 Broadway, New York, New York 10007–1866. During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed Consent Decree may 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. If requesting a copy of the proposed Consent Decree, please enclose a check in the amount of $4.25 (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.

Ronald Gluck,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–531 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Public Comment Period for Proposed Clean Water Act Consent Decree

Notice is hereby given that, for a period of 30 days, the United States will receive public comments on a proposed Consent Decree in *United States* v. *Explorer Pipeline Company* (''Explorer Consent Decree'') (Civil Action No. 4:08–cv–2944), which was lodged with the United States District Court for the Southern District of Texas on January 8, 2009.

The Complaint in this Clean Water Act case was filed against Explorer Pipeline Company on October 2, 2008. The Complaint alleges that Explorer is civilly liable for violation of the Clean Water Act (''CWA''), 33 U.S.C. 1251 *et seq.*, as amended by the Oil Pollution Act of 1990 (''OPA''), 33 U.S.C. 2701 *et seq.* The Complaint seeks civil penalties for the discharge of jet fuel into navigable waters of the United States or adjoining shorelines from Explorer's 28-inch interstate refined petroleum products pipeline near Huntsville, Walker County, Texas, on July 14, 2007. The Complaint alleges that at least 6,568 barrels of jet fuel were discharged from the pipeline during the spill event. Under the settlement, Explorer will pay a civil penalty of $3,300,000. In earlier responses to the spill, Explorer replaced the section of pipe that ruptured and completed cleanup of the impacted waters and adjoining shorelines. In addition, Explorer is cooperating in a joint federal and state natural resource damage assessment and is performing additional pipeline assessment and followup work under a Corrective Action Order issued by the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration.

Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and may be submitted to: P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or via e-mail to *pubcomment-ees.enrd@usdoj.gov,* and should refer to *United States* v. *Explorer Pipeline Company,* D.J. Ref. 90–5–1–1–07276/1.

The Consent Decree may be examined at the Office of the United States Attorney, Southern District of Texas, 919 Milam Street, Suite 1500, Houston, Texas. During the public comment period the Explorer Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Explorer Consent Decree also may 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

$4.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen M. Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–592 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act

Notice is hereby given that on December 31, 2008, a proposed consent decree (the ''Decree'') in *United States and State of Oregon* v. *Pacific Northern Environmental Corp., dba Dedicated Fuels, Inc.,* Civil Action No. 3:08–cv–01513–HU, was lodged with the United States District Court for the District of Oregon.

In this action the United States and State of Oregon sought civil penalties for Pacific Northern Environmental Corp.'s (''PNE'') violation of the Clean Water Act's spill prohibition. PNE owns and operates a heating oil business located in North Bend, Oregon, as well as several gas stations in the area. On July 8, 2006, a tanker truck owned and operated by Dedicated carrying several hundred barrels of diesel fuel overturned while traveling on Highway 38, near Milepost 17, just east of Scottsburg, Oregon. Approximately 197 barrels of diesel fuel spilled. Diesel fuel that did not ignite in the ensuing fire migrated to the Umpqua River. PNE's discharge to the Umpqua River violated the Clean Water Act and Oregon law. Under the consent decree, PNE will pay the United States and the State of Oregon civil penalties of $74,272 and $20,000, respectively. Additionally, PNE agrees to perform a supplemental environmental project (''SEP''), the cost of which shall be not less than $47,640.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States and State of Oregon* v. *Pacific Environmental Corp., dba Dedicated Fuels, Inc.*, Civil Action No. 3:08–cv–01513–HU, D.J. Ref. 90–5–1–1–09175.

The consent decree may be examined at the Office of the United States Attorney, Mark O. Hatfield U.S. Courthouse, 1000 SW. Third Avenue, Suite 600, Portland, OR, 97204, and at U.S. EPA Region 10, 1200 Sixth Avenue, Seattle, WA, 98101. During the public comment period, the consent decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the consent 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 $5.75 (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.

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section.

[FR Doc. E9–579 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States* v. *Savoy Senior Housing Corp., et al.*, No. 6:06–cv–31 (W.D. Va.), was lodged with the United States District Court for the Western District of Virginia, Lynchburg Division, on January 7, 2009.

The proposed Consent Decree concerns a complaint filed by the United States against Savoy Senior Housing Corporation, Savoy Liberty Village, LLC, SDB Construction, Inc., Jacob A. Frydman, Best G.C., Inc. (a/k/a Best Grading), and Acres of Virginia, Inc., for alleged violations of Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. 1311(a). The proposed Consent Decree resolves all allegations against the defendants for discharging dredged or fill material, and/or controlling and directing such discharges, into waters of the United States at a 140-acre property located in Campbell County, Virginia, without a permit issued by the United States Army Corps of Engineers. The proposed Consent Decree also resolves all allegations against the defendants for discharging sediment in stormwater, and/or controlling and directing such discharges, into waters of the United States on or from the same property, both without a CWA permit and in violation of such a permit once it was obtained.

The proposed Consent Decree requires Savoy Senior Housing Corporation, Savoy Liberty Village, LLC, SDB Construction, Inc., Best G.C., Inc., and Acres of Virginia, Inc., to pay to the United States a civil penalty. The proposed Consent Decree also requires these defendants to restore certain areas on and adjacent to the 140-acre site, and also to fund off-site mitigation through the purchase of credits from stream and wetland restoration banks in the region.

The Department of Justice will accept written comments relating to the proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to Kenneth C. Amaditz, Trial Attorney, Environmental Defense Section, P.O. Box 23986, Washington, DC 20026–3986, and refer to *United States* v. *Savoy Senior Housing Corp., et al.*, DJ # 90–5–1–1–17868.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the Western District of Virginia in Lynchburg, Virginia. In addition, the proposed Consent Decree may be viewed at *http://www.usdoj.gov/enrd/Consent_Decrees.html*.

Russell M. Young,

Assistant Chief, Environmental Defense Section, Environment & Natural Resources Division.

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DEPARMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 05–16]

Lyle E. Craker; Denial of Application

On December 10, 2004, the Deputy Assistant Administrator, Office of Diversion Control, issued an Order to Show Cause to Lyle E. Craker, Ph.D. (Respondent), of Amherst, Massachusetts. The Show Cause Order proposed the denial of Respondent's pending application for a registration as a bulk manufacturer of marijuana on two grounds. Show Cause Order at 1.

First, the Show Cause Order alleged that Respondent's ''registration would not be consistent with the public interest as that term is used in 21 U.S.C. 823(a).'' Show Cause Order at 1. Second, the Show Cause Order alleged that the Respondent's registration would be inconsistent ''with the United States'

obligations under the Single Convention on Narcotic Drugs (Single Convention), March 30, 1961, 18 U.S.T. 1407.'' *Id.*

With respect to both of these contentions, noting that Respondent sought registration ''to supply analytical, pre-clinical and clinical researchers with marijuana,'' the Show Cause Order emphasized that the ''National Institute on Drug Abuse (NIDA), a component [of] the National Institutes of Health (NIH)'' and ''the United States Department of Health and Human Services [HHS], oversees the cultivation, production and distribution of research-grade marijuana on behalf of the United States Government.'' *Id.* at 2.

With respect to the contention that Respondent's proposed registration is inconsistent with the public interest, the Show Cause Order stated that, under 21 U.S.C. 823(a), ''DEA must limit the number of producers of research-grade marijuana to that which can provide an adequate and uninterrupted supply under adequately competitive conditions.'' *Id.* at 4. The Show Cause Order then stated: ''For the past 36 years, the University of Mississippi has provided such supply under the foregoing criteria, and there is no indication that this registrant will fail to do so throughout the duration of its current registration. While the University of Massachusetts is free to compete with the University of Mississippi to obtain the next NIDA contract to produce research-grade marijuana, there is no basis under Section 823(a) to add an additional producer.'' *Id.*

With respect to the contention of Respondent's sponsor, the Multidisciplinary Association for Psychedelic Studies (MAPS), that marijuana provided by NIDA to researchers was both qualitatively and quantitatively inadequate, the Show Cause Order alleged that marijuana provided by NIDA was ''of sufficient quantity and quality to meet'' the needs of ''legitimate and authorized research[ers].'' *Id.* at 3.

The Show Cause Order also noted MAPS's contentions that ''NIDA is limited to supplying marijuana for research purposes and cannot supply marijuana on a prescription basis,'' that ''this limitation effectively prohibits a sponsor * * * from expending the necessary large amounts of funds to conduct drug development studies resulting in [a] marijuana prescription product,'' and that granting Respondent a registration would resolve this problem. *Id.* In response to these contentions, the Show Cause Order alleged that to obtain approval for the marketing of a new drug under the Food, Drug, and Cosmetic Act (FDCA), the safety and effectiveness of the drug must be demonstrated through three phases of clinical trials, and that clinical trials involving marijuana had not progressed beyond the first phase (phase 1). *Id.* at 2–4.

The Show Cause Order further noted that the policy of HHS for approving the distribution of marijuana to researchers ''has not unduly limited clinical research with marijuana.'' *Id.* at 5. More specifically, the Show Cause Order alleged that ''[s]ince the year 2000, there have been or are eleven approved clinical trials utilizing smoked marijuana,'' and that approved ''marijuana researchers administer marijuana to almost 500 human subjects.'' *Id.* The Show Cause Order also alleged that since 2000, there were ''four approved pre-clinical trials in laboratory and animal modes.'' *Id.* at 5. Relatedly, the Show Cause Order also asserted that ''DEA has no statutory authority to overturn HHS' policy.'' *Id.*

With respect to the contention that Respondent's registration would be inconsistent with the United States' obligations under the Single Convention, the Show Cause Order again referenced that HHS, through NIDA, oversees the cultivation, production and distribution of research-grade marijuana on behalf of the United States Government and alleged that ''[i]n accordance with the Single Convention, the Federal Government [is required] to limit marijuana available for clinical research to [this] source.'' *Id.* at 4.

Respondent timely requested a hearing. The matter was assigned to Administrative Law Judge (ALJ) Mary Ellen Bittner, who conducted a hearing on August 22–26 and December 12–14 and 16, 2005. At the hearing, the parties put on testimonial evidence and introduced documentary evidence. Following the hearing, the parties submitted briefs containing their proposed findings of fact, conclusions of law, and argument.

On February 12, 2007, the ALJ issued her recommended decision. Therein, the ALJ rejected the Government's contention that the Single Convention precluded Respondent's registration. In so holding, the ALJ acknowledged that the Convention requires that its signatories maintain a ''government monopoly on importing, exporting, wholesale trading, and maintaining stocks.'' ALJ at 82. The ALJ reasoned, however, that ''[i]t also appears, although it is not entirely clear, that the marijuana grown by the National Center [1] or by any other registrant for utilization in research would qualify as either 'medicinal' * * * or as 'special stocks' within the meaning of'' the Convention. *Id.* at 82 (citing Single Convention, art. 1, para. (1)(o) & (x)).

The ALJ then turned to whether Respondent had established that his registration would be consistent with the public interest when considering the six enumerated factors of 21 U.S.C. 823(a). With respect to the first factor, 21 U.S.C. 823(a)(1), the ALJ first recited the relevant text of this provision, which requires DEA to consider maintenance of effective controls against diversion by limiting the manufacturing of schedule I or II controlled substances ''to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes.'' ALJ at 82 (quoting § 823(a)(1)). Noting that there is precedent for the agency to interpret this provision in two distinct ways regarding the issue of adequacy of competition (either by considering or not considering the issue),[2] the ALJ stated that she would evaluate the issue in both ways. *Id.* at 83.

Under the first approach of interpreting 21 U.S.C. 823(a)(1) to allow DEA to disregard the issue of adequacy of competition as long as the agency finds that the applicant for registration would provide effective controls against diversion, the ALJ concluded that ''there is no evidence or contention that either Respondent or anyone working with him would be likely to divert the marijuana from the growing or drying or storage areas.'' *Id.*

The ALJ next rejected the Government's contention that there was a risk of diversion because Mr. Rick Doblin, the Director of MAPS, would determine who was to receive the marijuana. In so holding, the ALJ reasoned that Mr. Doblin would not have physical possession of the marijuana and that Respondent would only send marijuana to researchers with DEA registrations and the requisite approval of HHS. ALJ at 84. The ALJ thus concluded that ''the research project has procedures in place to adequately protect against diversion of the marijuana'' and that ''there is minimal risk of diversion.'' *Id.*

[1] The National Center is an entity of the University of Mississippi which currently holds the contract with NIDA for growing marijuana to supply United States researchers.

[2] The meaning of 21 U.S.C. 823(a)(1) and the competition issue are discussed in detail in part C of the discussion section of this final order.

Under the second approach of interpreting 21 U.S.C. 823(a)(1) to require DEA to consider whether competition is inadequate, the ALJ first turned to whether the supply of marijuana currently available to researchers through HHS is adequate. In this regard, the ALJ found that while ''there have been some problems with the marijuana that the National Center produces, * * * a preponderance of the evidence establishes that the quality is generally adequate.'' *Id.* The ALJ further found, however, that ''NIDA's system for evaluating requests for marijuana for research has resulted in some researchers who hold DEA registrations and requisite approval from [HHS] being unable to conduct their research because NIDA has refused to provide them with marijuana.'' *Id.* The ALJ thus concluded ''that the existing supply of marijuana is not adequate.'' *Id.* The ALJ also concluded that competition is inadequate within the meaning of 21 U.S.C. 823(a)(1). *Id.*[3] The ALJ thus held that the first public interest factor, 21 U.S.C. 823(a)(1), supported granting Respondent's application.

Under the second public interest factor, 21 U.S.C. 823(a)(2), the ALJ found that there was ''neither evidence nor contention that Respondent has not complied with applicable laws'' and thus concluded that this factor supported the granting of Respondent's application. *See id.*

Under the third public interest factor, 21 U.S.C. 823(a)(3), as to whether granting Respondent's application would promote technical advances in the art of manufacturing controlled substances, the ALJ found that Respondent has ''considerable experience in cultivating medicinal plants, which might promote technical advances in the cultivation of marijuana or developing new medications from it.'' ALJ at 85–86. The ALJ nonetheless found that ''there is not sufficient evidence in the record on which to base a finding as to whether granting Respondent's registration would promote technical advances.'' *Id.* at 86.

Under the fourth public interest factor, 21 U.S.C. 823(a)(4), the ALJ found that it was ''undisputed that Respondent has never been convicted of any violation of any law pertaining to controlled substances'' and therefore this factor weighed in favor of granting the application. *Id.*

Under the fifth public interest factor, 21 U.S.C. 823(a)(5), the ALJ considered Respondent's ''past experience in manufacturing controlled substances and the existence of effective controls against diversion.'' *Id.* The ALJ acknowledged that ''Respondent has no experience in manufacturing controlled substances.'' *Id.* Noting that Respondent ''does have experience in growing medicinal plants'' and that ''the risk of diversion is minimal,'' the ALJ concluded that this factor supported granted the application. *Id.*

Finally, under the sixth public interest factor, 21 U.S.C. 823(a)(6), in analyzing such other factors as are relevant to and consistent with public health and safety, the ALJ rejected the Government's contention that granting the application would ''circumvent[]'' HHS's policy with respect to the provision of marijuana to researchers. *Id.* Reasoning that ''the NIH Guidance by its own terms applies to marijuana that [HHS] makes available, [and] not [to] marijuana that might be available from some other legitimate source[,]'' the ALJ concluded that ''the NIH Guidance is not a factor in determining whether Respondent's application should be granted.'' *Id.* The ALJ thus concluded that granting Respondent's application ''would be in the public interest,'' and recommended that I grant his application. *Id.* at 87.

The Government excepted to the ALJ's decision on numerous grounds, and Respondent filed a response to the Government's exceptions. Thereafter, the record was forwarded to me for final agency action.

Having considered the record as a whole, I hereby issue this Decision and Final Order. For reasons explained more fully below, I reject the ALJ's legal conclusion ''that the Single Convention does not preclude registering Respondent.'' *Id.* at 82. Moreover, I reject the ALJ's finding that the proposed registration is consistent with the public interest when considering the six factors enumerated in 21 U.S.C. 823(a). *Id.* at 82–86. I therefore reject the ALJ's recommendation that the application be granted. *See id.* at 87.

Findings

Under Federal Law, marijuana and tetrahydrocannabinols (THC) are schedule I controlled substances. 21 U.S.C. 812(c), Schedule I(c)(10) & (17). Congress placed marijuana and THC in schedule I because the substances have ''a high potential for abuse,'' ''no current accepted medical use in treatment in the United States,'' and ''a lack of accepted safety for use * * * under medical supervision.'' 21 U.S.C. 812(b)(1). *See also* 66 FR 20038 (2001) (denying petition to reschedule marijuana from schedule I), *petition for review dismissed*, *Gettman* v. *DEA*, 290 F.3d 430 (D.C. Cir. 2002).[4]

Marijuana is cultivated from the cannabis plant, which is recognized as ''a very adaptive plant [whose] characteristics are even more variable than most plants.'' GX 25, at 7. Marijuana, which consists primarily of the dried flowering tops and leaves of the cannabis plant,[5] ''is a variable and complex mixture of biologically active compounds.'' *Id.* As of 2001, 483 different chemical constituents had been identified in marijuana, including approximately 66 cannabinoids.[6] 66 FR at 20041; Tr. 1142, 1147. ''THC[7] is the main psychoactive cannabinoid in marijuana''; the plant, however, also contains ''[v]arying proportions of other cannabinoids, mainly cannabidiol (CBD) and cannabinol (CBN),'' which ''sometimes [exist] in quantities that might modify the pharmacology of THC or cause effects of their own.'' *Id.* at 7–8.

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[3] In so finding, the ALJ rejected the Government's contention that because the NIDA contract is open to competitive bidding, adequate competition exists. According to the ALJ, ''[t]he question is not * * * whether the NIDA process addresses that agency's needs, but whether marijuana is made available to all researchers who have a legitimate need for it in their research. As discussed above, I answer that question in the negative.'' *Id.* at 85.

As further support for her conclusion, the ALJ reasoned that ''the NIDA contract requires the contractor to analyze'' marijuana seized by law enforcement agencies, and that ''a qualified cultivator may not be able to fulfill'' this requirement.''*Id.*

[4] As related in the Notice, the FDA recommended that marijuana be maintained in schedule I of the CSA. The FDA based its finding on, *inter alia*, the extensive evidence that marijuana has a history and pattern of abuse, that it is ''[t]he most frequently used illicit drug,'' and that it ''has a high potential for abuse.'' 66 FR at 20047 & 20051. The FDA also found that ''[t]here are not FDA-approved medical products,'' ''marijuana does not have a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions,'' and ''that, even under medical supervision, marijuana has not been shown to have an acceptable level of safety.'' 66 FR at 20052.

[5] The legal definition of marijuana, as set forth in the CSA, 21 U.S.C. 802(16), is as follows: The term ''marihuana'' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

[6] Cannabinoids are chemical compounds that are unique to the cannabis plant (not found in any other plant). Tr. 1140–41.

[7] While there are numerous isomers of THC (all of which fall within the listing of ''Tetrahydrocannabinols'' in schedule I of the CSA and many of which are found in the cannabis plant), delta-9-THC is the isomer that is recognized as the primary psychoactive component in marijuana and, for this reason the term ''THC'' is often used to refer to delta-9-THC. *See* 66 FR at 20045; Tr. 1146–47.

The National Center and NIDA's Drug Supply Program

Since 1968, the National Center for Natural Products Research (National Center), a division of the University of Mississippi, has held a contract with the Federal Government to grow marijuana for research purposes and held the requisite registrations under the Controlled Substances Act (CSA), as well as the federal law that preceded the CSA, authorizing the University to conduct such activity.[8] Tr. 1152–53, 1350–51. *See also* 21 CFR 1301.13. The contract, which is open for competitive bidding at periodic intervals, *see* GX 15, is administered by NIDA, a component of NIH (which is part of HHS), pursuant to its Drug Supply Program. RX 1, at 231. Since 1999, the term of the contract has been five years. *See* GXs 13 & 15; Tr. 1156.

Under the NIDA contract, the National Center ''[g]row[s], harvest[s], store[s], ship[s] and analyze[s] cannabis of different varieties, as required.'' GX 13, at 6. The contract requires that the National Center ''shall serve as NIDA's cannabis drug repository,'' as well as ''develop and produce standardized marijuana cigarettes within a range of specified THC content, and placebos for use in pre-clinical and clinical research programs,'' and maintain minimum stocks of both bulk marijuana and marijuana cigarettes of various THC contents, and store them in a DEA approved facility. *Id.* at 6–7.

Marijuana potency is primarily based on the concentration (percentage by weight) of THC in the plant material. Tr. 1148–49. As of August 25, 2005, the National Center held on behalf of NIDA approximately 1055 kilograms (kg) of marijuana with THC contents ranging up to 12.26 percent. *See* RX 53. This inventory includes six batches of marijuana with THC contents ranging from 9.02 to 9.89 percent,[9] one batch (of nearly 19 kg) with a THC content of 10 percent, nearly 25 kg with a THC content of 11.34 percent, and approximately 27 kg with a THC content of 12.26 percent.[10] *See id.* In his testimony, Mahmoud ElSohly, Ph.D., who is the Principal Investigator under the NIDA contract, and who has overseen the National Center's work with marijuana since 1980, stated that the Center is capable of producing marijuana with a THC content of 20 percent or more.[11] Tr. 1130–31, 1152, 1203, 1254–55.

The contract also requires the National Center to ''ship to research investigators as authorized by the [NIDA] Project Officer upon receipt of a shipment order.'' GX 13, at 7. While the NIDA ''Project Officer may pre-authorize any normal recurring requests that the contractor will then fill once it has received'' various assurances,[12] the contract further states that ''[a]ll other requests should be submitted to the NIDA Project Officer for approval.'' *Id.* at 8. Moreover, ''[i]f there is a reason to question a particular request, the Contractor shall inform the NIDA Project Officer who will make a final decision on providing the material and quantity requested.'' *Id.* As these provisions make clear, the National Center has no authority to distribute any of the marijuana it produces pursuant to the NIDA contract without NIDA's approval.[13]

In 1997, the White House Office of National Drug Control Policy asked the Institute of Medicine (IOM), a component of the National Academy of Sciences, to conduct a review of the scientific evidence regarding the potential health benefits and risks of marijuana and its constituent cannabinoids. RX 1, at 7. In 1999, the IOM published its report. The IOM found, among other things, that ''[d]efined substances, such as purified cannabinoid compounds, are preferable to plant products, which are of variable and uncertain composition. Use of defined cannabinoids permits a more precise evaluation of their effects, whether in combination or alone.'' RX 1, at 22. With respect to this issue, the IOM reached the following conclusion: ''Scientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC, for pain relief, control of nausea and vomiting, and appetite stimulation; smoked marijuana, however, is a crude THC delivery system that also delivers harmful substances.'' Id. The report further stated:

> The therapeutic effects of cannabinoids are most well established for THC, which is the primary psychoactive ingredient of marijuana. But it does not follow from this that smoking marijuana is good medicine.
>
> Although marijuana smoke delivers THC and other cannabinoids to the body, it also delivers harmful substances, including most of those found in tobacco smoke. In addition, plants contain a variable mixture of biologically active compounds and cannot be expected to provide a precisely defined drug effect. For those reasons there is little future in smoked marijuana as a medically approved medication. If there is any future in cannabinoid drugs, it lies with agents of more certain, not less certain, composition.''[14]

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[8] Initially, the National Center obtained a researcher's registration; it now also holds a manufacturer's registration.

[9] These batches range from approximately 12 to 15 kg in size.

[10] As of the date of the hearing, more than 920,000 marijuana cigarettes of various THC concentrations including placebo had been manufactured pursuant to the NIDA contracts between 1974 and 2003. GX 27.

[11] 11 As Dr. ElSohly explained, he has grown numerous strains of marijuana from seeds that have been obtained from a variety of countries and has used them to do ''genetic selection to have genetic material of high potency.'' Tr. 1255.

[12] These include that the researcher have the appropriate DEA registration and FDA/IND approvals, provide assurance that the marijuana ''will not be resold'' and ''will be used only for research or patient purposes,'' that the use of the marijuana will adhere to the appropriate Safety Standards for research,'' and that the researcher agree ''to comply with all Federal, State and Local Safety requirements for use of the materials.'' *See* GX 13, at 8.

[13] Independent of its contract with NIDA, the National Center holds an additional registration to manufacture marijuana and THC. GXs 75 & 78. The National Center was granted this registration under the terms of a Memorandum of Agreement (MOA) entered into with DEA in 1999. GX 78. As set forth in the MOA, the purpose of the registration was ''to allow the Center to develop a new product formulation for effecting delivery of [THC] in a pharmaceutically acceptable dosage form suppository * * * and to provide crude THC extract to a DEA-registered manufacturer of THC for further purification.'' *Id.* at 2. The MOA further stated that, under the terms thereof, the Center would ''manufacture marijuana for the purpose of extracting THC therefrom.'' *Id.* Subsequently, the Center submitted a new application for a registration to bulk manufacture marijuana and THC ''to prepare marihuana extract for further purification into bulk active [THC] for use in launching FDA-approved pharmaceutical products.'' 70 FR 47232 (2005). DEA has not yet issued a final order as to this application. (DEA publishes in the **Federal Register** all final orders on applications for registration to bulk manufacture schedule I and II controlled substances.)

The MOA further provided that ''[i]n accordance with articles 23 and 28 of the Single Convention on Narcotic Drugs * * * private trade in 'cannabis' is strictly prohibited. Therefore, the Center shall not distribute any quantity of marijuana to any person other than an authorized DEA employee.'' GX 78, at 2. Continuing, the MOA explained that ''[t]he Single Convention does not prohibit private trade in 'cannabis preparations,' '' and noted that this term, ''within the meaning of the Single Convention, is a mixture, solid or liquid containing cannabis, cannabis resin, or extracts or tinctures of cannabis.'' *Id.* Because ''[t]he THC that the Center will extract from marijuana [is] considered such a 'cannabis preparation[,]' * * * the Center may, in accordance with the Single Convention, distribute the crude THC extract to private entities'' provided the Center otherwise complies with the CSA and DEA regulations. *Id.* at 2–3. The MOA also set forth a detailed series of controls to maintain accountability of the marijuana from acquisition of the seeds through the extraction of THC from the harvested material. *Id.* at 3–7.

[14] To similar effect, an ad hoc group of experts, who were selected by NIH and convened in 1997 as part of a workshop to assess the potential medical uses of marijuana, issued a report to the Director of NIH, which noted:

> As with any smoked drug (e.g., nicotine or cocaine), characterizing the pharmacokinetics of THC and other cannabinoids from smoked marijuana is a challenge. A person's smoking behavior during an experiment is difficult for a researcher to control. People differ. Smoking behavior is not easily quantified. An experienced marijuana smoker can titrate and regulate doses to obtain the desired acute psychological effects and

Id. at 195–96. *See also* GX 53 (letter from Alice P. Mead, GW Pharmaceuticals, P.L.C., to Christine V. Beato, Acting Asst. Sec. for Health, HHS (Apr. 12, 2005)) (''[H]erbal cannabis should comprise only the starting material from which a *bona fide* medical product is ultimately derived. * * * [S]tandardizing herbal starting material represents only the first of many steps necessary to create a modern medicine that is safe and effective for use in specific medical conditions. * * * [A] final medical product * * * must also be delivered in a dosage form that is consistent in composition and that allows the patient to obtain an identifiable and reliable amount of medication.'') (emphasis in original).

Accordingly, the IOM recommended that clinical trials using cannabinoid drugs should be conducted with ''the goal of developing rapid-onset, reliable, and safe delivery systems.'' *Id.* at 197. The IOM also advised that clinical trials involving smoked marijuana ''should involve only short-term marijuana use (less than six months), should be conducted in patients with conditions for which there is a reasonable expectation of efficacy, should be approved by institutional review boards, and should collect data about efficacy.'' *Id.*

Also in 1999, due in part to an increased interest in marijuana research and taking into account the IOM report, HHS decided to change the procedures by which it would supply marijuana to researchers. Tr. 1632–33; GX 24. The new procedures were announced in a document released by NIH on May 21, 1999. GX 24, at 1. In the announcement, ''HHS recognize[d] the need for objective evaluations of the potential merits of cannabinoids for medical uses[,]'' and that ''[i]f a positive benefit is found, * * * the need to stimulate development of alternative, safer dosage forms.'' *Id.* at 2. Toward this end, NIH explained that the new procedures were designed to increase the availability of marijuana for research purposes by, among other things, making such marijuana ''available on a cost-reimbursable basis.'' *Id.* This new procedure allowed researchers who were privately funded to obtain marijuana from HHS by reimbursing the NIDA contractor for the cost of the marijuana. Tr. 1633; *see also* GX 31, at 3. This was a departure from the prior practice (pre-1999), whereby HHS only made marijuana available to persons who received NIH funding. *Id.* The new procedures implemented by HHS in 1999 remain in effect today. Tr. 1629.

HHS further stated in 1999 that it intended through the new procedures ''to make available a sufficient amount of research-grade marijuana to support those studies that are the most likely to yield usable, essential data.'' GX 24, at 2. With respect to those researchers who do not have NIH funding, HHS explained that ''the scientific merits of each protocol will be evaluated through a Public Health Service interdisciplinary review process [which] will take into consideration a number of factors, including the scientific quality of the proposed study, the quality of the organization's peer-review process, and the objective of the proposed research.'' *Id.*

HHS then identified the criteria it would apply in evaluating requests for marijuana:

> The extent to which the protocol incorporates the elements of good clinical and laboratory research;
>
> The extent to which the protocol describes an adequate and well-controlled clinical study to evaluate the safety and effectiveness of marijuana and its constituent cannabinoids in the treatment of a serious or life threatening condition;
>
> The extent to which the protocol describes an adequate and well-controlled clinical study to evaluate the safety and effectiveness of marijuana and its constituent cannabinoids for a use for which there are no alternative therapies;
>
> The extent to which the protocol describes a biopharmaceutical study designed to support the development of a dosage form alternative to smoking; [and]
>
> The extent to which the protocol describes high-quality research designed to address basic, unanswered scientific questions about the effects of marijuana and its constituent cannabinoids or about the safety or toxicity of smoked marijuana.

Id. at 3.

HHS further noted that ''[a] clinical study involving marijuana should include certain core elements,'' and that ''[a] study that incorporates the [1997] NIH Workshop recommendations will be expected to yield useful data and therefore, will be more likely to receive marijuana under the HHS program.'' *Id.*

Finally, HHS explained that the ''proposed protocols must be determined to be acceptable under FDA's standards for authorizing the clinical study of investigational new drugs.'' *Id.* Relatedly, HHS stated that ''although FDA's review of Phase 1 submissions will focus on assessing the safety of Phase 1 investigations, FDA's review of Phases 2 & 3 submissions will also include an assessment of the scientific quality of the clinical investigations and the likelihood that the investigations will yield data capable of meeting statutory standards for marketing approval.'' *Id.* HHS further made clear that if a protocol is approved, ''NIDA will provide the researcher with authorization to reference NIDA's marijuana Drug Master File.'' *Id.* at 4.

At the administrative hearing in this case, Steven Gust, Ph.D., Special Assistant to the Director of NIDA, explained that, in addition to seeking to facilitate research into the possible medical utility of marijuana, the new procedures implemented by HHS in 1999 were intended ''to make the process more standardized, and to * * * provide some expertise that did not really exist at NIDA in terms of reviewing applications that involved * * * the use of marijuana * * * for treatment of diseases.'' Tr. 1632–33. Accordingly, HHS ''established a separate peer review process that * * * moved the review into the Public Health Service [a component of HHS] * * * where additional expertise from other NIH Institutes and other Federal agencies'' could be utilized in reviewing the scientific merit of the applications. *Id.* at 1633–34. Dr. Gust further explained that the members of the review committee are drawn from the various specialty institutes of NIH, and the Substance Abuse and Mental Health Services Administration (SAMHSA). *Id.* at 1692; 1713–15.[15] Dr. Gust also testified that the ''scientific bar has been set very low, [so] that any project that has scientific merit is approved,'' and that ''anything that gets approved gets NIDA marijuana.'' *Id.* at 1700–01. As of April 2004, HHS had approved at least seventeen pre-clinical or clinical studies of marijuana, which were sponsored by the California Center for Medical Cannabis Research (CMCR).[16] GX 31, at

to avoid overdose and/or minimize undesired effects. Each puff delivers a discrete dose of THC to the body. Puff and inhalation volume changes with phase of smoking, tending to be highest at the beginning and lowest at the end of smoking a cigarette. * * * During smoking, as the cigarette length shortens, the concentration of THC in the remaining marijuana increases; thus, each successive puff contains an increasing concentration of THC.

One consequence of this complicated process is that an experienced marijuana smoker can regulate almost on a puff-by-puff basis the dose of THC delivered to lungs and thence to brain. A less experienced smoker is more likely to overdose or underdose. Thus a marijuana researcher attempting to control or specify dose in a pharmacologic experiment with smoked marijuana has only partial control over the drug dose actually delivered.

See GX 25, at 9–10 (Workshop on the Medical Utility of Marijuana).

[15] Dr. Gust initially testified that someone from FDA sits on the committee but later stated that he was not exactly sure if this was so. Tr. 1712.

[16] The California research studies were conducted pursuant to a law enacted by California in 1999 known as the Marijuana Research Act of 1999. Cal.

Continued

3. According to one witness who testified on behalf of Respondent, all of the CMCR-sponsored researchers who applied to NIDA for marijuana did in fact receive marijuana from NIDA. Tr. 694–95.

Respondent's Application and Contentions

Respondent is a Professor in the Department of Plant, Soil and Insect Sciences at the University of Massachusetts Amherst. Tr. 13. On June 28, 2001, Respondent submitted an application to bulk manufacture the schedule I controlled substances marijuana and tetrahydrocannabinols.[17] GXs 1 & 3; 21 CFR 1308.11(d). Respondent's application is sponsored by the Multidisciplinary Associations for Psychedelic Studies (MAPS). GX 3, at 1.

Because Respondent seeks a registration to manufacture a schedule I controlled substance, DEA required that he complete a questionnaire.[18] In response to the question regarding the purpose for which he sought registration, Respondent stated that ''[t]he plant material will be grown for federally-approved uses only, including analytical, pre-clinical, and clinical research,'' and that ''no material is intended for illegal use or for medical marijuana patients whose use may be legal under state, but not federal law.'' GX 3, at 1.[19]

Respondent added that ''[t]he production costs * * * would be underwritten by a grant'' from MAPS. *Id.* According to Respondent, ''MAPS is seeking to develop the marijuana plant into an FDA-approved prescription medicine,'' and that ''[t]he growth of plants at [UMASS] is a necessary step for supplying quality marijuana for use in MAPS' drug development process.'' *Id.* Respondent also advised that ''MAPS will sponsor research at other institutions using smoked marijuana and marijuana delivered through a vaporizer device that heats, but does not burn the plant material, thus reducing the products of combustion normally found in smoked marijuana.'' *Id.*

Respondent further stated that his ''[c]ustomers would include both MAPS-sponsored research and research sponsored by other organizations.'' *Id.* at 3. Relatedly, Respondent explained that ''[r]esearchers conducting MAPS sponsored research would receive supplies of the plant material free, while other researchers would either receive the marijuana free or through a donation to MAPS.'' *Id.* at 1. *See also* Tr. 225 (''I may very well be approached by other people with approved studies who need a source also.'').

At the hearing, Mr. Rick Doblin, the President of MAPS,[20] also testified regarding the purpose of Respondent's application. Mr. Doblin, who admitted that he engages in recreational use of marijuana on a weekly basis, explained that ''[t]he reason we need a supply from Dr. Craker is that we are engaged in trying to make marijuana into an FDA-approved prescription medicine, and * * * we need to establish a drug master file for a particular product, and * * * we need to conduct research with that product, and have that product available to us for potential marketing should we get FDA approval.'' Tr. 603, 718–19. Mr. Doblin testified as to his ''belie[f] that smoked marijuana or vaporized marijuana in plant form will successfully compete with marijuana extracts on price.'' *Id.* at 605. He also testified as to his belief that the ''efficacy and safety'' of vaporized plant-form marijuana ''will be similar'' to drugs containing cannabinoid extracts and that ''the efficacy will be similar and safety slightly different with smoked'' marijuana than with drugs containing cannabinoid extracts. *Id.*

Mr. Doblin further testified that he ''disagree[d]'' with the Institute of Medicine's conclusion that defined and purified cannabinoid compounds ''are preferable to plant products, which are of variable and uncertain composition.'' *Id.* at 654. Mr. Doblin also testified that ''what we're trying to do is get the Public Health Service and NIDA out of the picture; they're only in the picture just for marijuana only because they have a monopoly. And that is what is so obstructing the system.'' *Id.* at 666.

Finally, Mr. Doblin testified that MAPS would only need between $5 to $10 million ''to make marijuana into a medicine'' through the various stages of the FDA new drug approval (NDA) process.[21] *Id.* at 701; *see also id.* at 703. In his testimony, Mr. Doblin did not, however, identify a single instance in which an entity (whether for-profit or nonprofit) had taken a drug—let alone a botanical substance with known safety issues, *See, e.g.*, GX 43, at 9—through the multi-faceted NDA process for a similar cost.[22] Moreover, while Mr.

Health & Safety Code § 11362.9. This state law established the ''California Marijuana Research Program'' to develop and conduct studies on the potential medical utility of marijuana. *Id.* (The program is also referred to as the ''Center for Medicinal Cannabis Research'' (CMCR). Tr. 396.) The state legislature appropriated a total of $9 million for the marijuana research studies. Tr. 397. The state law was enacted following the passage of Proposition 215, a ballot initiative otherwise known as the Compassionate Use Act of 1996. Tr. 395–96; *see also United States* v. *Oakland Cannabis Buyers' Cooperative* (''*OCBC*''), 532 U.S. 483, 486 (2001).

[17] On his application for registration (GX 1), Respondent incorrectly checked the box for ''dosage form'' manufacturing when, in fact (based on the activity in which he proposes to engage), he is seeking to become registered as a ''bulk'' manufacturer. In written questions DEA submitted to Respondent as a follow-up to the application, DEA properly characterized the activity as ''bulk manufacture,'' and Respondent, in his written answers to these questions, gave no indication that he disagreed. *See* GX 3. Also, in his testimony at the hearing, Respondent acknowledged that his plan was to send marijuana ''in bulk'' to others, who would roll it into cigarettes. Tr. at 243. Respondent also testified that MAPS President Rick Doblin ''assisted in the response to the *bulk* manufacturer's questions.'' Tr. 352 (emphasis added). Cf. 32 CFR 1300.02(b)(32) (defining ''drug product'' as ''an active ingredient in dosage form that has been approved or otherwise may be lawfully marketed under the Food, Drug, and Cosmetic Act for distribution in the United States''); 21 CFR 1301.72(a) & 1304.22(a) (listing ''bulk materials awaiting further processing'' separately from ''finished products'').

[18] As set forth in 21 CFR 1301.15: ''The Administrator may require an applicant to submit such documents or written statements of fact relevant to the application as he/she deems necessary to determine whether the application should be granted.''

[19] Respondent further testified that it was his intention to simply send bulk marijuana to researchers who would then roll their own cigarettes. Tr. at 243.

[20] When asked during the hearing about the title of his organization (Multidisciplinary Association for Psychedelic Studies) and, in particular the term ''Psychedelic,'' Mr. Doblin explained, in part, ''it's about tools and procedures that bring to the surface people's subconscious and unconscious and, you know, deeper emotions.'' Tr. 474.

[21] In a recent Supreme Court decision, Justice Ginsberg, in a dissenting opinion, summarized the process by which FDA approves new drugs for marketing as follows:

The process for approving a new drug begins with preclinical laboratory and animal testing. The sponsor of the new drug then submits an investigational new drug application seeking FDA approval to test the drug on humans. *See* 21 U.S.C. 355(i); 21 CFR 312.1 *et seq.* (2007). Clinical trials generally proceed in three phases involving successively larger groups of patients: 20 to 80 subjects in phase I; no more than several hundred subjects in phase II; and several hundred to several thousand subjects in phase III. 21 CFR 312.21. After completing the clinical trials, the sponsor files a new drug application containing, *inter alia*, ''full reports of investigations'' showing whether the ''drug is safe for use and * * * effective''; the drug's composition; a description of the drug's manufacturing, processing, and packaging; and the proposed labeling for the drug. 21 U.S.C. 355(b)(1).

Riegel v. *Medtronic, Inc.*, 128 S.Ct. 999, 1018–19 n.15 (2008) (Ginsburg, J., dissenting).

[22] While Respondent produced evidence establishing that the $800–880 million costs of bringing a new drug to market includes research and development costs incurred for drugs that are not approved, as well as opportunity costs (the cost of investing in research rather than something else), *see* Tr. 161, 734–36, Respondent has not shown a single instance in which an entity has obtained FDA approval of a drug through the NDA process for the cost range which Mr. Doblin claimed would be sufficient to obtain approval of plant-form marijuana.

Moreover, the IOM Report states that the average cost of a Supplemental New Drug Application (SNDA), which is used when a company seeks to obtain FDA approval to market a drug (which has already gone through the three phases of clinical

Doblin testified that ''the mission statement [of MAPS] is to develop psychedelics and marijuana into FDA-approved medicines and then to educate the public about that'' (Tr. 478), the vagaries of his testimony prevent a clear determination of how far along in that goal he envisions MAPS to be.[23]

trials and been approved for marketing) for a new indication, was $10 to 40 million. RX 1, at 214. It should be noted, however, that in taking a drug through the three phases, its sponsor will have obtained extensive data regarding the drug's safety including ''adverse effects of the drug [and] clinically significant drug/drug interactions.'' 21 CFR 314.50(d)(5)(vi).

In support of his assertion that MAPS could obtain FDA approval for only $5 to $10 million, Mr. Doblin testified that marijuana is different than other drugs that go through the FDA approval process. Mr. Doblin based this assertion on his contentions that: marijuana has been used by ''tens of millions of people'' while others drugs going though the NDA process are only used by a few thousand; there is ''an enormous body of evidence about [marijuana's] safety * * * that we don't need to replicate;'' and sufficient data to satisfy the FDA as to marijuana's safety and efficacy could be obtained by testing only 500 to 600 people. *Id.* at 737–38.

The FDA's guidance document for botanical drug products makes plain that ''[a] botanical drug product that is not generally recognized as safe and effective for its therapeutic claims is considered a new drug under § 201(p) of the [Food, Drug, and Cosmetic] Act,[]'' and that ''any person wishing to market a botanical drug product that is a new drug is required to obtain FDA approval of an NDA * * * for that product.'' GX 92A, at 7. Moreover, ''an NDA must contain substantial evidence of effectiveness derived from adequate and well-controlled clinical studies, evidence of safety, and adequate CMC [chemistry, manufacturing, and controls] information.'' *Id. See also* GX 92A, at 27–38 (specifying the information that must be provided to FDA for phase 3 clinical studies of a botanical product to meet the requirements of the FDA regulations governing the contents of INDs). Finally, with respect to the nonclinical safety assessment required to support phase 3 clinical trials, the FDA guidance states:

To support safety for expanded clinical studies or to support marketing approval of a botanical drug product, toxicity data from standard toxicology studies in animals may be needed * * *. A botanical product submitted for marketing approval as a drug will be treated like any other new drug under development. Safety data from previous clinical trials conducted in foreign countries will be considered in determining the need for nonclinical studies. However, previous human experience may be insufficient to demonstrate the safety of a botanical product, especially when it is indicated for chronic therapy. Systematic toxicological evaluations could be needed to supplement available knowledge on the general toxicity, teratogenicity, mutagenecity, and carcinogenicity of the final drug product.

Id. at 34. While Mr. Doblin asserted that MAPS would not ''need to replicate all those studies about the genetics, * * * the effect on reproduction, the effect in all sorts of bodily systems,'' Tr. 737, he did not identify any specific studies performed in other countries that establish the safety of marijuana for testing in phase 3 clinical studies. While millions of people have undoubtedly used marijuana, few have done so subject to the scientific rigor of a controlled clinical trial. Nor did Respondent produce any credible evidence establishing that the various types of animal studies which FDA usually requires to support phase 3 clinical trials would not have to be performed. GX 92A, at 35–37.

Correspondence Pertaining to the Application

Subsequent to Respondent's submission of his application for a DEA registration, on March 4, 2003, the Chief of DEA's Drug and Chemical Evaluation Section wrote to Respondent noting that ''it appears that the basis for your application is the purported need for a higher potency and higher 'quality' marijuana product than that currently available from the National Institute on Drug Abuse.'' GX 29, at 1. The DEA letter further explained that the Agency had ''contacted NIDA, the Department of Health and Human Services * * * and some current researchers'' and had ''determined that * * * the quality of marijuana available from NIDA is acceptable,'' that a high potency product with a THC content of 7 to 8 percent was currently ''available to bona fide research protocols,'' and that if ''[i]n the future, should federally approved research protocols require a higher potency marijuana (*i.e.* 15 percent THC), all believe that it could be supplied by NIDA.'' *Id.*

Thereafter, on June 2, 2003, Respondent wrote to DEA acknowledging that during a visit with several agency Diversion Investigators, the discussion had ''primarily focused[ed] on the need for an alternative source of plant material to that grown at the University of Mississippi under contract to the National Institute of Drug Abuse (NIDA).'' GX 30. Continuing, Respondent stated that ''[a] second source of plant material is needed to facilitate privately-funded, FDA-approved research into medical uses of marijuana, ensuring a choice of sources and an adequate supply of quality, research-grade marijuana for medicinal applications.'' *Id.* Consistent with these statements, Respondent has declined to bid on the NIDA contract. Tr. 252–53.

[23] As indicated above, based on the record, no clinical trials involving marijuana have advanced beyond phase 1. Moreover, each sponsor must submit to FDA his/her own IND to be authorized to conduct clinical investigation with a new drug (such as marijuana). *See* 21 CFR 312.20, 312.23. Again, given the vagaries of Mr. Doblin's testimony, it cannot be determined whether there is sufficient existing preclinical laboratory and animal studies data to support a submission of an IND for whatever proposed indications that Mr. Doblin has in mind for his envisioned FDA-approved marijuana medicine. But even assuming, *arguendo*, that MAPS could successfully submit an IND based on existing data, it would still have to proceed through extensive clinical trials (*see* 21 CFR 312.21), and then—assuming that such trials are fully successful at demonstrating the basis for safety and efficacy (which often is not the case with clinical trials)—MAPS would still have to submit and obtain approval of an NDA. All of these steps, and the uncertainties as to the outcomes of each step, further call into question Mr. Doblin's estimate of being able to obtain FDA approval of marijuana for only $5 to $10 million.

Respondent further asserted that while ''the primary researchers now receiving plant material may openly state to you that they are satisfied with the current source, * * * in private conversations these same researchers indicate a fear of having the current supply eliminated if they complain about the available source material.'' GX 30. As support for his contention regarding the level of researcher's satisfaction with NIDA's marijuana, Respondent attached two items: a reprint of a newspaper article and a letter from a Dr. Ethan Russo to the then-Chief of DEA's Drug and Chemical Evaluation Section. *See* GX 30a & 30b.

At the hearing, Respondent testified that at the time he filed his application, he had become concerned, based on conversations he had with ''other people,'' that the marijuana provided by the National Center ''may have been of relatively low quality, and that [it] was not readily available to run the clinical trials which some people wanted to run.'' Tr. 215. When asked to provide the names of these ''other people'' who had told him this, Respondent said he did not recall. *Id.*

Respondent's Contentions Regarding the Inadequacy of NIDA Marijuana

Respondent makes three principal claims in support of his contention that the supply of marijuana currently available through NIDA is inadequate. First, he claims that ''NIDA does not provide medical marijuana to all legitimate researchers'' and that ''NIDA has refused to provide marijuana to at least three legitimate researchers.'' Resp. Prop. Findings at 12. Second, he claims that ''the quality of the NIDA marijuana raises concerns for researchers and patients.'' *Id.* at 16. Third, he claims that ''the NIDA supply was inadequate because a pharmaceutical developer could not reasonably rely on NIDA marijuana to take marijuana through the FDA new drug approval process.'' Respondent's Response to Govt.'s Exceptions (hereafter, ''Respondent's Resp.'') at 16.

HHS's Denials of Researcher's Requests for NIDA Marijuana

Respondent's first claim is based on three incidents over a decade-long time period in which he alleges that researchers were improperly denied access to NIDA's marijuana. The first incident, which occurred in 1995, involved an application submitted by Donald Abrams, M.D., who sought

marijuana from NIDA to study its effects on persons with HIV-related wasting syndrome. RX 15, at 1. NIDA rejected Dr. Abrams's application ''based upon issues of design, scientific merit and rationale.'' [24] Dr. Abrams subsequently submitted a revised research protocol that NIDA found to be scientifically meritorious and for which NIDA supplied marijuana in 1997.[25] *See* GX 21, at 1. NIDA also supplied Dr. Abrams with marijuana for subsequent studies. *Id.;* Tr. 689. In any event, for purposes of determining the relevance of the 1995 incident in which Dr. Abrams' original protocol was rejected by NIDA, it is notable that this occurred before HHS adopted its new guidelines for the provision of marijuana for research purposes. As Dr. Gust testified, in 1995, HHS's practice was to provide marijuana only to researchers who obtained NIH funding—a practice that was abandoned by HHS in 1999 when the agency adopted its new procedures for facilitating marijuana research (allowing privately funded researchers to also obtain marijuana). Tr. 1749.

The second incident involved an application by Dr. Ethan Russo, a neurologist, who sought funding from NIDA to study the use of marijuana to treat migraine headaches beginning around 1996. Tr. 527–28. The precise dates of the events related to Dr. Russo are somewhat unclear as Respondent presented these events through the testimony of Mr. Doblin. (Dr. Russo did not testify.) *Id.* Based on Mr. Doblin's testimony, it appears that during 1996–97, NIDA twice rejected Dr. Russo's protocol for reasons which are not clearly established by the record. *Id.* at 527, 691–92. However, according to Mr. Doblin, Dr. Russo conceded that, on both of these two occasions when NIDA rejected his protocol, NIDA's bases for doing so did include ''some valid critiques.'' Tr. 692. Mr. Doblin testified that Dr. Russo subsequently attempted for a third time to obtain marijuana from NIDA, but on this third occasion he decided not to seek government funding but to seek private funding to purchase the marijuana from NIDA. *Id.* at 692. According to Mr. Doblin, this third protocol submitted by Dr. Russo was approved by both the FDA and Dr. Russo's institutional review board, but NIDA again refused to supply marijuana. *Id.* at 692–93. When asked when this last denial by NIDA occurred, Mr. Doblin testified: ''I think it was 1999.'' *Id.* at 693.

As noted above, NIH announced on May 21, 1999, HHS's new procedures for making marijuana available to researchers. Bearing in mind that Respondent had the burden of proving any proposition of fact that he asserted in the hearing, 21 CFR 1301.44(a), nothing in Mr. Doblin's testimony, or any other evidence presented by Respondent, established that HHS denied Dr. Russo's request for marijuana under the new procedures implemented by the agency in 1999. Indeed, Respondent produced no evidence showing that HHS has denied marijuana to any clinical researcher with an FDA-approved protocol subsequent to the adoption of the 1999 guidelines.

The third incident involved an application by Chemic Laboratories (Chemic), which—at the request of Mr. Doblin—sought marijuana from NIDA in 2004 [26] for a proposed study involving a device known as the ''Volcano Vaporizer'' (hereafter ''Volcano''). RX 49 & 52B. To understand the nature and purpose of this proposed study, some earlier facts that were disclosed at the hearing need to be considered. According to Mr. Doblin's testimony, prior to this incident (*i.e.*, before Chemic applied to NIDA for marijuana in 2004), Mr. Doblin had devised an elaborate arrangement whereby Chemic received marijuana to conduct an earlier study with the Volcano using marijuana obtained outside of the HHS process and without the knowledge or approval of HHS or DEA. Specifically, Mr. Doblin admitted that he encouraged persons who obtained marijuana from ''buyers' clubs'' in California as well as persons who obtained their marijuana from NIDA under HHS's ''compassionate use program'' [27] to anonymously send their marijuana to a DEA-registered drug testing laboratory so that MAPS could compare the potency of the ''buyers' clubs'' marijuana with that supplied by NIDA.[28] Tr. 668–82. Acting at the behest of Mr. Doblin, once the drug testing laboratory completed its analysis of the marijuana it received through these sources, it delivered the ''extra'' marijuana to Chemic, so that Chemic could conduct testing on the Volcano. *Id.* Chemic did conduct such testing,[29]

[24] That the above-quoted grounds were the bases upon which NIDA denied Dr. Abrams' original application is implicit from the letter that Dr. Abrams submitted to NIDA in response to the denial (RX 15). These bases are explicitly stated in NIDA's April 19, 1995, letter to Dr. Abrams, which appears on MAPS' Web site (at *http://www.maps.org/mmj/leshner.html*) and of which I take official notice. This letter from NIDA stated, among other things, the following:

Our decision here is based upon issues of design, scientific merit and rationale. We believe that your study will not adequately answer the question posed.

Although the study propose[d] seeks to make a dose-effect comparison of smoked marijuana to delta-9-tetrahydrocannabinol (THC), there is no real dosing control. The marijuana is to be taken home and there is no requirement and way to ensure that the subjects smoke all available materials on any fixed schedule. Additionally, that they are given a two-week supply of marijuana at one time further confounds the study design. Thus, we believe the dose-effect component is confounded since the study cannot correlate variability in weight gain with dosage.

We also believe the study lacks adequate sample size to make any inferences regarding the dose-effect relationship. . . . Another confounding variable not adequately controlled for in your proposed study is diet. Neither the total daily caloric intake nor the percentages of the composition of the foodstuffs is assessed.

In accordance with the Administrative Procedure Act (APA), an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulations, Respondent is ''entitled on timely request to an opportunity to show to the contrary.'' 5 U.S.C. 556(e); *see also* 21 CFR 1316.59(e). To allow Respondent the opportunity to refute the facts of which I take official notice, Respondent may file a motion for reconsideration within fifteen days of service of this order which shall commence with the mailing of the order.

[25] Following the 1996 passage of proposition 215, NIDA contacted Dr. Abrams and asked him if he would redesign his study to determine whether marijuana usage by persons who were HIV-positive (but who did not have AIDS-wasting syndrome) increased viral load as well as the interaction of marijuana with protease inhibitors. Tr. 523–24. Dr. Abrams agreed to do so and NIDA provided him with a $1 million grant to fund the study.

[26] It appears from the record that Chemic initially applied to HHS for marijuana in 2003 but, at HHS's request, Chemic submitted a revised protocol, which HHS considered to be submitted in 2004. *See* GXs 49 & 52B.

[27] *See Kuromiya* v. *United States,* 78 F.Supp.2d 367 (E.D. Pa. 1999) (describing compassionate use program under which less than 10 persons currently receive marijuana from HHS).

[28] Because marijuana is a schedule I controlled substance, human use is limited to ''Government-approved research'' in accordance with 21 U.S.C. 823(f). *See OCBC,* 532 U.S. at 491–492 and n.5. In accordance with § 823(f) and the DEA regulations, where a schedule I controlled substance is used in research—including the HHS compassionate use program—the activities involving the substance must be limited to those authorized in the research protocol. *See* 21 CFR 1301.13(e)(1)(v), 1301.18. Research activities beyond those specified in the protocol are prohibited absent the submission and approval of a supplemental protocol. 21 CFR 1301.18(d). Respondent made no attempt to assert that any of the research protocols associated with the compassionate use program allow for the distribution of marijuana to a drug testing laboratory, as there is no basis for such an assertion. The CSA prohibits the distribution of any controlled substance except as authorized by the Act, 21 U.S.C. 841(a)(1), and the Act makes no allowance for ultimate users (including research subjects) to distribute their controlled substances to others.

[29] Chemic was not registered with DEA under 21 U.S.C. 823(f) to conduct research with marijuana and when DEA later learned that Chemic was seeking to conduct a second marijuana study (when Chemic subsequently sought to obtain marijuana directly from NIDA and sought DEA's authorization for doing so), the agency so advised Chemic that this activity required a research registration. *See* RX 49, at 2. DEA registrants are only authorized to conduct activities with controlled substances ''to

which was funded by MAPS and the California National Organization for the Reform of Marijuana Laws (CaNORML), and Chemic published its results in two reports, one of which was co-authored by CaNORML.[30] *See id.*

Thus, this ''third incident'' to which Respondent points involved an effort by MAPS to expand upon the research that Chemic had conducted on the Volcano—this time using marijuana directly obtained from NIDA rather than using marijuana obtained without the knowledge or approval of HHS or DEA. Id. Under MAPS sponsorship and oversight, Chemic so applied to NIDA in 2004. Id.; RX 52B. The protocol submitted by Chemic proposed to heat marijuana obtained from NIDA and from a Dutch ''medical marijuana'' program to three different temperature levels below its combustion temperature and to then ''compare the quality and relative percentage of available cannabinoids'' in the material obtained from each source. RX 52B, at 2–3.

By letter dated July 27, 2005, a U.S. Public Health Service (PHS) committee of scientists, which evaluated Chemic's protocol pursuant to the 1999 Guidance, rejected it on the grounds that the ''project does not add to the scientific knowledge base in a significant way.'' [31] Id. at 4. With respect to the protocol's purpose of comparing the cannibinoid content of NIDA and Dutch marijuana, the PHS committee found that ''[m]arijuana varies in THC content and [that] simply demonstrating that this device can measure those differences is of little scientific value.'' *Id.* at 3. The PHS committee also found that the protocol's other purposes (''to conduct a reliability study of the device by analyzing multiple vapor collections'' and to ''determine the 'precision, accuracy, robustness and efficacy' of the vaporizing device'') did ''not appear to be a hypothesis driven research project,'' but rather, ''analogous to a process that is used to 'validate' an analytical method.'' *Id.* The PHS committee thus concluded that the ''overall aims of the project appear to be descriptions of work that would need to be conducted as part of good standard laboratory procedure prior to a clinical study.'' *Id.*

The PHS Committee further noted that, at that time (2005), a separate, HHS-approved clinical trial involving marijuana and the Volcano was already underway. *Id.* This then-ongoing clinical trial was being conducted by Dr. Abrams and was sponsored by the CMCR, using NIDA-supplied marijuana. *Id.*; Tr. 689. Moreover, as the letter from the PHS Committee indicates, one of the documents that Dr. Abrams had previously submitted in support of his then-ongoing clinical trial was a report that Chemic itself had prepared regarding its prior study of marijuana and the Volcano.[32] GX 52B, at 3. Given that Dr. Abrams' clinical trial was ''underway and is examining the pharmacodynamics and pharmacokinetics of several different potencies of marijuana in human volunteers using the Volcano(c) device,'' the Committee concluded that ''[i]t is difficult to see what additional scientific knowledge will be provided by the current protocol, considering the prior work done by the applicant, as described in the above report, and the ongoing clinical trial at CMCR.'' *Id.*

Respondent also introduced into evidence a letter from the President of Chemic to HHS responding to several points raised by the PHS Committee in denying Chemic's application. *See* RX 55. Respondent's letter does not, however, establish that HHS impermissibly denied Chemic's application for marijuana.[33] To the contrary, the evidence supports the conclusion that HHS (acting through the PHS Committee) made its determination not to supply marijuana on this occasion based on scientific considerations, finding that Chemic's then-latest proposed study was duplicative of prior and ongoing research and not likely to provide useful data.

Respondent's Contention That NIDA's Marijuana Is of Poor Quality

Respondent also contends that ''[t]he quality of the NIDA marijuana raises concerns for researchers and patients.'' Resp. Prop. Findings at 16. In this regard, Respondent asserts that various researchers have complained that NIDA's marijuana is of inconsistent potency, that NIDA's marijuana is harsh, that NIDA's marijuana is frequently several years old and not fresh, that the available product is of low potency, and that NIDA's product includes stems and seeds. *See id.* at 16–27. Contrary to Respondent's view, the evidence does not ''demonstrate[] serious concerns about the quality of NIDA's'' marijuana products. *Id.* at 27. As explained below, Respondent's contentions are largely based on snippets from questionnaires in which the researchers generally indicated their overall satisfaction with the quality of NIDA's marijuana. As the ALJ found, ''a preponderance of the record establishes that the quality is generally adequate.'' ALJ at 84.

With respect to the contention that NIDA's marijuana is of inconsistent potency or inadequate potency, Respondent relies on comments contained on three questionnaires that were completed by researchers at DEA's request. Resp. Prop. Findings at 17–18. One of the questions asked: ''Have you ever had any difficulty obtaining marijuana from NIDA for all strengths of cigarettes to meet research requirements?'' GX 16, at 8. While Dr. Grant of the CMCR answered affirmatively and added that ''having consistency of 6% -8% [THC] content have been difficult,'' he further stated that NIDA ''ha[s] been *accommodating* by trying to produce the high % products in a timely manner.'' *Id.* at 9 (emphasis in original). In response to another question regarding the adequacy of NIDA's products, Dr. Grant noted that ''NIDA has been reliable[,]'' and ''they have been easy to work with and amenable to accommodating for the requirements of the study.'' *Id.* at 6.

It is true that Dr. Grant, in answering this question, noted the problems with the range of potency in the higher potency material. Dr. Grant explained, however, that the problems he found regarding the range of potency were attributable to the cigarettes being ''handrolled and thus difficult to prepare.'' *Id.* Moreover, Dr. Grant answered ''yes'' to the question of whether NIDA's current products were ''adequate for your research purposes

the extent authorized by their registration and in conformity with other provisions of [the CSA].'' 21 U.S.C. 822(b).

[30] The first report, which was submitted by Chemic in 2003 to MAPS and CaNORML, is titled ''Evaluation of Volcano(r) Vaporizer for the Efficient Emission of THC, CBD, CBN and the Significant Reduction and/or Elimination of Polynuclear-Aromatic (PNA) Analytes Resultant of Pyrolisis,'' and is available on MAPS' Web site at *http://www.maps.org/mmj/vaporizerstudy4.15.03.* The second report, titled ''Cannabis Vaporizer Combines Efficient Delivery of THC with Effective Suppression of Pyrolitic Compounds,'' also appears on MAPS' Web site at *http://www.maps.org/mmj/Gieringer-vaporizer.pdf.* I take official notice of both documents. *See also http://www.maps.org/news-letters/v13n1/13111gie.pdf* (2003 MAPS news letter discussing Vaporizer studies sponsored by MAPS and NORML and the Marijuana Policy Project), of which I take official notice.

[31] HHS also noted that there were ''a number of technical concerns'' with Chemic's proposal. RX 52B, at 4.

[32] The report, titled ''Evaluation of Volcano® Vaporizer for the efficient emission of THC, CBD, CBN and the significant reduction and/or elimination of polynuclear-aromatic (PNA) analytes resultant of pyrolysis,'' appears on MAPS Web site as discussed in note 30.

[33] If Chemic had a valid basis to challenge HHS's denial of its request for marijuana, it presumably had remedies available to challenge that agency action either within HHS or in the courts. *See, e.g.*, 5 U.S.C. 702 (''A person suffering legal wrong because of agency action * * * is entitled to judicial review thereof.''). Respondent produced no evidence showing that Chemic has pursued any such remedies.

with regard to potency?'' *Id.* at 15. Also, in response to the question of whether ''these problems [have] ever compromised the study?,'' Dr. Grant indicated: ''N/A.'' *Id.* at 6.

Dr. Grant further indicated that he had ''no'' information that ''would lead [him] to believe that the future supply of marihuana required for research would be insufficient or unavailable through NIDA,'' *id.* at 8, and that he had ''no'' concerns regarding ''the availability of research-grade marijuana from NIDA'' to meet CMCR's future needs. *Id.* at 9. While Dr. Grant also indicated that it would be clinically important to evaluate a higher potency product than the 7–8 percent THC content marijuana CMCR was currently using, he also indicated that CMCR had not sought a higher potency product but had only discussed with NIDA the feasibility of such a product. *Id.* at 16.

On his questionnaire, Ronald Ellis, M.D., of the University of California, San Diego, noted that in ''[a]t least two shipments, [there] was some variability on stated THC content and the actual [content] measured.'' GX 17, at 6. Dr. Ellis further noted, however, that NIDA personnel ''have been very responsive.'' *Id.* Apparently, Dr. Ellis's clinical trial received some marijuana which was supposed to have a THC content of 8 percent, but only had a content of approximately 7 percent. *Id.* at 9. Dr. Ellis indicated, however, that the potency of NIDA's current product was adequate for research purposes. *Id.*

Respondent also relies on Dr. Donald Abrams' ''no'' answer regarding the consistency of the potency of NIDA's product. Resp. Prop. Findings at 18 (citing GX 21, at 6). Dr. Abrams further noted that ''[o]riginally approved for 3.9% THC content, midway through the 'Short-term effects * * *' protocol, NIDA informed [us] that the potency had been downgraded to 3.5%. Everything since is said to be at 3.5%.'' GX 21, at 6. Notably, the ''Short-term effects'' study occurred more than a decade ago, and Dr. Abrams did not indicate that there had been further problems with the consistency of the potency of the marijuana supplied by NIDA for several later studies he conducted.

Nor does the evidence support Respondent's contention that the marijuana available through NIDA is of insufficient potency to satisfy the needs of legitimate researchers. In his brief, Respondent relies on the statements of Drs. Grant and Abrams that it would be beneficial to evaluate the efficacy of marijuana cigarettes with a higher THC content than what was currently being supplied by NIDA. Resp. Prop. Findings at 22–23 (citing GX 16 & 21). Respondent, however, produced no evidence establishing that any researcher has obtained approval of FDA and other reviewing authorities to conduct clinical trials using higher THC content marijuana. As Dr. Abrams explained, he ''wanted to use a higher potency product but there were questions from the [scientific review board] and the funding agency [CMCR].'' GX 21, at 9.

Moreover, as Dr. ElSohly testified, the National Center has in inventory substantial quantities of bulk marijuana material with THC contents of ten to eleven percent and has some material with a THC content of fourteen percent.[34] Tr. 1203. Dr. ElSohly also testified that the National Center could produce marijuana with a THC content of up to 20 percent. *Id.* He further testified that he had informed ''some of the investigators that if they want to, they can order material of a certain potency'' and ''roll their own cigarettes.'' *Id.* at 1204–05.

Respondent also maintains that NIDA's marijuana is harsh and that some patients have complained that it was ''inferior in sensory qualities (taste, harshness) [to] the marijuana they smoke outside the laboratory,'' and that ''it was the worst marijuana they had ever sampled.'' Resp. Prop. Findings at 19–21. Yet, as the questionnaires completed by the researchers indicate, only a small percentage of study subjects have complained about the harshness of NIDA's marijuana. See GX 18, at 7 (one of ten patients complained); GX 21, at 8 (four out of fifty dropped out because of quality); GX 22, at 7 (''Out of 100 plus subjects, no more than [three] may have commented that the product was harsh.'').[35] Moreover, as one of the researchers noted, it was unclear whether the harshness was related to the actual marijuana cigarettes or the placebo material.[36] As for Respondent's further contention that some patients complained that NIDA's marijuana ''was the worst they had ever sampled,'' this evidence does not establish that the taste of the products rendered them unsuitable for their intended use.[37] Furthermore, Respondent provides no scientific basis for his suggestion that the research subjects' description of the degree of their subjective satisfaction with the experience of smoking marijuana in a research setting should be a criterion for judging the adequacy of the quality of marijuana for research purposes.[38]

Finally, Respondent contends that NIDA's marijuana is frequently ''not fresh'' and that it includes stems and seeds. Resp. Prop. Findings at 21–22; 25–27. While the record contains some evidence that older marijuana loses some if its potency, all but one of the researchers indicated that neither the lack of freshness nor the existence of plant parts (stems and seeds) had adversely impacted their research. *See* GX 16, at 13 (CMCR); GX 17, at 7 (Dr. Ellis); GX 18, at 7 (Dr. Corey-Bloom); GX 19, at 7 (Dr. Israelski);[39] GX 20, at 7 (Dr. Wallace); GX 22, at 7 (Dr. Polich); GX 28, at 7 (Prof. Lichtman); *but see* GX 21, at 7–8 (Dr. Abrams) (indicating that four

[34] Respondent also cites the questionnaire of Prof. Aron Lichtman, of the Department of Pharmacology, Virginia Commonwealth University, who conducted research in animals. Resp. Proposed Findings at 23 (citing GX 28). On his questionnaire, Prof. Lichtman indicated that he ''would [have] prefer[red] something at a higher potency, but at the time, 3–4% was the highest potency available.'' GX 28, at 9. Prof. Lichtman's questionnaire indicated, however, that his study had last obtained marijuana in 1999. Prof. Lichtman's answer is thus not probative of whether NIDA is currently capable of providing marijuana of adequate potency to support legitimate research needs.

Respondent's evidence regarding the potency of marijuana distributed by NIDA for patients in the former Compassionate Investigational New Drug program likewise dates back to 1999. See Resp. Prop. Findings at 24 (citing RX 19, at 47–48). As such, the evidence is not probative of whether NIDA is currently capable of supplying marijuana of adequate potency.

[35] Dr. ElSohly testified: ''I think you had like 50 subjects, and only three or four complained of the harshness. That's a very small percentage. You are going to get that regardless of what you administer.'' Tr. at 1589.

[36] As Dr. Cory-Bloom noted, it was unclear whether the harshness was attributable to actual marijuana cigarettes or placebo cigarettes. GX 18, at 7. Relatedly, Dr. ElSohly testified that the complaints of harshness were likely attributable to the placebo because ''all of the components have been extracted out . . . [s]o this will be just like smoking * * * grass or * * * hay or something like that or just paper that might have this harshness, and there's no soothing effect of the other components in the plant material.'' Tr. 1289–90.

[37] Respondent also cites to hearsay evidence regarding the experience of a single patient who had previously used non-NIDA marijuana (illegally obtained from California ''buyers'' clubs'') without problems but then purportedly developed bronchitis upon smoking NIDA marijuana. Resp. Prop. Findings at 21; Tr. 570. Even if I were to credit this testimony, the record as a whole establishes that NIDA's marijuana was well tolerated in the great majority of the various studies' subjects.

[38] Marijuana is known to cause, among other things, ''a distortion in the sense of time associated with deficits in short-term memory and learning,'' ''difficulty carrying on an intelligible conversation,'' anxiety, paranoia, panic, depression, dysphoria, delusions, illusions, and hallucinations. RX 1 (IOM report), at 101–102. These effects impact the determination of what, if any, weight to attach to research subjects' descriptions of their satisfaction with the marijuana they have smoked.

[39] Dr. Israelski did not recall any complaints about the ''freshness'' of NIDA's marijuana.

out of fifty patients had ''dropped out due to quality'').

Moreover, with respect to the existence of stems and seeds in NIDA's marijuana, Dr. ElSohly acknowledged that prior to 2001, there may have some stems and seeds in the marijuana it sent to the Research Triangle Institute (the contractor for the manufacture of the cigarettes). Tr. 1300–01. Dr. ElSohly further testified, however, that in 2001, the National Center acquired a special de-seeding machine which removes all the seeds and stems from the marijuana that is used to manufacture cigarettes. *Id.* at 1301. Respondent produced no evidence showing that the marijuana which the National Center has since supplied has contained stems and seeds.[40]

Respondent's Contention That NIDA's Marijuana Is Inadequate To Support The Development of Plant-Form Marijuana Into an FDA-Approved Prescription Drug

Respondent further contends that the existing supply of NIDA marijuana is inadequate because ''MAPS seeks to develop botanical marijuana as an FDA-approved prescription drug.'' Resp. Prop. Findings at 8. In support of this contention, Respondent makes two primary factual assertions. First, he claims that ''to develop a pharmaceutical product, a developer must have assured access to a reliable, dependable source of the particular formulation of the product the developer needs, both for research, and for distribution if the product is approved,'' and that ''[w]ithout such a source, there is no development.'' *Id.* at 9. Second, he claims that ''even before the Phase [1] and Phase [2] studies on a product, the developer must generally submit a Drug Master File,''[41] and that the Drug Master File (DMF) for NIDA's marijuana contains proprietary information which NIDA controls. *Id.*

As for Respondent's contentions regarding the need to submit a DMF, Respondent asserts that ''there is no procedure to force [the DMF's] owner to make a Drug Master File, or the information in it, available to a drug developer.'' Resp. Prop. Findings at 10 (citing Tr. 447–49; testimony of Dale Gieringer). While Respondent concedes that NIDA ''has allowed the researchers whom it chooses to supply with marijuana to rely on that file,'' and that FDA has approved several Phase 1 studies using NIDA marijuana and the information contained in the DMF, *id.* at 10, it contends that because NIDA's mission is to study drug abuse, it is not likely that ''NIDA would authorize MAPS to rely on the NIDA marijuana [DMF] currently on file with the FDA.'' *Id.* at 45.

The 1999 HHS Guidance makes clear, however, that if a proposed research project meets the Department's criteria for the provision of research-grade marijuana, ''NIDA will provide the researcher with authorization to reference NIDA's marijuana Drug Master File.'' GX 24, at 4. Moreover, as the FDA has explained, ''the submission of a DMF is not required by law or regulation,'' but rather, ''is submitted solely at the discretion of the holder.'' *Guideline For Master Drug Files*, at 2. The FDA regulations provide: ''FDA ordinarily neither independently reviews drug master files nor approves or disapproves submissions to a drug master file. Instead, the agency customarily reviews the information only in the context of an application under part 312 or part [314].'' 21 CFR 314.420(a). Accordingly, as the FDA Guidelines explain, while ''the information contained in [a] DMF may be used to support an Investigational New Drug Application (IND), [or] a New Drug application (NDA) * * * [a] DMF is NOT a substitute for an IND [or] NDA.'' *Guideline For Master Drug Files,* at 3.

Relatedly, David Auslander, M.D., the Government's expert witness in pharmaceutical development, testified that ''not all companies do Drug Master Files'' and that ''FDA does not necessarily require a Drug Master File to do a Phase [1] and Phase [2] study in all cases if the Drug Master File * * * comes from a producer that's different from the sponsor itself.'' Tr. 2024. Dr. Auslander also explained that a drug developer may not even have a Drug Master File at the time it applies to conduct Phase 1 or Phase 2 studies. *Id.* As Dr. Auslander further testified, the necessary information can be submitted in an IND or an NDA. *Id.* at 2024–25.

As for the contention that NIDA is not a reliable source of supply, it is undisputed that a for-profit drug developer would be unlikely to take a drug through the FDA approval process unless it was ''assured that they would have a drug supply that is unchanging and reliable.'' Tr. 117 (testimony of Irwin Martin, Ph.D.). Dr. Martin also testified that ''[o]ne of the biggest problems in drug development is the unfortunate need sometimes to repeat studies. If you have a new formulation or your drug source has changed, you many need to repeat years worth of data because you can no longer assure that the data you developed with this earlier version of [the] drug will actually be the same drug as you now have.'' *Id.* at 118. Dr. Martin further testified that while ''no reasonably business-oriented company would ever develop a product'' if it did not have a reliable and consistent supply source, he also noted that if a company had to change its supply source, a company could try to show that the new product was pharmcokinetically equivalent to the old product. Tr. 120–21; *see also* Tr. 2027.

Also on this issue, Dr. Auslander testified further on behalf of the Government that if the developer's source changed, it ''would not necessarily repeat the Phase [1] and [2] clinical studies over again, but * * * would do additional chemical studies, stability [studies] * * * to show that the quality of material from source A and the quality of material acquired from source B are equivalent.'' Tr. 2027–28. Both Respondent's and the Government's experts agreed, however, that if the developer could not establish equivalence between the two products, ''it would not be a trivial experience'' for the developer. *Id.* at 2029; *see also id.* at 121 (testimony of Dr. Martin that developer would have to start over).

Relatedly, Respondent further asserts that there is ''overwhelming'' evidence that NIDA ''would not be likely to choose to serve as the supplier to a medical marijuana pharmaceutical product developer even if it were authorized to so.'' Resp. Prop. Findings at 10. In support of this assertion, Respondent extracts two sentences from a letter in which Nora Volkow, M.D., NIDA's director, responded to Mr. Doblin's letter accusing NIDA/HHS of ''seriously obstructing'' Chemic's research involving the Volcano which MAPS was sponsoring (and whose application HHS ultimately denied).[42] *See id.* (quoting RX 13; ''It is

[40] In support of its contention that NIDA marijuana contains stems and seeds which renders the product's quality inadequate, Respondent also cites an article, ''Chronic Cannabis Use in the Compassionate Investigational New Drug Program.'' Resp. Prop. Findings at 26 (citing RX 19, at 49–50). Respondent particularly notes two photographs of marijuana that was manufactured in April 1999. *See id.* This evidence thus predates the National Center's 2001 acquisition of a de-seeding machine.

[41] I also take official notice of the FDA's *Guideline For Drug Master Files* (Sept. 1989) (available at *http://www.fda.gov/cder/guidance/dmf.htm/*).

According to this FDA guideline (at 2), ''[a] Drug Master File (DMF) is a submission to the [FDA] that may be used to provide confidential detailed information about facilities, processes, or articles used in the manufacturing, processing, packaging, and storing of one or more human drugs.''

[42] In that letter, Mr. Doblin also mentioned that DEA had indicated that it would not review Chemic's application to import ten grams of Dutch marijuana until NIDA/HHS completed its review of Chemic's protocol. RX 14. Mr. Doblin also

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not NIDA's role to set policy in this area or to contribute to the DEA licensing procedures. Moreover, it is also not NIDA's mission to study the medicinal use of marijuana or to advocate for the establishment of facilities to support this research.''). *See also* RX 14 (letter of Mr. Doblin; ''NIDA/HHS is seriously obstructing a privately-funded drug development program aimed at evaluating marijuana's potential use as an FDA-approved medication.'').

In that letter, Dr. Volkow declined to intervene explaining that:

> * * * NIDA is just one of the participants on the HHS review panel and continues, on behalf of the U.S. Government, to provide supplies of well-characterized cannabis for both NIH and non-NIH-funded research. The latter is conducted according to the procedure established in 1999 by HHS for obtaining access to marijuana for research purposes. It is not NIDA's role to set policy in this area or to contribute to the DEA licensing procedures. Moreover, it is not NIDA's mission to study the medicinal uses of marijuana or to advocate for the establishment of facilities to support this research. Therefore, I am sorry but I do not believe that we can be of help to you in resolving these concerns.

RX 13. As both this letter and the 1999 Guidance make plain, HHS—and not NIDA—is the policymaker regarding the criteria for determining who can obtain research-grade marijuana from NIDA. As NIDA does not independently control to whom it may supply marijuana for legitimate research, the letter is not indicative of whether NIDA would be a reliable source of marijuana for an entity which sought to develop plant-form marijuana into an FDA-approved prescription medicine.

Respondent also points to the 1999 Guidance document's statement that ''[t]he goal of this program must be to determine whether cannabinoid components of marijuana administered through an alternative delivery system can meet the standards enumerated under the Federal Food, Drug, and Cosmetic Act for commercial marketing of a medical product. As the IOM report stated, 'Therefore, the purpose of clinical trials of smoked marijuana would not be to develop marijuana as a licensed drug, but such trials could be a first step towards the development of rapid-onset, nonsmoked cannabinoid delivery systems.' '' [43] GX 24, at 2.

As found above, the IOM's recommendation was based on its conclusion that ''[a]lthough marijuana smoke delivers THC and other cannabinoids to the body, it also delivers harmful substances, including most of those found in tobacco smoke. In addition, plants contain a variable mixture of biologically active compounds and cannot be expected to provide a precisely defined drug effect. For those reasons there is little future in smoked marijuana as a medically approved medication.'' RX 1, at 195–96.

Moreover, the HHS Guidance does not address what the Secretary's response would be were the current clinical trials to show that the efficacy/safety profile of smoked marijuana supported FDA approval of it as a prescription medicine for particular indications or patient populations. Nor does it address what the Secretary's response would be if clinical trials were to show that the efficacy/safety of vaporized plant form marijuana for particular indications supported its approval as a prescription drug.

Dr. Gust testified that notwithstanding the stated goal of the 1999 Guidance, a researcher who ''had an IND from FDA * * * would not have a problem getting marijuana.'' Tr. 1718. Further, in response to the ALJ's question as to whether a researcher whose goal was to obtain FDA approval of plant-form marijuana would have more difficulty obtaining marijuana from HHS than a researcher who sought to produce an extract-based product, Dr. Gust testified: ''I don't believe so.'' *Id.* at 1719–20.

Dr. Gust also explained that whether plant-form marijuana should be approved as a prescription medicine is ''not a question for the'' PHS committee that reviews requests for NIDA marijuana. *Id.* at 1720. Rather, ''it's a question for the regulation and approval process that goes on through FDA.'' *Id.* Finally, while Dr. Gust acknowledged that ''HHS would strongly endorse'' the IOM's view that ''if there's going to be an approved medication, it's going to be a purified constituent of marijuana that will be delivered in a non-smokable form,'' he further testified that in his experience, there was no bias against ''the concept of approving marijuana as a medication'' at the level of PHS review. *Id.* at 1722.[44]

Respondent further asserts that ''it is not at all clear that NIDA *could* serve as a source for a pharmaceutical product.'' Resp. Prop. Findings at 11 (emphasis in original). Notwithstanding Mr. Doblin's beliefs regarding the likely safety/efficacy profiles of smoked and vaporized marijuana, *see* Tr. at 605, it is highly speculative whether clinical trials will ultimately support FDA approval of plant-form marijuana through either delivery system.[45]

As further support for this contention, Respondent references that Dr. ElSohly answered ''That's correct'' when asked the following question by Respondent's counsel: ''So if somebody wants to develop a commercial product with marijuana, they could not use the NIDA marijuana; is that fair?'' Resp. Prop. Findings at 11 (quoting Tr. 1463). It is not clear exactly what to make of Dr. ElSohly's answer to this question.[46] In

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referenced DEA's handling of Respondent's application.

[43] In discussing the content of the HHS Guidance, Respondent asserts: ''And it expressly states that 'the purpose of clinical trials of smoked marijuana would not be to develop marijuana as a licensed drug.' '' Resp. Proposed Findings at 11 (quoting GX 24, at 2). Notably, Respondent's quotation edits out the Guideline's reference to the IOM Report. The complete text of the Guidance shows, however, HHS did not come to this conclusion without evidentiary support, but rather, relied on the extensive findings of the IOM.

[44] In discussing this testimony, the ALJ noted that Dr. Gust had acknowledged that a researcher with an FDA-approved protocol might nonetheless be denied marijuana by the PHS committee under the criteria set forth in the guidance. ALJ at 51 (citing Tr. 1694). There is, of course, no evidence that any researcher with an FDA-approved protocol has been denied marijuana subsequent to the 1999 guidelines. Dr. Gust's answer was based on a hypothetical question. Accordingly, this portion of Dr. Gust's testimony provides no basis to question his credibility as to whether in his experience, HHS (and the PHS review committees) are biased against researchers who seek to obtain FDA approval for plant-form marijuana.

[45] Given that, as indicated above, marijuana has been found to contain hundreds of different chemicals, including a variable mixture of biologically active compounds that cannot be expected to provide a precisely defined drug effect, IOM has expressed the view that, ''if there is any future in cannabinoid drugs, it lies with agents of more certain, not less certain, composition.'' RX 1, at 195–96.

[46] Based on the questions that led up to the above-quoted question, it appears that, in answering ''That's correct,'' Dr. ElSohly was confirming that the marijuana he grows pursuant to the NIDA contract may not be taken by the University of Mississippi (without prior authorization from NIDA) for use in the commercial development of a THC extract product where such commercial activity was not authorized by NIDA. *See* Tr. at 1462–63. Indeed, the following subsequent exchange between Respondent's counsel and Dr. ElSohly suggests that Dr. ElSohly correctly understood that there was no prohibition on the use of NIDA marijuana for the development of commercial products:

Q: Dr. ElSohly, if an organization like MAPS, for example, a nonprofit or pharmaceutical organization, wanted to try to develop smoked marijuana into an FDA-approved medicine, could it use the marijuana that you grow to the preclinical and clinical testing if NIDA agreed?

A: I would say yes.

Tr. 1562–63. Moreover, even if Dr. ElSohly was of the mistaken view that the marijuana he grew for NIDA could never be used by anyone for commercial product development, such a misunderstanding on Dr. ElSohly's part would not be controlling for purposes of this proceeding. The record is clear that it is HHS—not Dr. ElSohly—that determines the terms of his contract, including to whom and under what circumstances he may supply marijuana; and the record is also clear that Dr. ElSohly follows the instructions he receives from NIDA as to whom to deliver the marijuana. Further, as explained above, the record reveals that HHS's policy contains no prohibition on the use of

any event, no provision of the National Center's contract with NIDA imposes any prohibition on the use of the marijuana produced under the contract for the purposes of the development of a commercial product. Indeed, the language of the contract with NIDA suggests otherwise. While Article H.13 states that ''contract funds shall not be used to support activities that promote the legalization of any drug or other substance included in schedule I'' of the CSA, it further provides that ''[t]his limitation shall not apply when the contractor makes known to the contracting officer that there is significant medical evidence of a therapeutic advantage to the use of such drug or other substance or that federally sponsored clinical trials are being conducted to determine therapeutic advantage.'' GX 13, at 20 (citing Pub. L. 108–447, § 510, 108 Stat. 2809 (2005)). Likewise, the new procedures that HHS announced in 1999 for providing marijuana for medical research contain no restriction on using NIDA-supplied marijuana for the development of commercial products. GX 24. To the contrary, by adopting a new procedure whereby privately funded researchers could obtain marijuana from NIDA at cost, HHS made it possible starting in 1999 for a commercially sponsored researcher to develop a drug product using NIDA-supplied marijuana. *See id.* at 2. Finally, Respondent cites no provision of law that prohibits NIDA from serving as a supply source for a prescription drug approval process.[47]

Evidence Regarding the Remaining Statutory Factors

There is no evidence that Respondent has not complied with applicable state or local laws. *See* Gov. Proposed Findings at 139 (discussing 21 U.S.C. 823(a)(2)). Moreover, Respondent has never been convicted of any controlled-substance related offense. Tr. 78; *see* 21 U.S.C. 823(a)(4).

As for factor five, on the questionnaire, Respondent acknowledged that he ''has no current or previous registrations and is unaware of any registration [having] previously [been] granted to the university.'' GX 3, at 3. While Respondent testified that he would meet all ''appropriate security conditions,'' he also acknowledged that ''I've never grown marijuana or any other controlled substance.'' Tr. 79. He further testified that ''We have not—I have no experience in the control against diversion.'' *Id.* Relatedly, Respondent testified that he had no personal experience in providing security for plants, *id.* at 255, and that both graduate students and technicians would be used to perform the various tasks associated with the project. *Id.* at 254 (''I usually don't go down and water the plants in the greenhouse; I usually have a technician that does that.''); *id.* at 254–55 (''They [the graduate students and technicians] would probably do the transplanting[,]'' and ''a daily check on any environmental controls we have.''). Respondent presented no evidence that any person who would be involved in the daily operation of the project would have experience in the lawful manufacture or distribution of schedule I and II controlled substances.[48]

Finally, Respondent testified that he believed that granting his application would promote technical advances in the art of manufacturing controlled substances and the development of new substances. *Id.* at 74–76. More specifically, Respondent asserted that granting his application would advance ''the understanding [of] any possible clinical use of marijuana if we were able to supply this to investigators to run trials.'' *Id.* at 75–76. Respondent also testified that ''we would learn more about how the environment affects the constituents in the plant material which would enable'' a potential manufacturer, were marijuana to become approved by the FDA as a drug, to ''know the environment it needs to be grown under to produce a clinical marijuana.'' *Id.* at 76. Respondent further opined that granting his registration would promote technical advances because part of the purpose of growing the marijuana was to allow MAPS to test its vaporizer. *Id.* at 77–78. Respondent acknowledged, however, that he would not personally be working on MAPS's vaporizer device or on any other delivery device. *Id.* at 230. He also acknowledged that he has no patents regarding the growing of any medicinal plants. *Id.* at 238.

Discussion

Pursuant to 21 U.S.C. 823(a), ''[t]he Attorney General shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registration is consistent with the public interest and with the United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971.'' 21 U.S.C. 823(a). ''In determining the public interest,'' § 823(a) directs the Attorney General to consider the following factors:

(1) Maintenance of effective controls against diversion of particular controlled substances and any controlled substances in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;

(2) Compliance with applicable State and local law;

(3) Promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) Prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) Past experience in the manufacture of controlled substances, and the existence in the establishment of effective controls against diversion; and

(6) Such other factors as may be relevant to and consistent with public health and safety.

Id. This Agency's regulations further provide that ''[a]t any hearing on an application to manufacture any controlled substance listed in Schedule I or II, the applicant shall have the burden of proving that the requirements for such registration pursuant to [§ 823(a)] are satisfied.'' 21 CFR 1301.44(a).

As § 823(a) makes plain, even if an applicant satisfies its burden of proof with respect to the public interest inquiry, it cannot be granted a registration unless its proposed activities are consistent with the United States' obligations under international treaties. The United States is a party to

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the marijuana grown pursuant to the NIDA contract for commercial development purposes.

[47] As for Respondent's contention that the Government did not ''introduce any evidence that NIDA could or would [serve as a supply source] to support its claim that NIDA's supply is adequate to meet all legitimate medical and scientific purposes,'' Resp. Prop. Findings at 11, Respondent, and not the Government, has the burden of proof on the issue of whether supply is inadequate within the meaning of 21 U.S.C. 823(a)(1). *See* 21 CFR 1301.44(a).

[48] Respondent testified that he had performed classified work on plants for the U.S. Army and that ''there were security systems in place similar to the security systems you have in this building'' (referring to DEA Headquarters, where the hearing took place), and he answered ''Yes'' when asked by his counsel whether he recognized ''the importance of that sort of security in a situation like this registration application.'' Tr. 367. It is unclear what Respondent meant by ''the security systems you have in this building,'' since the only security to which he would have been exposed in entering DEA Headquarters to testify were the requirements of passing through a metal detector, being accompanied by a DEA employee, and wearing a visitor's badge. These DEA Headquarters security measures have nothing to do with the security measures required of DEA registrants who handle controlled substances, which are set forth in 21 CFR 1301.71 through 1301.76. Thus, this portion of Respondent's testimony was ambiguous and did not establish, for purposes of 21 U.S.C. 823(a)(5) that, if his application were granted, there would exist in his establishment effective controls against diversion.

the Single Convention. Accordingly, whether Respondent's proposed activities are consistent with this Nation's obligations under the Convention is a threshold question.

A. Whether Respondent's Proposed Registration Is Consistent With the Single Convention

The Single Convention imposes a comprehensive series of measures to control narcotic drugs and other substances including marijuana (which is referred to in the Single Convention as ''cannabis'').[49] Under the Convention, cannabis is both a Schedule I and Schedule IV [50] drug and is subject to the control measures applicable to each schedule. Single Convention, art. 2, para. 5; *see also* Secretary-General of the United Nations, *Commentary on the Single Convention on Narcotic Drugs, 1961,* 65 (1973) (hereinafter, Commentary). Moreover, under article 28, ''[i]f a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the opium poppy.'' Single Convention, art. 28, Para. 1. As the Commentary further explains:

> The system of control over all stages of the drug economy which the Single Convention provides has two basic features: limitation of narcotic supplies of each country * * * to the quantities that it needs for medical and scientific purposes, and authorization of each form of participation in the drug economy, that is, licensing of producers, manufacturers and traders. * * * In the case of the production of opium, coca leaves, cannabis and cannabis resin, this regime is supplemented by the requirement of maintaining government monopolies for the wholesale and international trade in these drugs in countries which produce them. * * *

Commentary at 263.

Amongthese controls is the requirement that ''[t]he Agency shall * * * have the exclusive right of importing, exporting, wholesale trading and maintaining stocks other than those held by manufacturers of opium alkaloids, medicinal opium or opium preparations.'' Single Convention art. 23, para. 2(e). The Convention further provides, however, that the ''Parties need not extend this exclusive right to medicinal opium and opium preparations.'' [51] *Id.*

The Commentary to article 28 thus explains that ''[a] Party permitting the cultivation of the cannabis plant for cannabis and cannabis resin must, pursuant to article 23, paragraph [2(e)(2)] in connexion with article 28, paragraph 1, grant its national cannabis agency *the exclusive right of wholesale * * * trade in these drugs.*'' Commentary at 314 (emphasis added). The Commentary further explains that the Government ''need not extend this exclusive right to extracts and tinctures of cannabis.'' *Id.*

Respondent raises several arguments as to why his registration would be consistent with the Single Convention. First, he argues that ''the Convention clearly contemplates that more than one cultivator or bulk manufacturer may be licensed by the member nation's licensing agency.'' Resp. Prop. Findings at 66. Second, he argues that because his ''crop would be medical marijuana, grown and processed to be adapted for medicinal use, it is not subject to the agency's 'exclusive right' for 'maintaining stocks.' '' *Id.* at 67.

Relatedly, Respondent argues that because DEA has granted Dr. ElSohly a registration to ''grow marijuana for private purposes'' and does not require him to ''turn[] over those stocks to any government agency,'' granting his application will likewise conform with the Single Convention. Respondent further contends that Dr. ElSohly has been able to grow marijuana outside of the NIDA contract and that ''DEA would not have issued those licenses had they violated the Single Convention.'' *Id.* at 68. Respondent also argues that the United Kingdom, which is also Party to the Convention, has allowed marijuana to be grown by a private entity (GW Pharmaceuticals) without its government taking physical possession. *Id.* Likewise, in his Response to the Government's exceptions to the ALJ's recommended decision, Respondent argues that the ALJ ''correctly held that Article 23 [para.] 2(d) does not require the government to take physical possession of [his] crop.'' Respondent's Resp. at 9.

In concluding that the ''Single Convention does not preclude registering Respondent,'' the ALJ offered three reasons. First, based on the United Kingdom's regulatory scheme, she reasoned that ''it appears * * * that the parties to the Single Convention are free to construe the term 'physical possession' as they see fit.'' ALJ 82. As for the remaining two reasons, the ALJ explained that ''[i]t also appears, although it is not entirely clear, that the marijuana grown by the National Center or by any other registrant for utilization in research would qualify as either 'medicinal' within the meaning of article 1, paragraph (1)(o), or a 'special stocks' within the meaning of article 1, paragraph (1)(x), and that therefore the government monopoly on importing, exporting, wholesale trading, and maintain stocks would not apply.'' *Id.*

Neither the ALJ's rationales nor Respondent's arguments are persuasive. As for the argument that the Single Convention does not require that the Government take physical possession, the argument provides no comfort to Respondent for two reasons. First, the argument ignores that taking possession and engaging in wholesale distribution are two separate activities under the Convention. Notably, in his briefs, Respondent does not even acknowledge the distinction. *See* Resp. Proposed Findings and Conclusion of Law at 64–70; Respondent's Resp. at 9–12.

Second, as Respondent's evidence makes clear, his purpose for seeking a registration is not simply to grow marijuana, but to distribute it outside of the HHS system. Mr. Doblin's testimony

[49] Under the Single Convention, '' 'cannabis plant' means any plant of the genus Cannabis.'' Article 1(c). The Single Convention defines ''cannabis'' to include ''the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated.'' Article 1(b). This definition of ''cannabis'' under the Single Convention is less inclusive than the CSA definition of ''marihuana.'' *See* 21 U.S.C. 802(16). However, this distinction in inconsequential for purposes of the matters at issue in this proceeding.

[50] The Single Convention's use of the term ''Schedule IV'' is not to be confused with the CSA's use of the same term. Under the Convention, the terms ''Schedule I, Schedule II, Schedule III and Schedule IV mean the correspondingly numbered list of drugs or preparations annexed to this Convention.'' Single Convention, art. 1, para. 1(u). As the Convention further explains, ''[t]he drugs in Schedule IV shall also be included in Schedule I and subject to all measures of control applicable to drugs in the latter Schedule'' as well as the additional measures contained in article 2, paragraph 5. *Id.* art. 2, para. 5.

Under Article 2, paragraph 5, the Convention requires that [a] Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included. *Id.* art. 2, para. 5(a). The Convention further directs that:

> A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party.

Id. art. 2, para. 5(b).

[51] Article 23 of the Convention further provides that ''[a] Party that permits the cultivation of the opium poppy for the production of opium shall establish, if it has not already done so, and maintain, one or more government agencies * * * to carry out the functions required under this article.'' Single Convention art. 23, para. 1. Moreover, ''[a]ll cultivators of the opium poppy shall be required to deliver their total crops of opium to the Agency. The Agency shall purchase and take physical possession of such crops as soon as possible, but not later than four months after the end of the harvest.'' *Id.* para. 2(d).

that ''what we're trying to do is get the [PHS] and NIDA out of the picture,'' Tr. 666, makes this plain. *See also* Tr. 225 (testimony of Respondent; ''I may very well be approached by other people with approved studies who need a source also.''). Thus, Respondent's contention that the Single Convention does not prohibit multiple cultivators is beside the point, since his proposed purpose for gaining authorization to grow marijuana (so that MAPS—rather than HHS/NIDA—can control distribution of the marijuana) would defy one of the central control provisions of the Single Convention with respect to cannabis cultivation. As the Commentary to the Single Convention states:

Countries * * * which produce * * * cannabis * * * , [i]n so far as they permit private farmers to cultivate the plants * * *, cannot establish with sufficient exactitude the quantities harvested by individual producers. If they allowed the sale of the crops to private traders, they would not be in a position to ascertain with reasonable exactitude the amounts which enter their controlled trade. The effectiveness of their control régime would thus be considerably weakened. In fact, experience has shown that permitting licensed private traders to purchase the crops results in diversion of large quantities of drugs into illicit channels. * * * [T]he acquisition of the crops and the wholesale and international trade in these agricultural products cannot be entrusted to private traders, but must be undertaken by governmental authorities in the producing countries. Article 23 * * * and article 28 * * * therefore require a government monopoly of the wholesale and international trade in the agricultural product in question in the country which authorizes its production.

Commentary at 278. Indeed, the central theme of Respondent's argument—starting with the opening sentence of his Proposed Findings and Conclusion of Law and repeated throughout the document—is that the very Government monopoly over the wholesale distribution of marijuana that the Single Convention demands is the primary evil that Respondent seeks to defeat through obtaining a DEA registration. Thus, from the outset of the analysis, Respondent's proposed registration cannot be reconciled with United States obligations under the treaty.

Respondent offers no argument that his proposed distributions would not constitute wholesale trading under the Convention. *See, e.g.*, GX 3, at 3 (''customers would include both MAPS-sponsored research and research sponsored by other organizations.''). Respondent's proposed activity in distributing to researchers does not constitute retail trading because his customers are not the ultimate users of the marijuana, but rather researchers, who would then dispense the drugs to ultimate users. *See* Commentary at 329 (A manufacturer's ''license does not in any event * * * include the retail trade in drugs.'').[52]

In construing the meaning of ''United States obligations under [the Single Convention]'' in the context of 21 U.S.C. 823(a), any reliance by the ALJ or Respondent on the United Kingdom's practice is misplaced.[53] For one, as set forth in § 823(a), Congress assigned to the Attorney General sole authority to determine whether a proposed registration under this provision is consistent with United States obligations under the Single Convention. Nowhere in the CSA does Congress call upon the Attorney General to rely on—or even consider—how other nations interpret the Single Convention as a basis for the Attorney General's determination of what are the United States obligations under the treaty.[54] Second, the Single Convention contains provisions that call upon each nation that is a party to the treaty to determine, in its own opinion, whether and how to tailor its control measures commensurate with the circumstances particularized to that country. For example, article 2, paragraph 5, of the Single Convention states the following with respect to drugs included in Schedule IV (including cannabis):

(a) A Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included; and

(b) A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party.

Thus, what the United Kingdom might, in its opinion, deem to be appropriate control measures to meet its obligations under the Single Convention given the circumstances involving cannabis in Britain might be distinct from what the United States finds, in its opinion, to be the appropriate control measures to fit the circumstances involving cannabis in the United States.[55]

If the United States were to look to any outside entity for guidance on compliance with the Single Convention, that entity would be the International Narcotics Control Board (INCB), which is the United Nations organ created by the Single Convention to implement, and monitor compliance with, the Convention. *See* Single Convention, articles 5, 9–15, 19–20. In its 2005 Annual Report, the INCB reiterated: ''Articles 23 and 28 of the [Single] Convention provide for a national cannabis agency to be established in countries where the cannabis plant is cultivated licitly for the production of cannabis, even if the cannabis produced is used for research purposes only.'' [56] Similarly, the INCB issued a statement in 2008 stating, with respect to the standards under the Single Convention

[52] Under the CSA and DEA regulations, wholesale distribution and dispensing (retail distribution) are independent activities and require separate registrations. *See* 21 U.S.C. 802(11) (definition of ''distribute'' excludes dispensing); *compare* 21 U.S.C. 823(b) *with* 823(f) (separate registration required for distributor versus dispenser); *see also* 21 CFR 1301.13(e) (listing categories of registration and authorized activities). Only a practitioner (and not a manufacturer or distributor) can dispense a controlled substance to a patient. *See id.* at 1301.13(e)(1).

Moreover, the Single Convention is a drug-control regime. The precise economic arrangements between Respondent, MAPS, and any other potential customers, are therefore irrelevant in determining whether his proposed activity would constitute wholesale trading.

[53] There was a dispute between the parties as to the admissibility of the document Respondent submitted (attached to RX 26) purporting to set forth the United Kingdom's explanation of how it carried out its obligation under the Single Convention to establish a national cannabis agency. Tr. 1812. After having the parties brief the issue, the ALJ noted, in a ''Memorandum to Counsel and Ruling,'' that one of the Government's objections was that Respondent did ''not explain how exhibit 26 was issued or under what authority.'' The ALJ concluded that ''although the circumstances under which exhibit 26 came to be promulgated are not clear, it appears that the document is in effect in the United Kingdom.'' *Id.* The ALJ did not explain her basis for this conclusion. *See id.* It is unnecessary to determine whether this ruling by the ALJ was proper because, even assuming, *arguendo,* that the document accurately represented the official position of the United Kingdom and was issued by the appropriate representative of the British Government, for the reasons explained above, reliance on this document for determining how to interpret the Single Convention for purposes of 21 U.S.C. 823(a) is inappropriate.

[54] For this reason, it is unnecessary to expressly reject the interpretation contained in the document submitted by Respondent (attached to RX 26) titled ''United Kingdom National Cannabis Agency: Protocol.''

[55] In any event, there is no evidence that the British Government has allowed GW to engage in the type of activity for which Respondent seeks to become registered—the wholesale distribution of plant-form marijuana. Rather, as DEA has done with respect to the National Center and its project to supply THC extract to Mallinckrodt (GX 78), the British Government has granted GW a license to grow marijuana for the limited purpose of producing extract for a pharmaceutical product. Rx 26, Ex. A at 2.

[56] The above-quoted statement appears on page 16, in paragraph 81, of the 2005 INCB Annual Report, which is available at *http://www.incb.org/pdf/e/ar/2005/incb_report_2005_2.pdf.* I take official notice of the report.

relating to the control of cannabis, that ''[s]uch standards require, inter alia, the control of cultivation and production of cannabis by a national cannabis agency.'' [57] As explained above, it is this control of the cultivation and production of cannabis by a national agency of the United States to which Respondent is fundamentally opposed, thereby demonstrating the inconsistency between his application and the Single Convention.

The ALJ further reasoned that ''although it is not entirely clear,'' the marijuana Respondent seeks to grow would be exempt from the Government's exclusive right to engage in wholesale trading because it would qualify as either ''medicinal'' or ''special stocks.'' ALJ at 82. As explained below, the ALJ erred on both counts.

In his response to the Government's exceptions, Respondent contends that the ''[t]he Single Convention defines 'medicinal' marijuana as that 'which has undergone the process necessary to adapt it for medicinal use.' '' Respondent Resp. at 10 (quoting art I. para 1 (o)). The Single Convention, however, contains no such term.

Rather, the Convention defines only the term ''[m]edicinal opium.'' Single Convention art 1, para.1(o) (defining ''medicinal opium'' as ''opium which has undergone the processes necessary to adapt it for medicinal use.''). Accordingly, Respondent's argument rests solely on an analogy to the term ''medicinal opium.'' Respondent's reliance is misplaced as it ignores several critical distinctions between what was formerly known as ''medicinal opium'' and what it contends is ''medicinal marijuana.''

As the Commentary explains: ''The Single Convention follows earlier narcotics treaties in defining 'medicinal opium' as a special form of opium in which that drug is used in medical treatment.'' Commentary at 21–22. The Commentary goes on to state that ''medicinal opium'' is a form of opium powder to which lactose has been added ''to reduce its morphine content *to the standard* of about 10 percent prescribed for 'medicinal opium.' '' *Id.* (emphasis added).

In a footnote, the Commentary further explains that ''[t]he fifth edition of the *Pharmacopœa Helvetica* (1949) * * * defines 'medicinal opium' as opium powder reduced to a content of 9.2 to 10.2 per cent of anhydrous morphine by the addition of lactose. This pharmacopœa calls 'medicinal opium' also 'powdered opium.' '' Commentary at 22 n.8. The Commentary then notes that ''[t]he term 'medicinal opium' ha[d] been abandoned in'' in favor of the terms ''powdered opium'' and ''standardized powered opium'' in several pharmacopœas which had been published in the late 1960s. *Id.* (citing *British Pharmacopœa* 686 (1968), and *Pharmacopœa Internationalis* 403 (2d ed. 1967)). Of further note, the term is not used at all in more recent pharmacopœas.[58] *See, e.g., The United States Pharmacopeia 2008,* at 2860–61 (31st Rev. 2007); *British Pharmacopoeia 2008,* at 1599–1601 (2007).

Thus, the term ''medicinal opium'' is now obsolete. The term's obsolescence itself provides ample reason to disregard it in determining the scope of the United States' obligations with respect to marijuana. But even if the term is still relevant, Respondent ignores that the term referred to a product which had not only been extracted from the opium poppy but had also undergone several further processes (including the addition of another substance, lactose) to prepare it for use in other drugs and to obtain a specific and *standardized* content of morphine, its primary active ingredient. *See British Pharmacopoeia 2008,* at 1599 (''Raw opium is intended only as a starting material for the manufacture of galenical preparations. It is not dispensed as such.''); GX 53, at 3 (letter of GW Pharmaceuticals) (''[O]pium is a Schedule II substance, but it merely provides the starting material for a number of pharmaceutical dosage forms that are lawfully marketed in the U.S. Herbal opium is not itself used directly by patients.'').

Indeed, the inclusion of ''medicinal opium'' in the various older Pharmacopœas indicates that there were recognized standards for the substance's manufacture and composition and that the drug had an accepted medical use in humans. *See, e.g., The United States Pharmacopeia* (17th Rev. ed. 1965), at xxv (noting that federal law ''designate[s] the Pharmacopeia as establishing the standards of strength, quality, and purity of medicinal products recognized therein when sold in interstate commerce for medicinal use''); [59] *see also The United States Pharmacopeia 2008,* at v (''*USP 31* * * * contains science-based standards for drugs, biologics, dietary, and excipients used in dosage forms and products. With few exceptions, all articles for which monographs are provided in *USP 31* * * * are legally marketed in the United States or are contained in legally marketed articles.''); *British Pharmacopoeia 2008,* at 4 (''The requirements stated in the monographs of the Pharmacopoeia apply to articles that are intended for medicinal use. * * * An article intended for medicinal use that is described by means of an official title must comply with the requirements of the relevant monograph.'').

In contrast, there are no recognized standards with respect to herbal marijuana. And consistent with the recognition in almost every country that marijuana has no accepted medical use, neither marijuana, cannabis, nor THC is listed in the various pharmacopeias. *See The United States Pharmacopeia 2008,* at 1620, 2588–2589, 3366–3367; *British Pharmacopoeia 2008,* at 375–376, 1373–1374, 2111–2112; *European Pharmacopoeia,* at 777, 1495, 1997. *Cf. James Everard's Breweries* v. *Day,* 265 U.S. 545, 562 (1924) (rejecting contention that Congress arbitrarily determined that ''intoxicating malt liquors possessed no substantial and essential medicinal properties''; ''Neither beer nor any other intoxicating malt liquor is listed as a medicinal remedy in the United States Pharmacopeia. They are not generally recognized as medicinal agents. There is no consensus of opinion among physicians and medical authorities that they have any substantial value as medical agents. * * * '').

Moreover, it is beyond question that, in the United States, marijuana has no currently accepted medical use and there are no FDA-approved medical products consisting of marijuana. *See OCBC,* 532 U.S. at 491 (''for purposes of the [CSA], marijuana has 'no currently accepted medical use' at all.''); 66 FR at 20052 (as stated by the FDA, ''[t]here are no FDA-approved marijuana products.''). Thus, by any plausible application of the term ''medicinal opium'' to cannabis, as a factual matter, there is currently no such thing in the United States as ''medicinal cannabis.'' Respondent effectively concedes this point, by describing the purpose of his proposed registration as being ''to *develop* the marijuana plant into an

[57] This statement was made in an INCB press release issued on February 8, 2008, which is available at *http://www.unis.unisvienna.org/unis/pressrles/2008/usinar1023.html*, and of which I take official notice.

[58] There is also no listing of any opium-containing product in the latest edition (2008) of FDA's ''Orange Book,'' which lists each drug product currently approved for marketing under the FDCA based on a determination by the FDA that the drug is safe and effective. *See http://www.fda.gov/cder/orange/obannual.pdf.*

[59] *See also European Pharmacopoeia* 1, § 1.1 (4th ed. 2001) (General Statements) (''The active ingredients (medicinal substances), excipients (auxiliary substances), pharmaceutical preparations and other articles described in monographs are intended for human consumption and veterinary use (unless explicitly restricted to one of these uses)'').

FDA-approved prescription medicine.'' GX 3, at 1 (emphasis added).

Finally, even if all the foregoing considerations were ignored and DEA were to treat the marijuana that Respondent seeks to grow as akin to ''medicinal opium'' for purposes of the Single Convention, Respondent's proposed activity would still be inconsistent with the Convention for the following reason. As the Commentary explains: ''Opium-producing countries may thus authorize private manufacture of, and private international and domestic wholesale trade in, medicinal opium and opium preparations. *The opium other than medicinal opium needed for such manufacture must however be procured from the national opium agency.*'' Commentary at 284 (emphasis added). Thus, under the Convention, even if ''medicinal cannabis'' may be privately traded, the treaty requires that the raw material needed to produce the ''medicinal cannabis'' (i.e., the marijuana plant material) must be obtained from the national cannabis agency. This again reflects the central theme of cannabis control under the Single Convention—that the national agency must control the production and distribution of the raw marijuana material used for research or any other permissible purpose. Respondent's unwillingness to accept this principle illustrates how his proposed registration is fundamentally at odds with the treaty.

The ALJ also reasoned that the marijuana Respondent seeks to grow would qualify under the Convention as ''special stocks'' and thereby be exempt from the ''exclusive government's right to maintain stocks.'' ALJ at 82. Even Respondent acknowledges the ALJ's error on this point. *See* Respondent's Resp. at 12 (''[I]t is evident that [the ALJ] simply inadvertently referenced the wrong term from Article 1.''). The term ''special stocks'' under the Convention refers to ''drugs held in a country or territory by the Government of such country or territory for special government purposes and to meet exceptional circumstances.'' Single Convention, Art. 1, para. 1(w). Neither party is suggesting, and there is no basis to conclude, that the marijuana Respondent seeks to produce fits into this definition.[60]

While recognizing that the ALJ misread the term ''special stocks,'' Respondent argues that the marijuana he seeks to produce nonetheless qualifies as retail ''stocks,'' because it is marijuana that will be held '' 'by institutions or qualified persons in the duly authorized exercise of therapeutic or scientific functions.' '' *Id.* (quoting Single Convention, art. 1, para. 1(x)). Respondent thus contends that the marijuana he seeks to produce is exempt from the government monopoly provisions of article 23, paragraph 2, subparagraph (e).

Respondent is mistaken. The entire text of the relevant provision explains that the marijuana Respondent would maintain does not fall within the exception to the definition of ''stocks.'' What is excluded under the treaty from the definition of ''stocks'' are those drugs held ''[b]y retail pharmacists or other authorized retail distributors and by institutions or qualified persons in the duly authorized exercise of therapeutic or scientific functions.'' Single Convention, art. 1, para. 1(x)(iv). As this provision makes plain, the exemption applies only to the drugs held by those persons or entities who are authorized to dispense to ultimate users.

Respondent is not, however, a licensed pharmacist or physician and obviously cannot legally seek a practitioner's registration, which is required to dispense. *See* 21 U.S.C. 823(f). Rather, he is seeking to produce raw cannabis plant material to supply researchers. His proposed activity thus does not fall within the exemption for ''qualified persons in the duly authorized exercise of therapeutic or scientific functions'' within the meaning of the Single Convention.

Moreover, even with respect to cannabis material acquired for retail purposes that does fit within the exception of article 1, paragraph (x)(iv), the treaty still requires that such material be obtained via the national agency. As the Commentary explains with respect to opium (and therefore also with respect to cannabis, by virtue of article 28), while ''[t]he retail trade in, and other retail distribution of, opium * * * need not be in the hands of the monopoly[,] [r]etail traders or distributors must, however, acquire their opium from the'' Government. Commentary at 284. Respondent's arguments repeatedly fail to acknowledge or accept this concept that lies at the core of the Single Convention.

Yet, there is no escaping that, by seeking through his application to dismantle the existing Government control over the distribution of cannabis produced by growers and turn a share of that control over to MAPS, Respondent's goal is antithetical to the treaty. For the foregoing reasons, the provision of article 1, paragraph (x)(iv) exempting certain material from the definition of ''stocks'' does not support Respondent.

As for Respondent's point that DEA has previously allowed the University of Mississippi to grow marijuana to produce ''marijuana extracts that the University then sells to pharmaceutical companies to develop products'' (Resp. Prop. Findings at 68), it is true that DEA has previously allowed such activity under a Memorandum of Agreement (MOA) that was entered into in 1999. GX 78. However, that MOA expressly states:

> In accordance with articles 23 and 28 of the Single Convention on Narcotic Drugs, 1961 (''Single Convention''), private trade in ''cannabis'' is strictly prohibited. Therefore, the Center shall not distribute any quantity of marijuana to any person other than an authorized DEA employee.
>
> The Single Convention does not prohibit private trade in ''cannabis preparations,'' however. A ''cannabis preparation,'' within the meaning of the Single Convention, is a mixture, solid or liquid containing cannabis, cannabis resin, or extracts or tinctures of cannabis. The THC that the Center will extract from marijuana would be considered such a ''cannabis preparation.'' Therefore, the Center may, in accordance with the Single Convention, distribute the crude THC extract to private entities (provided such distributions of THC by the Center comply with all requirements set forth in the CSA and DEA regulations).

Id. at 2–3 (footnote explaining treaty definition of cannabis omitted). Thus, the MOA was specifically designed to ensure that the University of Mississippi would not be distributing cannabis outside of the Government-controlled system required by the Single Convention. *See* Single Convention, art. 23, para. 1(e) (exempting ''preparations'' from government monopoly on wholesale distribution). In contrast, Respondent does *not* seek to distribute a cannabis extract or any other processed cannabis material that constitutes a ''preparation'' within the meaning of the Single Convention. Instead, Respondent seeks to grow and distribute marijuana plant material that has undergone no processing other than drying (and therefore does not come within the Single Convention definition of ''preparation'').[61]

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[60] The term ''special stocks'' is operative in the Single Convention only in ways that have no bearing on this adjudication. *See* art. 19, paras. 1(d) & 2(d) (requiring parties to furnish the INCB with annual estimates of, among other things, ''[q]uantities of drugs necessary for addition to special stocks'' and amounts taken therefrom); art. 20, para. 3 (parties' statistical returns to INCB need not address those relating to special stocks); art. 21, para. 2 (explaining how to take into account special stocks for purposes of countries' limitations on manufacture and importation).

[61] The above-quoted 1999 MOA was issued with respect to the University of Mississippi's 1998

Continued

As the foregoing demonstrates, while the Single Convention does not necessarily prohibit the registration of an additional manufacturer, what it does prohibit is the wholesale distribution of plant-form marijuana by any entity other than the United States Government. Respondent is not under contract with HHS to supply it with marijuana and has made clear that the purpose of his registration is to distribute marijuana outside of the HHS system. Because it is clear that Respondent's proposed activity is not within one of the exemptions from the obligatory government monopoly imposed by the Convention, he has failed to show that his proposed activities would be consistent with the Single Convention.[62] *See* 21 U.S.C. 823(a). Accordingly, his proposed registration is precluded under Federal law.

B. Whether Respondent's Proposed Registration Is Consistent With the Public Interest

As explained in the preceding section, Respondent's registration is clearly inconsistent with the United States' obligations under the Single Convention. While this ground alone compels DEA to deny the application, as explained below, an analysis of the public interest criteria of 21 U.S.C. 823(a) leads to the conclusion that Respondent's registration is inconsistent with the public interest. This provides a separate basis—independent of the treaty consideration—on which the application must be denied.

As stated above, under § 823(a), there are six factors that must be evaluated in determining whether a proposed registration is consistent with the public interest. The public interest factors ''are considered in the disjunctive.'' *Southwood Pharmaceuticals, Inc.,* 72 FR 36487, 36497 (2007). I may rely on any one or a combination of factors and give each factor the weight I deem appropriate in determining whether to deny an application for a registration. *See Green Acre Farms, Inc.,* 72 FR 24607, 24608 (2007); *ALRA Laboratories, Inc.,* 59 FR 50620, 50621 (1994). Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

1. Public Interest Factor One

The first public interest factor is the:

> maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, *by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate an uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes.*

21 U.S.C. 823(a)(1) (emphasis added).

As the ALJ observed, DEA has construed paragraph 823(a)(1) in two different ways in prior final orders, both of which were simultaneously upheld in a case that was reviewed by a United States Court of Appeals. ALJ at 82–83. Because of this, I have undertaken an extensive analysis of this provision, which is found in part C of this discussion.[63] For the reasons explained therein, I believe that the most sound reading of the text of paragraph 823(a)(1) requires DEA to consider limiting the number of bulk manufacturers and importers of a given schedule I or II controlled substance to that which can produce an adequate and uninterrupted supply under adequately competitive conditions. The Government so asserted in the Show Cause Order and throughout the proceedings. Although Respondent offered a different interpretation of paragraph 823(a)(1),[64] he asserted that, under any interpretation, this factor weighed in favor of finding the proposed registration consistent with the public interest.[65]

As discussed at length in part C of this discussion, *infra,* to properly construe paragraph 823(a)(1), it must be viewed in comparison with § 823(d)(1). Whereas § 823(d)(1) contains no requirement that DEA consider limiting in any way the total number of registered manufacturers of controlled substances in schedules III, IV, and V, paragraph 823(a)(1) does require DEA to consider limiting the total number of bulk manufacturers of schedule I and II controlled substances. Specifically, paragraph 823(a)(1) calls upon DEA to consider ''limiting'' (i.e., placing an *upper boundary* on) the number of registered bulk manufacturers of a given schedule I or II controlled substance to that ''which can produce an adequate

application to become registered to manufacture marijuana for the purposes of product development. GX 78, at 1–2. In 2005, the University of Mississippi applied for a new registration to manufacture marijuana ''to prepare marihuana extract for further purification into bulk active [THC] for use in launching FDA-approved pharmaceutical products.'' 70 FR 47232; *see also* Tr. 1521. DEA has not yet issued a final order as to this application and the University therefore does not currently have DEA authorization to undertake such activity. As with Respondent's application, DEA may only grant the pending University of Mississippi application if the agency determines that the University has demonstrated that the registration would be consistent with United States treaty obligations and the public interest. *See* GX 79, at 3. In making such determinations, DEA will not simply rely on the prior issuance of registration under the 1999 MOA but will consider the application anew, in view of the current circumstances and consistent with this final order. Among other things that must be considered with respect to the pending University of Mississippi application, I note that the Commentary to the Single Convention states the following with respect to the exemption for ''opium preparations'' under Article 23, paragraph (e): ''Opium-producing countries may thus authorize private manufacture of, and private international and domestic wholesale trade in, medicinal opium and opium preparations. *The opium other than medicinal opium needed for such manufacture must however be procured from the national opium agency.*'' Commentary at 284 (emphasis added). Whether the University of Mississippi's proposed registration would be consistent with this aspect of the treaty has not yet been determined by DEA and is not the subject of this adjudication.

[62] Though the above discussion provides ample basis on which to conclude that Respondent has failed to meet his burden of proving that his proposed registration is consistent with United States obligations under the Single Convention, I also note briefly the following statement in the Commentary regarding the obligation of the United States under article 23, paragraph 2(a) to designate the areas in which cultivation takes place: ''It is also suggested that [such areas] should to the greatest extent possible be located in the same part of the country, and be contiguous, in order to facilitate more effective control.'' Commentary at 280. Thus, in a situation in which a country that is a party to the treaty allows for multiple growers of opium or cannabis with the national agency maintaining control over the distribution of such material in accordance with the Single Convention, the Commentary suggests that proper adherence to the treaty would result in that country keeping the growers located as near as possible to one another.

[63] For ease of exposition, the detailed analysis of the meaning of paragraph 823(a)(1) appears in a separate section of this discussion (part C), due to its length.

[64] *See* note 65, *infra,* regarding Respondent's proposed interpretation of paragraph 823(a)(1).

[65] Because I have concluded, for the reasons set forth in part C of the discussion, that DEA is obligated under the text of paragraph 823(a)(1) to consider limiting the number of bulk manufacturers and importers of a given schedule I or II controlled substance to that which can produce an adequate and uninterrupted supply under adequately competitive conditions, I reject Respondent's alternative reading of paragraph 823(a)(1). Specifically, I reject the interpretation of paragraph 823(a)(1) under which ''the registration should be granted without regard to'' adequacy of competition and supply so long as the ''registration would not interfere with DEA's maintenance of effective diversion controls.'' *See* Respondent's Resp. at 13. Respondent cites *Noramco* v. *DEA,* 375 F.3d 1148 (D.C. Cir. 2004) in support of this interpretation. *Id.*; Resp. Proposed Findings and Conclusion of Law at 36. The *Noramco* decision is examined at length in part C of this discussion. Because I interpret paragraph 823(a)(1) to require consideration of the adequacy of supply and competition, I decline to undertake an analysis of the facts of this case whereby the adequacy of competition and supply is disregarded. However, as indicated above, Respondent has alternatively argued that there is a sufficient basis to grant his application when construing paragraph 823(a)(1) as requiring a showing of inadequate competition or supply, and that argument is addressed at length in this final order.

and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes.''

Thus, an applicant seeking to become registered to bulk manufacture a schedule I or II controlled substance bears the burden of demonstrating that the existing registered bulk manufacturers of a given schedule I or II controlled substance are unable to produce an adequate and uninterrupted supply of that substance under adequately competitive conditions. As a threshold matter, Respondent misconstrues this provision as placing the burden on *DEA,* whenever someone applies for registration under 21 U.S.C. 823(a), to demonstrate that competition is already adequate within the meaning of paragraph 823(a)(1). *See* Resp. Proposed Findings and Conclusion of Law at 47 (in which Respondent contends that the ''requirement'' of ''adequately competitive conditions'' ''is not met by the by the current NIDA monopoly''). In fact, the DEA regulations plainly state that every applicant seeking registration under § 823(a) has ''the burden of proving that the requirements for such registration pursuant to [this section] are satisfied.'' 21 CFR 1301.44(a).

Accordingly, the analysis under paragraph 823(a)(1) (and Respondent's burdens thereunder) must be divided into the following parts: (a) an analysis of the adequacy of supply and (b) an analysis of the adequacy of competition. If Respondent can demonstrate by a preponderance of the evidence that either supply or competition is inadequate within the meaning paragraph 823(a)(1), this weighs heavily in favor of granting the registration. If, however, Respondent fails to meet his burden with respect to both supply and competition, this weighs heavily against granting the registration. (See part C of this discussion.)

(a) Adequacy of Supply Within the Meaning of Paragraph 823(a)(1)

The first question under paragraph 823(a)(1) is whether Respondent has demonstrated that the existing supply of marijuana is inadequate to meet the legitimate needs of the United States. As the parties essentially agree, the adequacy of supply of marijuana must be evaluated in two respects: (i) quantity and (ii) quality.

(i) Adequacy of the Quantity of the Existing Supply

With respect to the adequacy of the *quantity* of supply, the record establishes that as of the date of the hearing, there were approximately 1055 kg of marijuana of various potencies in the NIDA vault. RX 53. Moreover, some of this marijuana apparently had been harvested as early as 1997, and it appears that as of the date of the hearing, no marijuana had been grown since 2001. *Id.* For the following reasons, this amount of existing supply far exceeds any present demand for research-grade marijuana as well as any reasonably anticipated demand for such marijuana in the foreseeable future.

Lawful research involving marijuana can be divided into two categories: NIH-funded and privately funded. *See* GX 31, at 3. With respect to NIH-funded research, Respondent does not contend, and there is no basis in the record to conclude, that NIDA has failed to provide, or is incapable of providing, an adequate quantity of marijuana. Rather, to the extent Respondent is claiming that NIDA is unable to provide an adequate quantity of marijuana,[66] this claim relates to privately funded researchers. Yet, even as to this claim, the evidence indicates otherwise.

The record reflects that since HHS changed its policies in 1999 to make marijuana more readily available to researchers (by, among other things, allowing privately funded researchers to obtain marijuana), every one of the 17 CMCR-sponsored pre-clinical or clinical studies that requested marijuana from NIDA was provided with marijuana. GX 31, at 3; Tr. 694–95. Significantly, according to one of the witnesses who testified on behalf of Respondent, CMCR funding of research involving marijuana has currently ended and it appears doubtful that a resumption of such funding is ''on the horizon.'' Tr. at 397–402, 441. Thus, the witness testified, once the research projects sponsored by CMCR that utilize NIDA marijuana reach their conclusion, ''[i]t's likely that the [CMCR] research is done.'' *Id.* at 401–02. Other than the CMCR-sponsored research, the record reveals only one other instance in which a privately funded researcher sought marijuana from NIDA after HHS changed its policies in 1999 to make marijuana more readily available to researchers. That one other instance was the MAPS-sponsored request submitted by Chemic to obtain marijuana to conduct research on the Volcano. *See* RX 52B. According to Mr. Doblin, Chemic ''applied to NIDA to purchase ten grams'' of marijuana. Tr. 531; RX 14. Although, as discussed above, HHS denied that request on scientific grounds (*see* RX 52B), there is no basis to conclude that NIDA was incapable of providing Chemic with the quantity of marijuana it was seeking. Indeed, the ten grams of marijuana that Chemic requested is less then one 100,000th of the amount of marijuana that NIDA has available to supply researchers. *See* RX 53.

Accordingly, the evidence overwhelmingly establishes that NIDA is capable of providing an adequate quantity of marijuana to meet all current and foreseeable research needs of the United States. And while NIDA's existing system for supplying marijuana is quantitatively adequate regardless of how much or how little additional marijuana Respondent seeks to produce, it is notable that the approximately 1055 kg of marijuana currently on hand is more than 90 times the amount of marijuana that Respondent proposes to grow.

Respondent nonetheless contends that the process by which HHS provides marijuana to researchers—which involves a peer review of the scientific merits of the research proposal[67]—results in a barrier to research that effectively renders the supply of marijuana inadequate. Respondent points to three prior incidents to support his contention that the HHS scientific review process impedes research. As discussed above, the first two of these incidents (those involving Dr. Abrams and Dr. Russo) are irrelevant as they occurred before HHS adopted its new procedures in 1999 for making marijuana more widely available to researchers.[68] The third incident involved the application of Chemic to obtain marijuana to conduct research on the Volcano. As discussed above, HHS

[66] Respondent appears to challenge the process by which NIDA supplies marijuana to researchers and the quality of the marijuana, rather than the quantity. *See, e.g.*, Respondent's Resp. at 15–16. The ALJ's recommendation regarding the adequacy of supply also focused on the process by which NIDA supplies marijuana, and she was not of the opinion actual quantity of marijuana supplied by NIDA was inadequate. *See* ALJ at 84. Nonetheless, for the sake of completeness, and in accordance with 21 U.S.C. 823(a)(1), I am addressing the adequacy of supply from a quantitative perspective.

[67] Tr. at 1626–28, 1635. In his testimony, Dr. Gust explained the term ''peer review'' as follows: ''Peer review is a process that has been used, certainly by NIH, and I think in other agencies in the Department of Health and Human Services, and probably the Federal Government, where outside expertise is acquired and outside opinions on the scientific merit of specific research proposals.'' *Id.* at 1627. Dr. Gust added that the NIH peer review committees ''review proposals three times a year for the NIH, and there are—occasionally a Federal employee participates in one of those reviews, but probably 90 percent or more of the participants are researchers who are in the private sector, for the most part in academic institutions.'' *Id.* at 1627–28.

[68] Further, as discussed above, the evidence indicates that the denials involving of Dr. Abrams and Dr. Russo were based on HHS finding their protocols to be lacking in scientific merit.

declined to supply Chemic with marijuana in 2005 based on scientific considerations, finding that Chemic's then-latest proposed study was duplicative of prior and ongoing research and not likely to provide useful data. Thus, the success of Respondent's claim that the HHS scientific review process renders the existing supply of marijuana inadequate depends on whether one accepts Respondent's assumption that anyone in the United States who has a proposed research project involving marijuana should be entitled to obtain marijuana—regardless of whether the competent Government authority finds the research to be lacking in scientific merit.[69]

Respondent's assumption about who is entitled to conduct research with marijuana is directly undercut by the text of the CSA. As set forth in 21 U.S.C. 823(f), persons seeking to conduct research with schedule I controlled substances (such as marijuana) may only obtain a DEA registration ''for the purpose of *bona fide* research'' (emphasis added), with the Secretary of HHS being responsible for determining ''the qualifications and competency'' of the applicant ''as well as the merits of the research protocol.'' The process HHS has established to assess the scientific merit of proposed research studies involving marijuana is that described in the 1999 HHS announcement of its new procedures.[70] GXs 24 & 31; Tr. at 1626–35. That Respondent finds this process to be scientifically rigorous[71]—and thereby not automatically accepting of any proposed study sponsored by MAPS—provides no basis for any valid objection or any contention that the HHS supply of marijuana is inadequate.[72]

(ii) Adequacy of the Quality of the Existing Supply

As for Respondent's contention that the *quality* of marijuana supplied by NIDA is unsatisfactory and that this renders the supply of marijuana inadequate within the meaning of 21 U.S.C. 823(a)(1), the ALJ rejected this contention, finding that a preponderance of the evidence established that ''the quality is generally adequate.'' ALJ at 84. In this regard, Respondent contended that NIDA's marijuana was of inconsistent potency, that it was of too low a potency, that it included stems and seeds, that it was not fresh, and that some of the patients had complained that it ''was the worst marijuana they had ever sampled.'' Resp. Proposed Findings at 16–27 & 49.

As found above, Respondent's contentions rest largely on snippets taken from questionnaires which were completed by a number of researchers. On balance, however, the researchers indicated their overall satisfaction with NIDA's marijuana and noted that the agency had been accommodating and responsive to their concerns. *See, e.g.*, GX 16, at 6 & 19. Moreover, most of the researchers indicated that the potency of NIDA's product was adequate and had not compromised their research. *See, e.g.*, GX 16, at 6 & 15; GX 17, at 9. Furthermore, while Respondent notes that several researchers stated that it would be beneficial to evaluate a higher potency product, he produced no evidence that any researcher had obtained approval from FDA and other reviewing authorities to conduct clinic trials with such a product. *See* GX 21, at 9 (researcher explaining that he ''wanted to use a higher potency product but there were questions from the [scientific review board] and the'' CMCR). In any event, the evidence establishes that NIDA's stock includes substantial quantities of high THC content marijuana and that its contractor is capable of producing marijuana with a THC content of up to twenty percent.[73] Tr. 1203–05.

Related to this argument, Respondent also contends that NIDA's marijuana has stems and seeds and that some patients complained that ''that the marijuana is inferior in sensory qualities (taste, harshness) than the marijuana they smoke outside the laboratory. Some have stated it was the worst marijuana they had ever sampled.'' Resp. Proposed Findings at 20 (other citation omitted); *see also id.* at 49. The evidence establishes, however, that the contractor has rectified the problem with respect to the stems and seeds. Tr. 1301.

As for the complaints regarding the sensory qualities of NIDA's products, only a small percentage of the numerous studies' subjects complained about the harshness of NIDA's marijuana, and as one researcher explained, it is not clear whether it was placebo or actual marijuana that was the cause of the complaints. GX 18, at 7. Relatedly, it seems a strained argument for Respondent to make that experienced

[69] It is not even clear whether Respondent continues to cite the Chemic situation of an example of supposedly ''legitimate research'' for which HHS declined to provide marijuana. While Respondent did so characterize the Chemic situation in his proposed findings of fact and conclusions of law (at 14), in his subsequently filed response to the Government's exceptions to the ALJ recommendation, he listed only Dr. Abrams and Dr. Russo as examples of ''legitimate research'' for which marijuana was not supplied. Respondent's Resp. at 16. As noted, the incidents involving Dr. Abrams and Dr. Russo occurred prior to HHS's promulgation of the 1999 guidelines. As such, these incidents are not probative of the current availability of research-grade marijuana from HHS.

[70] Respondent points out that the Secretary of HHS has delegated to the FDA Commissioner the Secretary's functions under 21 U.S.C. 823(f) relating to research with controlled substances in schedule I. Respondent's Resp. at 4–5 (citing FDA Staff Manual Guides 1410.10). While this is correct as a general matter for schedule I controlled substances, the record plainly indicates that with specific regard to research involving marijuana, HHS has retained its authority to determine the qualifications and competency of the researcher, as well as the merits of the research protocol, for purposes of § 823(f). *See* GX 24. Indeed, the 1999 HHS announcement of its policies for providing marijuana to researchers expressly states: ''To receive such a registration [under § 823(f)], a researcher must first be determined *by HHS* to be qualified and competent, and the proposed research must be determined *by HHS* to have merit.'' *Id.* at 1 (emphasis added). Dr. Gust's testimony confirms that, in fact, HHS—through its peer review process—does make these determinations for persons seeking to conduct research with marijuana. Tr. 1626–35.

Moreover, as discussed above, Respondent produced no evidence showing that HHS has denied marijuana to any clinical researcher with an FDA-approved protocol subsequent to the adoption of the 1999 guidelines. The lone applicant whose post-1999 request for marijuana was denied (Chemic) submitted its request to, and had it reviewed by HHS—not FDA. *See* GXs 49 & 52B. For all these reasons, it is unfounded for Respondent to suggest that the supply of marijuana is somehow inadequate because HHS has not assigned FDA sole responsibility for determining what research proposals involving marijuana are scientifically meritorious.

[71] Any suggestion that the HHS scientific review process is unduly rigorous is belied by the testimony of Dr. Gust that the ''scientific bar has been set very low, [so] that any project that has scientific merit is approved,'' and that ''anything that gets approved gets NIDA marijuana'' (Tr. at 1700–01) as well as the uncontroverted evidence that every one of the 17 CMCR-sponsored research protocols submitted to HHS was deemed scientifically meritorious by HHS and was supplied with marijuana (GX 31, at 3; Tr. 694–95).

[72] For the same reasons, I find wholly unpersuasive the ALJ's recommended finding that the supply of marijuana is inadequate because of the HHS scientific review process.

[73] Despite Respondent's suggestion that human research subjects should be given marijuana of higher potencies than that supplied by NIDA (*see, e.g.*, Tr. 552, 567 (testimony of Mr. Doblin)), there is no basis in the record to conclude that it would be medically or scientifically appropriate to do so. To the contrary, Dr. ElSohly testified that he was told by CMCR researchers that they did *not* want Dr. ElSohly to supply them with marijuana with a THC content as high as eight percent because, based on their prior observations of research subjects being given NIDA marijuana containing eight percent THC, ''the subject couldn't tolerate that, and if we can make a six percent, that would be more appropriate.'' Tr. 1280. Dr. ElSohly also testified that other scientists expressed the same opinion that six percent THC content was preferable because the research subjects ''would not tolerate'' marijuana with eight percent THC. Tr. 1295. Large doses of marijuana (in terms of the amount of THC administered) have been found to cause adverse mood reactions, including anxiety, paranoia, panic, depression, dysphoria, depersonalization, delusions, illusions, and hallucinations. RX 1, at 102. A primary reason that researchers are required to submit an IND to FDA prior to engaging in research with human subjects is ''to assure the safety and rights of subjects.'' 21 CFR 312.22(a).

marijuana smokers reported, after consuming a hallucinogenic substance, that they found NIDA's marijuana to be less pleasing to their senses than the marijuana they had illegally obtained and used. People generally take medicines—which marijuana is not—for their therapeutic benefits and not their taste. And in any event, Respondent has not established that NIDA's products were unsuitable for their intended use.[74]

For these reasons, I accept the ALJ's recommended finding that Respondent did not meet his burden of demonstrating that NIDA is incapable of providing marijuana of sufficient quality to meet the legitimate research needs of the United States.

Thus, I conclude that the evidence does not support Respondent's contention that the supply of marijuana is inadequate—in terms of quantity or quality—within the meaning of paragraph 823(a)(1).

(b) Adequacy of Competition Within the Meaning of Paragraph 823(a)(1)

The second question under paragraph 823(a)(1) is whether Respondent has demonstrated that the existing supply of marijuana is not being produced under adequately competitive conditions to meet the legitimate needs of the United States. Again, as explained below in part C of this discussion, paragraph 823(a)(1) does *not* require DEA simply to register as many bulk manufacturers of a given schedule I or II controlled substance as the market will bear. Nor does paragraph 823(a)(1) require the registration of an additional bulk manufacturer based merely on the assertion the additional registration will result in some vague, theoretical incremental increase in competition. If such a theoretical assertion would suffice, then the language of paragraph 823(a)(1) requiring DEA to consider ''limiting'' the number of registered bulk manufacturers would be rendered meaningless. This is because every person seeking to enter the market as a new bulk manufacturer of a given schedule I or II controlled substance could make the theoretical claim that every new registrant increases the overall amount of competition.

Thus, to avoid reading the limiting language of paragraph 823(a)(1) in a superfluous manner, in final orders where DEA has analyzed competition under paragraph 823(a)(1), DEA has looked to empirical data; specifically, DEA has focused on the historical and present prices charged to those who lawfully acquire the controlled substance from the existing registered bulk manufacturers.[75] This approach is consistent with the following statement made by the Department of Justice stated during Congressional hearings leading up to the enactment of the CSA:

> There is no reason to assume that the Attorney General will prejudice his primary objectives of effective control by excessive licensing. Nor will he undertake direct price control. He will be empowered to take cognizance of evidence showing that prices are clearly and persistently excessive. The criteria for determining whether prices far exceed that which is reasonable relate to reasonable costs and reasonable profits. * * * If evidence indicates that additional licensing will result in more reasonable prices with no significant diminution in the effectiveness of drug control, the Attorney General should be able to license the additional manufacturers.[76]

Here, the evidence demonstrates that NIDA has always provided marijuana to researchers at cost or for free—and at no profit to NIDA. Privately funded researchers receive marijuana at NIDA's cost[77] and HHS-funded researchers (who have historically comprised the bulk of the marijuana recipients) receive the marijuana at no cost. GX 24, at 2; GX 31, at 3; Tr. 1212, 1633, 1670–71. Thus, there is no basis to suggest that the cost to any researcher under the existing supply arrangement is unreasonable. Respondent himself does not so contend; nor does he claim that the cost to any researcher of obtaining marijuana would be lower if Respondent became registered to grow marijuana. Respondent hypothesizes that ''if another manufacturer could produce suitable medical marijuana for a lower cost, competitive conditions would, as they usually do, benefit the researcher-consumer.'' Resp. Prop. Findings at 48. However, Respondent provides no evidentiary basis for the proposition that he (or anyone else) could produce marijuana at a lower cost than NIDA. Moreover, Mr. Doblin acknowledged that MAPS would have a ''profit-making'' motivation as part of its ''operation'' to supply marijuana for the purposes of drug development, and that this would impact ''costs.'' Tr. 605–606. In contrast, there is no evidence that HHS or NIDA is driven in any respect by a profit motive in deciding to whom and at what cost to supply marijuana. Even accepting, *arguendo*, Mr. Doblin's testimony that ''we [MAPS] would either provide [marijuana] free or at cost through donations to MAPS to other researchers who are not doing MAPS funded projects'' (Tr. at 589), this would still not demonstrate a lowering of the cost to researchers. This is because, if MAPS were so willing to fund all researchers, they could do so under the existing system by paying NIDA on a cost-reimbursable basis for the marijuana, allowing the researchers to obtain the marijuana at no cost to the researchers. Thus, Respondent has not demonstrated that competition is inadequate in the way that other applicants for registration under § 823(a) have successfully done in prior final orders; i.e., by focusing on prices charged by the existing registrants that supply the market for the schedule I or II controlled substance in question and showing those prices to be unreasonable.[78]

Respondent also claims that the process by which the NIDA contract is awarded is not adequately competitive because the contract requires not only that the contractor manufacture marijuana, but also that it analyze marijuana samples sent in by law enforcement agencies. *Id.* at 48. Respondent further contends that the NIDA process ''does not ensure that researchers pay a competitive price [because] NIDA sets the price and there is no evidence as to how that price is set.'' *Id.* Finally, Respondent rehashes his argument regarding the quality of NIDA's marijuana contending that granting his application would promote competition and improvement in the quality of research marijuana. *Id.* at 49.

The ALJ agreed with Respondent and rejected the Government's contention that the NIDA process provides for adequate competition because demand for research grade marijuana is limited, the contract is periodically put up for

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[74] Moreover, Respondent presented no evidence to show that he is capable of producing marijuana with any degree of quality control—let alone the type of evidence that would allow an inference that he could improve upon the quality of marijuana produced at the University of Mississippi. To the contrary, as explained below in the discussion of public interest factor five, Respondent's lack of experience in growing marijuana is in stark contrast to Dr. ElSohly's decades of experience in manufacturing, analyzing, and publishing scientific articles on the subject.

[75] See *Penick Corporation Inc.,* 68 FR 6947 (2003); *Roxane Laboratories, Inc.,* 63 FR 55891 (1998).

[76] *Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary, United States Senate,* 91st Cong. 372 (1969) (discussed more fully in part C of this discussion).

[77] According to Dr. ElSohly, where marijuana is supplied to privately funded researchers, ''the researchers would just pay the production costs.'' RX 5, at 2.

[78] *See Penick Corporation, supra; Roxane Laboratories, supra* (both of which are examined in part C of this discussion). As one DEA scientist testified in this proceeding, based on his experience, when the agency has historically considered the adequacy of competition within the meaning of paragraph 823(a)(1), the analyses ''all seem to be geared around the economics.'' Tr. at 945.

competitive bidding, and the Convention requires that the Government maintain a monopoly on the wholesale distribution of the substance. More specifically, the ALJ reasoned that ''[t]he question is not * * * whether the NIDA process addresses that agency's needs, but whether marijuana is made available to all researchers who have a legitimate need for it in their research.'' ALJ at 85. Based on her finding that NIDA denied marijuana to two researchers, the ALJ ''answer[ed] that question in the negative.'' *Id.*

The ALJ also reasoned that analyzing marijuana samples was ''a separate activity from cultivating marijuana for research purposes and a requirement that a qualified cultivator may not be able to fulfill.'' *Id.* The ALJ thus concluded that ''the NIDA contractual process does not * * * render competition in the manufacture of marijuana adequate.'' *Id.*

I reject both the ALJ's legal conclusions and Respondent's arguments. As for the ALJ's (and Respondent's) reasoning that the NIDA contractual process does not render competition adequate because the contract requires the analyzing of marijuana samples, in executing its authority under § 823(a), DEA does not act as a board of contract appeals. In any event, the contract does not prohibit the contractor from subcontracting this function. *See* GX 15, at 4 (Request for Proposal) (''As this procurement may require expertise in several scientific areas, *offerors are encouraged* to solicit subcontractors or expert consultants as appropriate.'') (emphasis added).[79]

Finally, as for the contention that granting his application would provide for competition and thereby promote improvement in the quality of research-grade marijuana,[80] if Respondent believes that he can produce a higher-quality product than the current contractor, he should bid on the contract.[81] If he prevails, and demonstrates that his project will implement effective controls against diversion, he can establish that his registration would be consistent with the public interest. Respondent, however, has not been awarded a contract to supply NIDA, which, consistent with the Single Convention, is the only lawfully authorized wholesale distributor of plant-form marijuana.

Thus, whether viewing the competition aspect of paragraph 823(a)(1) by considering the reasonableness of prices paid by those who lawfully acquire bulk marijuana for research or by considering the adequacy of the competitiveness of the process by which persons may bid to become the grower of marijuana for NIDA, Respondent has failed to meet his burden. This combined with his failure to meet his burden of demonstrating inadequate supply within the meaning of paragraph 823(a)(1) weighs heavily against granting his application. Nonetheless, Respondent raises a host of arguments under the heading of paragraph 823(a)(1) which—though not actually germane to paragraph 823(a)(1)—are addressed below.

(c) Additional Arguments Raised by Respondent Under the Heading of Paragraph 823(a)(1)

In lieu of presenting evidence to show that competition is inadequate by virtue of unreasonable prices for research-grade marijuana or any other economic data, Respondent argues that competition should be deemed inadequate within the meaning of paragraph 823(a)(1) based on his objection to the to ''government monopoly'' whereby HHS distributes marijuana to researchers. In other words, the very monopoly over the wholesale distribution of marijuana that is mandated by the Single Convention (indeed, the element that is at the heart of the structure of cannabis control under the treaty) is the central basis on which Respondent relies in attempting to meet his burden of demonstrating inadequate competition within the meaning of paragraph 823(a)(1). This argument is flawed in the following respects. As explained above and in part C of this discussion, the competition analysis set forth in paragraph 823(a)(1) must be based on actual economic considerations in the existing market—not policy questions about the wisdom of having the Federal Government control the wholesale distribution of marijuana.

In addition, Respondent's suggestion that paragraph 823(a)(1) can be used to defeat the Single Convention's requirement of a government monopoly over wholesale marijuana distribution mistakenly construes the treaty criterion § 823(a) as being in competition with the public interest criterion. In fact, as explained above, an applicant for registration under § 823(a) must demonstrate that the proposed registration is consistent with *both* the Single Convention and the public interest—and neither criterion is at odds with the other. Both the Single Convention and the United States Code are the ''supreme law of the land,'' U.S. Const. art VI, and in enacting the CSA, Congress made clear that § 823(a) should be interpreted in a manner that is consistent with the United States' obligations under the Convention. The Agency's interpretation of paragraph 823(a)(1) must therefore recognize not only the Convention's specific provisions applicable to marijuana, which expressly prohibit competition in the wholesale distribution of the substance, but also the background principles which underlie both the Convention and the CSA. Accordingly, I reject Respondent's invitation to interpret § 823(a) in a manner that would abrogate the United States' obligation under the Convention to maintain a monopoly in the wholesale trade of marijuana.

While § 823(a) was enacted subsequent to the Convention—indeed it implements the Convention[82]—it is a provision of general applicability and contains no explicit reference to marijuana. Under settled principles of statutory construction, while a later enacted law can sometime repeal an earlier provision, '' '[r]epeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.' '' *National Ass'n of Home Builders* v. *Defenders of Wildlife,* 127 S.Ct. 2518, 2532 (2007) (quoting *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981)). Accordingly, courts ''will not infer a statutory repeal 'unless the later statute expressly contradict[s] the original act' or unless such a construction is 'absolutely necessary * * * in order that [the] words [of the later statute] shall have any meaning at all.' '' *Id.* (quoting *Traynor* v. *Turnage*, 485 U.S. 535, 548 (1988) (int. quotations and other citations omitted)).

[79] The University of Mississippi subcontracts to another entity, Research Triangle Institute (RTI), the responsibilities under the contract to produce the marijuana cigarettes (using marijuana supplied by the University of Mississippi) and deliver them to authorized recipients. Tr. 1162–65, 1168–69; *see also* 72 FR 73369 (notice of registration for RTI).

[80] As discussed above, Respondent failed to put forth any evidence demonstrating that he is capable of any type of quality control relating the manufacture of marijuana and his lack of experience and expertise in this field compared to that of Dr. ElSohly suggests that he is incapable of improving on the quality of marijuana produced by the University of Mississippi.

[81] I also note Respondent's contention that the NIDA process ''does not ensure that researchers pay a competitive price [because] NIDA sets the price and there is no evidence as to how that price is set.'' Resp. Prop. Findings at 48. Even if marijuana were not subject to the Convention's requirement, I would still reject the argument because Respondent had the burden of proving that the prices are excessive.

[82] *See* H.R. Rep. 1444 (91st. Cong., 2d Sess.), *reprinted at* 1970 U.S.C.C.A.N. 4566, 4572.

Here, this rule applies with added force for two reasons. First, Respondent's construction would derogate the sovereign authority of the United States. See, *e.g., E. I. Du Pont de Nemours & Co.* v. *Davis,* 264 U.S. 456, 462 (1924) (noting that in taking over the railroads, ''the United States did so in its sovereign capacity * * * and it may not be held to have waived any sovereign right or privilege unless plainly so provided''); *cf. Federal Power Comm'n* v. *Tuscarora Indian Nation,* 362 U.S. 99, 120 (1960) (quoting *United States* v. *United Mine Workers of America,* 330 U.S. 258, 272 (1947) (''There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect.''); *Sea-Land Service, Inc.,* v. *The Alaska R.R.,* 659 F.2d 243, 245 (D.C. Cir. 1981) (holding that ''[t]he Sherman Act * * * does not expose United States instrumentalities to liability, whether legal or equitable in character, for conduct alleged to violate antitrust constraints'').

Second, Respondent's construction would result in the abrogation of the Convention's provision. While Congress may abrogate a treaty, the ''legislation must be clear to ensure that Congress—and the President—have considered the consequences.'' *Roeder* v. *Islamic Republic of Iran,* 333 F.3d 228, 238 (D.C. Cir. 2003). The D.C. Circuit has further explained that ''[t]he 'requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' '' *Id.* (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991)). *See also Vimar Seguros y Reaserguros, S.A.* v. *M/V Sky Reefer,* 515 U.S. 528, 539 (1995) (''If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.''); *George E. Warren Corp.* v. *U.S. E.P.A.,* 159 F.3d 616, 624 (D.C. Cir. 1998) (upholding agency rule which ''avoid[ed] an interpretation that would put a law of the United States into conflict with a treaty obligation of the United States,'' and observing that that ''[s]ince the days of Chief Justice Marshall, the Supreme Court has consistently held that congressional statutes must be construed wherever possible in a manner that will not require the United States to violate the law of nations'') (internal quotations and other citations omitted).

As explained above, § 823(a) is not limited to applicants who seek a registration to manufacture marijuana, but rather is a provision that applies to every person who seeks a registration to manufacture any one of the hundreds of other controlled substances listed in schedules I and II. Paragraph 823(a)(1)'s direction to the Attorney General to consider the adequacy of competition does not provide a clear statement of congressional intent to abrogate the Convention's requirement that the United States Government maintain a monopoly on the wholesale trade in marijuana. Absent the requisite clear statement, I conclude that to the extent the CSA seeks to promote adequate competition in the supply of marijuana, the NIDA process satisfies Congress' purpose by putting the contract up for competitive bidding at periodic intervals then supplying the marijuana to researchers for free or at NIDA's cost.

Respondent also contends that the current NIDA supply is ''inadequate because a pharmaceutical developer could not reasonably rely on NIDA marijuana to take [plant-form] marijuana through the FDA new drug approval process.'' Respondent's Resp. at 16; *see also* Respondent Proposed Findings at 45 (''no rational drug sponsor seeking to develop botanical marijuana as an FDA-approved product could proceed without seeking a source of supply alternative to NIDA's''). Of note in this regard, Mr. Doblin testified that MAPS could take plant-form marijuana through the FDA-approval process for a cost of $5 to $10 million notwithstanding ample evidence that the actual costs would be considerably more, and that he ''disagree[d]'' with the IOM's conclusion that defined and purified cannabinoid compounds ''are preferable to plant products, which are of variable and uncertain composition.'' Tr. 654; RX 1, at 22. *See also* GX 53 (letter of GW Pharmaceuticals; ''[H]erbal cannabis should comprise only the starting material from which a *bona fide* medical product is ultimately derived.''). Mr. Doblin also testified that the safety of smoked marijuana would be only ''slightly different'' from that of drugs containing cannabinoid extracts, Tr. at 605, notwithstanding the IOM's further conclusion that smoking ''is a crude THC delivery system that also delivers harmful substances'' such as those found in tobacco, and that ''there is little future in smoked marijuana as a medically approved medication.'' RX 1, at 195.

Mr. Doblin's testimony hardly suggests that he is a ''rational drug developer.'' But even ignoring his testimony, Respondent's argument is meritless. Respondent's contention that ''MAPS can have no confidence * * * that NIDA would authorize MAPS to rely on'' NIDA's Drug Master File, Resp. Proposed Findings at 44–45, ignores that under the HHS Guidance, NIDA is required to ''provide the researcher with authorization to reference'' it. GX 24, at 4. Moreover, neither Federal law nor FDA's regulations require that a drug developer submit a Drug Master File. FDA, *Guideline for Drug Master Files,* at 2.

Respondent further contends that NIDA would not be willing to serve as supplier to a drug developer because doing so is not part of its mission. It is, however, HHS, and not NIDA (which is only a subcomponent therein) which sets policy on whether to provide marijuana. As for Respondent's insinuation that HHS is biased against research that seeks to develop plant-form marijuana into a prescription medicine, it is true that Dr. Gust testified that HHS ''strongly endorse[s]'' the IOM's view that if marijuana is to provide the basis for a prescription medicine, it will be in a medicine which uses ''a purified constituent'' and a non-smokable delivery system. Tr. 1722. A view based on science is not bias. Moreover, Dr. Gust's testimony made clear that PHS does not have a bias against research that is directed at developing plant-form marijuana, *id.* at 1719–20, 1722; and that whether plant-form marijuana should be approved as a prescription medicine is a question for the FDA-approval process. *Id.* at 1720. Respondent's contention to this effect is therefore rejected.

In sum, under the text of 21 U.S.C. 823(a)(1), to maintain effective controls against diversion, DEA is obligated to consider limiting the number of registered bulk manufacturers of any given schedule I or II controlled substance to that which can produce an adequate and uninterrupted supply of the substance under adequately competitive conditions. Thus, every applicant for registration under § 823(a) bears the burden of demonstrating that either the existing supply or competition is inadequate within the meaning of paragraph 823(a)(1). For the reasons provided above, Respondent has failed to meet this burden. Accordingly, factor one weighs heavily against granting his application.

2. Public Interest Factor Two

The second public interest factor is ''compliance with applicable State and local law.'' 21 U.S.C. 823(a)(2). The ALJ stated: ''There is neither evidence nor

contention that Respondent has not complied with applicable laws and I therefore find that this factor weighs in favor of granting Respondent's application.'' ALJ at 85. In view of this statement, it must be repeated that at any hearing on an application to manufacture a schedule I or II controlled substance, the applicant has the burden of proving that the requirements for registration under 21 U.S.C. 823(a) are satisfied. 21 CFR 1301.44(a). Moreover, the issue under the second public interest factor is not merely whether an applicant has complied in the past with applicable State and local law, but also whether the applicant will do so if he becomes registered. Thus, it was imprecise for the ALJ to suggest that the absence of evidence regarding past compliance with applicable State and local law constitutes a favorable showing on behalf of the applicant for purposes of the second public interest factor. However, the record is not entirely silent with respect to this factor. As the ALJ noted (ALJ at 57), and as Respondent has emphasized (Resp. Prop. Findings at 57), Respondent did testify that he met with ''state investigators'' who told him that ''a state permit would depend on a federal permit being granted.'' Tr. 45. Given that the Government did not contest this part of Respondent's testimony, I will give Respondent the benefit of the doubt by inferring that what he intended to convey was that Massachusetts state officials indicated to him that he would be able to obtain a ''registration'' under Massachusetts law to manufacture marijuana if and when he were to obtain a DEA registration to do so.[83] I do so despite the fact that Respondent did not indicate in his testimony or through the submission of any documentary exhibits whether he had actually filed an application with the state and submitted the appropriate fee for such state registration. Thus, consistent with the ALJ's recommendation, I find Respondent has put forth some evidence which (being unrefuted) allows for a conclusion that his proposed activities would be in compliance with State and local law.

The Government took exception, however, to the ALJ's recommendation that this factor (paragraph 823(a)(2)) be weighed in favor of granting Respondent's application. Gov. Exceptions at 12–13. The Government argues that this factor ''is most often relevant'' in cases in which practitioners have lost their state controlled substance authorization. *Id.* at 13. Further, the Government contends, ''[w]hile the failure to have a required state or local license would prove fatal to an application, * * * an expectation by Respondent that the required state license will ineluctably follow the granting of a DEA registration and a promise to comply with state and local law in the future simply renders this factor irrelevant and does not weigh in favor of either party.'' *Id.* In response thereto, Respondent asserts that the lack of evidence of noncompliance with state or local law should indeed support a finding that this factor weighs in favor of registration. Respondent's Resp. at 18–19.

It is certainly true, as both parties agree, that the evidence relating to Respondent's proposed activities cannot be deemed as weighing against the pubic interest for purposes of paragraph 823(a)(2). However, whether one characterizes the evidence relevant to this factor as weighing in favor of granting Respondent's application or simply neutral seems somewhat a matter of semantics. Given the nature of the evidence here (Respondent's mere testimony that he anticipates authorization from the state and that he promises to comply with state law), I accept the characterization that the evidence is favorable as to the second public interest factor, with the caveat that this factor is of limited weight commensurate with the nature of the evidence.

3. Public Interest Factor Three

The third public interest factor is ''promotion of technical advances in the art of manufacturing these substances and the development of new substances.'' 21 U.S.C. 823(a)(3). The ALJ found that Respondent has ''considerable experience in cultivating medicinal plants, which might promote technical advances in the cultivation of marijuana or developing new medications from it.'' ALJ at 85–86. The ALJ nonetheless found that ''there is not sufficient evidence in the record on which to base a finding as to whether granting Respondent's registration would promote technical advances.'' Id. at 86. When asked by his own counsel how his registration would promote technical advances, Respondent answered in a vague manner:

> Well, I think there is two answers to that as far as I'm concerned. One is that, yes, it would make an advance in the understanding any possible clinical use of marijuana if we were able to supply this to investigators to run trials, and, secondly, as I've explained to DEA agents that visited, that we would learn more about how the environment affects the constituents in the plant material which would enable, if this does become at some stage down the road here, becomes a useful drug, and that the manufacturer of it has to be controlled under security conditions, they would know the environment it needs to be grown under to produce a clinical marijuana, medical marijuana.

Tr. at 75–76. In the first part of the above answer, it appears that Respondent is simply accepting the word of his sponsor, Mr. Doblin, that his obtaining a DEA registration would result in marijuana being provided to researchers who would not otherwise obtain it. If so, Respondent is relying on a false premise. As discussed at length above, the evidence demonstrates that not one bona fide researcher within the meaning of the CSA (i.e., one whose protocol has been determined by HHS to be scientifically meritorious) has ever been denied marijuana[84] and that, under the new procedures adopted by HHS in 1999, the ''scientific bar'' has been set relatively low, allowing marijuana to be provided to 17 privately funded researchers. As for the second part of his answer, in which Respondent attempted to explain how his registration would result in learning ''more about how the environment affects the constituents in the plant material,'' this explanation is noticeably lacking in detail and without any discernable scientific basis. By his own admission, Respondent is ''not experienced in growing this plant (marijuana).'' Tr. at 40. In comparison, Dr. ElSohly, who has been the principal investigator under the NIDA contract and has overseen the National Center's work with marijuana since 1980 (employing a wide variety of

[83] Analogous to federal law, Massachusetts law provides that ''every person who manufactures * * * any controlled substance within the commonwealth shall upon payment of a fee, * * * register with the commissioner of public health, in accordance with his regulations, said registration to be effective for one year from the date of issuance.'' Mass. Gen. Laws Ann. ch. 94C, § 7(a) (West 2008). Massachusetts has adopted the CSA schedules of controlled substances, making marijuana a schedule I controlled substance under state law. *See* Mass. Gen. Laws Ann. ch. 94C, § 2(a).

[84] Even with respect to Dr. Abrams—who MAPS seems to believe was improperly denied marijuana in the pre-1999 era (before HHS changed its policy for providing marijuana to researchers)—Respondent produced no evidence that HHS's denial was lacking in scientific basis. To the contrary, as indicated above, the evidence indicates that NIDA initially denied Dr. Abrams' request based on valid concerns about the design and scientific merit of his protocol. *See* note 24, *supra,* and accompanying text. The record further reflects that Dr. Abrams corrected these deficiencies to NIDA's satisfaction upon submitting a revised protocol and, as a result, received marijuana from NIDA in 1997; NIDA also supplied Dr. Abrams with marijuana for subsequent studies. *Id.*

manufacturing techniques),[85] has at least seven patents relating to the manufacture and identification of marijuana and its derivatives, and has authored numerous articles on these subjects that have been published in scientific journals. Tr. 1136–38, 1331–36; GXs 65–71, 93. Respondent's lack of experience in growing marijuana does not preclude a finding under paragraph 823(a)(3) that his proposed activities would promote technical advances in the art of manufacturing marijuana and developing new substances. Nor does Respondent's lack of expertise in this area compared to that of Dr. ElSohly preclude such a finding as it is conceivable that a newcomer to a field could make scientific discoveries that others have failed to make. However, Respondent's lack of experience and expertise combined with the vagaries of his testimony as to how he would promote technical advances in the art of manufacturing marijuana and developing new substances do not support a finding that he would do so. Thus, I concur with the ALJ's recommendation as to this factor and conclude that Respondent has failed to meet his burden of demonstrating that his proposed activities would promote technical advances in the art of manufacturing marijuana and developing new substances.

4. Public Interest Factor Four

The fourth public interest factor is ''prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances.'' 21 U.S.C. 823(a)(4). I adopt the ALJ's recommended finding that it was ''undisputed that Respondent has never been convicted of any violation of any law pertaining to controlled substances'' and therefore this factor weighs in favor of granting the application. I reject the Government's contention that the historical and ongoing activities of Mr. Doblin and MAPS relating to controlled substances (which the Government asserts are improper but for which there is no evidence in the record of any criminal convictions) should be considered under this factor.

5. Public Interest Factor Five

The fifth public interest factor is ''past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion.'' 21 U.S.C. 823(a)(5). Both parties and the ALJ agree that Respondent has no past experience in the manufacture of controlled substances, and I so find.[86] Consideration of such experience serves two purposes. First, the review of an applicant's track record provides substantial information as to prior violations and the likelihood of its future compliance with the Act and regulations. *See ALRA Laboratories, Inc.* v. *DEA*, 54 F.3d 450, 452 (7th Cir. 1995) (''An agency rationally may conclude that past performance is the best predictor of future performance.''). Second, the experience factor recognizes that the regulatory scheme is complex and that having effective controls against diversion requires more than simply having a secure building and a policy and procedures manual.[87] Rather, having effective controls requires that those controls be properly performed. Thus, Respondent's lack of experience in the manufacture of controlled substances cannot be dismissed as inconsequential.[88] Indeed, there is agency precedent for concluding, in appropriate circumstances, that lack of such experience can be an independent basis for denial of registration.[89] However, I find in this case that Respondent's lack of experience in handling controlled substances—while a factor weighing against granting his application—should not disqualify him from obtaining a registration to bulk manufacture marijuana.

As to whether there would be, within Respondent's establishment, effective control against diversion,[90] Respondent testified that, although he ''did not have a full-blown plan when [he] applied for the [DEA registration],'' when DEA personnel conducted an on-site inspection of his premises, he assured them that he ''understood the need for security'' and that they thought that his proposed room for growing marijuana ''could be made secure with no problems.'' Tr. 44–45, 355–56. Respondent further testified that he

[85] The National Center grows marijuana both indoors and outdoors and has done so using conventional soil planting from seeds and seedlings, as well as using hydroponics (without soil), vegetative propagation (using cuttings to retain the genetic identity of the ''mother plant''), and micropropagation (vegetative propagation using a very small part of plant material rather than a cutting). Tr. 1187–1263, 1328–30. It has also utilized a variety of harvesting, drying, fertilization, and storage methods to affect the THC content of the marijuana, to promote more effective rolling of cigarettes, and to isolate certain cannabinoids. *Id.* It also has in its inventory seeds from different parts of the world, which can produce marijuana of various potencies. *Id.* Respondent did not identify any cultivation, harvesting, or other manufacturing techniques relating to marijuana in which the National Center lacks expertise.

[86] While the ALJ correctly observed that Respondent has no experience in the in the manufacture of controlled substances, she stated that Respondent ''does have experience in growing medicinal plants.'' ALJ at 86. It is unclear whether the ALJ was taking this into account for purposes of factor 5, or simply noting it in passing, because she ultimately recommended that I conclude ''there is not sufficient evidence in the record on which to base a finding as to whether granting Respondent's registration would promote technical advances.'' *Id.* In any event, under the text of paragraph 823(a)(5), experience in the manufacture of anything other than ''controlled substances'' is immaterial for purposes of factor 5.

[87] The CSA and DEA regulations impose a complex and comprehensive scheme to protect against diversion. These include not only requirements pertaining to the physical security of manufacturing facilities, *see* 21 CFR 1301.73, and employee screening procedures, *id.* 1301.90, but also extensive inventory, record keeping, and reporting requirements. *See* 21 CFR 1304.04 (maintenance of records and inventories); id. 1304.11 (inventory requirements); 1304.22(a) (records for manufacturers); 1304.33 (ARCOS reports); 1301.74(c) (reporting of theft).

[88] Respondent notes the Government's argument that '' '[i]n no case involving applications to handle controlled substances, has 'prior experience' with non-controlled substances ever been considered as support for granting an application.' '' Respondent's Resp. at 24. Respondent maintains that ''this argument is simply wrong,'' and that ''[i]n *Chattem Chemicals, Inc.*, 71 FR 9834, 9838 (2006) * * * the applicant had no prior experience in processing opium alkaloids, the controlled substance for which it sought a manufacturer's registration.'' Respondent's Resp. at 24–25. That much is true. Respondent ignores, however, that Chattem already held registrations to manufacture schedule II controlled substances including morphine, codeine and oxycodone, and to import other controlled substances. *See* 71 FR at 9836. In contrast to Respondent, who has no relevant experience, Chattem had extensive experience in the regulatory scheme and the effective implementation of controls against diversion.

Respondent also notes Dr. ElSohly's testimony to the effect that when the University of Mississippi first applied in 1968 for the contract to grow marijuana for NIDA's predecessor, ''he lacked experience and expertise in security measures relating to controlled substances.'' Respondent Resp. at 27. Respondent ignores, however, that the registration belongs to the University of Mississippi and was issued to it 12 years before Dr. ElSohly took over the project and under a different statutory scheme and further that Dr. ElSohly had been working on the marijuana project for four years at the time he succeeded his predecessor. *See* Tr. at 1131–32, 1152.

[89] *Cf. Stephen J. Heldman*, 72 FR 4032, 4034 (2007) (noting that even ''[w]ere there no evidence of Respondent having engaged in illicit activity * * * his lack of experience bars his registration'').

[90] As explained in part C of the discussion section, this aspect of paragraph 823(a)(5) requires DEA to consider, among other things, whether Respondent has demonstrated that he will have in place appropriate physical security and employee screening as required by the DEA regulations and as confirmed through a DEA on-site inspection of the premises. Also as explained in part C, this aspect of paragraph 823(a)(5)—which involves an evaluation of the applicant's particular facility, proposed security measures, and other controls against diversion to be implemented by the applicant—is best viewed as being distinguished from the requirement under paragraph 823(a)(1) that *DEA* maintain effective controls against diversion ''by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions.''

agreed to meet all DEA security requirements. Tr. 79. The Government did not dispute these assertions. I therefore find that Respondent has met his burden of demonstrating that, if the registration were granted, he would have in place effective controls against diversion.[91] In sum, the evidence bearing on factor five weighs both in favor of and against Respondent's application: it indicates that he has no past experience in the manufacture of controlled substances but that he will have in the establishment effective controls against diversion.

6. Public Interest Factor Six

The sixth and final public interest factor is ''such other factors as may be relevant to and consistent with the public health and safety.'' 21 U.S.C. 823(a)(6). At the outset, it should be noted that, because the text of this provision calls on me to consider ''such *other* factors,'' I will *not* restate in the discussion of factor six the evidence that I have already taken into account for purposes of the first five public interest factors—even though such evidence might be relevant to the determination of whether Respondent's proposed registration would be consistent with the public health and safety.

The most notable evidence relevant to factor six is that relating to Mr. Doblin.[92] Before addressing this evidence, it needs to be made clear that I consider irrelevant for purposes of this application whether Mr. Doblin, in the expression of his political viewpoints, supports the legalization of marijuana and other controlled substances. I also consider irrelevant the political activities of the organization he heads, MAPS. The expression of political viewpoints enjoys the protection of the first amendment. However, it is certainly relevant for purposes of factor six whether a person who might be in a position to directly influence the activities of a registrant has engaged in actual conduct involving controlled substances that fails to comply with the federal or state law.

The evidence indicates that Mr. Doblin has been significantly involved in Respondent's application process and plans to retain a key role in Respondent's activities if the registration is granted. Mr. Doblin came up with the idea of sponsoring an applicant for a DEA registration who would be a supplier of marijuana other than NIDA, and he selected Respondent to be that applicant. Tr. 210–12, 219. Mr. Doblin assisted Respondent in filling out the application, supplied answers to DEA's supplemental written questions, and agreed, on behalf of MAPS, to ''cover all the costs'' associated with the registered activities, including the costs of equipment, manufacturing, and security installations. Tr. 221–22, 351–52; 383, 583; GX 3, at 1. Respondent has agreed that Mr. Doblin, in his role as head of MAPS, will take an active role in deciding to whom Respondent will supply the marijuana. Tr. 224–26, 358–360. Respondent described the process of applying for the DEA registration and the ''project of developing marijuana'' as a ''joint effort'' by Mr. Doblin and himself. Tr. 390–91. Indeed, Respondent testified that his ''understanding'' of his ''role,'' as well as that of Mr. Doblin, was that dictated to him by Mr. Doblin.[93] *Id.* at 358. Another part of Mr. Doblin's role would be to ''route'' the ''investigators'' (those seeking marijuana for research) to Respondent. *Id.* Mr. Doblin would also decide for Respondent the ''strains'' of marijuana to produce and ''allocate'' the marijuana produced in accordance with MAPS's priorities. Tr. 589.

In short, Mr. Doblin has mapped out and assisted in most acts, if not every act, that Respondent has taken toward applying for a registration to manufacture marijuana and, if the registration were granted, Mr. Doblin would continue to maintain responsibility for managing and monitoring the activities of the registrant. Given this level of involvement by Mr. Doblin—and the passive, if not subservient, nature of Respondent's involvement—it is appropriate under factor six to consider the following conduct by Mr. Doblin relating to controlled substances. First, Mr. Doblin admits that he smokes marijuana for ''recreational use'' on a weekly basis. Tr. 716, 718–19. Thus, Mr. Doblin violates federal and state laws relating to controlled substances on a weekly basis.[94] This demonstrates that Mr. Doblin has disregard for the controlled substances laws. It is simply inconceivable that DEA would—consistent with its obligations under the CSA—grant a registration to engage in certain activities involving controlled substances where it is clear that a person who will have *any* role in the oversight and management of such activities routinely engages in the illegal use of controlled substances. It is still more untenable where that person has the level of oversight and management that Mr. Doblin would have—and where the controlled substance he illegally uses is the very controlled substance the applicant seeks to produce. Indeed, it is remarkable that Mr. Doblin would—given his admitted illegal involvement in controlled substances—ask DEA to effectively grant him permission to take on such a prominent role in the manufacture of the most widely abused illegal controlled substance in the United States.

Respondent points to Mr. Doblin's testimony that MAPS has previously sponsored research by DEA registrants involving schedule I controlled substances other than marijuana. Respondent's Resp. at 23 (citing Tr. 482–491). Respondent characterizes such research as having taken place ''all without a hint of * * * diversion.'' *Id.* at 23–24. However, there is nothing in the record that confirms or refutes this

[91] Because the DEA regulations require all registered manufacturers of controlled substances to have certain control measures in place at all times (21 CFR 1301.71–.74, .76), DEA may not issue a certificate of registration to a new applicant until the required security measures are actually in place.

Moreover, while I acknowledge that Respondent testified that he would secure the growing area and meet ''appropriate security conditions'' (Tr. 79), and I find it is highly unlikely that Respondent would personally divert, this does not establish that the risk of diversion is minimal. Respondent testified that he usually does not go down to the greenhouse to water the plants but leaves this task to a technician. Tr. at 254. Moreover, the graduate students and technicians ''would probably do the transplanting'' and the ''daily check on any environmental controls.'' *Id.* at 254–55. Respondent's testimony begs the question of who would be supervising these workers. Furthermore, while Respondent has promised to meet appropriate security conditions, it is undisputed that he has no experience in the manufacture of controlled substances and the regulatory scheme. As he testified: ''I have no experience in the control against diversion.'' Tr. 79.

Thus, my finding under factor five that Respondent would have in place effective controls against diversion might be viewed as being generous toward Respondent.

[92] By its terms, paragraph 823(a)(6) is not limited to conduct on the part of the applicant. Rather, its broad wording indicates that it is a catchall provision that calls on the agency to consider ''such other factors [not covered by factors (a)(1) through (a)(5)] as may be relevant to and consistent with the public health and safety.''

[93] Further indication that MAPS is the driving force behind this application is that, when asked to explain the meaning of one of his written answers to the questions submitted by DEA as a follow up to the application, Respondent admitted that he had ''no idea'' whether he was referring to Chemic when he answered that one of the proposed recipients of the marijuana that he seeks to produce would be an entity that would use ''marijuana delivered through a vaporizer device.'' Tr. at 225–26. Nor did Respondent know if this entity was authorized under the law to conduct such research or the amount of marijuana that would be needed for this research. *Id.* at 229. Respondent said that such questions would have to be referred to Mr. Doblin. *Id.* at 226. Respondent acknowledged that the only entity he had in mind as a recipient of the marijuana he seeks to grow was the researcher that would test the vaporizer. Tr. at 235.

[94] 21 U.S.C. 844; Mass. Gen. Laws Ann. ch. 94C, § 34 (West 2008). Mr. Doblin lives in Massachusetts. Tr. 472.

characterization; nor does the record indicate exactly what role Mr. Doblin played in the prior MAPS-sponsored research.[95] In any event, even assuming that MAPS has previously sponsored DEA-registered researchers without incident, this does not undo the legitimate concerns that came to light in this proceeding about Mr. Doblin's fitness for directing, at least in part, the activities of a DEA-registered bulk manufacturer of marijuana, given Mr. Doblin's routine illegal use of marijuana.

Thus, Mr. Doblin's ongoing illegal marijuana use, by itself (i.e., even putting aside the treaty considerations and Respondent's failure to demonstrate inadequate supply or competition within the meaning of paragraph 823(a)(1)), provides a sufficient independent basis upon which DEA may deny the application.

Accordingly, based on a consideration of all six pubic interest factors set forth in 21 U.S.C. 823(a), I conclude the Respondent has failed to meet his burden of demonstrating that his proposed registration is consistent with the public interest. To the contrary, the evidence is compelling that the registration is inconsistent with the public interest.

C. The Meaning of 21 U.S.C. 823(a)(1)

This section of the discussion contains a far more extensive analysis of 21 U.S.C. 823(a)(1) (hereafter, ''paragraph 823(a)(1)'') than DEA has previously published. As indicated above, for ease of exposition, due to the length of this analysis, it is being presented here as a separate section of the discussion rather than inserting it directly into the above discussion of the public interest factors.

1. The Text of the Statute

The appropriate starting point for the analysis of any statute is the text of the statute itself. The text of § 823(a) remains the same today as it was when the CSA was enacted by Congress in 1970. It states:

(a) Manufacturers of controlled substances in schedule I or II

The Attorney General shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. In determining the public interest, the following factors shall be considered:

(1) Maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;

(2) Compliance with applicable State and local law;

(3) Promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) Prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) Past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion; and

(6) Such other factors as may be relevant to and consistent with the public health and safety.

Thus, the statute allows DEA to register an applicant to bulk manufacture a schedule I or II controlled substance only if the Deputy Administrator[96] determines that the proposed registration would be consistent with both (i) the Single Convention and (ii) the public interest. In determining whether the proposed registration is consistent with the public interest, the statute requires DEA to evaluate the above six factors. The first factor, set forth in 21 U.S.C. 823(a)(1) (referred to in this discussion as ''paragraph 823(a)(1)''), requires the Deputy Administrator to consider ''maintenance of effective controls against diversion * * * *by limiting the * * * bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions* for legitimate medical, scientific, research, and industrial purposes.'' (Emphasis added.) Thus, Congress stated in paragraph 823(a)(1) that—in order to maintain effective controls against diversion of a given schedule I or II controlled substance—DEA must consider limiting the number of registered bulk manufactures of the substance to that ''which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions.''

While the above-quoted text of paragraph 823(a)(1) is relatively straightforward, consulting the dictionary helps to confirm the meaning. The word ''limiting'' (or ''limit''), when used as a verb, is defined as ''to assign certain limits to; prescribe,'' ''to restrict the bounds or limits of,'' or ''to curtail or reduce in quantity or extent.''[97] The word ''limit,'' when used as a noun, is defined as ''something that bounds, restrains or confines'' or ''the utmost extent.''[98] Thus, the command under paragraph 823(a)(1) that DEA consider ''limiting'' the number of registered bulk manufacturers of a given schedule I or II controlled substance can be construed to mean that the *upper boundary* on the number of such manufacturers is that ''which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes.''

It is notable that, by requiring DEA to consider *limiting* the number of bulk manufactures of a given schedule I controlled substance to that ''which can produce an adequate and uninterrupted supply * * * under adequately competitive conditions,'' paragraph 823(a)(1) does *not* allow DEA simply to register as many bulk manufacturers of a given schedule I or II controlled substance as the market will bear. Rather, DEA is obligated under paragraph 823(a)(1) to consider disallowing additional entrants into the schedule I and II bulk manufacturing market *unless* DEA concludes that addition of a particular applicant is necessary to produce ''an adequate and uninterrupted supply of [a given substance] under adequately competitive conditions.''

This reading of paragraph 823(a)(1) is also consistent with the overall structure of the CSA. The Act places each controlled substance into one of five schedules based on: whether the substance has a currently accepted medical use in the United States; the substance's relative potential for abuse; and the extent to which abuse of the substance may lead to psychological or physical dependence.[99] As the United States Supreme Court has stated, ''[t]he Act then imposes restrictions on the

[95] Respondent does not appear to contend that DEA granted the prior registrations to MAPS-sponsored researchers knowing that MAPS was the sponsor with Mr. Doblin having the same level of involvement that he seeks here, and he cites no part of the record for such a proposition.

[96] Pursuant to 21 U.S.C. 871(a), functions vested in the Attorney General by the CSA have been delegated to the Administrator of DEA. 28 CFR 0.100(b). The function of issuing final orders regarding applications for registration has been further delegated to the Deputy Administrator. 28 CFR 0.104, appendix to subpart R, sec. 7(a).

[97] Merriam-Webster OnLine, *http://www.merriam-webster.com/dictionary* (2008).

[98] *Id.*

[99] 21 U.S.C. 812(b).

manufacturing and distribution of the substance according to the schedule in which it has been placed.'' [100] ''Schedule I,'' as the Court observed, ''is the most restrictive schedule.'' This is commensurate with the fact that schedule I controlled substances are the only controlled substances with no currently accepted medical use in treatment in the United States. Schedule II restrictions are the next most restrictive (less restrictive than those for schedule I controls but more restrictive than those for schedules III, IV, and V)—commensurate with schedule II substances having the highest potential for abuse of those controlled substances that have a currently accepted medical use (those in schedules II through V).

Consistent with this basic CSA principle of applying greater controls to the substances that are most subject to abuse and most harmful when abused, the CSA is structured to apply certain critical control provisions to schedule I and II substances but not to those in schedules III, IV, and V. For example, the CSA imposes quota restrictions and order form requirements for schedule I and II controlled substances but not for those in schedules III, IV, and V.[101] Paragraph 823(a)(1) is another example of this principle. The required consideration in paragraph 823(a)(1) of limiting the number of bulk manufacturers of schedule I and II controlled substances (to that which can produce an adequate and uninterrupted supply of a given substance under adequately competitive conditions) is noticeably absent from paragraph 823(d)(1), which governs the registration of manufacturers of schedule III, IV, and V controlled substances. This contrast between the presence of the ''limiting'' language in paragraph 823(a)(1) and its absence from paragraph 823(d)(1) underscores the importance of this requirement—particularly in view of Congress's overall scheme of placing the greatest restrictions on substances in schedules I and II.

Another consideration when interpreting the language of paragraph 823(a)(1) is a comparison of its terms with those of paragraph 823(a)(5). As indicated above, paragraph 823(a)(5) is one of the six factors DEA must consider when evaluating an application for registration to bulk manufacture a schedule I or II controlled substance. Paragraph 823(a)(5) requires consideration of, among other things, ''the existence *in the establishment* of effective control against diversion.'' (Emphasis added.) The plain meaning of this language is that the Deputy Administrator must evaluate whether the particular facility in which the applicant proposes to manufacture the schedule I or II controlled substance will have in place effective safeguards to prevent diversion. This would include, among other considerations, appropriate physical security and employee screening as required by the DEA regulations [102] as confirmed through a DEA on-site inspection of the premises. That paragraph 823(a)(5) expressly requires the Deputy Administrator to consider ''the existence *in the establishment* of effective control against diversion'' is a further indication that paragraph 823(a)(1) is not intended to cover precisely the same consideration. To restate this interpretation somewhat, whereas paragraph 823(a)(1) can be viewed as preventing diversion on a registrant-wide scale (by directing the agency to consider limiting the total number of registered bulk manufacturers and importers of schedule I and II controlled based on the principle—discussed below—that fewer registrants decreases the likelihood of diversion), paragraph 823(a)(5) can be viewed as preventing diversion on an individual-registrant basis (by directing the agency to consider whether the applicant will have in place, in its particular establishment, effective controls against diversion).[103]

In sum, for the preceding reasons, examining the text of paragraph 823(a)(1) can lead squarely to the conclusion that it requires DEA to maintain effective controls against diversion by considering ''limiting the * * * bulk manufacture of [schedule I and II] controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions.''

2. Legislative History of the Statute

Congress derived paragraph 823(a)(1) from the Narcotics Manufacturing Act of 1960 [104] (which was superseded by the CSA in 1970). Under the 1960 Act, a person seeking to manufacture a basic class of narcotic drugs was required to obtain a license from the Secretary of the Treasury Department. Within the Treasury Department, this function was delegated to the Commissioner of the Bureau of Narcotics (a predecessor of DEA). Section 8 of the 1960 Act set forth the criteria that the Commissioner was required to consider in determining whether to issue a narcotics manufacturing license. Paragraph (a)(1) of section 8 of the 1960 Act was the analog to paragraph 823(a)(1) of the CSA. Paragraph (a)(1) provided that, in determining whether to issue a license to an applicant seeking to manufacture a basic class of narcotic drug, the Commissioner was required to consider:

> Maintenance of effective controls against the diversion of the particular basic class of narcotic drug and of narcotic drugs compounded therefrom into other than legitimate medical and scientific channels *through limitation of manufacture of the particular basic class of narcotic drug to the smallest number of establishments which will produce an adequate and uninterrupted supply* of narcotic drugs of or derived from such basis class of narcotic drugs for medical and scientific purposes, consistent with the public interest.

(Emphasis added.)

As the italicized language above indicates, the 1960 Act reflected the then-policy of the United States to limit the number of licensed manufacturers ''to the smallest number of establishments which will produce an adequate and uninterrupted supply''—without regard to whether there was adequate competition. Plainly, there are both similarities to and distinctions between this provision of the 1960 Act and its counterpart in the CSA. The CSA carried forward the concept of ''limiting'' the number of registered manufacturers (with respect to schedule I and II controlled substances). However, the CSA modified this requirement by providing that this limitation on the number of manufacturers be based not only on that which can produce ''an adequate and uninterrupted supply,'' but also on that which provides for ''adequately competitive conditions.'' Put slightly differently, when Congress enacted the CSA, it raised the ceiling on the number of manufacturers from that which can produce ''an adequate and uninterrupted supply'' to a consideration of that which can produce ''an adequate and uninterrupted supply * * * under adequately competitive conditions.'' [105] The policies underlying

[100] OCBC, 532 U.S. at 492 (2001).

[101] 21 U.S.C. 826 & 828.

[102] *See* 21 CFR 1301.71–1301.93.

[103] As discussed below, some prior DEA final orders have construed paragraph 823(a)(1) to require consideration of the existence in the establishment of effective control against diversion. While this factor must be considered in evaluating any application for registration under § 823(a), it is best considered only for purposes of paragraph 823(a)(5) and not mingled with the analysis under paragraph 823(a)(1).

[104] 74 Stat. 55 (1960).

[105] To be precise, the text of the CSA (in contrast to that of the 1960 Act) does not unambiguously impose an absolute ceiling on the number of registered manufacturers (that which can produce an adequate and uninterrupted supply under adequately competitive conditions). Rather, as indicated above, the text of the CSA requires DEA

this change in the law are summarized in the following exchange during the Congressional hearings on the enactment of the CSA. The exchange was between Senator Hruska (one of the co-sponsors of the various bills that led up to the CSA) and then-Attorney General Mitchell:

Senator Hruska: We have two national policies involved here. One is the anticompetitive situation policy. The antitrust law is a very well-established concept * * * . We also have another national policy have we not, Mr. Attorney General? We have entered into a global series of agreements in which we undertake in joint action with other nations the business of controlling the manufacture and distribution of the opiates and final derivatives of opium. Among those agreements is this principle: That we urge upon nations to keep the number of producers down to as low a point as possible to facilitate and to make more certain their ability to control and supervise the output and to keep it in normal and proper legal channels. We have these two national policies involved here, have we not?

Mr. Mitchell: Yes sir, you have both of them, and there is no intention on the part of the Justice Department nor the Bureau of Narcotics and Dangerous Drugs by this provision to expand beyond necessity, and of course those are the key words, any manufacturers in this particular area. We felt it was necessary to maintain the protection of the consumer from the price structure point of view and that is why the additional provisions have been added.[106]

During that same hearing, the Department of Justice submitted in writing its position regarding a proposed version of what would become paragraph 823(a)(1). In that document, the Department of Justice stated the following with respect to the then-pending proposal to deviate in the CSA from the 1960 Act by adding the consideration of adequacy of competition, and how the Department would carry out such proposal, if enacted:

There is no reason to assume that the Attorney General will prejudice his primary objectives of effective control by excessive licensing. Nor will he undertake direct price control. He will be empowered to take cognizance of evidence showing that prices are clearly and persistently excessive. The criteria for determining whether prices far exceed that which is reasonable relate to reasonable costs and reasonable profits. No explicit statement of criteria is needed. If evidence indicates that additional licensing will result in more reasonable prices with no significant diminution in the effectiveness of drug control, the Attorney General should be able to license the additional manufacturers.[107]

Consistent with the foregoing statements made during the Senate hearings, a subsequent Senate report contained the following statement, which echoes the language of what is now in paragraph 823(a)(1): ''[T]he Attorney General must limit the importation and manufacture of schedules I and II substances to a number of establishments which can produce an adequate and uninterrupted supply under adequately competitive conditions for legitimate purposes.'' [108]

Thus, the legislative history reaffirms several principles already evident from the text of paragraph 823(a)(1) and expands upon those principles. The legislative history confirms that paragraph 823(a)(1) indeed was designed to require the Attorney General to take into account limiting the number of bulk manufacturers (and importers) of schedule I and II controlled substances. However, this limit was not as restrictive as under the law that preceded the CSA. Whereas under the 1960 Act, additional manufacturers could only be added if supply was inadequate, the CSA added the consideration of adequacy of competition. Nonetheless, as the legislative history reflects, Congress under the CSA placed the burden on the applicant seeking to become registered to bulk manufacture a schedule I or II controlled substance to put forth evidence demonstrating either inadequate supply or inadequate competition.

The legislative history also reflects the recognition by Congress of a crucial principle underlying paragraph 823(a)(1): That the risk of diversion tends to increase with each new registered bulk manufacturer of a schedule I or II controlled substance. At the same time, the language of paragraph 823(a)(1) reflects the determination by Congress that—despite the increased risk of diversion resulting from the addition of each new registered manufacturer—it is beneficial to the public interest to allow the registration of additional manufacturers where the Attorney General finds that doing so is necessary to produce an adequate and uninterrupted supply of a given substance under adequately competitive conditions.[109]

3. Treaty Considerations

The principle that limiting the number of producers of narcotics and other schedule I and II controlled substances tends to promote more effective control has long been a part of United States policy and incorporated into the international drug control treaties to which the United States has been a party and which predate the CSA. Under the Single Convention, article 29 addresses the manufacture of narcotic drugs. Paragraph 2(b) of article 29 requires parties to the treaty to ''[c]ontrol under license the establishment and premises in which such manufacture may take place.'' With respect to this provision, the Commentary to the Single Convention states: ''It is suggested that, in order to facilitate control, the licensing system under subparagraph (b) should be employed to ensure that the manufacture of drugs, their salts and preparations is restricted to as small a number of establishments and premises as is practicable.'' Commentary at 322 (emphasis added); *see also id.* at 319 (discussing how the concept of limiting the number of manufacturers of narcotic drugs was inherent in the international drug control treaties that preceded the Single Convention).[110] This is the same

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to ''consider * * * limiting'' the number of manufacturers to such a number (along with considering the other public interest factors). It should also be noted that, whereas the 1960 Act referred to allowing only ''the *smallest* number of establishments which will produce an adequate and uninterrupted supply'' (emphasis added), the CSA does not contain the term ''smallest'' in paragraph 823(a)(1). Nonetheless, as explained above, the use of the term ''limiting'' in paragraph 823(a)(1) can be construed to mean that DEA, when evaluating an application under § 823(a), must consider keeping as the upper boundary on the number of manufacturers that which can produce an adequate and uninterrupted supply under adequately competitive conditions. In other words, even though Congress when it enacted the CSA did not carry forward from the 1960 Act the term ''smallest,'' because it did carry forward the term ''limiting,'' it retained the concept of an upper limit on the number of manufacturers as a factor to be considered when evaluating an application for registration under § 823(a).

[106] *Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary, United States Senate*, 91st Cong. 261–262 (1969).

[107] *Id.* at 372. Although this statement by the Department of Justice was commenting on an earlier version of the bill, the modified version of the bill that ultimately was enacted retained the same principles as the earlier version under which the adequacy of competition would become a consideration in determining whether to grant applications to become registered to manufacture schedule I or II controlled substances.

[108] *Controlled Dangerous Substances Act of 1969: Report of the Comm. on the Judiciary, United States Senate*, 91st Cong. 7 (1969).

[109] As the statute states, an application for registration under § 823(a) may only be granted if DEA determines that such registration is consistent with *both* the public interest and United States obligations under the Single Convention. Thus, even if a proposed registration were found by DEA to be consistent with the public interest based on a consideration of the six public interest factors of § 823(a), the registration must be denied if DEA finds it would be inconsistent with United States obligations under the Single Convention.

[110] Also illustrative of this point are the following statements contained in a 1979 resolution issued by the United Nations Commission on Narcotic Drugs, which DEA has cited in a prior **Federal Register** publication: ''Recalling the relevant provisions of

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principle as that referred to in the legislative history of the CSA (in the above-quoted exchange between Senator Hruska and the then-Attorney General).

4. Pertinent Provision of the DEA Regulations

The only applications for registration for which the DEA regulations require the agency to publish notice in the **Federal Register** are those by persons seeking to bulk manufacture and import schedule I and II controlled substances. 21 CFR 1301.33(a) & 1301.34(a). These are the applications governed by 21 U.S.C. 823(a). In the cases of such applications, the regulations further require DEA to mail (simultaneously with the publication in the **Federal Register**) a copy of the **Federal Register** notice to each person registered as a bulk manufacturer of the particular schedule I or II controlled substance and to each person who has submitted a pending application therefor. *Id.* Any such person may also file written comments or objections to the proposed registration. *Id.*

That the regulations provide the foregoing procedures in the case of applications filed pursuant to 21 U.S.C. 823(a)—and for no other categories of applications—is indicative of the distinction between the statutory factors for registration contained in subsection 823(a) and those contained in all other subsections of § 823. As explained above in the discussion of the text of the statute, whereas paragraph 823(a)(1) requires DEA to consider limiting the number of registered bulk manufacturers and importers of a given schedule I or II controlled substance to that which can produce an adequate and uninterrupted supply under adequately competitive conditions, this consideration appears nowhere else in § 823 (i.e., it is inapplicable to all other applications for registration). Moreover, the consideration of adequacy of supply and competition is the *only* factor that is unique to subsection 823(a). It is therefore implicit that the notice-and-comment provisions of the regulations listed above (those contained in 21 CFR 1301.33(a) and 1301.34(a)) are designed to effectuate the consideration by DEA of adequacy of supply and competition. This implication is also consistent with the view that, in addition to DEA and the applicant itself, those registrants that constitute the existing suppliers (bulk manufacturers) of a given schedule I or II controlled substance have the requisite knowledge to comment on whether the existing market is capable of producing an adequate and interrupted supply under adequately competitive conditions.

Thus, the notice-and-comment provisions of 21 CFR 1301.33(a) and 1301.34(a) provide further support for interpreting paragraph 823(a)(1) as requiring DEA to consider, for purposes of determining the public interest, limiting the number of registered bulk manufacturers and importers of schedule I and II controlled substances to that which can produce an adequate and uninterrupted supply under adequately competitive conditions.

Another provision of the regulations that warrants discussion is 21 CFR 1301.33(b), which states:

> In order to provide adequate competition, the Administrator shall not be required to limit the number of manufacturers in any basic class to a number less than that consistent with maintenance of effective controls against diversion solely because a smaller number is capable of producing an adequate and uninterrupted supply.

Although this provision is somewhat awkwardly phrased, a careful examination reveals that it is merely a corollary to paragraph 823(a)(1). In construing subsection 1301.33(b), it is important to bear in mind that an agency regulation cannot deviate from any mandate imposed by Congress under the statute that the regulation implements. Thus, any reading of subsection 1301.33(b) must be consistent with Congress's direction in paragraph 823(a)(1) that DEA consider limiting the number of bulk manufacturers of schedule I and II controlled substances to that which can produce an adequate and uninterrupted supply under adequately competitive conditions.

With the foregoing principles in mind, subsection 1301.33(b) can be broken down into its constituent elements for purposes of analysis as follows:

■ ''In order to provide adequate competition''; i.e., if it has been determined under paragraph 823(a)(1) that granting a particular applicant a registration to bulk manufacture a given schedule I or II controlled substance is necessary to provide an adequate and uninterrupted supply of that substance under adequately competitive conditions,

■ ''The Administrator shall not be required to limit the number of manufacturers in any basic class to a number less than that consistent with maintenance of effective controls against diversion''; i.e., if granting the applicant's registration (based on a finding of inadequate competition) will bring the total number of registered bulk manufacturers of a given schedule I or II controlled substance to a number which remains consistent with maintenance of effective controls against diversion, DEA is not obligated to keep the total *less than* that number,

■ ''Solely because a smaller number is capable of producing an adequate and uninterrupted supply''; i.e., based solely on the fact that the existing number of manufacturers already produces an adequate and uninterrupted supply (but under *in*adequately competitive conditions).

Viewing these elements together, it is apparent that subsection 1301.33(b) merely states what are direct outgrowths of 21 U.S.C. 823(a)(1):

(1) That the existence of an adequate and uninterrupted supply of a given schedule I or II controlled substance is *not* a sufficient basis to deny an application by a person seeking to become an additional manufacturer of that substance (since inadequate competition may provide an independent basis for registration under paragraph 823(a)(1)) and

(2) That DEA need not keep the number of registered bulk manufacturers to a number *below* that which is consistent with maintenance of effective controls against diversion where adding an additional manufacturer is necessary to provide for adequate competition.

Thus, 21 CFR 1301.33(b) can be reconciled with the statutory text (paragraph 823(a)(1))—as must be the case for the regulation to be valid.[111]

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the Single Convention * * * to limit cultivation, production, manufacture and use of narcotic drugs to an amount required for medical and scientific purposes * * *'' and ''Bearing in mind that the treaties which establish this system are based on the concept that the number of producers of narcotic materials for export should be limited in order to facilitate effective control. * * *'' Cited in 44 FR 33695 (1979) and available at *http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/638/29/IMG/NR063829.pdf?OpenElement.*

[111] It is unclear why subsection 1301.33(b) was written in the manner that it was. Given that the regulation was promulgated shortly after the enactment of the CSA in 1970, it is possible that it was written to emphasize how paragraph 823(a)(1) represented a departure from the provision it superseded in the 1960 Narcotic Manufacturing Act. As explained above, the 1960 Act limited the number of licensed manufacturers ''to the smallest number of establishments which will produce an adequate and uninterrupted supply''—without regard to whether there was adequate competition. In contrast, when Congress enacted the CSA, it raised the ceiling on the number manufacturers to that which can produce an adequate and uninterrupted supply *under adequately competitive conditions.* Subsection 1301.33(b) seems to emphasize this distinction between the 1960 Act and the CSA by pointing out that, under the latter, DEA may not deny an application based solely on the existence of an adequate and uninterrupted supply.

In 2004, the Department of Justice provided Congress with an explanation of subsection 1301.33(b) that is consistent with the explanation

5. Prior DEA Statements Regarding the Meaning of Paragraph 823(a)(1)

As discussed above, I now conclude that the text of paragraph 823(a)(1) indicates a directive, which is confirmed by the legislative history, that the agency consider limiting the number of registered bulk manufacturers and importers of controlled substances in schedules I and II to that which can produce an adequate and uninterrupted supply under adequately competitive conditions. Yet, in various final orders and other statements issued by DEA over the years, the agency has at times followed this approach and at other times failed to do so.

For example, in *Roxane Laboratories, Inc.,* 63 FR 55891 (1998), the agency applied paragraph 823(a)(1) consistent with the interpretation that requires the applicant to demonstrate that the existing manufacturer of the controlled substance in question is unable to provide an adequate and uninterrupted supply of the substance under adequately competitive conditions. Roxane Laboratories, Inc. (Roxane) was a company that applied to become registered to import cocaine hydrochloride, a schedule II controlled substance, for use in pharmaceutical products. As § 823(a) states, both an application to import a schedule I or II controlled substance and an application to bulk manufacture such a substance must be evaluated under the same criteria set forth in § 823(a).[112] Thus, in *Roxane,* the Acting Deputy Administrator had to evaluate whether the proposed registration was consistent with the public interest in view of the six public interest factors of § 823(a), including paragraph 823(a)(1).

Consistent with the interpretation of paragraph 823(a)(1) under which the adequacy of supply and competition must be considered, the parties in *Roxane* presented extensive evidence as to whether there was adequate competition within the meaning of the statute.[113] Toward that end, much of the testimony and other evidence introduced in the proceedings focused on the historical and prevailing prices for bulk cocaine hydrochloride charged by what was then the only registered importer of that substance. In addition to presenting factual evidence regarding such prices, each side presented its own economic expert to testify whether, in view of the prices, competition in the market was adequate within the meaning of paragraph 823(a)(1).[114] Ultimately, the Acting Deputy Administrator found that the applicant had met its burden under paragraph 823(a)(1) of demonstrating that competition was inadequate and, in view of all the applicable statutory factors, granted Roxane's application to become registered as an importer of cocaine hydrochloride.

Four years later, in *Johnson Matthey, Inc.*, 67 FR 39041 (2002), DEA again addressed the paragraph 823(a)(1) issue. As in *Roxane,* Johnson Matthey had applied to become registered as, among other things, an importer of schedule II controlled substances. Thus, as in *Roxane,* one of the central issues in *Johnson Matthey* was whether granting the application was necessary to provide adequate competition within the meaning of paragraph 823(a)(1).[115] The application was opposed by two firms that were already registered as importers of the same substances that Johnson Matthey sought to import. These competing firms contended at the administrative hearing that they maintained an adequate and uninterrupted supply of the substances under adequately competitive conditions. The two firms therefore objected to the proposed registration under paragraph 823(a)(1), among other grounds.

The final order in *Johnson Matthey* contains no description of the evidence presented by the parties during the administrative hearing on the competition issue as the final order expressly declared such evidence to be irrelevant. Nor does the *Johnson Matthey* final order contain a recitation of the text of paragraph 823(a)(1) or an independent analysis of the statutory text. Instead, the *Johnson Matthey* final order simply adopted a proposed rule that was published 18 years earlier by DEA and subsequently withdrawn by the agency. In that subsequently withdrawn 1974 proposed rule (39 FR 12138 (1974)), DEA proposed to revise its regulations to state that, during an administrative hearing on an application to manufacture a controlled substance in schedule I or II, if the ALJ determines that the registration would be consistent with maintenance of effective controls against diversion, he shall exclude as irrelevant evidence bearing on whether existing manufacturers are capable of producing an adequate and uninterrupted supply under adequately competitive conditions.

The *Johnson Matthey* final order failed to state that, two months after DEA published the aforementioned proposed rule in 1974, the agency published a notice in the **Federal Register** that three firms (which were then registered bulk manufacturers under § 823(a)) filed objections to, and requested a hearing on, the proposed rule, asserting that ''the Controlled Substances Act requires a finding respecting the adequacy of competition prior to registering any person to engage in the bulk manufacture of a schedule I or II substance.'' 39 FR 20382 (1974). These objections that were submitted in response to the 1974 proposed rule reflect precisely the same conclusion regarding the meaning of paragraph 823(a)(1) that I find—for the reasons discussed above—to be most

provided in the text above. *See Marijuana and Medicine: The Need for a Science-Based Approach: Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources*, 108th Cong. 208 (2004) (letter from Assistant Attorney General William Moschella to Subcomm. Chairman Rep. Souder) (''The meaning of [21 CFR 1301.33(b)] can be restated as follows: *If DEA determines there is inadequate economic competition among the existing manufacturers of the particular controlled substance that the applicant seeks to produce* (e.g., substantial overcharging by the existing manufacturers due to an insufficient number of competing manufacturers of that controlled substance), and provided further that granting the applicant's registration (and thereby increasing the total number of manufacturers) is consistent with maintenance of effective controls against diversion, DEA is not required to deny the application solely because the number of manufacturers currently registered can adequately supply the market for that controlled substance in terms of quantity and quality of product.'') (emphasis in original).

[112] *See also* 21 U.S.C. 958(a) (a registration to import a schedule I or II controlled substance must be consistent with the public interest, based on consideration of the six criteria of § 823(a)). Further, 21 U.S.C. 952(a)(2)(B) requires a person seeking to become registered to import a schedule I or II controlled substance to demonstrate not only that competition among domestic manufacturers of the particular substance is inadequate but also that competition ''will not be rendered adequate by the registration of additional [domestic] manufacturers under section 823.'' Thus, an applicant to import a schedule I or II substance must make an additional showing beyond that required for an applicant to bulk manufacture such a substance. However, as § 823(a) indicates, both the applicant seeking to import and the applicant seeking to bulk manufacture are subject to the same 823(a) criteria, including the same determination under paragraph 823(a)(1) regarding the adequacy of competition.

[113] That the existing supply of cocaine hydrochloride was adequate within the meaning of paragraph 823(a)(1) was not in dispute in *Roxane*.

[114] As indicated above, because *Roxane* involved an application to import a schedule II controlled substance, the applicant was required demonstrate that competition was inadequate not only within the meaning of paragraph 823(a)(1), but also within the meaning of 21 U.S.C. 952(a)(2)(B). As to the latter, the DEA regulations require consideration of the factors set forth in 21 CFR 1301.34(d). These factors are specifically designed to assess competition in the context of an import application. However, as § 823(a) indicates, an application to import a schedule I or II controlled substance must also be evaluated under paragraph 823(a)(1) regarding the adequacy of competition.

[115] As Johnson Matthey had applied to import narcotic raw materials, the application also had to be evaluated under 21 U.S.C. 952(a)(1).

reconcilable with the text of the statute. That DEA withdrew the 1974 proposed rule a month after publishing these objections (39 FR 26031 (1974)) is consistent with the conclusion that the proposed rule could not be firmly reconciled with the statute.[116]

Thus, the *Johnson Matthey* final order appears to have been flawed both procedurally (by relying entirely upon a proposed rule that was withdrawn) and substantively (by relying on an interpretation of paragraph 823(a)(1) that is, in my view, difficult to reconcile with the statutory text). Nonetheless, it must be recognized that the *Johnson Matthey* final order was upheld on appeal in *Noramco* v. *DEA*, 375 F.3d 1148 (D.C. Cir. 2004). Examining the *Noramco* decision is therefore warranted. Before doing so, however, it is necessary to review another DEA final order that was issued shortly after *Johnson Matthey*.

In *Penick Corporation Inc.*, 68 FR 6947 (2003), DEA evaluated the paragraph 823(a)(1) issue in a different manner than it had done eight months earlier in the *Johnson Matthey* final order. As in *Roxane* and *Johnson Matthey*, Penick had applied with DEA to become registered as, among other things, an importer of schedule II controlled substances. Also as in *Roxane* and *Johnson Matthey*, the applicant's competitors (who were already in the market as registered importers of the same substances) objected to the proposed registration contending, among other things, that the applicant had failed to demonstrate the existence of inadequate competition within the meaning of paragraph 823(a)(1). However, in contrast to the *Johnson Matthey* final order, the *Penick* final order did not disregard the competition issue as irrelevant. Nor did the *Penick* final order mention the 1974 proposed rule (that was subsequently withdrawn), which was relied upon in *Johnson Matthey*. Rather, the *Penick* final order did examine the evidence presented on the competition issue and ultimately concluded: ''Having found that the market is not adequately competitive, the Deputy Administrator concludes that this factor weighs in favor of granting Penick's application, even though *Noramco* and Mallinckrodt are capable of maintaining an adequate and uninterrupted supply.'' [117] The *Penick* final order did not address the *Johnson Matthey* final order or why the two final orders took a differing approach as to the competition issue.

Both the *Johnson Matthey* final order and the *Penick* final order were challenged by a competitor (Noramco) in *Noramco* v. *DEA*. The United States Court of Appeals for the D.C. Circuit consolidated Noramco's two petitions for review into one appellate proceeding. With respect to the *Johnson Matthey* final order, Noramco contended that DEA erred by failing to consider the adequacy of competition and limit the number of importers to that which can produce an adequate and uninterrupted supply under adequately competitive conditions as paragraph 823(a)(1) requires. The D.C. Circuit panel reviewed DEA's decision ''under the familiar two-step *Chevron* framework.'' [118] Under this framework, if the reviewing court finds that the statute does not directly address ''the precise question at issue'' (step one), the court must sustain the agency's interpretation if it is ''based on a permissible construction of the statute'' (step two).[119] The court of appeals in *Noramco* upheld the *Johnson Matthey* final order, under *Chevron* step two, finding that DEA's decision to disregard competition to be a ''permissible interpretation'' of paragraph 823(a)(1).[120] Simultaneously, the court of appeals in *Noramco* upheld the *Penick* final order after reciting how DEA did consider the competition issue as paragraph 823(a)(1) directs. That the final orders in *Johnson Matthey* and *Penick* were inconsistent with one another as to the interpretation of paragraph 823(a)(1) was rejected by the court of appeals as a basis for reversal.[121]

It is especially important to note here that, under *Chevron* step two, ''[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.'' [122] Accordingly, when the court in *Noramco* upheld the final order in *Johnson Matthey,* it was not offering an opinion whether that final order had interpreted paragraph 823(a)(1) in the best manner; rather, the court was merely stating that DEA (being owed the measure of *Chevron* deference accorded to an agency that administers a statute) had put forth a ''permissible interpretation'' of the statute. This point is underscored by the fact that the court in *Noramco* also upheld the *Penick* final order, which interpreted paragraph 823(a)(1) in a notably different manner than did the *Johnson Matthey* final order.

Thus, nothing in the *Noramco* decision constrains DEA from concluding, as I now do, that the most sound reading of the text of paragraph 823(a)(1) is that which requires the agency to consider limiting the number of bulk manufacturers and importers of schedule I and II controlled substances to that which can produce an adequate and uninterrupted supply of a given substance under adequately competitive conditions.

In 2006, another final order was issued involving the competition issue. In *Chattem Chemicals, Inc.*, 71 FR 9834 (2006), *petition for review denied, Penick Corp., Inc.* v. *DEA*, 491 F3d 483 (D.C. Cir. 2007), the applicant sought to become registered to import a schedule II controlled substance, just as Roxane, Johnson Matthey, and Penick had previously done. In the final order, which I issued, I followed the *Johnson Matthey* approach of declining to consider the adequacy of competition or supply. In doing so, I expressly noted that this approach had been ''approved by the appellate court in *Noramco*.'' [123] Upon review of the *Chattem* final order, the court of appeals likewise reaffirmed that, under *Noramco*, this approach of not considering adequacy of competition was a permissible reading of the statute. *Penick*, 491 F.3d at 491 n.11. However, for the reasons discussed at length above, I now believe that this approach—though deemed permissible upon *Chevron* review—must be rejected in favor of that which more accurately follows the text of the statute; i.e., the approach that was taken in *Roxane* and *Penick* of considering limiting the number of bulk manufacturers and importers of a given schedule I or II controlled substance to that which can produce an adequate and uninterrupted supply under adequately competitive conditions.[124] In addition

[116] The notice of withdrawal of the proposed rule stated that DEA was in the midst of reviewing and revising all the agency regulations in their entirety and that the proposed amendments regarding the competition issue ''are withdrawn so that all proposed changes to the regulations may be published together.'' However, DEA never again proposed to amend its regulations to eliminate the consideration—that paragraph 823(a)(1) mandates—of adequacy of supply and competition.

[117] 68 FR at 6950.

[118] 375 F.3d at 1152 (citing *Chevron U.S.A, Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1983)).

[119] *Id.*

[120] 375 F.3d at 1153.

[121] 375 F.3d at 1157 n.8.

[122] 467 U.S. at 843 n.11.

[123] 71 FR at 9838.

[124] While it is certainly preferable that an agency interpret a statutory provision that it administers in a consistent manner throughout the agency's existence, the head of an agency ''is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation.'' *See Thomas Jefferson University* v. *Shalala*, 512 U.S. 504, 517 (1994); *cf. Chevron*, 467 U.S. at 863 (''The fact that the agency has from time to time

to finding this interpretation to be that which most closely mirrors the text of the statute, I believe that, upon consideration of the legislative history and treaty considerations discussed above, this interpretation most effectively achieves the principles underlying the statutory text: Balancing the overarching goal of preventing the United States from being a source of domestic and international diversion by limiting the number of bulk manufacturers of schedule I and II controlled substances with the desire to ensure a level of competition adequate to prevent legitimate purchasers of these substances from being charged unreasonable prices.[125] The alternative interpretation, though found to be permissible, does not give full effect to these principles and provides no mechanism to prevent the proliferation of bulk suppliers of schedule I and II controlled substances beyond that necessary to adequately supply the legitimate United States demand for these materials under adequately competitive conditions. It is axiomatic that the proliferation of suppliers of bulk schedule I and II controlled substances heightens the risk of oversupply, which in turn increases the risk of diversion. The alternative interpretation, therefore, does not effectuate the statute and its underlying purposes as well as the interpretation followed in this final order.

D. Summary of the Discussion

For the reasons indicated above, I have determined that Respondent's proposed registration is inconsistent with United States obligations under the Single Convention and with the public interest based on a consideration of the factors set forth in 21 U.S.C. 823(a). With respect to the Single Convention, Respondent's desire to become registered in order to achieve MAPS's goal of ending the Federal Government's monopoly on the wholesale distribution of marijuana cannot be squared with the requirement under the Convention that there be precisely such a monopoly. With respect to the public interest, Respondent's failure to demonstrate that the longstanding existing system in the United States of producing and distributing research-grade marijuana under the oversight of HHS and NIDA is inadequate within the meaning of 21 U.S.C. 823(a)(1) weighs heavily against granting his application. Also with respect to the public interest, the admitted conduct relating to controlled substances of Respondent's sponsor, Mr. Doblin (in particular, Mr. Doblin's past and ongoing conduct relating to marijuana) is unacceptable for anyone seeking to have a prominent role in overseeing the controlled substance activities of a DEA registrant—especially where the registrant's proposed activities are the manufacture and distribution of the very drug marijuana. In sum, there are three independent grounds, any of which, standing alone, provide a sufficient (indeed, compelling) legal basis for denying Respondent's application.

changed its interpretation of [a statutory provision] does not * * * lead us to conclude that no deference should be accorded the agency's interpretation of the statute.'').

[125] DEA has never invoked the ''limiting'' language of paragraph 823(a)(1) as a basis to revoke the registration of an existing bulk manufacturer that is currently utilizing its registration to supply the market for a given schedule I or II controlled substance, and this final order should not be construed as suggesting a departure from such practice.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(a), as well as 28 CFR 0.100(b) & 0.104, appendix to subpart R, sec. 7(a), I order that the application of Lyle E. Craker, Ph.D., for a DEA certificate of registration as a manufacturer of marijuana be, and hereby is, denied. This order is effective February 13, 2009.

Dated: January 7, 2009.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E9–521 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Foreign Claims Settlement Commission of the United States

Privacy Act of 1974; System of Records

AGENCY: Foreign Claims Settlement Commission of the United States.

ACTION: Notice of a New System of Records.

SUMMARY: Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), the Foreign Claims Settlement Commission (Commission), Department of Justice, proposes to establish a new system of records to enable the Commission to carry out its statutory responsibility to determine the validity and amount of the claims submitted to the Commission against Libya. The Claims Against Libya System will include documentation provided by the claimant as well as background material that will assist the Commission in the processing of their claims. The system will also include the final decision of the Commission regarding the claim.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), the public is given a 30-day period in which to comment; and the Office of Management and Budget (OMB), which has oversight responsibility under the Act, requires a 40-day period in which to conclude its review of the system. Accordingly, please submit any comments by February 17, 2009.

ADDRESSES: The public, OMB, and Congress are invited to submit any comments to the Foreign Claims Settlement Commission of the United States, 600 E Street, NW., Suite 6002, Washington, DC 20579.

FOR FURTHER INFORMATION CONTACT: The Administrative Office, Foreign Claims Settlement Commission, U.S. Department of Justice, 600 E Street, NW., Suite 6002, Washington, DC 20579, or by telephone at 202–616–6975. In accordance with 5 U.S.C. 552a(r), the Department has provided a report to OMB and the Congress on the new system of records.

Dated: January 9, 2009.

Mauricio Tamargo,

Chairman.

JUSTICE/FCSC–29

SYSTEM NAME:

Libya, Claims Against.

SYSTEM LOCATION:

Offices of the Foreign Claims Settlement Commission, 600 E Street, NW., Suite 6002, Washington, DC 20579.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons with claims against Libya covered by the August 14, 2008 Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya and referred by the Department of State to the Foreign Claims Settlement Commission.

CATEGORIES OF RECORDS IN THE SYSTEM:

Claim information, including name and address of claimant and representative, if any; date and place of birth or naturalization; nature of claim; description of loss or injury including medical records; and other evidence establishing entitlement to compensation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority to establish and maintain this system is contained in 5 U.S.C. 301 and 44 U.S.C. 3101, which authorize the Chairman of the Commission to create

and maintain federal records of agency activities, and is further described in 22 U.S.C. 1622e, which vests all non-adjudicatory functions, powers and duties in the Chairman of the Commission.

PURPOSE:

To enable the Commission to carry out its statutory responsibility to determine the validity and amount of certain claims of U.S. nationals against Libya.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The information contained in this system of records will be disclosed by the Commission under the following circumstances:

a. To the Department of State and the Department of the Treasury in connection with the negotiation, adjudication, settlement and payment of claims;

b. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the federal government, when necessary to accomplish a Commission function related to this system of records;

c. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record;

d. Where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature—the relevant records may be referred to the appropriate federal, state, local, territorial, tribal, or foreign law enforcement authority or other appropriate entity charged with the responsibility for investigating or prosecuting such violation or charged with enforcing or implementing such law;

e. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when the Department of Justice and/or the Commission determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding;

f. To a former employee of the Commission for purposes of: Responding to an official inquiry by a federal, state, or local government entity or professional licensing authority, in accordance with applicable Commission regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Commission requires information and/or consultation from the former employee regarding a matter within that person's former area of responsibility.

g. To appropriate agencies, entities, and persons when (1) it is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Commission has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Commission or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

STORAGE:

Paper records maintained in file folders at the Commission's office and an electronic Microsoft Access database located on the Commission's Server.

RETRIEVABILITY:

Information from this system of records will be retrieved by claimant name, claim number and/or decision number. An alphabetical index is used for identification of a claim by claimants' name (see system ''Justice/FCSC–1'' originally published in the **Federal Register**, June 10, 1999, 64 FR 31296).

SAFEGUARDS:

Paper records are under security safeguards at the Commission's office. The electronic records are safeguarded by the DOJ JCON security procedures. Access to the Commission's data requires a password and is limited to Commission employees and contractors with appropriate security clearances.

RETENTION AND DISPOSAL:

Records are maintained under 5 U.S.C. 301. Disposal of records will be in accordance with the determination by the National Archives and Records Administration with regard to the Commission's request for Records Disposition Authority dated November 26, 2008.

SYSTEM MANAGER(S) AND ADDRESS:

Administrative Office, Foreign Claims Settlement Commission, 600 E Street, NW., Suite 6002, Washington, DC 20579. Telephone: 202/616–6975. Fax: 202/616–6993.

NOTIFICATION PROCEDURE:

The Administrative Officer will inform any person or other agency about any correction or notation of dispute made in accordance with title 45 CFR Sec. 503.7 of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

RECORD ACCESS PROCEDURE:

(a) Upon request in person or by mail, any individual will be informed whether or not a system of records maintained by the Commission contains a record or information pertaining to that individual. (b) Any individual requesting access to a record or information on himself or herself must appear in person at the offices of the Foreign Claims Settlement Commission, 600 E Street, NW., Room 6002, Washington, DC, between the hours of 9 a.m. and 5 p.m., Monday through Friday, and (1) Provide information sufficient to identify the record, e.g., the individual's own name, claim and decision number, date and place of birth, etc.; (2) Provide identification sufficient to verify the individual's identity, e.g., driver's license, identification or Medicare card; and (3) Any individual requesting access to records or information pertaining to himself or herself may be accompanied by a person of the individual's own choosing while reviewing the records or information. If an individual elects to be so accompanied, advance notification of the election will be required along with a written statement authorizing disclosure and discussion of the record in the presence of the accompanying person at any time, including the time access is granted. (c) Any individual making a request for access to records or information pertaining to himself or herself by mail must address the request to the Administrative Officer (Privacy Officer), Foreign Claims Settlement Commission, 600 E Street, NW., Room 6002, Washington, DC 20579, and must provide information acceptable to the Administrative Officer to verify the individual's identity. (d) Responses to requests under this section normally will be made within ten (10) days of receipt (excluding Saturdays, Sundays, and legal holidays). If it is not possible to respond to requests within that period, an acknowledgment will be sent to the individual within ten (10) days of

receipt of the request (excluding Saturdays, Sundays, and legal holidays).

CONTESTING RECORD PROCEDURES:

(a) Any individual may request amendment of a record pertaining to himself or herself according to the procedure in paragraph (b) of this section, except in the case of records described under paragraph (d) of this section. (b) After inspection by an individual of a record pertaining to himself or herself, the individual may file a written request, presented in person or by mail, with the Administrative Officer, for an amendment to a record. The request must specify the particular portions of the record to be amended, the desired amendments and the reasons therefor. (c) Not later than ten (10) days (excluding Saturdays, Sundays, and legal holidays) after the receipt of a request made in accordance with this section to amend a record in whole or in part, the Administrative Officer will: (1) Make any correction of any portion of the record which the individual believes is not accurate, relevant, timely or complete and thereafter inform the individual of such correction; or (2) Inform the individual, by certified mail return receipt requested, of the refusal to amend the record, setting forth the reasons therefor, and notify the individual of the right to appeal that determination as provided under 45 CFR Sec. 503.8. (d) The provisions for amending records do not apply to evidence presented in the course of Commission proceedings in the adjudication of claims, nor do they permit collateral attack upon what has already been subject to final agency action in the adjudication of claims in programs previously completed by the Commission pursuant to statutory time limitations.

RECORD SOURCE CATEGORIES:

Claimant on whom the record is maintained.

[FR Doc. E9–629 Filed 1–13–09; 8:45 am]

BILLING CODE 4410–01–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273), the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) by number and alternative trade adjustment assistance (ATAA) by (TA–W) by number issued during the period of December 15 through December 19, 2008.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (i.e., conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W–64,466; Mt. Pleasant Hosiery Mills, Mt. Pleasant, NC: November 12, 2007.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W–64,589; American First Forestry, Usk, WA: November 26, 2007.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,091; All-Luminum Products—d/b/a Rio Brands, Philadelphia, PA: September 18, 2007.
TA–W–64,373; Maytag Parts Distribution, Subsidiary Whirlpool Corporation, Milan,TN: November 4, 2007.
TA–W–64,382; Blumenthal Mills, Marion, SC: November 7, 2007.
TA–W–64,398; Thayer Coggin, Inc., High Point, NC: November 10, 2007.
TA–W–64,485; Traeger Pellet Grills, LLC, Wilsonville, OR: November 17, 2007.
TA–W–64,495; Wilen Industries, Atlanta, GA: November 18, 2007.
TA–W–64,540A; Jessica Charles LLC, High Point, NC: November 25, 2007.
TA–W–64,540; Hancock and Moore, Inc., and Jessica Charles, LLC, High Point, NC: November 25, 2007.
TA–W–64,571; Europackaging, LLC, Salem, NH: December 1, 2007.
TA–W–64,596; Atwood Mobile Products, LLC, A Subsidiary of Atwood Mobile Products, West Union, IA: January 20, 2009.
TA–W–64,623; Skilled Manufacturing, Inc., Traverse City, MI: December 5, 2007.
TA–W–64,637; Kraco Enterprises, LLC, A Subsidiary of KE Mats Holding Corp., Compton, CA: December 9, 2007.
TA–W–64,183; Prairie Wood Products, A Subsidiary of D.R. Johnson Lumber Co., Prairie City, OR: October 1, 2007.
TA–W–64,238; Plum Creek MDF, Inc., On-Site Leased Workers From LC Staffing, Columbia Falls, MT: October 16, 2007.
TA–W–64,292; PHB Die Casting, Subsidiary of PHB, Inc., On-Site Leased Workers from Career Concepts & Volt, Fairview, PA: October 27, 2007.
TA–W–64,322; Woodbridge Corporation, St. Peters, MO: October 30, 2007.
TA–W–64,388; Foam Fabricators, Inc., Forrest City, AR: November 7, 2007.
TA–W–64,541; North Douglas Wood Products, Inc., Drain, OR: October 30, 2007.
TA–W–64,344; UCO Fabrics, Inc., Rockingham, NC: November 3, 2007.
TA–W–64,377; Ryder Integrated Logistics, A Subsidiary of Ryder Systems, Norcross, GA: November 5, 2007.
TA–W–64,378; Hancock Company, DBA Gitman and Company, IAG, A Subsidiary of Tom James Co., Ashland, PA: November 7, 2007.
TA–W–64,439; Cooper Hosiery Mill, Inc., Fort Payne, AL: November 13, 2007.
TA–W–64,643A; Chrysler LLC, Technology Center, Auburn Hills, MI: December 6, 2007.
TA–W–64,643B; Chrysler LLC, Featherstone, Auburn Hills, MI: December 6, 2007.
TA–W–64,643; Chrysler LLC, Headquarters, Auburn Hills, MI: December 6, 2007.
TA–W–64,684; Chrysler Transportation, LLC, A Subsidiary of Chrysler LLC, Detroit, MI: December 12, 2007.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,641; Atlas Tube, Inc., On-Site Workers From Staffmark, Blytheville, AR: December 9, 2007.
TA–W–64,318; Clarion Technologies, Inc., Greenville, MI: August 15, 2008.
TA–W–64,331; SUEZ Energy Bio Power, A Subsidiary of GFD, Suez Energy North America, Forest City, NC: October 30, 2007.
TA–W–64,413; Visteon System, LLC, North Penn Plant Electronic Prod. Group, Ryder, Lansdale, PA: December 6, 2008.
TA–W–64,469; Avail Medical Products, A Subsidiary of Flextronics International, Bellefonte, PA: November 18, 2007.
TA–W–64,508; Liberty Miami Distribution Center, Division of Wentworth Corporation, Miami, FL: October 31, 2007.
TA–W–64,521; Rohr, Inc., Subsidiary of Goodrich Corp. Operating as Goodrich Aerostructures Group, Chula Vista, CA: November 6, 2007.
TA–W–64,547A; GKN Sinter Metals, Kersey, PA: November 14, 2007.
TA–W–64,547; GKN Sinter Metals—Kersey, Kersey, PA: November 14, 2007.
TA–W–64,559; General Electric Company—Austintown Products Plant, Lighting, Consumer and Industrial Division, Youngstown, OH: December 23, 2008.
TA–W–64,576; Bowles Fluidics Corporation, Columbia, MD: December 2, 2007.
TA–W–64,607; Cintas Manufacturing LLC, Hazard, KY: December 4, 2007.
TA–W–64,633; Hewlett-Packard, Imaging & Printing Group, Edgeline Development and Operations, Vancouver, WA: December 3, 2007.
TA–W–64,635; Simpson Door Company, McCleary, WA: December 5, 2007.
TA–W–64,650; Accuride Corporation, Henderson, KY: December 10, 2007.
TA–W–64,660; Cintas Corporation, Owingsville, KY: December 10, 2007.
TA–W–64,694; IQE, Inc., Bethlehem, PA: December 12, 2007.
TA–W–64,721; Hewlett-Packard, Imaging & Printing Group, San Diego, CA: December 3, 2007.
TA–W–64,354; eInstruction Corporation, Columbia, MD: November 4, 2007.
TA–W–64,404; Electronic Data Systems (EDS) An HP Company, GMAC Applications Delivery Division, Dayton, OH: November 3, 2007.
TA–W–64,482; APV North America, Inc., Lake Mills, WI: November 18, 2007.
TA–W–64,520; Bowne of Cleveland, Inc., Cleveland, OH: November 21, 2007.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–63,890; New Process Gear, A Division of Magna Powertrain USA, Inc., East Syracuse, NY: August 14, 2007.
TA–W–64,080; Wetzel Molded Plastics, Warren, OH: September 12, 2007.
TA–W–64,299; Hofmann Industries, On-Site Leased Workers of Gage Personnel & Keystone Technical, Sinking Spring, PA: October 27, 2007.
TA–W–64,411; Arkansas Aluminum Alloys, Inc., Hot Springs, AR: November 10, 2007.

TA–W–64,493; Floturn, Inc., Fairfield, OH: November 20, 2007.
TA–W–64,494A; Chrysler LLC, Indiana Transmissional, Plant 1 and 2, Powertrain Division, Kokomo, IN: November 14, 2007.
TA–W–64,494B; Chrysler LLC, Kokomo Casting Plant, TCMA Division, Kokomo, IN: November 14, 2007.
TA–W–64,494; Chrysler LLC, Kokomo Transmissional Plant, Powertrain Division, Kokomo, IN: November 14, 2007.
TA–W–64,523; Kautex-Textron.,Wilmington Div, Wilmington, OH: November 21, 2007.
TA–W–64,543; E. R. Wagner Manufacturing Company, Engineered Hinges and Stampings Business Unit and Tubular Products Division, Milwaukee, WI: November 24, 2007.
TA–W–64,550; Chrysler LLC, Trenton Engine Plant, Port Huron, MI: November 26, 2007.
TA–W–64,653; RPM Electronics, Inc., Rad Technologies, Fort Collins, CO: December 8, 2007.
TA–W–64,663; OutWorks, LLC, Austin, TX: December 10, 2007.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of Section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

TA–W–64,466; Mt. Pleasant Hosiery Mills, Mt. Pleasant, NC.
TA–W–64,589; American First Forestry, Usk, WA.

The Department has determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

None.

The Department has determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–64,620; Rockwell Automation, Manchester, NH.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–63,912; Harley-Davidson Motor Company Operations, York, PA.
TA–W–64,020; American Multimedia, Inc., Burlington, NC.
TA–W–64,101; Eagle Cap Campers, Inc., La Grande, OR.
TA–W–64,164; Veka Innovations d/b/a Vinyl Source, Youngstown, OH.
TA–W–64,218; Trilogy Finishing, Detroit, MI.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–64,423; International Sources, Inc, Mill Valley, CA.
TA–W–64,430; Maersk, Inc., Charlotte, NC.
TA–W–64,470; Syncreon-US Automotive, Chicago, IL.
TA–W–64,544; Source Provides, Inc., Division Comprehensive Logistics, Lansing, MI.
TA–W–64,625; Black Frymer Company, Inc.,—d/b/a National Payroll Advance, Cambridge, OH.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of December 15 through December 19, 2008. Copies of these determinations are available for inspection in Room N–5428, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: January 6, 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–640 Filed 1–13–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of *December 22 through December 26, 2008.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially

separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2.The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm (or subdivision) described in paragraph (2) Contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (*i.e.*, conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of section 222(a)(2)(A) (increased imports) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,422; Mars Petcare US, Inc., A Subsidiary of Mars, Inc., Everson, PA: November 12, 2007.

TA–W–64,425; Tenere, Inc., Oakdale Division, Oakdale, MN: November 12, 2007.

TA–W–64,446; Doutt Tool, Inc., Venango, PA: November 14, 2007.

TA–W–64,515; Perry Manufacturing, El Dorado Springs, MO: November 20, 2007.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,235; DynAmerica Manufacturing, LLC, Muncie, IN: October 10, 2007.

TA–W–64,250; Findlay Industries, Inc., Chesterfield, MO: October 17, 2007.

TA–W–64,405; ITW Tomco, A Wholly Owned Subsidiary of Illinois Tool Works, Bryan, OH: November 25, 2008.

TA–W–64,594; Bio-Rad Laboratories, Waltham, MA: December 3, 2007.

TA–W–64,601; Bosch Communications Systems, Div. Telex Communications, A Subsidiary of Robert Bosch North America, Glencoe, MN: December 4, 2007.

TA–W–64,611; Optima Batteries, Inc., A Subsidiary of Johnson Controls Battery Group, Aurora, CO: December 3, 2007.

TA–W–64,639; Acument Global Technologies, A Subsidiary of Platinum Equity, Camcar, LLC Division, Wytheville, VA: December 9, 2007.

TA–W–64,648; Cuno, Inc., A Subsidiary of 3M Company, Meriden, CT: December 10, 2007.

TA–W–64,690; Elixir Industries, Division 55, Vancouver, WA: December 15, 2007.

TA–W–64,174; Loewenstein, Inc., A Division of Brown Jordan International, Greensboro, NC: October 6, 2007.

The following certifications have been issued. The requirements of section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,166; Best Foam, Inc., Sherman, MS: October 2, 2007.

The following certifications have been issued. The requirements of section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

None.

The Department has determined that criterion (2) of section 246 has not been met. Workers at the firm possess skills that are easily transferable.

None.

The Department has determined that criterion (3) of section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

TA–W–64,667; Wichorus, Inc., San Jose, CA.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–64,257; Vanguard Furniture, Conover, NC.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–64,171; Glen X Machine, Wheeling Brake Band and Friction Mfg., Glen Dale, WV.
TA–W–64,389; A. Schulman, Inc., Polybatch Color Center, Sharon Center, OH.
TA–W–64,504; Canac Kitchens U.S. Limited, Statesville, NC.
TA–W–64,681; United State Steel—Granite City Works, Granite City, IL.
TA–W–64,574; Alcoa Tennessee Operations, Alcoa, TN.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–64,358; First American Title Insurance Company, Roseville, CA.
TA–W–64,442; Technology Associates, Inc., dba Ranal, Inc., Measurement Point Division, Auburn Hills, MI.
TA–W–64,451; Open Solutions, Inc., San Leandro Facility Item Processing Center, San Leandro, CA.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of *December 22 through December 26, 2008*. Copies of these determinations are available for inspection in Room N–5428, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: January 7, 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–641 Filed 1–13–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than January 26, 2009.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than January 26, 2009.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 6th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 12/15/08 and 12/19/08]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
64667	Wichorus, Inc. (State)	San Jose, CA	12/15/08	12/12/08
64668	Tenneco (State)	Cozad, NE	12/15/08	12/12/08
64669	Century Chain Plant 3 (Wkrs)	Hickory, NC	12/15/08	12/11/08
64670	NXP Semiconductors (Comp)	Hopewell Junction, NY	12/15/08	12/02/08
64671	Ermico Enterprises, Inc. (Wkrs)	San Francisco, CA	12/15/08	12/12/08
64672	Alcan Packaging GTA (State)	Syracuse, NE	12/15/08	12/12/08

APPENDIX—Continued

[TAA petitions instituted between 12/15/08 and 12/19/08]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
64673	Varsity Spirit Fashions & Supplies (Wkrs)	McLenoresville, TN	12/15/08	12/11/08
64674	Frito Lay (State)	Mission, TX	12/15/08	12/12/08
64675	Procter and Gamble Hair Care LLC (Comp)	Stamford, CT	12/15/08	12/12/08
64676	D.R. Johnson Lumber Company (Comp)	Riddle, OR	12/15/08	12/12/08
64677	Riddle Laminators (Comp)	Riddle, OR	12/15/08	12/12/08
64678	Alpha Stamping Company (Comp)	Livonia, MI	12/15/08	12/11/08
64679	Entertainment Distribution Company (USA), LLC (Wkrs)	Grover, NC	12/15/08	12/11/08
64680	Alex Products, Inc. (Wkrs)	Paulding, OH	12/15/08	12/12/08
64681	United State Steel—Granite City Works (USW)	Granite City, IL	12/15/08	12/12/08
64682	Vishay General Semiconductors (Comp)	Westbury, NY	12/15/08	12/11/08
64683	The Ascent Services Group (State)	Walnut Creek, CA	12/15/08	12/02/08
64684	Chrysler Transportation, LLC (UAW)	Detroit, MI	12/15/08	12/12/08
64685	Major Sportswear Corporation (Wkrs)	Corona, NY	12/15/08	12/12/08
64686	Cessna Aircraft (State)	Bend, OR	12/16/08	12/15/08
64687	Delaware Valley Financial Services (Wkrs)	Berwyn, PA	12/16/08	12/12/08
64688	Imerys (State)	Kimberly, WI	12/16/08	12/10/08
64689	V.I. Prewett and Sons, Inc. (State)	Fort Payne, AL	12/16/08	12/15/08
64690	Elixir Industries (Comp)	Vancouver, WA	12/16/08	12/15/08
64691	Bauhaus USA, Inc. (Comp)	Sherman, MS	12/16/08	12/08/08
64692	Aptara, Inc. (Comp)	Commerce, CA	12/16/08	12/15/08
64693	Avid Industries, Inc. (Comp)	Argyle, MI	12/16/08	12/15/08
64694	IQE, Inc. (Wkrs)	Bethlehem, PA	12/16/08	12/12/08
64695	Keith Manufacturing Company (State)	Madras, OR	12/16/08	12/15/08
64696	Emcon Technologies (UAW)	Dexter, MO	12/16/08	12/15/08
64697	Tower Automotive (Comp)	Traverse City, MI	12/16/08	12/15/08
64698	Feralloy Wheeling Specialty Processing Company (USW)	Wheeling, WV	12/16/08	12/15/08
64699	Kimrick, LP (State)	Ft Worth, TX	12/16/08	12/11/08
64700	WK Industries, Inc. (State)	Sterling Heights, MI	12/16/08	12/11/08
64701	Atmel Corporation (Wkrs)	Colorado Springs, CO	12/16/08	12/03/08
64702	DESA, LLC (Comp)	Bowling Green, KY	12/16/08	12/12/08
64703	5R Processors, Ltd (Wkrs)	Ladysmith, WI	12/17/08	12/11/08
64704	Fostoria Industries, Inc. (Union)	Fostoria, OH	12/17/08	12/16/08
64705	Kentucky Derby Hosiery/Gildan Activewear (Comp)	Hillsville, VA	12/17/08	12/16/08
64706	Timber Products, Inc. (Wkrs)	White City, OR	12/17/08	12/05/08
64707	GMAC, LLC (Wkrs)	Auburn Hills, MI	12/17/08	12/16/08
64708	NuTec Tooling Systems, Inc. (Comp)	Meadville, PA	12/17/08	12/16/08
64709	SAFAS Corporation (Comp)	New Castle, PA	12/17/08	12/16/08
64710	Orchid International (Wkrs)	McAllen, TX	12/17/08	12/16/08
64711	Scott Brass, Inc. (IBT)	Cranston, RI	12/17/08	12/16/08
64712	Claymore Electronics (State)	Lawrenceville, GA	12/17/08	12/15/08
64713	Frontier Yarns, LLC (Comp)	Wetumpka, AL	12/17/08	12/16/08
64714	Globaltex, Inc. (Comp)	Mooresville, NC	12/17/08	12/16/08
64715	Cadence Innovation, LLC (Comp)	Troy, MI	12/17/08	12/15/08
64716	ABX Air, Inc. (Wkrs)	Erie, PA	12/17/08	12/12/08
64717	ABB Flexible Automation/Rebuild Dept. (Wkrs)	Auburn Hills, MI	12/17/08	12/12/08
64718	TAC Automotive (Wkrs)	Flint, MI	12/17/08	12/15/08
64719	Shorewood Packaging (Wkrs)	Springfield, OR	12/17/08	12/11/08
64720	Hubbell Lenoir City, Inc. (Wkrs)	San Jose, CA	12/17/08	12/15/08
64721	Hewlett-Packard, Imaging & Printing Group (Comp)	San Diego, CA	12/18/08	12/03/08
64722	International Electronics, Inc. (Comp)	Canton, MA	12/18/08	12/12/08
64723	Thomasville Furniture Industries, Inc. (Comp)	Lenoir, NC	12/18/08	12/17/08
64724	Danaher Motion (Pac Sci Motion Control, Inc.) (Comp)	Rockford, IL	12/18/08	12/17/08
64725	Weather Shield (Wkrs)	Medford, WI	12/18/08	12/17/08
64726	SurgRx, Inc. (Rep)	Redwood City, CA	12/18/08	12/13/08
64727	Printer Components, Inc. (Comp)	Victor, NY	12/18/08	12/17/08
64728	Meubles Villagenis (Wkrs)	Malone, NY	12/18/08	12/17/08
64729	Forster Textile Mills, Inc. (Comp)	Maxton, NC	12/18/08	12/17/08
64730	Conner Avenue Assembly Plant (UAW)	Detroit, MI	12/18/08	12/16/08
64731	Mt. Elliott Tool and Die (UAW)	Detroit, MI	12/18/08	12/16/08
64732	Sun Chemical—North American Ink (Union)	Cheektowaga, NY	12/18/08	12/17/08
64733	Modine Manufacturing (Comp)	Lawrenceburg, TN	12/18/08	12/17/08
64734	ACE Packaging Systems (Comp)	Newport, MI	12/18/08	12/17/08
64734A	ACE Packaging Systems (Comp)	Brownstown, MI	12/18/08	12/17/08
64735	Rockwell Collins/Miami Service Base (Wkrs)	Miami, FL	12/18/08	12/05/08
64736	True Textiles, Inc. (Wkrs)	Guilford, ME	12/18/08	12/15/08
64737	Stillwater Mining Company (Comp)	Billings, MT	12/18/08	12/04/08
64738	Flextronics (Wkrs)	Westwood, MA	12/18/08	12/08/08
64739	Freightliner, LLC (Comp)	Mt. Holly, NC	12/18/08	11/24/08
64740	LSP Products Group (State)	Carson City, NV	12/19/08	12/18/08
64741	3M Cuno (State)	Enfield, CT	12/19/08	12/18/08

APPENDIX—Continued

[TAA petitions instituted between 12/15/08 and 12/19/08]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
64742	American Axle & Manufacturing (State)	Detroit, MI	12/19/08	12/16/08
64743	Alcoa, Inc.—West Plant (Comp)	Massena, NY	12/19/08	12/18/08
64744	Alcoa, Inc.—East Plant (Comp)	Massena, NY	12/19/08	12/18/08
64745	HDM Henredon Furniture Industries (Comp)	Marion, NC	12/19/08	12/18/08
64746	HDM Furniture Industries/Drexel Heritage Plant #60 (Comp).	Morganton, NC	12/19/08	12/18/08
64747	Fasco Motors (Wkrs)	Eldon, MO	12/19/08	12/17/08
64748	Timber Products (Wkrs)	White City, OR	12/19/08	12/17/08
64749	Lane Furniture Industries (Comp)	Saltillo, MS	12/19/08	12/17/08
64750	Bush Industries (Comp)	Erie, PA	12/19/08	12/18/08
64751	Leon Map, Inc. (Wkrs)	Pasadena, CA	12/19/08	12/16/08

[FR Doc. E9–638 Filed 1–13–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221 (a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than January 26, 2009.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than January 26, 2009.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 8th day of January 2009.

Linda G. Poole,

Certifying Officer, Division Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 12/22/08 and 12/24/08]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
64752	Pearson/a Furniture Brands International Co. (Comp)	High Point, NC	12/22/08	12/19/08
64753	Restoration Hardware/The Michaels Furniture Co. (Wkrs)	Sacramento, CA	12/22/08	12/19/08
64754	Klaussner Furniture Industries, Inc. (Rep)	Candor, NC	12/22/08	12/18/08
64755	Rea Magnet Wire Company (Comp)	Las Cruces, NM	12/22/08	12/08/08
64756	Air Liquide Electronics U.S. LP (Comp)	Dallas, TX	12/22/08	12/19/08
64757	Ferro Corporation (Wkrs)	Toccoa, GA	12/22/08	12/18/08
64758	Fortis Plastics, LLC (Comp)	Alamo, TX	12/22/08	12/19/08
64759	Formica Corporation (State)	Rocklin, CA	12/22/08	12/19/08
64760	HDM/Drexel Heritage Furniture Industries, Inc., Plant 75/CRC (Comp).	Morganton, NC	12/22/08	12/19/08
64761	Swift Spinning, Inc. (Comp)	Columbus, GA	12/23/08	12/03/08
64762	Syracuse Gauge Company (Comp)	Syracuse, NY	12/23/08	12/22/08
64763	Andrew, LLC (Comp)	Joliet, IL	12/23/08	12/22/08
64764	Alcoa Primary Metals—Intalco Works (IAMAW)	Ferndale, WA	12/23/08	12/15/08
64765	Dana Holding Corporation (Wkrs)	Danville, KY	12/23/08	12/22/08
64766	Veyance Technologies, Inc. (USW)	Sun Prairie, WI	12/23/08	12/22/08
64767	Garrity Industries, Inc. (Comp)	Ashaway, RI	12/23/08	12/15/08
64768	HDM Morganton Operations (Comp)	Morganton, NC	12/23/08	12/22/08
64769	True Temper Sports (Wkrs)	Amory, MS	12/23/08	12/22/08
64770	DSI Ground Support (Wkrs)	Blairsville, PA	12/23/08	12/11/08
64771	Hanesbrands, Inc. (Comp)	China Grove, NC	12/23/08	12/17/08
64772	East Tennessee Zinc Company, LLC (Wkrs)	Strawberry Plains, TN	12/23/08	12/19/08
64773	US Steel Great Lakes Works (Wkrs)	Ecorse, MI	12/23/08	12/19/08
64774	Anthology, Inc. (Wkrs)	Arlington Heights, IL	12/23/08	12/23/08
64775	National Semiconductor (Wkrs)	South Portland, ME	12/23/08	12/16/08
64776	Maitland Smith Furniture Industries (Comp)	High Point, NC	12/24/08	12/23/08

APPENDIX—Continued

[TAA petitions instituted between 12/22/08 and 12/24/08]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
64777	AD Graphics (State)	Lino Lakes, MN	12/24/08	12/23/08
64778	Hamilton Sundsland (State)	Windsor Locks, CT	12/24/08	12/23/08

[FR Doc. E9–639 Filed 1–13–09; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,645]

Columbian Chemicals Company Marshall Plant Proctor, WV; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 11, 2008, in response to a petition filed by the International Chemical Workers Union/United Food and Commercial Workers International Union, Local 888C, on behalf of workers of Columbian Chemicals Company, Marshall Plant, Proctor, West Virginia.

The Department has determined that this petition is a photocopy of petition number TA–W–64,606 that was instituted on December 8, 2008. The Department, on December 29, 2008, issued a certification of eligibility to apply for trade adjustment assistance and alternative trade adjustment assistance, applicable to all workers of the subject firm separated from employment on or after December 8, 2007 through December 29, 2010.

Therefore, further investigation in this petition would serve no purpose, and the investigation is terminated.

Signed at Washington, DC, this 30th day of December 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–637 Filed 1–13–09; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,516]

JDSU Uniphase, Inc., San Jose, CA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 24, 2008, in response to a worker petition on behalf of workers at JDSU Uniphase, Inc., San Jose, California.

The petitioning group of workers is covered by an earlier petition (TA–W–64,440) filed on November 17, 2008 that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC, this 7th day of January 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–642 Filed 1–13–09; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,542]

Mannatech, Inc., Coppell, TX; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 26, 2008 in response to a petition filed by workers at Mannatech, Inc., Coppell, Texas.

The petitioning group of workers is covered by an earlier petition (TA–W–64,511) filed on November 21, 2008 that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC, this 30th day of December 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–643 Filed 1–13–09; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,613]

Mt. Pleasant Hosiery Mills, Inc.; Mt. Pleasant, NC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 8, 2008 in response to a petition filed by a company official on behalf of workers of Mt. Pleasant Hosiery Mills, Inc., Mt. Pleasant, North Carolina.

The workers are covered under an existing certification (TA–W–64,466) issued for all workers of Mt. Pleasant Hosiery Mills, Inc., Mt. Pleasant, North Carolina, which expires on December 16, 2010. Consequently, further investigation in this case would serve no purpose and the investigation has been terminated.

Signed at Washington, DC, this 18th day of December 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–644 Filed 1–13–09; 8:45 am]
BILLING CODE 4510–FN–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination of Eligibility for Retroactive Duty Treatment Under the Dominican Republic-Central America-United States Free Trade Agreement

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: Pursuant to Section 205(b) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (the Act), the United States Trade Representative (USTR) is providing notice of her determination that Costa Rica is an eligible country for purposes of retroactive duty treatment as provided in Section 205 of the Act.

DATES: *Effective Date:* January 14, 2009.

ADDRESSES: Inquiries may be mailed, delivered, or faxed to Caroyl Miller, Deputy Special Textile Negotiator, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, fax number, (202) 395–5639.

FOR FURTHER INFORMATION CONTACT: Caroyl Miller, Office of the United States Trade Representative, 202–395–3026.

SUPPLEMENTARY INFORMATION: Section 205(a) of the Act (Pub. L. 109–53; 119 Stat. 462, 483; 19 U.S.C. 4034) provides that certain entries of textile or apparel goods of designated eligible countries that are parties to the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA–DR) made on or after January 1, 2004 may be liquidated or reliquidated at the applicable rate of duty for those goods established in the Schedule of the United States to Annex 3.3 of the CAFTA–DR. Section 205(b) of the Act requires the USTR to determine, in accordance with Article 3.20 of the CAFTA–DR, which CAFTA–DR countries are eligible countries for purposes of Section 205(a). Article 3.20 provides that importers may claim retroactive duty treatment for imports of certain textile or apparel goods entered on or after January 1, 2004 and before the entry into force of CAFTA–DR from those CAFTA–DR countries that will provide reciprocal retroactive duty treatment or a benefit for textile or apparel goods that is equivalent to retroactive duty treatment.

Pursuant to Section 205(b) of the Act, I have determined that Costa Rica will provide an equivalent benefit for textile or apparel goods of the United States within the meaning of Article 3.20 of the CAFTA–DR. I therefore determine that Costa Rica is an eligible country for purposes of Section 205 of the Act.

Susan C. Schwab,

U.S. Trade Representative.

[FR Doc. E9–493 Filed 1–13–09; 8:45 am]

BILLING CODE 3190–W9–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59218; File No. 4–575]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities Between the Financial Industry Regulatory Authority, Inc. and the Boston Stock Exchange, Incorporated

January 8, 2009.

On December 8, 2008, the Financial Industry Regulatory Authority, Inc. (''FINRA'') and the Boston Stock Exchange, Incorporated (''BX'') (together with FINRA, the ''Parties'') filed with the Securities and Exchange Commission (''Commission'') a plan for the allocation of regulatory responsibilities, dated December 5, 2008 (''17d–2 Plan'' or the ''Plan''). The Plan was published for comment on December 22, 2008.[1] The Commission received no comments on the Plan. This order approves and declares effective the Plan.

I. Introduction

Section 19(g)(1) of the Securities Exchange Act of 1934 (''Act''),[2] among other things, requires every self-regulatory organization (''SRO'') registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of the Act.[3] Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (''common members''). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act[4] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[5] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[6] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (''DEA'') to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[7] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[8] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for appropriate notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors; to foster cooperation and coordination among the SROs; to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system; and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

[1] *See* Securities Exchange Act Release No. 59101 (December 15, 2008), 73 FR 78402.

[2] 15 U.S.C. 78s(g)(1).

[3] 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

[4] 15 U.S.C. 78q(d)(1).

[5] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[6] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[7] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

[8] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

II. Proposed Plan

On August 29, 2008, BX was acquired by The NASDAQ OMX Group, Inc. (''NASDAQ OMX''). At the time of this acquisition, BX was not operating a venue for trading cash equities. BX has since adopted a new rulebook with rules governing membership, the regulatory obligations of members, listing, and equity trading.[9] The new BX rules, in particular the member conduct rules that would be the Common Rules under the proposed Plan, are based to a substantial extent on the rules of the NASDAQ Stock Market LLC (''NASDAQ Exchange''),[10] which, in turn, are based to a substantial extent on the comparable rules of FINRA.

The NASDAQ Exchange currently is party to a 17d–2 plan with FINRA.[11] The proposed Plan would allocate regulatory responsibility between BX and FINRA in a manner similar to the allocation of regulatory responsibility that currently exists between the NASDAQ Exchange and FINRA.

Accordingly, the proposed 17d–2 Plan is intended to reduce regulatory duplication for firms that are common members of both FINRA and BX.[12] Pursuant to the proposed 17d–2 Plan, FINRA would assume certain examination and enforcement responsibilities for common members with respect to certain applicable laws, rules, and regulations.

The text of the Plan delineates the proposed regulatory responsibilities with respect to the Parties. Included in the proposed Plan is an exhibit (the ''Rules Certification for 17d–2 Agreement with FINFA,'' referred to herein as the ''Certification'') that lists every BX rule, and select federal securities laws, rules, and regulations, for which FINRA would bear responsibility under the Plan for overseeing and enforcing with respect to BX members that are also members of FINRA and the associated persons therewith (''Dual Members'').

Specifically, under the 17d–2 Plan, FINRA would assume examination and enforcement responsibility relating to compliance by Dual Members with the rules of BX that are substantially similar to the applicable rules of FINRA, as well as any provisions of the federal securities laws and the rules and regulations thereunder delineated in the Certification (''Common Rules'').[13] Common Rules would not include the application of any BX rule or FINRA rule, or any rule or regulation under the Act, to the extent that it pertains to violations of insider trading activities, because such matters are covered by a separate multiparty agreement under Rule 17d–2.[14] In the event that a Dual Member is the subject of an investigation relating to a transaction on BX, the plan acknowledges that BX may, in its discretion, exercise concurrent jurisdiction and responsibility for such matter.[15]

Under the Plan, BX would retain full responsibility for surveillance, examination, investigation, and enforcement with respect to trading activities or practices involving BX's own marketplace; registration pursuant to its applicable rules of associated persons (*i.e.*, registration rules that are not Common Rules); its duties and obligations as a DEA pursuant to Rule 17d–1 under the Act; and any BX rules that are not Common Rules.[16]

III. Discussion

The Commission finds that the proposed Plan is consistent with the factors set forth in Section 17(d) of the Act[17] and Rule 17d–2(c) thereunder[18] in that the proposed Plan is necessary or appropriate in the public interest and for the protection of investors, fosters cooperation and coordination among SROs, and removes impediments to and fosters the development of the national market system. In particular, the Commission believes that the proposed Plan should reduce unnecessary regulatory duplication by allocating to FINRA certain examination and enforcement responsibilities for Dual Members that would otherwise be performed by both BX and FINRA. Accordingly, the proposed Plan promotes efficiency by reducing costs to Dual Members. Furthermore, because BX and FINRA will coordinate their regulatory functions in accordance with the Plan, the Plan should promote investor protection. The Commission notes that the proposed Plan would allocate regulatory responsibility between BX and FINRA in a manner similar to the allocation of regulatory responsibility that currently exists between the NASDAQ Exchange and FINRA.[19]

The Commission notes that, under the Plan, BX and FINRA have allocated regulatory responsibility for those BX rules, set forth on the Certification, that are substantially similar to the applicable FINRA rules in that examination for compliance with such provisions and rules would not require FINRA to develop one or more new examination standards, modules, procedures, or criteria in order to analyze the application of the rule, or a Dual Member's activity, conduct, or output in relation to such rule. In addition, under the Plan, FINRA would assume regulatory responsibility for certain provisions of the federal securities laws and the rules and regulations thereunder that are set forth in the Certification. The Common Rules covered by the Plan are specifically listed in the Certification, as may be amended by the Parties from time to time.

According to the Plan, BX will review the Certification, at least annually, or more frequently if required by changes in either the rules of BX or FINRA, and, if necessary, submit to FINRA an updated list of Common Rules to add BX rules not included on the then-current list of Common Rules that are substantially similar to FINRA rules; delete BX rules included in the then-current list of Common Rules that are no longer substantially similar to FINRA rules; and confirm that the remaining rules on the list of Common Rules continue to be BX rules that are substantially similar to FINRA rules.[20]

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[9] *See* Securities Exchange Act Release Nos. 58927 (November 10, 2008), 73 FR 69685 (November 19, 2008) (SR–BSE–2008–48) (notice of proposed rule change); and 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR–BSE–2008–48) (order approving proposed rule change).

[10] *See* Securities Exchange Act Release No. 58927 (November 10, 2008), 73 FR at 69686 (November 19, 2008) (SR–BSE–2008–48) (notice of proposed rule change).

[11] *See* Securities Exchange Act Release No. 54136 (July 12, 2006), 71 FR 40759 (July 18, 2006) (File No. 4–517) (order approving and declaring effective the plan between the NASDAQ Exchange and NASD (n/k/a FINRA)).

[12] The proposed 17d–2 Plan refers to these common members as ''Dual Members.'' *See* Paragraph 1(c) of the proposed 17d–2 Plan.

[13] *See* paragraph 1(b) of the proposed 17d–2 Plan (defining Common Rules). *See also* paragraph 1(f) of the proposed 17d–2 Plan (defining Regulatory Responsibilities). Paragraph 2 of the Plan provides that annually, or more frequently as required by changes in either BX rules or FINRA rules, the parties shall review and update, if necessary, the list of Common Rules. Further, paragraph 3 of the Plan provides that BX shall furnish FINRA with a list of Dual Members, and shall update the list no less frequently than once each calendar quarter.

[14] *See* Securities Exchange Act Release No. 58806 (October 17, 2008), 73 FR 63216 (October 23, 2008) (File No. 4–566) (notice of filing and order approving and declaring effective the plan). The Certification identifies two Common Rules that may also be addressed in the context of regulating insider trading activities pursuant to the separate multiparty agreement.

[15] *See* paragraph 6 of the proposed 17d–2 Plan.

[16] *See* paragraph 2 of the proposed 17d–2 Plan.

[17] 15 U.S.C. 78q(d).

[18] 17 CFR 240.17d–2(c).

[19] The proposed new BX rules are based to a substantial extent on the rules of the NASDAQ Exchange which, in turn, are based to a substantial extent on the comparable rules of FINRA. The NASDAQ Exchange currently is party to a 17d–2 plan with FINRA. *See* Securities Exchange Act Release No. 54136 (July 12, 2006), 71 FR 40759 (July 18, 2006) (File No. 4–517) (order approving and declaring effective the plan between the NASDAQ Exchange and NASD (n/k/a FINRA)).

[20] *See* paragraph 2 of the proposed 17d–2 Plan.

FINRA will then confirm in writing whether the rules listed in any updated list are Common Rules as defined in the Plan. Under the Plan, BX will also provide FINRA with a current list of Dual Members and shall update the list no less frequently than once each quarter.[21] The Commission believes that these provisions are designed to provide for continuing communication between the Parties to ensure the continued accuracy of the scope of the proposed allocation of regulatory responsibility.

The Commission is hereby declaring effective a plan that, among other things, allocates regulatory responsibility to FINRA for the oversight and enforcement of all BX rules that are substantially similar to the rules of FINRA for Dual Members of BX and FINRA. Therefore, modifications to the Certification need not be filed with the Commission as an amendment to the Plan, provided that the Parties are only adding to, deleting from, or confirming changes to BX rules in the Certification in conformance with the definition of Common Rules provided in the Plan. However, should the Parties decide to add a BX rule to the Certification that is not substantially similar to a FINRA rule; delete a BX rule from the Certification that is substantially similar to a FINRA rule; or leave on the Certification a BX rule that is no longer substantially similar to a FINRA rule, then such a change would constitute an amendment to the Plan, which must be filed with the Commission pursuant to Rule 17d–2 under the Act and noticed for public comment.[22]

The Plan also permits BX and FINRA to terminate the Plan, subject to notice.[23] The Commission notes, however, that while the Plan permits the Parties to terminate the Plan, the Parties cannot by themselves reallocate the regulatory responsibilities set forth in the Plan, since Rule 17d–2 under the Act requires that any allocation or re-allocation of regulatory responsibilities be filed with the Commission.[24]

IV. Conclusion

This Order gives effect to the Plan filed with the Commission in File No. 4–575. The Parties shall notify all members affected by the Plan of their rights and obligations under the Plan.

It is therefore ordered, pursuant to Section 17(d) of the Act, that the Plan in File No. 4–575, between FINRA and BX, filed pursuant to Rule 17d–2 under the Act, is approved and declared effective.

It is further ordered that BX is relieved of those responsibilities allocated to FINRA under the Plan in File No. 4–575.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–613 Filed 1–13–09; 8:45 am]

BILLING CODE 8011–01–P

[21] *See* paragraph 3 of the proposed 17d–2 Plan.

[22] The Commission also notes that the addition to or deletion from the Certification of any federal securities laws, rules, and regulations for which FINRA would bear responsibility under the Plan for examining, and enforcing compliance by, Dual Members, also would constitute an amendment to the Plan.

[23] *See* paragraph 13 of the proposed 17d–2 Plan.

[24] The Commission notes that paragraph 13 of the Plan reflects the fact that FINRA's responsibilities under the Plan will continue in effect until the Commission approves any termination of the Plan.

[25] 17 CFR 200.30–3(a)(34).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59222; File No. SR–FINRA–2009–002]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Make Conforming Changes to FINRA Rules 6380B and 6730 To Reflect Amendments Proposed Pursuant to SR–FINRA–2008–060

January 8, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 8, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) (''FINRA'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to make conforming changes to Rules 6380B and 6730 to reflect amendments that were proposed pursuant to proposed rule change SR–FINRA–2008–060, but were superseded by an intervening rule change.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On December 11, 2008, FINRA filed proposed rule change SR–FINRA–2008–060 to amend FINRA rules to clarify the trade reporting requirements relating to transfers of securities pursuant to an asset purchase agreement (''APA''). In that filing, FINRA proposed to amend Rule 6380C(e) relating to trade reporting to the FINRA/NYSE Trade Reporting Facility (the ''FINRA/NYSE TRF'') and Rule 6730(e) relating to trade reporting to the Trade Reporting and Compliance Engine (''TRACE''). SR–FINRA–2008–060 was filed for immediate effectiveness with an operative date of January 12, 2009.[4]

On December 18, 2008, FINRA filed proposed rule change SR–FINRA–2008–065 to extend the pilot program in Rule 6730(e)(4). SR–FINRA–2008–065 was filed for immediate effectiveness with an operative date of January 8, 2009. The underlying text of SR–FINRA–2008–065 did not reflect the amendments to Rule 6730(e) that were proposed pursuant to SR–FINRA–2008–

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] See Securities Exchange Act Release No. 59126 (December 19, 2008), 73 FR 79948 (December 30, 2008) (notice of filing and immediate effectiveness of SR–FINRA–2008–060).

060, because those changes are not operative until January 12, 2009.[5]

On December 22, 2008, FINRA filed proposed rule change SR–FINRA–2008–066 to reflect the closing of the FINRA/NSX Trade Reporting Facility. As part of that proposed rule change, FINRA proposed to renumber the rules relating to the FINRA/NYSE TRF and Rule 6380C became Rule 6380B. SR–FINRA–2008–066 was filed for immediate effectiveness with an operative date of January 1, 2009. The underlying text of SR–FINRA–2008–066 did not reflect the amendments to Rule 6380C(e) that were proposed pursuant to SR–FINRA–2008–060, because those changes are not operative until January 12, 2009.[6]

Because of the timing of the aforementioned filings, the amendments to Rules 6380B(e) and 6730(e) that were proposed pursuant to SR–FINRA–2008–060 were effectively superseded. Accordingly, FINRA is proposing to make conforming changes to Rules 6380B(e) and 6730(e) to reflect the amendments that were proposed pursuant to SR–FINRA–2008–060, with no material changes to those amendments.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[7] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposed rule change will provide greater clarity to members and the public regarding FINRA's rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

[5] See SR–FINRA–2008–065, available at *http://www.finra.org/Industry/Regulation/RuleFilings/2008/P117571*.

[6] *See* Securities Exchange Act Release No. 59175 (December 30, 2008), 74 FR 840 (January 8, 2009) (notice of filing and immediate effectiveness of SR–FINRA–2008–066).

[7] 15 U.S.C. 78*o*–3(b)(6).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

FINRA represented that the proposed rule change qualifies for immediate effectiveness pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder[9] because it: (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.[10]

The Exchange has requested that the Commission waive the 30-day operative delay, so that the proposed rule change may become operative upon filing. The Commission hereby grants the Exchange's request.[11] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it makes only technical changes to FINRA's rules necessitated by an earlier rule change and thus should help avoid confusion among FINRA members and other market participants.

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–FINRA–2009–002 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–FINRA–2009–002. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2009–002 and should be submitted on or before February 4, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–610 Filed 1–13–09; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

[11] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59216; File No. SR–FINRA–2008–065]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend a TRACE Pilot Program

January 8, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 18, 2008, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) (''FINRA'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to extend the pilot program in FINRA Rule 6730(e)(4) (formerly NASD Rule 6230(e)(4)) to January 7, 2011, and incorporate a reference to current New York Stock Exchange (''NYSE'') Rule 86.[4] The pilot program exempts from reporting to Trade Reporting and Compliance Engine (''TRACE'') transactions in TRACE-eligible securities that are executed on a facility of the NYSE in accordance with NYSE Rules 1400 and 1401 and reported to NYSE in accordance with NYSE's applicable trade reporting rules and disseminated publicly by NYSE.

Below is the text of the proposed rule change. Proposed new language is in *italics;* proposed deletions are in brackets.

* * * * *

6700. TRADE REPORTING AND COMPLIANCE ENGINE (TRACE)

* * * * *

6730. Transaction Reporting

(a) through (d) No Change.

(e) Transactions Exempt From Reporting

The following types of transactions shall not be reported:

(1) through (3) No Change.

(4) [For the duration of a two-year pilot program, effective upon the later of either: (1) approval of this Rule by the SEC, or (2) execution by FINRA and the New York Stock Exchange (''NYSE'') of a data sharing agreement addressing data related to transactions covered by this Rule,]*Provided that a data sharing agreement between FINRA and NYSE related to transactions covered by this Rule remains in effect, for a pilot program expiring on January 7, 2011,* transactions in TRACE-eligible securities that are executed on a facility of NYSE in accordance with NYSE Rules 1400*,* [and]1401 *and 86* and reported to NYSE in accordance with NYSE's applicable trade reporting rules and disseminated publicly by NYSE.

(5) No Change.

(f) No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to SR–NASD–2006–110, FINRA amended FINRA Rule 6730(e) (then NASD Rule 6230(e)) to exempt from TRACE reporting requirements, for a pilot period of two years, transactions in TRACE-eligible securities that are executed on a facility of the NYSE in accordance with NYSE Rules 1400 and 1401, reported to NYSE in accordance with NYSE's applicable trade reporting rules and disseminated publicly by NYSE. The exemption did not take effect until FINRA and NYSE entered into a data sharing agreement addressing data related to the transactions covered by FINRA Rule 6730(e)(4) (then NASD Rule 6230(e)(4)). The Commission approved SR–NASD–2006–110 on an accelerated basis on November 16, 2006, and the two-year pilot period began on January 9, 2007. The pilot program is scheduled to expire on January 9, 2009.

FINRA is proposing to extend the pilot program for two years to continue to exempt members that execute transactions in TRACE-eligible securities on an NYSE facility (and as to which all the other conditions of the exemption are met) from the TRACE reporting requirements. The pilot will expire at 11:59:59 p.m. on January 7, 2011. FINRA believes that a two-year extension will provide additional time to analyze the impact of the exemption. Without the extension, members would be subject to both FINRA's and NYSE's trade reporting requirements with respect to these securities.

FINRA also proposes two technical changes to FINRA Rule 6730(e)(4). FINRA proposes to incorporate a reference to amended NYSE Rule 86 in FINRA Rule 6730(e)(4) to identify more clearly the scope of the pilot program. FINRA believes this is necessary because the NYSE recently established a new bond trading facility, which is not reflected in NYSE Rules 1400 or 1401 (i.e., the rules currently referenced in FINRA Rule 6730(e)(4)). Rather, NYSE Rule 1400, which addresses eligibility requirements for unlisted debt securities to be traded on the NYSE, refers to ABS, the bond trading facility that is no longer in existence.[5] FINRA's proposal

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] FINRA Rule 6730 became effective on December 15, 2008. *See Regulatory Notice* 08–57 (October 2008).

[5] On January 9, 2007, when FINRA Rule 6730(e)(4) (then NASD Rule 6230(e)(4)) became effective, the operation of NYSE's bond trading system, the ''Automated Bond System'' or ''ABS,'' was addressed in NYSE Rule 86 and identified by name in NYSE Rule 1400. In 2007, the NYSE replaced the ABS with a new bond trading facility, ''New York Bonds.'' NYSE Rule 86 was amended to reflect the name and operation of New York Bonds. However, NYSE Rule 1400 continues to refer to ABS and does not reflect the establishment of New York Bonds. *See* Securities Exchange Act Release No. 55496 (March 20, 2007); 72 FR 14631 (March 28, 2007) (SR–NYSE–2006–37) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of Proposed Rule Change, as Amended, Relating to the Establishment of NYSE Bonds). In addition, a bond trading facility, which is ''based on NYSE Bonds,'' was recently established by an affiliate of the NYSE, NYSE Alternext US LLC (''NYSE Alternext''). *See* Securities Exchange Act Release No. 58839 (October 23, 2008); 73 FR 64645 (October 30, 2008) (SR–NYSEALTR–2008–003) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Relocation of the Trading of Certain Debt Securities Conducted On or Through the

Continued

to reference NYSE Rule 86 in FINRA Rule 6730(e)(4) would clarify the scope of the pilot program currently in effect and proposed to be extended. The proposed rule change would not expand or otherwise change the pilot program.

Also, the proposed rule change would amend FINRA Rule 6730(e)(4) to restate the requirement that the exemption is predicated on the data agreement between FINRA and NYSE to share data related to the transactions covered by the Rule remaining in effect. The success of the pilot program remains dependent on FINRA's ability to effectively continue to conduct surveillance on corporate debt trading in the over-the-counter market.

The effective date of the proposed rule change will be January 8, 2009.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[6] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the extension of the exemptive provision protects investors and the public because transactions will be reported, price transparency will be maintained for these transactions, and NYSE's agreement to share data with FINRA allows FINRA to conduct surveillance in the corporate debt securities market.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

FINRA represented that the proposed rule change qualifies for immediate effectiveness pursuant to Section 19(b)(3)(A) of the Act [7] and Rule 19b–4(f)(6) thereunder [8] because it: (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.[9]

The Exchange has requested that the Commission waive the 30-day operative delay, so that the proposed rule change may become operative upon filing. The Commission hereby grants the Exchange's request and believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[10] This will allow the existing pilot program to continue without interruption and thereby eliminate duplicative transaction reporting obligations of broker-dealers engaging in transactions in TRACE-eligible debt securities on NYSE.

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–FINRA–2008–065 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–FINRA–2008–065. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2008–065 and should be submitted on or before February 4, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–612 Filed 1–13–09; 8:45 am]

BILLING CODE 8011–01–P

Exchange's Legacy Trading Systems and Facilities to an Automated Bond Trading Platform Based on NYSE Bonds). FINRA's proposed amendment makes explicit that the pilot program is intended to include transactions executed on a facility of NYSE in accordance with NYSE Rules 1400, 1401 and 86, but would not extend to any transactions executed on the NYSE Alternext bond trading facility.

[6] 15 U.S.C. 78*o*–3(b)(6).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

[10] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59214; File No. SR–NASDAQ–2008–096]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Accelerated Approval to a Proposed Rule Change Relating to the Generic Listing Standards for Index Multiple Exchange Traded Fund Shares and Index Inverse Exchange Traded Fund Shares

January 7, 2009.

I. Introduction

On December 9, 2008, The NASDAQ Stock Market LLC (''Nasdaq'') 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 permit Nasdaq to list and trade, or trade pursuant to unlisted trading privileges (''UTP''), shares of a series of Index Multiple Exchange Traded Fund Shares (''Multiple Fund Shares'') and Index Inverse Exchange Traded Fund Shares (''Inverse Fund Shares'') (collectively, the ''Fund Shares''). The proposed rule change was published in the **Federal Register** on December 22, 2008 for a 15-day comment period.[3] The Commission received no comments on the proposal. This order approves the proposed rule change on an accelerated basis.

II. Description of the Proposal

Nasdaq Rule 4420(j) provides standards for listing Index Fund Shares (''IFSs'') on the Exchange. Nasdaq proposes to revise Nasdaq Rule 4420(j)(1)(B)(iii) to allow the listing and trading of Multiple Fund Shares and Inverse Fund Shares that sought to provide investment results, before fees and expenses, in an amount not exceeding −300%, rather than −200%, of the underlying benchmark index pursuant to Rule 19b–4(e) under the Act,[4] where the other applicable generic listing standards for IFSs are satisfied. In connection with Inverse Funds that seek to provide investment results, before fees and expenses, in an amount that exceeds −300% of the underlying benchmark index, the Exchange's proposal would continue to require specific Commission approval pursuant to Section 19(b)(2) of the Act.[5] In particular, Nasdaq Rule 4420(j)(1)(B)(iii) would expressly prohibit Inverse Funds that seek to provide investment results, before fees and expenses, in an amount that exceeds −300% of the underlying benchmark index, from being approved by the Exchange for listing and trading pursuant to Rule 19b–4(e) under the Act.[6]

Additional information about the proposed rule change and IFSs, including applicable generic listing standards, limitation on leverage, availability of information about Fund Shares and underlying indexes, trading halts, suitability, and surveillance, among other things, is contained in the Notice.[7]

III. Discussion and Accelerated Approval

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with Section 6(b) of the Act [8] and the rules and regulations thereunder. Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act [9] which requires, among other things, that the rules of a national securities exchange be 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.[10]

The Commission believes that the Exchange's proposal reasonably balances the removal of impediments to a free and open market with the protection of investors and the public interest, two principles set forth in Section 6(b)(5) of the Act. The Commission notes that it has previously approved the listing and trading of various leveraged exchange-traded funds, including trading pursuant to unlisted trading privileges on the Exchange, that seek daily investment results, before fees and expenses, that correspond to twice the inverse or opposite of the daily performance (−200%) of the underlying index.[11] The Commission also notes that the proposed rule change is substantially similar to another exchange's generic listing requirements for Multiple Fund Shares and Inverse Fund Shares.[12] With respect to the listing and trading of a series of Inverse Fund Shares that seek to provide investment results that exceed −300% of the percentage performance of an underlying benchmark index, the Commission further notes that the Exchange would be required to obtain prior Commission approval pursuant to Section 19(b)(2) of the Act.

The Commission also notes that Fund Shares must comply with all of the applicable provisions under Nasdaq Rule 4420(j), as proposed to be amended as well as all other requirements applicable to IFSs including, without limitation, requirements relating to the dissemination of intraday indicative value, index value, disclosure of portfolio holdings, rules and policies governing the trading of equity securities, trading hours, trading halts, surveillance, firewalls, and Information Circulars to member and member organizations, as set forth in prior Commission orders approving the generic listing rules applicable to the listing and trading of IFSs.

The Commission further notes that the proposed rule change is reasonably designed to promote fair disclosure of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 59098 (December 12, 2008), 73 FR 78415 (''Notice'').

[4] 17 CFR 240.19b–4(e).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 240.19b–4(e).

[7] *See supra* note 3.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 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).

[11] *See, e.g.*, Securities Exchange Act Release Nos. 56713 (October 29, 2007), 72 FR 61915 (November 1, 2007) (SR–Amex–2007–74) (approving the listing and trading of Rydex Leveraged Funds, Inverse Funds and Leveraged Inverse Funds); 52553 (October 3, 2005), 70 FR 59100 (October 11, 2005) (SR–Amex–2004–62) (approving the listing and trading of the ProShares Ultra Funds and Short Funds); 54040 (June 23, 2006), 71 FR 37629 (June 30, 2006) (SR–Amex–2006–41) (approving the listing and trading of the ProShares UltraShort Funds); 55117 (January 17, 2007), 72 FR 3442 (January 25, 2007) (SR–Amex–2006–101) (approving the listing and trading of Ultra, Short and UltraShort Funds based on various indexes); 56592 (October 1, 2007), 72 FR 57364 (October 9, 2007) (SR–Amex–2007–60) (approving the listing and trading of ProShares Ultra, Short and UltraShort Funds based on various international indexes); and 56998 (December 19, 2007), 72 FR 73404 (December 27, 2007) (SR–Amex–2007–104) (approving the listing and trading of ProShares Ultra, Short and UltraShort Funds based on several fixed income indexes, among others). *See also, e.g.*, Securities Exchange Act Release Nos. 56763 (November 7, 2007), 72 FR 64103 (November 14, 2007) (SR–NYSEArca–2007–81) (approving UTP trading of shares of funds of Rydex ETF Trust); 56601 (October 2, 2007), 72 FR 57625 (October 10, 2007) (SR–NYSEArca–2007–79) (approving UTP trading of shares of eight funds of the ProShares Trust); 55125 (January 18, 2007), 72 FR 3462 (January 25, 2007) (SR–NYSEArca–2006–87) (approving UTP trading of shares of 81 funds of the ProShares Trust); and 54026 (June 21, 2006), 71 FR 36850 (June 28, 2006) (SR–PCX–2005–115) (approving UTP trading of shares of funds of the ProShares Trust).

[12] See Securities Exchange Act Release No. 58825 (October 21, 2008), 73 FR 63756 (October 27, 2008) (SR–NYSEArca–2008–89).

information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. Nasdaq Rule 4420(j)(1)(B)(iv) requires daily public Web site disclosure of its portfolio holdings including, as applicable, the identity and number of shares held of each specific equity security, the identity and amount held of each fixed income security, the specific types of Financial Instruments and characteristics of such instruments, and cash equivalents and the amount of cash held in the portfolio of a fund. With respect to such Financial Instruments, the Commission notes that a notification procedure will be implemented by the Exchange so that timely notice from the investment adviser of such Multiple or Inverse Fund is received by the Exchange when a particular Financial Instrument is in default or shortly to be in default. The Commission also notes that the Exchange would be required to halt trading if Nasdaq becomes aware that the NAV or the identities and quantities of the portfolio of securities and other assets with respect to a Fund Share is not disseminated to all market participants at the same time.

In addition, the Commission notes that the Exchange's suitability requirements would apply to the trading of Multiple Fund Shares and Inverse Fund Shares. Specifically, prior to commencement of trading, the Exchange will issue an Information Circular to its members and member organizations providing guidance with regard to member firm compliance responsibilities (including suitability obligations) when effecting transactions in the Fund Shares and highlighting the special risks and characteristics of Funds Shares as well as applicable Exchange rules.

In sum, the Commission believes that the Exchange's proposed amendments to Nasdaq Rule 4420(j) relating to the listing and trading of Multiple Fund Shares and Inverse Fund Shares should fulfill the intended objective of Rule 19b–4(e) under the Act by allowing such derivative securities products to be listed and traded without separate Commission approval. The Commission believes that the proposed rule change should facilitate the listing and trading of additional types of exchange-traded products and reduce the time frame for bringing these securities to market, thereby reducing the burdens on issuers and other market participants and promoting competition.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[13] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission notes that it has previously approved a substantially similar proposed rule change of another self-regulatory organization.[14] No comments were received on the proposed rule change during the 15-day comment period, and the Commission believes that the Exchange's proposal does not present any novel regulatory issues.

As such, the Commission believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for such products.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–NASDAQ–2008–096) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–611 Filed 1–13–09; 8:45 am]

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[13] 17 CFR 240.10A–3.

[14] *See supra* note 12.

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA 2008–0045]

Privacy Act of 1974, as Amended; Computer Matching Program (SSA/Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement (OCSE) Match Number 1074.

AGENCY: Social Security Administration (SSA).

ACTION: Notice of the renewal of an existing computer matching program scheduled to expire on March 12, 2009.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces the renewal of an existing computer matching program that SSA is currently conducting with HHS/ACF/OCSE.

DATES: SSA will file a report of the subject matching program with 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, Office of Management and Budget (OMB). The renewal of the matching program will be effective as indicated below.

ADDRESSES: Interested parties may comment on this notice by either telefaxing to (410) 965–0201 or writing to the Deputy Commissioner for Budget, Finance and Management, 800 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401. All comments received will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: The Deputy Commissioner for Budget, Finance and Management as shown above.

SUPPLEMENTARY INFORMATION:

A. General

The Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503), amended the Privacy Act (5 U.S.C. 552a) by describing the conditions under which computer matching involving the Federal government could be performed and adding certain protections for individuals applying for and receiving Federal benefits. Section 7201 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) further amended the Privacy Act regarding protections for such individuals.

The Privacy Act, as amended, regulates 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. It requires Federal agencies involved in computer matching programs to:

(1) Negotiate written agreements with the other agency or agencies participating in the matching programs;

(2) Obtain the approval of the matching agreement by the Data Integrity Boards (DIB) of the participating Federal agencies;

(3) Publish notice of the computer matching program in the **Federal Register**;

(4) Furnish detailed reports about matching programs to Congress and OMB;

(5) Notify applicants and beneficiaries that their records are subject to matching; and

(6) Verify match findings before reducing, suspending, terminating or denying an individual's benefits or payments.

B. SSA Computer Matches Subject to the Privacy Act

We have taken action to ensure that all of SSA's computer matching programs comply with the requirements of the Privacy Act, as amended.

Dated: January 7, 2009.

Mary Glenn-Croft,

Deputy Commissioner for Budget, Finance and Management.

Notice of Computer Matching Program, Social Security Administration (SSA) with the Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement (HHS/ACF/ OCSE).

A. Participating Agencies

SSA and OCSE.

B. Purpose of the Matching Program

The purpose of this agreement is to establish the conditions, terms, and safeguards under which OCSE agrees to the disclosure of quarterly wage, new hire, and unemployment insurance information to SSA. The matching program will assist SSA in establishing or verifying eligibility and/or payment amounts under the Supplemental Security Income (SSI) program, as authorized by the Social Security Act and by the Privacy Act.

C. Authority for Conducting the Matching Program

The legal authority for SSA to conduct this matching activity for SSI purposes is contained in sections 453(j)(4), 1631(e)(1)(B) and (f) of the Social Security Act, 42 U.S.C. 653(j)(4) and 1383(e)(1)(B) and (f), and 5 U.S.C. 552a(b)(3) and 552a(o), (p), (q), and (r).

D. Categories of Records and Individuals Covered by the Matching Program

1. Specified Data Elements Used in the Match

SSA will provide certain identifying information extracted from its Supplemental Security Record and Special Veterans Benefits (SSR) system of records to OCSE. OCSE and SSA will conduct a computerized comparison of the quarterly wage payment and unemployment insurance benefit information in the National Directory of New Hires of its Location and Collection System of records.

2. Systems of Records

OCSE will provide SSA electronic files containing quarterly wage and unemployment insurance information from its system of records, the Location and Collection System (HHS/OCSE, 09–90–0074) last published at 70 FR 21200 on April 25, 2005. Pursuant to U.S.C. 552a(b)(3), OCSE has established routine use to disclose the subject information.

SSA will match OCSE information with electronic files from its system of records, No. 60–0103, SSR (the Supplemental Security Record and Special Veterans Benefits) last published at 71 FR 1830 on January 11, 2006.

E. Inclusive Dates of the Matching Program

The matching program will become effective no sooner than 40 days after notice of the matching program is sent to Congress and the Office of Management and Budget, or 30 days after publication of this notice in the **Federal Register**, whichever date is later. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.

[FR Doc. E9–599 Filed 1–13–09; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending December 13, 2008

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2008–0378.

Date Filed: December 8, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 29, 2008.

Description: Application of Trans States Airlines, Inc. (''Trans States'') requesting that the Department (i) disclaim jurisdiction over a proposed corporate re-organization in which Trans States will be converted from a Missouri corporation to a Delaware limited liability company bearing the name Trans States Airlines, LLC, and shortly thereafter, transfer its certificate of public convenience and necessity, exemptions, designations, and any related operating authorities to Trans States Airlines, LLC, a Delaware Limited Liability Company, which will continue air carrier operations under the name of Trans States Airlines, LLC.

Docket Number: DOT–OST–2008–0379.

Date Filed: December 8, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 29, 2008.

Description: Application of SATA Internacional—Servicos E Transportes Aereos, S.A. (''SATA International'') requesting an amended foreign air carrier permit, incorporating all of the new rights made available to European Community carriers specifically, SATA Internacional seeks blanket open skies authority to enable it to engage in (i) Scheduled and charter foreign air transportation of persons, property and mail from any point or points behind any Member State of the European Union via any point or points in any Member State and via intermediate points to any point or points in the United States and beyond; (ii) scheduled and charter foreign air transportation of persons, property and mail between any point or points in any member of the European Common Aviation Area and any point or points in the United States; (iii) scheduled and charter all-cargo foreign air transportation between any point or points in the United States and any other point or points; (iv) other charters subject to the Department's regulations; and (v) transportation authorized by any additional route rights made available to European Community airlines in the future. SATA Internacional also requests exemption authority to the extent necessary to enable it to provide the services covered by this application while the Department evaluates SATA Internacional's application to amend its foreign air carrier permit.

Docket Number: DOT–OST–2008–0382.

Date Filed: December 9, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 30, 2008.

Description: Application of Travel Service, a.s. requesting an exemption authority and a foreign air carrier permit to conduct charter foreign air

transportation between the European Community and the Member States of the European Union and the United States, consistent with the U.S.-EU Air Transport Agreement.

Docket Number: DOT–OST–1998–3876.

Date Filed: December 11, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: January 2, 2009.

Description: Application of Shuttle America Corporation (''Shuttle America'') requesting an amendment of its certificate of public convenience and necessity to remove the restriction which currently limits Shuttle America's scheduled passenger authority using large aircraft to operations conducted under fee-for-service agreements with U.S. air carriers.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E9–696 Filed 1–13–09; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for certain steel products used in Federal-aid construction projects in Oregon and Washington.

DATES: The effective date of the waiver is January 15, 2009.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, *gerald.yakowenko@dot.gov.* For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, *michael.harkins@dot.gov.* Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register's** home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/ nara.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for two specific cases.

In accordance with section 130 of Division K of the ''Consolidated Appropriations Act, 2008'' (Pub. L. 110–161), the FHWA published on its Web site two notices of intent to issue Buy America waivers: (1) A waiver for 1'' diameter hollow-core threaded anchor rod in Oregon *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=23* on November 6, 2008, and (2) a waiver for CIPEC WP 250 Steel expansion joint system in Washington *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=22* on October 23, 2008. The FHWA received no comments in response to the 1″ diameter hollow-core threaded anchor rod which suggested that the 1″ diameter hollow-core threaded anchor rod may not be available domestically. Further investigation and inquiry revealed that the product is not available domestically. The FHWA received six comments in response to the CIPEC WP 250 Steel expansion joint system. The comments suggested that there are other alternative domestic joint systems available: Finger joint, Elastomeric strip seal joints, Modular expansion joints, and WaboFlex bolt-down panel joint. Washington State has used the WaboFlex in a number of projects, but discontinued using it over 10 years ago as a result of failure modes and poor performance that posed safety hazards to the travelling public. The Finger joint, Elastomeric, and modular expansion joints were disallowed due to subsequent failures and not meeting the specification of 9 inch tolerable movement range that would satisfy the American Association of State Highway and Transportation Officials loading requirements for high capacity high volume roadway system. During the 15-day comment period, the FHWA conducted additional nationwide review to locate potential domestic manufacturers for the products. Based on all the information available to the Agency, including the responses received to the notices as well as the Agency's nationwide review, the FHWA concludes that there are no domestic manufacturers for the 1″ diameter hollow-core threaded anchor rod and the CIPEC WP250 steel expansion joint system.

In accordance with the provisions of section 117 of the ''SAFETEA—LU Technical Corrections Act of 2008'' (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate pursuant to 23 CFR 635.410(c)(1). The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the links above to the Oregon and Washington waiver pages noted above.

(Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.)

Issued on: January 7, 2009.

Thomas J. Madison, Jr.,

Federal Highway Administrator.

[FR Doc. E9–557 Filed 1–13–09; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Utah

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by FHWA and Other Federal Agencies.

SUMMARY: This notice announces actions taken by the FHWA that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to the proposed Layton Interchange project in Davis County in the State of Utah. Those actions grant approvals for the highway project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the FHWA actions on the highway project will be barred unless the claim is filed on or before July 13, 2009. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Woolford, Project Manager, Federal Highway Administration, 2520 West 4700 South, Suite 9A, Salt Lake

City, Utah 84118; telephone: (801) 963–0182; e-mail: *Edward.Woolford@dot.gov.* The FHWA Utah Division Office's normal business hours are 7:45 a.m. to 4:15 p.m. (Mountain Standard Time). You may also contact Mr. Charles Mace, Utah Department of Transportation, 166 West Southwell Street, Ogden, Utah 84404–4194; telephone: (801) 620–1685.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA has taken final agency action subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the following highway project in the State of Utah:

Layton Interchange on Interstate 15 in Davis County, Utah. The project will include a new full interchange over Interstate 15 at milepost #330; a grade separated railroad overpass over the Union Pacific Railroad as part of the new interchange; a new five lane roadway from Fort Lane to Flint Street (750 South connection); removing the existing partial South Layton Interchange; and removing the existing at-grade railroad crossing at 900 South. The actions by the FHWA, and the laws under which such actions were taken, are described in the Final Environmental Impact Statement (FEIS) for the project, approved on September 24, 2008, in the FHWA Record of Decision (ROD) issued on December 24, 2008, and in other documents in the FHWA project files. The FEIS, ROD, and other project records are available by contacting the FHWA or the Utah Department of Transportation at the addresses provided above. The FHWA FEIS and ROD can be viewed and downloaded from the project Web site at *http://www.udot.utah.gov/laytoninterchange/* or viewed at public libraries in the project area.

This notice applies to all FHWA decisions as of the issuance date of this notice and all laws under which such actions were taken. Laws generally applicable to such actions include but are not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].
2. *Air:* Clean Air Act, 42 U.S.C. 7401–7671(q).
3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303];
4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].
5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].
6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].
7. *Wetlands and Water Resources:* Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 401, Section 319); Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601–4604; Safe Drinking Water Act (SDWA), 42 U.S.C. 300(f)–300(j)(6); Rivers and Harbors Act of 1899, 33 U.S.C. 401–406; Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287; Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931; TEA–21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(11); Flood Disaster Protection Act, 42 U.S.C. 4001–4128.
8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Issued on: January 5, 2009.

Bryan Cawley,

Acting Division Administrator, Salt Lake City.

[FR Doc. E9–566 Filed 1–13–09; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2009–0001–N–1]

Notice and Request for Comments

AGENGY: Federal Railroad Administration, DOT.

ACTION: Notice and Request For Comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Requirements (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICRs describe the nature of the information collections and their expected burdens. The **Federal Register** notice with a 60-day comment period soliciting comments on the following collections of information was published on November 3, 2008 (73 FR 65441).

DATES: Comments must be submitted on or before February 13, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493–6292), or Ms. Nakia Jackson, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6073). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, Section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR Part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On November 3, 2008, FRA published a 60-day notice in the **Federal Register** soliciting comment on ICRs that the agency was seeking OMB approval. 73 FR 65441. FRA received no comments after issuing this 60-day notice. Accordingly, DOT announces that these information collection activities have been re-evaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30 day notice is published. 44 U.S.C. 3507 (b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983,

Aug. 29, 1995. OMB believes that the 30 day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The revised requirements are being submitted for clearance by OMB as required by the PRA.

Title: Inspection and Maintenance Standards For Steam Locomotives.

OMB Control Number: 2130–0505.

Type of Request: Extension of a currently approved collection.

Affected Public: Railroads.

Abstract: The Locomotive Boiler Inspection Act (LBIA) of 1911 requires each railroad subject to the Act to file copies of its rules and instructions for the inspection of locomotives. The original LBIA was expanded to cover the entire steam locomotive and tender and all its parts and appurtenances. This Act then requires carriers to make inspections and to repair defects to ensure the safe operation of steam locomotives. The collection of information is used by tourist or historic railroads and by locomotive owners/operators to provide a record for each day a steam locomotive is placed in service, as well as a record that the required steam locomotive inspections are completed. Additionally, the collection of information is used by FRA Federal inspectors to verify that necessary safety inspections and tests have been completed, and to ensure that steam locomotives are indeed ''safe and suitable'' for service and are properly operated and maintained.

Annual Estimated Burden Hours: 314 hours.

Title: Identification of Cars Moved in Accordance with Order 13528.

OMB Control Number: 2130–0506.

Type of Request: Extension of a currently approved collection.

Affected Public: Railroads.

Abstract: This collection of information identifies a freight car being moved within the scope of Order 13528 (now codified under 49 CFR 232.3). Otherwise, an exception will be taken, and the car will be set out of the train and not delivered. The information that must be recorded is specified at 49 CFR 232.3(d)(3), which requires that a car be properly identified by a card attached to each side of the car and signed stating that such movement is being made under the authority of the order. § 232.3(d)(3) does not require retaining cards or tags. When a car bearing a tag for movement under this provision arrives at its destination, the tags are simply removed.

Annual Estimated Burden Hours: 67 hours.

Title: U.S. Locational Requirement for Dispatching U.S. Rail Operations.

OMB Control Number: 2130–0556.

Type of Request: Extension of a currently approved collection.

Affected Public: Railroads.

Abstract: Part 241 requires, in the absence of a waiver, that all dispatching of railroad operations that occurs in the United States be performed in this country, with a minor exception. A railroad is allowed to conduct extraterritorial dispatching from Mexico or Canada in emergency situations, but only for the duration of the emergency. A railroad relying on the exception must provide written notification of its action to the FRA Regional Administrator of each FRA region in which the railroad operation occurs; such notification is not required before addressing the emergency situation. The information collected under this rule is used as part of FRA's oversight function to ensure that extraterritorial dispatchers comply with applicable safety regulations.

Annual Estimated Burden Hours: 8 hours.

Addressee: Send comments regarding these information collections to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC 20503, Attention: FRA Desk Officer. Alternatively, comments may be sent via e-mail to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, at the following address: *oira_submissions@omb.eop.gov*.

Comments are invited on the following: Whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collections; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collections of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

Authority : 44 U.S.C. 3501–3520.

Issued in Washington, DC on January 9, 2009.

Kimberly Orben,

Director, Office of Financial Management, Federal Railroad Administration.

[FR Doc. E9–614 Filed 1–13–09; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Twin Cities and Western Railroad (Docket Number FRA–2008–0154); Canadian Pacific Railroad (Docket Number FRA–2008–0163); Escanaba and Lake Superior Railroad Company (Docket Number FRA–2008–0155)

The Twin Cities and Western Railroad (TC&W), Canadian Pacific Railroad (CP), and Escanaba and Lake Superior Railroad Company (E&LS), seek permanent waivers of compliance from certain provisions of the Railroad Safety Appliance Standards in Title 49 CFR Part 231, concerning RailMate® train operations over their systems. Specifically, TC&W, CP, and E&LS request relief from those sections of 49 CFR Part 231 that stipulate the number, location, and dimensions for handholds, ladders, sill steps, and uncoupling levers, and handbrakes. TC&W, CP and E&LS also seek relief from 49 CFR Part 231.31, which sets the standard height for drawbars.

TC&W, CP, and E&LS state that these waivers are necessary to permit them to begin operation of RailMate® equipment over various routes on their systems.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before

the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.*, Waiver Petition Docket Number FRA–2008–0154, 2008–0163, and/or 2008–0155) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Because of the similarity of the subject requests, FRA reserves the right to consider comments filed in any one of the three dockets with respect to the resolution of the request(s) in more than one docket, to the extent the comment is applicable to the particular request.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

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

Issued in Washington, DC on January 8, 2009.

Grady C. Cothen, Jr.

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E9–615 Filed 1–13–09; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted regarding: the passenger motor vehicle insurance companies and rental/leasing companies comply with 49 CFR Part 544, Insurer Reporting Requirement, has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on September 25, 2008 (73 FR 55591). The agency received no comments.

DATES: Comments must be submitted on or before February 13, 2009.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Departments' estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Carlita Ballard at the National Highway Traffic Safety Administration, Office of International Policy, Fuel Economy and Consumer Programs (NVS–131), 1200 New Jersey Ave., SE., West Building, Room W43–439, NVS–131, Washington, DC 20590. Ms. Ballard's telephone number is (202) 366–0846. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: 49 CFR Part 544; Insurer Reporting Requirement.

OMB Control Number: 2127–0547.

Type of Request: Request for public comment on a previously approved collection of information.

Abstract: This information collection supports the Department's strategic goal of Economic Growth and Trade. The Motor Vehicle Theft Law Enforcement Act of 1984, added Title VI to the Motor Vehicle and Information Cost Savings Act (recodified as Chapter 331 of Title 49, United States Code) which mandated this information collection. The 1984 Theft Act was amended by the Anti Car Theft Act (ACTA) of 1992 (Pub. L. 102–519). NHTSA is authorized under 49 U.S.C. 33112, to collect this information. This information collection supports the agency's economic growth and trade goal through rulemaking implementation developed to help reduce the cost of vehicle ownership by reducing the cost of comprehensive insurance coverage. 49 U.S.C. 33112 requires certain passenger motor vehicle insurance companies and rental/leasing companies to provide information to NHTSA on comprehensive insurance premiums, theft and recoveries and actions taken to address motor vehicle theft

Affected Public: Business or other for profit.

Estimated Total Annual Burden: Based on prior years' insurer compilation information, the agency estimates that the time to review and compile information for the reports will take approximately a total of 63,238 burden hours (60,004 man-hours for 28 insurance companies and 3,234 man-hours for 7 rental and leasing companies). Claim Adjusters incur separate burden hours from the number of insurers. There is one Claim Adjuster assigned to each insurer. There was a decrease in several rental and leasing companies that have merged into one entity or have been exempted from the reporting requirements since the last reporting period. The agency has re-estimated the burden hours to be 63,238 total annual hours requested in lieu of 64,610 as the current OMB inventory. This is a decrease of 1,372 hours. Most recent year insurer compilation information estimates reveal that it takes an average cost of $65.00 per hour for clerical and technical staff to prepare the annual reports. Therefore, the agency estimates the total cost associated with the burden hours is $4,110,470.

The burden hour for rental and leasing companies is significantly less than that for insurance companies because rental and leasing companies comply with fewer reporting requirements than the insurance companies. The reporting burden is based on insurers' salaries, clerical and technical expenses, and labor costs.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A Comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued on: January 8, 2009.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E9–565 Filed 1–13–09; 8:45 am]

BILLING CODE 4910–59–P

Federal Register

Wednesday,
January 14, 2009

Part II

Securities and Exchange Commission

17 CFR Parts 210, 211 et al.
Modernization of Oil and Gas Reporting; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 211, 229, and 249

[Release Nos. 33–8995; 34–59192; FR–78; File No. S7–15–08]

RIN 3235–AK00

Modernization of Oil and Gas Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; interpretation; request for comment on Paperwork Reduction Act burden estimates.

SUMMARY: The Commission is adopting revisions to its oil and gas reporting disclosures which exist in their current form in Regulation S–K and Regulation S–X under the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as Industry Guide 2. The revisions are intended to provide investors with a more meaningful and comprehensive understanding of oil and gas reserves, which should help investors evaluate the relative value of oil and gas companies. In the three decades that have passed since adoption of these disclosure items, there have been significant changes in the oil and gas industry. The amendments are designed to modernize and update the oil and gas disclosure requirements to align them with current practices and changes in technology. The amendments concurrently align the full cost accounting rules with the revised disclosures. The amendments also codify and revise Industry Guide 2 in Regulation S–K. In addition, they harmonize oil and gas disclosures by foreign private issuers with the disclosures for domestic issuers.

DATES: *Effective Date:* January 1, 2010.

Comment Date: Comments on the Paperwork Reduction Act Analysis should be received on or before February 13, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–15–08 on the subject line; or
- Use the Federal e-Rulemaking Portal *http://www.regulations.gov*. Follow the instructions for submitting comments.

Paper Comments

- Send paper submissions in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–15–08. This file number should be included on the subject line if e-mail is used. To help us 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/concept.shtml*). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Ray Be, Special Counsel, Office of Chief Counsel at (202) 551–3500; Dr. W. John Lee, Academic Petroleum Engineering Fellow, or Brad Skinner, Senior Assistant Chief Accountant, Office of Natural Resources and Food at (202) 551–3740; Leslie Overton, Associate Chief Accountant, Office of Chief Accountant for the Division of Corporation Finance at (202) 551–3400, Division of Corporation Finance; or Mark Mahar, Associate Chief Accountant, Jonathan Duersch, Assistant Chief Accountant, or Doug Parker, Professional Accounting Fellow, Office of the Chief Accountant at (202) 551–5300; U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Rule 4–10 [1] of Regulation S–X [2] and Items 102, 801 and 802 [3] of Regulation S–K.[4] We also are adding new Subpart 1200, including Items 1201 through 1208, to Regulation S–K.

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I. Introduction

A. Background

On June 26, 2008, the Commission issued a proposing release (Proposing Release) seeking public comment on proposed amendments to the disclosure requirements regarding oil and gas companies.[5] These proposals encompassed issues that were previously addressed more generally in a concept release that the Commission issued on December 12, 2007 (Concept Release),[6] which solicited comment on possible revisions to the oil and gas reserves disclosure requirements specified in Rule 4–10 of Regulation S–X[7] and Item 102 of Regulation S–K.[8] The Proposing Release also contained proposals not addressed by the Concept Release related to the updating and codification of Industry Guide 2.

We initially adopted our oil and gas disclosure requirements in 1978 and 1982.[9] Since that time, there have been significant changes in the oil and gas industry and markets, including technological advances, and changes in the types of projects in which oil and gas companies invest their capital.[10] Prior to our issuance of the Concept Release and the Proposing Release, many industry participants had expressed concern that our disclosure rules are no longer in alignment with current industry practices and therefore limit their usefulness to the market and investors.[11]

[5] Release No. 33–8935 (June 27, 2008) [73 FR 39181].

[6] Release No. 33–8870 (Dec. 12, 2007) [72 FR 71610].

[7] 17 CFR 210.4–10. See Release No. 33–6233 (Sept. 25, 1980) [45 FR 63660] (adopting amendments to Regulation S–X, including Rule 4–10). The precursor to Rule 4–10 was Rule 3–18 of Regulation S–X, which was adopted in 1978. See Accounting Series Release No. 253 (Aug. 31, 1978) [43 FR 40688]. See also Accounting Series Release No. 257 (Dec. 19, 1978) [43 FR 60404] (further amending Rule 3–18 of Regulation S–X and revising the definition of proved reserves).

[8] Item 102 of Regulation S–K [17 CFR 229.102]. In 1982, the Commission adopted Item 102 of Regulation S–K. Item 102 contains the disclosure requirements previously located in Item 2 of Regulation S–K. See Release No. 33–6383 (March 16, 1982) [47 FR 11380]. The Commission also ''recast * * * the disclosure requirements for oil and gas operations, formerly contained in Item 2(b) of Regulation S–K, as an industry guide.'' See Release No. 33–6384 (Mar. 16, 1982) [47 FR 11476].

[9] The disclosure requirements were introduced pursuant to a directive in the Energy Policy and Conservation Act of 1975 (the ''EPCA''). The EPCA directed the Commission to ''take such steps as may be necessary to assure the development and observance of accounting practices to be followed in the preparation of accounts by persons engaged, in whole or in part, in the production of crude oil or natural gas in the United States.'' See 42 U.S.C. 6201–6422.

[10] See, for example, Daniel Yergin and David Hobbs: ''The Search for Reasonable Certainty in Reserves Disclosure,'' Oil and Gas Journal (July 18, 2005).

[11] See, for example, Greg Courturier, ''Standard & Poor's Urges SEC to Change Disclosure Rules,'' International Oil Daily (Dec. 3, 2007); Steve Levine, ''Tracking the Numbers: Oil Firms Want SEC to Loosen Reserves Rules,'' Wall Street Journal Online (Feb. 7, 2006); Christopher Hope, ''Oil Majors Back Attack on SEC Rules,'' The Daily Telegraph (London) (Feb. 24, 2005); Barrie McKenna, ''Rules undervalue reserves report says: Volumes buried in Canada's oil sands not counted by SEC's measure,'' The Globe & Mail (Canada) (Feb. 24, 2005); and ''Deloitte Calls on Regulators to Update Rules for Oil and Gas Reserves Reporting,'' Business Wire Inc. (Feb. 9, 2005).

B. Issuance of the Concept Release

The Concept Release addressed the potential implications for the quality, accuracy and reliability of oil and gas disclosure if the Commission were to:

- Revise the definition of ''proved reserves'' in our rules, in particular, the criteria used to assess and quantify resources that can be classified as proved reserves; and
- Expand the categories of resources that may be disclosed in Commission filings to include resources other than proved reserves.

In addition, the Concept Release questioned whether our revised disclosure rules should be modeled on any particular resource classification framework currently being used within the oil and gas industry. We also asked how any revised disclosure rules could be made flexible enough to address future technological innovation and changes within the oil and gas industry. The Concept Release sought further comment on whether the Commission should require independent third-party assessments of reserves estimates that a company includes in its filings.

In response to the Concept Release, commenters submitted 80 comment letters.[12] We received comment letters from a variety of industry participants such as accounting firms, engineering consulting firms, domestic and foreign oil and gas companies, federal government agencies, individuals, law firms, professional associations, public interest groups, and rating agencies. We considered these comments and addressed many of them in issuing the Proposing Release.

C. Overview of the Comment Letters Received on the Proposing Release

The Proposing Release sought significantly more detailed comment on issues raised in the Concept Release, as well as proposed amendments to the disclosure items in our rules and Industry Guide 2. In response to the Proposing Release, we received 65 comment letters, again from a variety of constituents with interests in oil and gas industry disclosure.

[12] The public comments we received are available for inspection in the Commission's Public Reference Room at 100 F St., NE., Washington, DC 20549 in File No. S7–29–07. They are also available on-line at *http://www.sec.gov/comments/s7-29-07/s72907.shtml*.

Almost all commenters supported some form of revision to the current oil and gas disclosure requirements, particularly given the length of time that has elapsed since the requirements were initially adopted.[13] Commenters provided significantly more detailed comments on the Proposing Release than on the Concept Release, which did not include specific proposed regulatory text. We discuss those comments in detail in the relevant sections of this release. However, in general, commenters focused on several key issues raised by the Proposing Release. These issues included the following:

- The proposal to permit disclosure of probable and possible reserves;
- The proposed use of average historical prices to represent existing economic conditions to determine the economic producibility of oil and gas reserves for disclosure purposes while continuing to use a single day year-end price to determine the economic producibility of reserves for accounting purposes;
- The proposed inclusion of bitumen, oil shales, and other resources in the definition of ''oil and gas producing activities'';
- The proposed provision to broaden the types of technology that a company may use to establish reserves estimates and categories;
- The proposed change in the definition of proved undeveloped reserves to eliminate the ''certainty'' requirement; and
- The increased detail of disclosure that would be required as a result of our proposed definition of ''geographic location.''

II. Revisions and Additions to the Definition Section in Rule 4–10 of Regulation S–X

A. Introduction

The revisions and additions to the definition section in Rule 4–10(a) of Regulation S–X [14] update our reserves definitions to reflect changes in the oil and gas industry and markets and new technologies that have occurred in the decades since the current rules were adopted. Many of the definitions are designed to be consistent with the Petroleum Resource Management System (PRMS).[15] Among other things, the revisions to these definitions address four issues that have been of particular interest to companies, investors, and securities analysts:

- The use of single-day year-end pricing to determine the economic producibility of reserves;
- The exclusion of activities related to the extraction of bitumen and other ''non-traditional'' resources from the definition of oil and gas producing activities;
- The limitations regarding the types of technologies that an oil and gas company may rely upon to establish the levels of certainty required to classify reserves; and
- The limitation in the current rules that permits oil and gas companies to disclose only their proved reserves.

The revisions of, and additions to, the Rule 4–10 definitions attempt to address these issues without sacrificing clarity and comparability, which provide protection and transparency to investors. In addition, to the extent appropriate, we have revised our proposals so that the final definitions are more consistent with terms and definitions in the PRMS to improve compliance and understanding of our new rules.

B. Pricing Mechanism for Oil and Gas Reserves Estimation

1. 12-Month Average Price

The final rules define the term ''proved oil and gas reserves'' in part as ''those quantities of oil and gas, which, by analysis of geoscience and engineering data, can be estimated with reasonable certainty to be economically producible—from a given date forward, from known reservoirs, and under existing economic conditions, operating methods, and government regulations—prior to the time at which contracts providing the right to operate expire, unless evidence indicates that renewal is reasonably certain, regardless of whether deterministic or probabilistic methods are used for the estimation.'' The definition states that the economic producibility of a reservoir must be based on existing economic conditions. It specifies that, in calculating economic producibility, a company must use a 12-month average price, calculated as the unweighted arithmetic average of the first-day-of-the-month price for each month within the 12-month period prior to the end of the reporting period, unless prices are defined by contractual arrangements, excluding escalations based upon future conditions.[16]

Most commenters supported the use of a 12-month average price to serve as a proxy for existing economic conditions to determine the economic producibility of reserves.[17] Some noted that a 12-month average price is considered to reflect ''current economic conditions'' by PRMS.[18] They noted that the use of an average price would reduce the effects of short term volatility [19] and seasonality,[20] while

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[13] See letters from American Association of Petroleum Geologists (''AAPG''), American Clean Skies Foundation (''American Clean Skies''), American Petroleum Institute (''API''), AngloGold Ashanti Ltd. (''AngloGold''), Apache Corporation (''Apache''), BHP Billiton Petroleum (''BHP''), BP Plc. (''BP''), Brookwood Petroleum Advisors, Ltd. (''Brookwood''), Canadian Association of Petroleum Producers (''CAPP''), Canadian Natural Resources Ltd. (''Canadian Natural''), Center for Audit Quality (''CAQ''), Center for Corporate Policy (''CCP''), CFA Institute Centre for Financial Market Integrity (''CFA''), Chesapeake Energy Corporation (''Chesapeake''), Chevron Corporation (''Chevron''), Coeur d'Alene Mines Corporation (''Coeur''), Cunningham, Peter (''Cunningham''), Davis, Polk & Wardwell (''Davis Polk''), Deloitte & Touche (''Deloitte''), Devon Energy Corporation (''Devon''), EnCana Corporation (''EnCana''), Energen Corporation (''Energen''), Energy Information Administration (of DOE) (''EIA''), Eni S.p.A. (''Eni''), Equitable Resources, Inc. (''Equitable''), Ernst & Young (''E&Y''), Evolution Petroleum Corporation (''Evolution''), ExxonMobil Corporation (''ExxonMobil''), Federal Energy Regulatory Commission (''FERC''), Graff Consulting Group LLC (''Graff Consulting''), Grant Thornton (''Grant Thornton''), Imperial Oil Ltd. (''Imperial''), Independent Petroleum Association of America (''IPAA''), KPMG (''KPMG''), Luscher, Brian (''Luscher''), Magoto, Joseph (''Magoto''), McMoRan Exploration Co. (''McMoRan''), Newfield Exploration Company (''Newfield''), Nexen, Inc. (''Nexen''), Peabody Energy Corporation (''Peabody''), Petro-Canada (''Petro-Canada''), Petroleo Brasileiro S.A. (''Petrobras''), Petroleos Mexicanos (''PEMEX''), PRA International Ltd. (''PRA''), PriceWaterhouseCoopers (''PWC''), Questar Market Resources (''Questar''), RepsolYPF, S.A. (''Repsol''), Ross Petroleum Ltd. (''Ross''), Ryder Scott Company, L.P. (''Ryder Scott''), Sasol Ltd. (''Sasol''), Senator Robert Menendez, Senator Russell D. Feingold, and Senator Bernard Sanders, U.S. Senate (''Three Senators''), Shearman & Sterling (''Shearman & Sterling''), Shell International B.V. (''Shell''), Society of Exploration Geophysicists (''SEG''), Society of Petroleum Engineers (''SPE''), Society of Petroleum Evaluation Engineers (''SPEE''), Southwestern Energy Production Company (''Southwestern''), Standard Advantage (''Standard Advantage''), StatoilHydro (''StatoilHydro''), Swift Energy Company (''Swift''), Talisman Energy Inc. (''Talisman''), Total, S.A. (''Total''), van Wyk, Mike (''van Wyk''), Wagner, Robert (''Wagner''), Zakaib, Geoff (''Zakaib'').

[14] 17 CFR 210.4–10(a).

[15] The Petroleum Resources Management System is a widely accepted standard for the management of petroleum resources developed by several industry organizations. See Society of Petroleum Engineers, the World Petroleum Council, American Association of Petroleum Geologists, and the Society of Petroleum Evaluation Engineers, *Petroleum Resources Management System,* SPE/WPC/AAPG/SPEE (2007).

[16] See Rule 4–10(a)(22)(v) [17 CFR 210.4–10(a)(22)(v)].

[17] See letters from AngloGold, Apache, API, BHP, BP, Canadian Natural, CAPP, Chesapeake, Chevron, Devon, EIA, EnCana, Equitable, Evolution, ExxonMobil, Newfield, Nexen, Petrobras, Petro-Canada, PWC, Questar, Repsol, Ryder Scott, Sasol, Shell, Southwestern, SPE, Total, and Wagner.

[18] See letters from AngloGold, BHP, Equitable, Ryder Scott, and SPE.

[19] See letters from Apache, API, BHP, BP, Canadian Natural, CAPP, Chesapeake, EIA, EnCana, Equitable, Evolution, ExxonMobil, Imperial, IPAA, Newfield, Petrobras, Petro-Canada, Repsol, Ryder Scott, SPE, Total, and Wagner.

[20] See letters from Apache, Canadian Natural, Devon, EnCana, Evolution, IPAA, Petro-Canada, Repsol, and Ryder Scott.

maintaining comparability of disclosures among companies.[21]

Seven commenters recommended the use of first-of-the-month prices [22] instead of the proposed use of end-of-the-month prices because the use of first-of-the-month prices would provide companies with more time to estimate their reserves [23] and they thought that these prices better reflect the actual price received under typical natural gas contracts.[24] Conversely, six commenters recommended the use of a 12-month daily average price [25] because they thought that a daily average price would be more appropriate than a monthly average price. These commenters noted that oil sales contracts often are based on daily averages.[26] Two commenters expressed concern that end-of-the-month prices are not representative of actual prices because commodity traders often ''clear their books'' at the end of the month.[27]

One commenter opposed the use of average prices stating that, conceptually, the use of average prices is poor regulatory policy and may encourage the market to pressure standard setters to use historical average prices for financial instruments and other assets and liabilities associated with volatile markets.[28] It noted that volatility reflects the underlying economics of the oil and gas industry.[29]

The objective of reserves estimation is to provide the public with comparable information about volumes, not fair value, of a company's reserves available to enable investors to compare the business prospects of different companies. The use of a 12-month average historical price to determine the economic producibility of reserves quantities increases comparability between companies' oil and gas reserve disclosures, while mitigating any additional variability that a single-day price may have on reserve estimates. Although oil and gas prices themselves are subject to market-based volatility, the estimation of reserves quantities based on any historical price assumption determines those reserves quantities as if the oil or gas already has been produced, even though they have not, and these measures do not attempt to portray a reflection of their fair value. If the objective of reserve disclosures were to provide fair value information, we believe a pricing system that incorporates assumptions about estimated future market prices and costs related to extraction could be a more appropriate basis for estimation.

In order to provide disclosures which are more consistent with the objective of comparability, the amendments state that the existing economic conditions for determining the economic producibility of oil and gas reserves include the 12-month average price, calculated as the unweighted arithmetic average of the first-day-of-the-month price for each month within the 12-month period prior to the end of the reporting period.[30] For example, a company with a reporting year end of December 31 would determine its reserves estimates for its annual report based on the average of the prices for oil or gas on the first day of every month from January through December. Therefore, the use of a 12-month average price provides companies with the ability to efficiently prepare useful reserve information without sacrificing the objective of comparability. We believe that the revised definition of the term ''proved oil and gas reserves'' will provide investors with improved reserves information thereby enhancing their ability to analyze the disclosures.

2. Prices Used for Disclosure and Accounting Purposes

A proposal that resulted in significant comment was the use of a 12-month average price to estimate reserves for disclosure purposes, but a single-day, year-end price for accounting purposes.[31] All commenters addressing the issue of using different prices to determine reserves for disclosure and accounting opposed the proposal.[32] We are not adopting this aspect of the proposal. Instead, we are revising both our disclosure rules and our full-cost accounting rules related to oil and gas reserves to use a single price based on a 12-month average.[33] We also will continue to communicate with the FASB staff to align their accounting standards with these rules.

Commenters pointed out that the use of two different prices for disclosure and accounting purposes could:

- Confuse investors and other users of financial statements.[34]
- Create misleading information; [35]
- Harm comparability; [36]
- Decrease transparency; [37]
- Increase costs and burden significantly; [38]
- Increase the complexity of disclosures; [39]
- Double recordkeeping burden; [40]
- Require more disclosure to explain the differences in reserves estimates; and [41]
- Break the connection between disclosures and accounting.[42]

Some commenters noted that the disclosure and accounting rules and guidance do not use a different pricing method in other situations.[43] In addition, several commenters believed that changing to the use of an average price to estimate proved reserves would have a minimal impact on depreciation and net income.[44] We believe that changing the rules to use a 12-month average price in reserves estimations is

[21] See letters from BHP, Canadian Natural, CAPP, Deloitte, Devon, IPAA, Newfield, Petro-Canada, Total, and Wagner.

[22] See letters from Apache, BP, Chesapeake, Chevron, Devon, Repsol, and Shell.

[23] See letters from Chesapeake, Devon, and Shell.

[24] See letters from Apache, Newfield, and Repsol.

[25] See letters from Canadian Natural, CAPP, EnCana, Nexen, Petro-Canada, and Repsol.

[26] See letter from Newfield.

[27] See letters from Apache and Shell.

[28] See letter from CFA.

[29] See letter from CFA.

[30] See new Rule 4–10(a)(22)(v) of Regulation S–X [17 CFR 210.4–10(a)(22)(v)].

[31] Currently, companies use a single-day, year-end price to determine the quantity of its proved reserves. From an accounting perspective, the quantity of those reserves, while not included on the balance sheet, is used to determine the depreciation, depletion and amortization of certain capitalized costs included on the balance sheet. If the final rule retained a single-day, year-end price for determining reserves for accounting purposes (i.e. , for determining depreciation, depletion and amortization), then companies would effectively be required to calculate reserves twice, using two different pricing assumptions—once for disclosure purposes and once for accounting purposes. Similarly, under the full cost rules, the full cost ceiling test, as described in Section III of this release, would have similar implications.

[32] See letters from Apache, API, Audit Quality, BHP, BP, Canadian Natural, CAPP, CFA, Chesapeake, Chevron, Deloitte, Devon, E&Y, EnCana, Energen, Eni, Equitable, Evolution, ExxonMobil, Grant Thornton, Imperial, KPMG, McMoRan, Newfield, Nexen, PEMEX, Petrobras, Petro-Canada, PWC, Questar, Repsol, Ross, Ryder Scott, Sasol, Shell, Southwestern, SPEE, StatoilHydro, Swift, Talisman, Total, and Wagner.

[33] See Rule 4–10.

[34] See letters from Audit Quality, BHP, Canadian Natural, CAPP, Chesapeake, Deloitte, Devon, Evolution, ExxonMobil, Imperial, Newfield, Nexen, Petrobras, Petro-Canada, PWC, Questar, Repsol, Ryder Scott, Shell, Swift, Talisman, Total, and Wagner.

[35] See letters from BP, CFA, Devon, Eni, Nexen, Repsol, and Wagner.

[36] See letters from Apache, Canadian Natural, CAPP, Questar, StatoilHydro, and Wagner.

[37] See letters from Canadian Natural, CAPP, ExxonMobil, Shell, Swift, and Wagner.

[38] See letters from Apache, Audit Quality, BHP, Canadian Natural, CAPP, Chevron, Deloitte, Devon, Eni, Equitable, Evolution, ExxonMobil, Imperial, McMoRan, Newfield, Nexen, Petrobras, Questar, Petro-Canada, PWC, Ryder Scott, Shell, Swift, Total, and Wagner.

[39] See letters from CAPP, CFA, and Devon.

[40] See letters from Apache, Chesapeake, Eni, Equitable, and Imperial.

[41] See letters from CAPP, Devon, Eni, ExxonMobil, Imperial, and Wagner.

[42] See letters from Apache, Audit Quality, CAPP, CFA, Deloitte, E&Y, Energen, Eni, ExxonMobil, Imperial, KPMG, Newfield, PWC, Repsol, and Total.

[43] See letters from API, CAPP, and Shell.

[44] See letters from API, Canadian Natural, EnCana, ExxonMobil, and Total.

not inconsistent with the principles and objectives of financial reporting in authoritative accounting guidance.

With respect to accounting pronouncements that currently make reference to a single-day pricing regime with respect to oil and gas reserves, we are communicating with the FASB staff to align the standards used in its pronouncements with the 12-month average price used in our new rules, as several commenters recommended.[45] As discussed in more detail below, we are adopting a compliance date that will provide sufficient time to coordinate such activities with the FASB. However, as we discuss our revisions with the FASB, we will consider whether to delay the compliance date further.

3. Alternate Pricing Schemes

Some commenters on the Proposing Release believed that oil and gas futures prices, or management's forecast of future prices, would better represent the value of the reserves[46] and be better aligned with fair value of the reserves.[47] They indicated that management uses futures prices, not historical prices, in its planning and day-to-day decision making.[48] They suggested that the use of futures prices, combined with disclosure of how management made the estimates, would provide greater transparency[49] and comparability of disclosure.[50] One noted that historical prices have little to do with a company's future investments and values.[51] Another commenter noted that differentials can be calculated through established accounting procedures under SFAS 157.[52]

However, other commenters argued that futures prices are not available for all reserves locations[53] and that applying differentials to prices would require subjective estimates and reduce comparability among companies.[54] Two commenters noted that standard prices are not consistently available in some geographic regions.[55] Similarly, two commenters were concerned that futures price estimates would have to be accompanied by estimates of future costs, which they thought would be very subjective and not comparable for determining future economic conditions.[56] One commenter asserted that the use of future prices would require companies to document assumptions about future costs, or else the disclosure would be very inconsistent among reporting companies.[57] Three commenters believed that futures prices are more subject to market perceptions than market realities and are seldom used in actual physical trading of oil and gas.[58]

We share the concerns of many of these commenters that determinations of expected future prices could require significant estimations which could fall into a wide, albeit reasonable, range. For example, in many situations and parts of the world, natural gas is sold through longer term contracts where observable market inputs are not widely available. As a result, there could be less comparability among different companies depending on their assumptions, which are inherent in determining futures prices. Difference in assumptions between companies could reduce the comparability of reserves information between those companies.

We believe that the purpose of disclosing reserves estimates is to provide investors with information that is both meaningful and comparable. The reserves estimates in our disclosure rules, however, are not designed to be, nor are they intended to represent, an estimation of the fair market value of the reserves. Rather, the reserves disclosures are intended to provide investors with an indication of the relative quantity of reserves that is likely to be extracted in the future using a methodology that minimizes the use of non-reserves-specific variables. By eliminating assumptions underlying the pricing variable, as any historical pricing method would do, investors are able to compare reserves estimates where the differences are driven primarily by reserves-specific information, such as the location of the reserves and the grade of the underlying resource. We recognize that energy markets are continuing to develop. Therefore, we are not adopting a rule that requires companies to use futures prices to estimate reserves at this time.

4. Time Period Over Which the Average Price Is To Be Calculated

Numerous commenters on the Proposing Release recommended that the 12-month period used to calculate the average price for estimating reserves should not coincide with the fiscal year, as we proposed.[59] Most of these commenters recommended a 12-month period running from the beginning of the fourth quarter of the prior fiscal year through the end of the third quarter of the present fiscal year. For example, for a company with a fiscal year end of December 31, the relevant 12-month period would span from October 1 of the prior year to September 30 of the fiscal year covered by the annual report.[60] Several commenters suggested that we provide a two-month buffer between the end of the measurement period and the end of the company's fiscal year so that reserves estimates would be based on prices from November 1 through October 31 by a company with a fiscal year ending on December 31.[61] Commenters attributed the need for a buffer period to the accelerated filing dates for annual reports[62] and stated that they expected that the additional time would result in better, more accurate disclosure.[63] Others noted that some agreements, like production sharing contracts and other complex concession agreements, can make calculations difficult.[64] One commenter also noted that shifting the relevant measurement period so that it ends three-months prior to the fiscal-year end would align economic calculations with technical calculations, which typically occur at the end of the third quarter.[65]

As noted above, we have considered all of these recommendations. We are adopting a pricing formula based on the average of prices at the beginning of each month in the 12-month period prior to the end of the reporting period. A number of commenters believed that the use of first-of-the-month prices essentially would provide companies with one month more to prepare the reserves disclosures,[66] while still

[45] See letters from Apache, BHP, Canadian Natural, CAPP, CFA, Deloitte, McMoRan, Newfield, Nexen, Questar, Southwestern, Talisman, and Total.

[46] See letters from CFA, Deloitte, Grant Thornton, and McMoRan.

[47] See letters from CFA and Deloitte.

[48] See letters from CFA, Grant Thornton, and McMoRan.

[49] See letter from Deloitte.

[50] See letters from Deloitte and McMoRan.

[51] See letter from McMoRan.

[52] See letter from CFA.

[53] See letters from ExxonMobil and Wagner.

[54] See letters from EnCana, Evolution, ExxonMobil, Newfield, Ryder Scott, and Total.

[55] See letters from Ryder Scott and Total.

[56] See letters from SPE and Total.

[57] See letter from SPE.

[58] See letters from Evolution, Ryder Scott, and Wagner.

[59] See letters from Apache, API, BP, Canadian Natural, CAPP, EnCana, Eni, ExxonMobil, PEMEX, Petro-Canada, Repsol, Ryder Scott, Sasol, Shell, Total, van Wyk, and Wagner.

[60] See letters from Apache, API, BP, Canadian Natural, CAPP, Devon, Eni, ExxonMobil, PEMEX, Petro-Canada, Repsol, Ryder Scott, Sasol, Shell, Total, van Wyk, and Wagner.

[61] See letters from Canadian Natural, CAPP, Eni, Nexen, and Petro-Canada.

[62] See letters from API, Canadian Natural, CAPP, Devon, Evolution, PEMEX, Petrobras, Ryder Scott, Sasol, Shell, Total, and Wagner.

[63] See letters from Canadian Natural, CAPP, Nexen, Petrobras, Petro-Canada, Ryder Scott, Sasol, and Wagner.

[64] See letters from API and Shell.

[65] See letter from Shell.

[66] See letters from API, Devon, Eni, Evolution, ExxonMobil, PEMEX, Petrobras, PWC, Repsol, and Total.

aligning the time period with the fiscal year.[67] We agree with the commenters that such an average will provide companies more time to prepare more accurate disclosure, while still tying the pricing formula to the period covered by the annual report.

C. Extraction of Bitumen and Other Non-Traditional Resources

1. Definition of ''Oil and Gas Producing Activities''

Our current definition of ''oil and gas producing activities'' explicitly excludes sources of oil and gas from ''non-traditional'' or ''unconventional'' sources, that is, sources that involve extraction by means other than ''traditional'' oil and gas wells.[68] These other sources include bitumen extracted from oil sands, as well as oil and gas extracted from coal and shales, even though some of these resources are sometimes extracted through wells, as opposed to mining and surface processing. However, such sources are increasingly providing energy resources to the world due in part to advancements in extraction and processing technology.[69] Therefore, the rules we adopt today revise the definition of ''oil and gas producing activities'' to include such activities.[70]

All commenters on this issue supported including the extraction of unconventional resources as oil and gas producing activities.[71] They believed that such inclusion would greatly improve the quality and completeness of the disclosures.[72] Eight commenters noted that inclusion would better align disclosure with the way that companies view their operations.[73] Some noted that, although the distinction was reasonable decades ago when traditional resources dominated oil and gas production, the reality of today is that such unconventional resources are mainstream and companies invest significant amounts of capital to develop these resources.[74]

The revised definition of ''oil and gas producing activities'' that we adopt today includes the extraction of the non-traditional resources described above.[75] This amendment is intended to shift the focus of the definition of ''oil and gas producing activities'' to the final product of such activities, regardless of the extraction technology used. The amended definition states specifically that oil and gas producing activities include the extraction of saleable hydrocarbons, in the solid, liquid, or gaseous state, from oil sands, shale, coalbeds, or other nonrenewable natural resources which are intended to be upgraded into synthetic oil or gas, and activities undertaken with a view to such extraction.[76]

Currently, two types of natural resources pose a unique problem to establishing oil and gas reserves. Coal and, to a lesser degree, oil shale are used both as direct fuel and as feedstock to be converted into oil and gas. In response to our request for comment on how best to treat these resources, several commenters recommended that the extraction of coal [77] and oil shale [78] be categorized based on the final product. One commenter noted that investment decisions are based on the value and disposition of the final product.[79] We agree with these commenters and have revised the proposal to require a company to include coal and oil shale that is intended to be converted into oil and gas as oil and gas reserves. The adopted rules also, however, prohibit a company from including coal and oil shale that is not intended to be converted into oil and gas as oil and gas reserves.

2. Disclosure by Final Products

We proposed that disclosure of reserves would be organized based on the pre-processed resource extracted from the ground. For example, under the proposal, a company that extracted bitumen and processed that bitumen into synthetic crude oil in its own processing plant would have had to base its reserves disclosure on the amount of bitumen that was economically producible, not taking into account the economics of the processing plant. This proposal was consistent with our traditional separation of ''upstream'' activities such as drilling and producing oil and gas from ''downstream'' activities such as refining. Distinguishing between traditional resources and unconventional resources can be significant to investors because unconventional resources often involve significantly different economics and company resources than oil and gas from traditional wells.

Several commenters disagreed with our proposal, recommending that the determining factor should be the final product.[80] They believed that a company should be able to consider the prices of self-processed resources when estimating oil and gas reserves because the economics of the processing plant are critical to the registrant's evaluation of the economic producibility of the resources.[81] One commenter was concerned that distinguishing bitumen or other intermediate product from traditional oil and gas creates a false and misleading sense of comparability because producers that upgrade bitumen and sell synthetic crude do not face the same risks and rewards as do producers who sell the bitumen itself.[82]

We are persuaded by these commenters. However, we believe that the distinction between a company's traditional and unconventional activities is an important one from an investor's perspective because many of the unconventional activities are costlier and, therefore, have a much higher threshold of economic producibility. Therefore, we are revising the proposed table in Item 1202 to require separation of reserves based on final product, but distinguishing between final products that are traditional oil or gas from final products of synthetic oil or gas. We believe that with this separate disclosure, investors will be able to identify resources in projects that produce synthetic oil or gas that may be more sensitive to economic conditions from other resources.

In addition, as proposed, we are amending the definition of ''oil and gas producing activities'' to include activities relating to the processing or upgrading of natural resources from which synthetic oil or gas can be

[67] See letters from Devon and ExxonMobil.

[68] See Rule 4–10(a)(1)(ii)(D) [17 CFR 210.4–10(a)(1)(ii)(D)].

[69] Commenters noted that unconventional resources currently represent 45% of natural gas production in the U.S. See letters from American Clean Skies and IPAA.

[70] See Rule 4–10(a)(16) [17 CFR 210.4–10(a)(16)].

[71] See letters from American Clean Skies, Apache, API, Canadian Natural, CAPP, CAQ, CFA, Davis Polk, Devon, E&Y, EnCana, ExxonMobil, FERC, Imperial, IPAA, KPMG, Nexen, Petrobras, Petro-Canada, PRA, PWC, Repsol, Ryder Scott, Sasol, Shell, SPE, StatoilHydro, Talisman, Total, and Wagner.

[72] See letters from API, CAPP, CAQ, ExxonMobil, Imperial, PWC, Repsol, Ryder Scott, Total, and Wagner.

[73] See letters from API, CAQ, E&Y, ExxonMobil, Imperial, Petro-Canada, PWC, and Total.

[74] See letters from Imperial, IPAA, Repsol, and Total.

[75] See Rule 4–10(a)(16) [17 CFR 210.4–10(a)(16)].

[76] A hydrocarbon product is saleable if it is in a state in which it can be sold even if there is no ready market for that hydrocarbon product in the geographic location of the project. The absence of a market does not preclude the activity from being considered an oil and gas producing activity. However, in order to claim reserves for that hydrocarbon product from a particular location, there must be a market, or a reasonable expectation of a market, for that product.

[77] See letters from CAPP, ExxonMobil, Ryder Scott, Sasol, Shell, StatoilHydro, and Wagner.

[78] See letters from CAPP, ExxonMobil, Shell, StatoilHydro, and Wagner.

[79] See letter from ExxonMobil.

[80] See letters from Apache, Nexen, Petrobras, and Ryder Scott.

[81] See letters from Apache, CAQ, and Nexen.

[82] See letter from Nexen.

extracted. However, the definition would continue to exclude:

- Transporting, refining, processing (other than field processing of gas to extract liquid hydrocarbons by the company and the upgrading of natural resources extracted by the company other than oil or gas into synthetic oil or gas) or marketing oil and gas;
- The production of natural resources other than oil, gas, or natural resources from which synthetic oil and gas can be extracted; and
- The production of geothermal steam.

D. Proved Oil and Gas Reserves

We proposed to significantly revise the definition of ''proved oil and gas reserves.'' We are adopting that definition, substantially as proposed.[83] However, as noted above, we have decided to base the price used to establish economic producibility on the average price during the 12-month period prior to the ending date of the period covered by the report, determined as an unweighted arithmetic average of the first-day-of-the-month price for each month within such period.

One commenter recommended against using an average price to calculate existing economic conditions if the price is set by contractual arrangements.[84] We agree that under such circumstances, the appropriate price to use for establishing economic producibility is the price set by those contractual arrangements. Therefore, we have revised the definition to reflect that situation.[85]

The existing definition of the term ''proved oil and gas reserves'' incorporates certain specific concepts such as ''lowest known hydrocarbons'' which limit a company's ability to claim proved reserves in the absence of information on fluid contacts in a well penetration,[86] notwithstanding the existence of other engineering and geoscientific evidence.[87] We proposed revisions to the definition that would permit the use of new reliable technologies to establish the reasonable certainty of proved reserves. The proposed revisions to the definition of ''proved oil and gas reserves'' also included provisions for establishing levels of lowest known hydrocarbons and highest known oil through reliable technology other than well penetrations. We are adopting those revisions as proposed.

We also are adopting, as proposed, revisions that permit a company to claim proved reserves beyond those development spacing areas that are immediately adjacent to developed spacing areas if the company can establish with reasonable certainty that these reserves are economically producible.[88] These revisions are designed to permit the use of alternative technologies to establish proved reserves in lieu of requiring companies to use specific tests. In addition, they establish a uniform standard of reasonable certainty that applies to all proved reserves, regardless of location or distance from producing wells.

E. Reasonable Certainty

Both the existing definition of the term ''proved oil and gas reserves,'' and the definition of that term that we are adopting in this release, rely on the term ''reasonable certainty,'' which previously was not defined in Rule 4–10. In the Proposing Release, we proposed to define the term ''reasonable certainty'' as ''much more likely to be achieved than not'' to avoid ambiguity in that term's meaning. However, several commenters recommended that the rules mirror the PRMS definition more closely.[89] Four commenters were concerned that a different definition from the PRMS would cause confusion. They recommended using the PRMS standard of ''high degree of confidence that the quantities will be recovered.''[90] One commenter recommended that, because the proposed definition is new, the Commission should adopt a safe harbor, to avoid potential uncertainty until a court interprets the phrase.[91] But others believed that the proposed definition is consistent with the PRMS definition.[92] One commenter opined that the concept of estimated ultimate recovery (EUR) is appropriate to establish proved oil and gas reserves.[93]

We believe that the terms ''high degree of confidence'' from the PRMS and ''much more likely to be achieved than not'' in our proposal have the same meaning. Our proposed language was not intended to change the level of certainty required to establish reasonable certainty. However, we agree that the use of terminology that is consistent with the PRMS will assist in the understanding of those terms. Therefore, we are adopting the ''high degree of confidence'' standard that exists in the PRMS. We also are clarifying that having a ''high degree of confidence'' means that a quantity is ''much more likely to be achieved than not, and, as changes due to increased availability of geoscience (geological, geophysical, and geochemical), engineering, and economic data are made to estimated ultimate recovery (EUR) with time, reasonably certain EUR is much more likely to increase or remain constant than to decrease'' to provide elaboration to the definition of reasonable certainty.

We are adopting a definition of ''reasonable certainty'' that addresses, and permits the use of, both deterministic methods and probabilistic methods for estimating reserves, as proposed. Nine commenters supported permitting the use of either deterministic methods or probabilistic methods.[94] One commenter believed that each method may be more appropriate for different situations.[95] Other commenters also supported the proposed alignment of the definitions of those terms with the definitions in the PRMS definitions.[96] The definition that we are adopting states that, if deterministic methods are used, reasonable certainty means a high degree of confidence that the quantities will be recovered.[97] Consistent with the PRMS definition, if probabilistic methods are used, there should be at least a 90% probability that the quantities actually recovered will equal or exceed the estimate.

F. Developed and Undeveloped Oil and Gas Reserves

We proposed to revise the definitions of the terms ''proved developed oil and gas reserves'' and ''proved undeveloped oil and gas reserves.'' One commenter noted that the terms ''developed'' and ''undeveloped'' are not restricted to proved oil and gas reserves, but could apply to all classifications of reserves, including probable and possible reserves.[98] We agree with that

[83] See Rule 4–10(a)(22) [17 CFR 210.4–10(a)(22)].

[84] See letter from SPE.

[85] See Rule 4–10(a)(22)(v) [17 CFR 210.4–10(a)(22)(v)].

[86] In certain circumstances, a well may not penetrate the area at which the oil makes contact with water. In these cases, the company would not have information on the fluid contact and must use other means to estimate the lower boundary depths for the reservoir in which oil is located.

[87] See previous Rule 4–10(a)(2)(i) [17 CFR 210.4–10(a)(2)(i)].

[88] See Rule 4–10(a)(22) [17 CFR 210.4–10(a)(22)]. See Section II.G for a more detailed discussion regarding this provision.

[89] See letters from EIA, ExxonMobil, and Zakaib.

[90] See letters from Apache, EIA, Energen, and SPE.

[91] See letter from Evolution.

[92] See letters from EnCana, ExxonMobil, Petrobras, and Ryder Scott.

[93] Total.

[94] See letters from Apache, Devon, Evolution, Petro-Canada, Ryder Scott, Shell, SPE, Total, and Wagner.

[95] See letter from Wagner.

[96] See letters from AAPG, SPE, and Southwestern.

[97] See Rule 4–10(a)(24) [17 CFR 210.4–10(a)(24)].

[98] See letter from SPE. We note that with respect to oil and gas reserves, the term ''classification'' is

commenter. Although the development of a prospect may provide the company with more information and data to determine reserves amounts more accurately, companies may estimate proved, probable, and possible volumes regardless of the development stage. In the past, these terms were linked to the concept of proved reserves because our disclosure rules permitted the disclosure only of proved reserves. In light of our revision to allow disclosure of probable and possible reserves, the final rules define the terms ''developed oil and gas reserves'' and ''undeveloped oil and gas reserves'' to indicate that the development status of the reserves is relevant to all classifications of oil and gas reserves.[99]

1. Developed Oil and Gas Reserves

Other than the change discussed above to eliminate ''proved'' from the term being defined, we are adopting a definition of ''developed oil and gas reserves'' substantially as proposed. We proposed to define the term ''proved developed oil and gas reserves'' as proved reserves that:

- In projects that extract oil and gas through wells, can be expected to be recovered through existing wells with existing equipment and operating methods; and
- In projects that extract oil and gas in other ways, can be expected to be recovered through extraction technology installed and operational at the time of the reserves estimate.

Two commenters suggested that, consistent with the PRMS, reserves should be considered developed if the cost of any required equipment is relatively minor compared to the cost of a new well or the installed equipment.[100] Again, we agree that consistency with PRMS would improve compliance with our rules. In addition, such a revision is consistent with our existing definition of the term ''proved undeveloped reserves'' which includes reserves on which a well exists, but a relatively ''major'' expenditure is required for recompletion.[101] Therefore, the final rules provide that reserves also are developed if the cost of any required equipment is relatively minor compared to the cost of a new well.[102]

used to indicate the level of certainty that estimated amounts will be recovered. Thus, although the terms ''developed'' and ''undeveloped'' may be considered means in which to generically ''classify'' reserves, for clarity, we use that term to be consistent with industry usage.

[99] See Rules 4–10(a)(6) and (31) [17 CFR 210.4–10(a)(6) and (31)].

[100] See letters from SPE and Total.

[101] See previous Rule 4–10(a)(4) [17 CFR 210.4–10(a)(4)].

[102] See Rule 4–10(a)(6) [17 CFR 210.4–10(a)(6)].

2. Undeveloped Oil and Gas Reserves

In the Proposing Release, we proposed a significantly revised definition of the term ''proved undeveloped oil and gas reserves.'' The most significant aspect of the proposed revision was the replacement of the existing ''certainty'' test for areas beyond one offsetting drilling unit [103] from a productive well with a ''reasonable certainty'' test. Currently, the definition of the term ''proved undeveloped reserves'' imposes a ''reasonable certainty'' standard for reserves in drilling units immediately adjacent to the drilling unit containing a producing well and a ''certainty'' standard for reserves in drilling units beyond the immediately adjacent drilling units.[104] All commenters on this issue supported the proposal.[105] Three commenters noted that a single standard-reasonable certainty-should apply to all proved reserves.[106] We are adopting this aspect of the definition as proposed.

Many commenters opposed the proposed language that would have imposed a five-year limit on maintaining undeveloped reserves unless ''unusual'' circumstances existed.[107] They asserted that large projects, projects in remote areas, and projects in continuous accumulations, such as oil sands, typically take more than five years to develop, but they do not view such projects as ''unusual.'' [108] One commenter noted that the proposed rule is not consistent with the PRMS, which uses the term ''specific circumstances,'' rather than ''unusual circumstances.'' [109] Other commenters suggested that we require the company to explain why it has not developed any undeveloped reserves for more than five years.[110] The intent of the proposal was not to exclude projects that typically take more than five years to develop from being considered reserves. We agree that the rule should allow the recognition of reserves in projects that are expected to run more than five years, regardless of whether ''unusual'' circumstances exist. Therefore, we have revised the rule to replace the term ''unusual'' with the term ''specific.'' [111] We note that, as proposed, Item 1203 of Regulation S–K would require disclosure regarding why such undeveloped reserves have not been developed.[112]

We also proposed to broaden the definition of the term ''proved undeveloped reserves'' to permit a company to include, in its undeveloped reserves estimates, quantities of oil that can be recovered through improved recovery projects and to expand the technologies that a company can use to establish reserves. Under the existing definition, a company can include such quantities only if techniques have been proved effective by actual production from projects in the area and in the same reservoir. As proposed, we are expanding this definition of the term ''undeveloped oil and gas reserves'' to permit the use of techniques that have been proved effective by actual production from projects in the same reservoir or an analogous reservoir or ''by other evidence using reliable technology that establishes reasonable certainty.'' [113]

We also are making other, less substantive revisions to the definition of ''undeveloped oil and gas reserves.'' First, commenters suggested that we use the term ''development spacing'' [114] or ''drainage areas'' [115] instead of ''drilling units'' because the term ''drilling units'' is only relevant in jurisdictions that establish such units. They noted that many foreign jurisdictions do not establish such units. We concur with those commenters and have replaced the term ''drilling units'' with the term ''development spacing areas.''

One commenter also noted that the PRMS guidance on the use of analogs for improved recovery projects does not limit such use to ''within the immediate area'' and recommended that we delete this phrase from the definition.[116] Again, we agree that consistency with PRMS would be beneficial in this instance and have deleted that phrase

[103] As noted later in this section of the release, we are replacing the term ''drilling unit'' with the term ''development spacing area'' in the final rules. However, for purposes of discussing the proposal and the existing rules, we continue to use the term ''drilling unit'' because that is the term used in the proposal and the existing rules.

[104] See previous Rule 4–10(a)(4) [17 CFR 210.4–10(a)(4)]. A drilling unit refers to the spacing between wells required by some local jurisdictions to prevent wasting resources and optimize recovery.

[105] See letters from American Clean Skies, Apache, API, Canadian Natural, CAPP, Chesapeake, Devon, Evolution, ExxonMobil, McMoRan, Petro-Canada, Questar, Repsol, Southwestern, Shell, SPE, Total, and Wagner.

[106] See letters from Devon, EnCana, and Equitable.

[107] See letters from American Clean Skies, Apache, CAPP, Chesapeake, EnCana, ExxonMobil, Luscher, Newfield, Nexen, Petrobras, Petro-Canada, Ryder Scott, Shell, SPE, and Total.

[108] See letters from American Clean Skies, CAPP, Chesapeake, EnCana, ExxonMobil, Newfield, Nexen, Petrobras, Petro-Canada, Ryder Scott, Shell, and Total.

[109] See letter from SPE.

[110] See letters from Devon, Ryder Scott, and Wagner.

[111] See Rule 4–10(a)(31) [17 CFR 210.4–10(a)(31)].

[112] See Item 1203(d) [17 CFR 229.1203(d)].

[113] See Rule 4–10(a)(31) [17 CFR 210.4–10(a)(31)].

[114] See letter from Total.

[115] See letter from SPE.

[116] See letter from SPE.

from the definition. We also have eliminated two paragraphs of the proposed definition because they were largely repetitive of other aspects of the definition and were unnecessary.[117]

G. Reliable Technology

1. Definition of the Term ''Reliable Technology''

We are adopting, substantially as proposed, a new definition of ''reliable technology'' that would broaden the types of technologies that a company may use to establish reserves estimates and categories. All commenters on this topic supported the proposed principles-based definition for reliable technology.[118]

The current rules limit the use of alternative technologies as the basis for determining a company's reserves disclosures. For example, under the current rules, a company must use actual production or flow tests to meet the ''reasonable certainty'' standard necessary to establish the proved status of its reserves.[119] Similarly, the current rules provide bright line tests for determining fluid contacts, such as lowest known hydrocarbons and highest known oil, which establish the volume of the hydrocarbons in place.

We recognize that technologies have developed, and will continue to develop, improving the quality of information that can be obtained from existing tests and creating entirely new tests that we cannot yet envision. Thus, the new definition of the term ''reliable technology'' permits the use of technology (including computational methods) that has been field tested and has demonstrated consistency and repeatability in the formation being evaluated or in an analogous formation. This new standard will permit the use of a new technology or a combination of technologies once a company can establish and document the reliability of that technology or combination of technologies.

We are adopting certain revisions to our proposed definition of the term ''reliable technology.'' The proposal also would have required reliable technology to be ''widely accepted.'' However, some commenters were concerned that this requirement would exclude proprietary technologies that companies develop internally that have proven to be reliable.[120] We concur with these commenters and have removed the ''widely accepted'' requirement from the final rule.

We also proposed to define the term ''reliable technology,'' expressed in probabilistic terms, as technology that has been proven empirically to lead to correct conclusions in 90% or more of its applications. Several commenters expressed concern that this proposed 90% threshold would be difficult to verify and support on an ongoing basis.[121] We agree that a bright line test would be difficult to apply to a particular technology or mix of technologies to determine their reliability. Therefore, we are not adopting the 90% threshold as part of the definition.

2. Disclosure of Technologies Used

The proposal would have required a company to disclose the technology used to establish reserves estimates and categories for material properties in a company's first filing with the Commission and for material additions to reserves estimates in subsequent filings because, under the proposal, a company would be able to select the technology or mix of technologies that it uses to establish reserves. Two commenters supported the proposal because they believed that disclosure of the technologies used is reasonable if the definition of ''reliable technology'' is principles-based.[122] However, many other commenters were concerned that the proposed requirement to disclose the technologies used to establish levels of certainty for reserves estimates would lead to very complex, technical disclosures that would have little meaning to investors.[123] Others were concerned that disclosure of the technology, or the mix of technologies, might cause competitive harm.[124]

As an alternative, some commenters recommended that the rule require a more general overview of the technologies used.[125] We are clarifying that the required disclosure would be limited to a concise summary of the technology or technologies used to create the estimate.[126] A company would not be required to disclose proprietary technologies, or a proprietary mix of technologies, at a level of specificity that would cause competitive harm. Rather, the disclosure may be more general. For example, a company may disclose that it used a combination of seismic data and interpretation, wireline formation tests, geophysical logs, and core data to calculate the reserves estimate. As noted, however, the Commission's staff, as part of the review and comment process, may continue to request companies to provide supplemental data, consistent with current practice,[127] which, under the new rules, may include information sufficient to support a company's conclusion that a technology or mix of technologies used to establish reserves meets the definition of ''reliable technology.''

Two commenters supported the proposal to limit the disclosures to technologies used to establish reserves in a company's first filing with the Commission and material additions to reserves.[128] We are adopting this limitation as proposed.[129] If the company has not previously disclosed reserves estimates in a filing with the Commission or is disclosing material additions to its reserves estimates, the company must disclose the technologies used to establish the appropriate level of certainty for reserves estimates from material properties included in the total reserves disclosed and the particular properties do not need to be identified. We believe that requiring such disclosure when reserves, or material additions to reserves, are reported for the first time will discourage the use of questionable technologies to establish reserves. However, we do not believe it is necessary to require a company to disclose the technology or technologies

[117] These paragraphs would have clarified (1) in a conventional accumulation, offsetting productive units must lie within an area in which economic producibility has been established by reliable technology to be reasonably certain and (2) proved reserves can be claimed in a conventional or continuous accumulation in a given area in which engineering, geoscience, and economic data, including actual drilling statistics in the area, and reliable technology show that, with reasonable certainty, economic producibility exists beyond immediately offsetting drilling units. We do not believe that these statements, based on the terms ''conventional accumulation'' and ''continuous accumulation'' which are no longer being defined continue to serve a helpful purpose. See Section II.J.5 of this release.

[118] See letters from AAPG, American Clean Skies, Apache, CFA, Davis Polk, Devon, EnCana, ExxonMobil, Petrobras, Ryder Scott, Sasol, Shell, SPE, Southwestern, and Wagner.

[119] However, in the past, the Commission's staff has recognized that flow tests can be impractical in certain areas, such as the Gulf of Mexico, where environmental restrictions effectively prohibit these types of tests. The staff has not objected to disclosure of reserves estimates for these restricted areas using alternative technologies.

[120] See letters from Chesapeake, ExxonMobil, Shell, and Total.

[121] See letters from AAPG, Apache, EIA, Evolution, Ryder Scott, Shell, SPE, and Wagner.

[122] See letters from Davis Polk and Sasol.

[123] See letters from API, Devon, Eni, ExxonMobil, PEMEX, Petro-Canada, Questar, Repsol, Ryder Scott, Shell, Southwestern, StatoilHydro, and Total.

[124] See letters from API, Devon, Evolution, ExxonMobil, Ryder Scott, StatoilHydro, and Total.

[125] See letters from EnCana, Eni, Evolution, Ryder Scott, and Shell.

[126] See Item 1202(a)(6) [17 CFR 229.1202(a)(6)].

[127] Currently, the Commission's staff requests supplemental data pursuant to Instruction 4 to Item 102 of Regulation S–K [17 CFR 229.102], Rule 418 [17 CFR 230.418], and Rule 12b–4 [17 CFR 240.12b–4]

[128] See letters from Southwestern and Wagner.

[129] See Item 1202(a)(6) [17 CFR 229.1202(a)(6)].

relied upon to establish reserves previously disclosed under our rules because the permitted technologies have been limited to those permitted by our existing rule. In addition, we believe that ongoing disclosure of the technologies used to establish all of a company's reserves would become unnecessarily cumbersome.

H. Unproved Reserves—''Probable Reserves'' and ''Possible Reserves''

As discussed more fully in Section IV.B.3 of this release addressing the disclosure requirements of new Subpart 1200, we are adopting the proposal to permit disclosure of probable and possible reserves. Therefore, we are adopting the proposed definitions of the terms ''probable reserves'' and ''possible reserves'' as proposed.

When producing an estimate of the amount of oil and gas that is recoverable from a particular reservoir, a company can make three types of estimates:

- An estimate that is reasonably certain;
- An estimate that is as likely as not to be achieved; and
- An estimate that might be achieved, but only under more favorable circumstances than are likely.

These three types of estimates are known in the industry as (1) proved, (2) proved plus probable, and (3) proved plus probable plus possible reserves estimates.

1. Probable Reserves

We are adopting the definition of the term ''probable reserves'' as proposed. It states that ''probable reserves'' are those additional reserves that are less certain to be recovered than proved reserves but which, in sum with proved reserves, are as likely as not to be recovered.[130] This definition provides guidance for the use of both deterministic and probabilistic methods. The definition clarifies that, when deterministic methods are used, it is as likely as not that actual remaining quantities recovered will equal or exceed the sum of estimated proved plus probable reserves. Similarly, when probabilistic methods are used, there must be at least a 50% probability that the actual quantities recovered will equal or exceed the proved plus probable reserves estimates. This definition was derived from the PRMS definition of the term ''probable reserves.'' Several commenters agreed with the proposed definition of this term, noting that it is roughly consistent with PRMS.[131]

2. Possible Reserves

We also are adopting the definition of the term ''possible reserves'' as proposed. The new definition states that possible reserves include those additional reserves that are less certain to be recovered than probable reserves.[132] It clarifies that, when deterministic methods are used, the total quantities ultimately recovered from a project have a low probability to exceed the sum of proved, probable, and possible reserves. When probabilistic methods are used, there must be at least a 10% probability that the actual quantities recovered will equal or exceed the sum of proved, probable, and possible estimates. Several commenters noted that our proposed definition of the term ''possible reserves'' was consistent with PRMS, which also uses a 10% threshold.[133] One commenter recommended that the threshold for ''possible reserves'' should be a 25% likelihood of recovery because that percentage would be more meaningful than 10%.[134] We believe that a definition consistent with the PRMS will provide the most certainty and clarity for companies and investors.

I. Reserves

We proposed to add a definition of the term ''reserves'' to our rules. The proposed definition would have described the criteria that an accumulation of oil, gas, or related substances must satisfy to be considered reserves (of any classification), including non-technical criteria such as legal rights. Specifically, we proposed to define reserves as the estimated remaining quantities of oil and gas and related substances anticipated to be recoverable, as of a given date, by application of development projects to known accumulations based on:

- Analysis of geoscience and engineering data;
- The use of reliable technology;
- The legal right to produce;
- Installed means of delivering the oil, gas, or related substances to markets, or the permits, financing, and the appropriate level of certainty (reasonable certainty, as likely as not, or possible but unlikely) to do so; and
- Economic producibility at current prices and costs.

The proposed definition also would have clarified that reserves are classified as proved, probable, and possible according to the degree of uncertainty associated with the estimates. We are not adopting the definition as proposed. Four commenters recommended clarification that the term ''legal right to produce'' extends beyond the initial term of an oil and gas concession if there is a reasonable expectation that the concession will be renewed, consistent with the PRMS and current staff position.[135] We are adopting a definition of the term ''reserves'' that more closely parallels the PRMS definition of that term.

Our final rules define the term ''reserves'' as the estimated remaining quantities of oil and gas and related substances anticipated to be economically producible, as of a given date, by application of development projects to known accumulations.[136] In addition, there must exist, or there must be a reasonable expectation that there will exist, the legal right to produce or a revenue interest in the production of oil and gas, installed means of delivering oil and gas or related substances to market, and all permits and financing required to implement the project.

A note to the definition clarifies that reserves should not be assigned to adjacent reservoirs isolated by major, potentially sealing, faults until those reservoirs are penetrated and evaluated as economically producible and that reserves should not be assigned to areas that are clearly separated from a known accumulation by a non-productive reservoir (*i.e.*, absence of reservoir, structurally low reservoir, or negative test results). Such areas may contain prospective resources (*i.e.*, potentially recoverable resources from undiscovered accumulations).[137]

One notable difference between our final definition of ''reserves'' and the PRMS definition is that our definition is based on ''economic producibility'' rather than ''commerciality.'' One commenter believed that reserves must be ''commercial,'' as stated in the PRMS definition.[138] However, commerciality introduces a subjective aspect to the price used to establish existing economic conditions by factoring in the rate of return required by a particular company before it will commit resources to the project. This rate of return will vary among companies, reducing the comparability among disclosures. Therefore, the adopted definition of the term ''reserves'' relies on economic producibility, as proposed.

[130] See Rule 4–10(a)(18) [17 CFR 210.4–10(a)(18)].

[131] See letters from Devon, EnCana, SPE, and StatoilHydro.

[132] See Rule 4–10(a)(17) [17 CFR 210.4–10(a)(17)].

[133] See letters from Devon, EnCana, SPE, and StatoilHydro.

[134] See letter from Evolution.

[135] See letters from API, CAQ, Grant Thornton, and KPMG.

[136] See Rule 4–10(a)(26) [17 CFR 210.4–10(a)(26)].

[137] See Note to Rule 4–10(a)(26) [17 CFR 210.4–10(a)(26)].

[138] See letter from StatoilHydro.

J. Other Supporting Terms and Definitions

We also proposed to define several other terms primarily to support and clarify the definitions of the key terms. We are adopting most of those supporting definitions as discussed in further detail below.

1. Deterministic Estimate

A company can derive two different types of reserves estimates depending on the method used to calculate the estimates. These two types of estimates are known as ''deterministic estimates'' and ''probabilistic estimates.'' [139] In the Proposing Release, we proposed to define the term ''deterministic estimate'' as an estimate based on a single value for each parameter (from the geoscience, engineering, or economic data) in the reserves calculation that is used in the reserves estimation procedure. We are adopting that definition as proposed.

2. Probabilistic Estimate

We are adopting a new definition of the term ''probabilistic estimate'' substantially as proposed. The new rule defines the term ''probabilistic estimate'' as an estimate that is obtained when the full range of values that could reasonably occur from each unknown parameter (from the geoscience and engineering data) is used to generate a full range of possible outcomes and their associated probabilities of occurrence.[140] In response to a comment received, however, we revised the definition so that it does not include the application of a range of values with respect to economic conditions because those conditions, such as prices and costs, are based on historical data, and therefore are an established value, rather than a range of estimated values.[141]

3. Analogous Reservoir

We proposed a definition of the term ''analogous formation in the immediate area.'' As noted above, we received comment indicating that the use of appropriate analogs should not be limited to the immediate area in which the reserves are being estimated.[142] Therefore, we have changed the defined term to ''analogous reservoir.'' [143] In addition, based on commenters' remarks, we are defining the term ''analogous reservoir'' in a manner that is more consistent with the PRMS, which addresses more specifically the types of reservoirs that may be used as analogues. The new definition of the term ''analogous reservoir'' states that analogous reservoirs, as used in resources assessments, have similar rock and fluid properties, reservoir conditions (depth, temperature, and pressure) and drive mechanisms, but are typically at a more advanced stage of development than the reservoir of interest and thus may provide concepts to assist in the interpretation of more limited data and estimation of recovery.[144] When used to support proved reserves, an ''analogous reservoir'' refers to a reservoir that shares the following characteristics with the reservoir of interest:

- Same geological formation (but not necessarily in pressure communication with the reservoir of interest);
- Same environment of deposition;
- Similar geological structure; and
- Same drive mechanism.

As proposed, the new definition includes an instruction that clarifies that reservoir properties must, in the aggregate, be no more favorable in the analog than in the reservoir of interest. The new definition also clarifies that, although an analogous reservoir must be in the same geological formation as the reservoir of interest, it need not be in pressure communication with the reservoir of interest.

4. Definitions of Other Terms

We received no comment with regard to several of the proposed supporting definitions. We are adopting those definitions substantially as proposed without material changes. They include the following terms:

- ''Condensate''; [145]
- ''Development project''; [146]
- ''Economically producible''; [147]
- ''Estimated ultimate recovery,'' [148]
- ''Exploratory well''; [149]
- ''Extension well''; [150] and
- ''Resources.'' [151]

Most of these supporting terms and their definitions are based on similar terms in the PRMS. The definition of ''resources'' is based on the Canadian Oil and Gas Evaluation Handbook (COGEH).

In the Proposing Release, we solicited comment on whether we should adopt any other supporting definitions. One commenter submitted an appendix to its letter containing numerous other terms that it thought we should adopt.[152] We have decided not to adopt those additional definitions because we feel that they are unnecessary at this time. However, we have decided to adopt a definition for the term ''bitumen.'' We believe that providing a definition for this term will lead to more consistency among disclosures because there currently are several competing definitions of that term used in the industry.

We are defining the term ''bitumen'' as ''petroleum in a solid or semi-solid state in natural deposits. In its natural state, it usually contains sulfur, metals, and other non-hydrocarbons. Bitumen has a viscosity greater than 10,000 centipoise measured at original temperature in the deposit and atmospheric pressure, on a gas free basis.'' [153] This definition is similar to the PRMS definition of ''natural bitumen.''

5. Proposed Terms and Definitions Not Adopted

We proposed definitions for the terms ''continuous accumulations'' and ''conventional accumulations'' to assist companies in disclosing segregated reserves based on these two types of accumulations. As noted elsewhere in this release, the final rules do not require disclosure based on the type of accumulation in which the reserves are found.[154] Therefore, there is no need to define these terms and we are not adopting the proposed definitions.

Similarly, we proposed a definition for the term ''sedimentary basin'' because it would have been part of our definition of the term ''by geographic area.'' As noted elsewhere in this release, we have substantially revised the definition of the term ''by geographic area'' [155] and the term ''sedimentary basin'' is no longer needed, so we are not adopting this proposed term and definition.

As noted above, one commenter recommended that we adopt a large glossary of terms and definitions that correspond with the PRMS definitions.[156] Rather than defining an extensive glossary of terms in our rules

[139] See Rules 4–10(a)(5) and (a)(19) [17 CFR 210.4–10(a)(5) and (a)(19)]. These definitions are based on the Canadian Oil and Gas Evaluation Handbook (COGEH). This handbook was developed by the Calgary Chapter of the Society of Petroleum Evaluation Engineers and the Petroleum Society of CIM to establish standards to be used within the Canadian oil and gas industry in evaluating oil and gas reserves and resources.

[140] See Rule 4–10(a)(19) [17 CFR 210.4–10(a)(19)].

[141] See letter from Shell.

[142] See letter from SPE.

[143] See Rule 4–10(a)(2) [17 CFR 210.4–10(a)(2)].

[144] See Rule 4–10(a)(2) [17 CFR 210.4–10(a)(2)].

[145] See Rule 4–10(a)(4) [17 CFR 210.4–10(a)(4)].

[146] See Rule 4–10(a)(8) [17 CFR 210.4–10(a)(8)].

[147] See Rule 4–10(a)(10) [17 CFR 210.4–10(a)(10)].

[148] See Rule 4–10(a)(11) [17 CFR 210–4–10(a)(11)].

[149] See Rule 4–10(a)(13) [17 CFR 210.4–10(a)(13)].

[150] See Rule 4–10(a)(14) [17 CFR 210.4–10(a)(14)].

[151] See Rule 4–10(a)(28) [17 CFR 210.4–10(a)(28)].

[152] See letter from SPE.

[153] See Rule 4–10(a)(3) [17 CFR 210.4–10(a)(3)].

[154] See Section III.B.3.c.

[155] See Section III.B.2.a.

[156] See letter from SPE.

and attempting to constantly update those definitions, we advise companies to look to definitions that are commonly accepted within the oil and gas industry to the extent such definitions are not in, or inconsistent with, our rules.

K. Alphabetization of the Definitions Section of Rule 4–10

We are alphabetizing the definitional terms in Rule 4–10(a) because we are adding a significant number of defined terms to this section.

III. Revisions to Full Cost Accounting and Staff Accounting Bulletin

As we noted in Section II.B.2 of this release, commenters unanimously opposed our proposal to use different prices for disclosure and accounting purposes. We agree with those commenters and are revising our proposal to use a 12-month average price for accounting purposes. These revisions primarily will appear under the full cost accounting method described in Rule 4–10(c) [157] of Regulation S–X. The full cost accounting method permits certain oil and gas extraction costs to accumulate on a company's balance sheet subject to a limitation test or a ''ceiling'' as described in Rule 4–10(c)(3)(4). Like reserve disclosures, these capitalized costs and the related limitation test are not fair value based measurements. Rather the capitalized costs represent the accumulated historical acquisition, exploration and development costs (net of any previously recorded depletion, amortization or ceiling test write downs) incurred for oil and gas producing activities, limited to a standardized mathematical calculation (the full cost ceiling) adopted over 25 years ago. Costs that do not exceed the limitation are deferred and amortized over time. The limitation test calculation on capitalized costs is not designed or intended to represent a fair valuation of the related oil and gas assets.[158]

Similar to the single-day, year-end pricing used under the successful efforts method,[159] the application of the full cost method of accounting in Rule 4–10(c) has used ''current prices,'' interpreted as single-day, year-end prices, as the basis for calculating the limitation on costs that may be capitalized under the full cost method. In order to further the objective of providing comparable oil and gas reserve quantities, our final rule clarifies that the term ''current prices'' as used in Rule 4–10(c) is consistent with the 12-month average price as calculated in Rule 4–10(a)(22)(v).[160]

However, since these calculations are not designed to result in a calculation of fair value and since the change to the full cost accounting method would effectively eliminate the anomalies caused by the single-day, year-end price currently used in the limitation test, the SEC staff will eliminate portions of Staff Accounting Bulletin (SAB) Topic 12:D.3.c that permit consideration of the impact of price increases subsequent to the period end on the ceiling limitation test.

The combination of adopting a 12-month average pricing mechanism and eliminating portions of SAB Topic 12:D.3.c could have the effect of requiring a company using the full cost accounting method to record a ceiling test write-down in income during periods of rising oil and gas prices. In that situation, it is possible that using a 12-month average price in the ceiling test calculation might result in a write-down that would not otherwise have been required had the full cost company been permitted to use the single-day, year-end price. Conversely, it is also possible that in periods of declining oil and gas prices, the application of this rule could result in the deferral of ceiling test write-downs. In that situation, it is possible that using a 12-month average price in the ceiling limitation test calculation might not result in a write-down in situations where a write down would have otherwise been required had the full cost company been required to use a single-day, year-end price in its ceiling limitation test calculation.

Because the application of the ceiling limitation test is not a fair-value-based calculation but rather a limit on the amount of certain oil and gas related exploration costs that can be capitalized, portions of which would have resulted in write-downs in prior periods under other methods of accounting, we believe the benefits of using a single pricing mechanism justify the potential changes to the timing of those ceiling test write-downs or amortizations amounts. However, as discussed in Section V of this release, we believe that the company should discuss such situations, if material, particularly when pricing trends indicate the possibility of future write-downs, in Management's Discussion and Analysis and, where appropriate, the notes to the financial statements.

IV. Update and Codification of the Oil and Gas Disclosure Requirements in Regulation S–K

The Proposing Release proposed to update and codify Securities Act and Exchange Act Industry Guide 2: Disclosure of Oil and Gas Operations (Industry Guide 2).[161] Industry Guide 2 currently sets forth most of the disclosures that an oil and gas company provides regarding its reserves, production, property, and operations. Regulation S–K references Industry Guide 2 in Instruction 8 to Item 102 (Description of Property), Item 801 (Securities Act Industry Guides), and Item 802 (Exchange Act Industry Guides). However, Industry Guide 2 itself does not appear in Regulation S–K or in the Code of Federal Regulations. The rules that we adopt today codify the contents of Industry Guide 2 in a new Subpart 1200 of Regulation S–K.

A. Revisions to Items 102, 801, and 802 of Regulation S–K

The instructions to Item 102 of Regulation S–K, as well as Items 801 and 802 of Regulation S–K, currently reference the industry guides. Because we are codifying the Industry Guide 2 disclosures in a new Subpart 1200 of Regulation S–K, we are revising the instructions to Item 102 to reflect this change.[162] We also are eliminating the references in Items 801 and 802 to Industry Guide 2 because that industry guide will cease to exist upon effectiveness of the amendments we adopt today.[163]

In addition, Instruction 5 to Item 102 of Regulation S–K currently prohibits the disclosure of reserves other than proved oil and gas reserves. Because we are adopting rules to permit disclosure of probable and possible oil and gas reserves, we are revising Instruction 5 to limit its applicability to extractive enterprises other than oil and gas producing activities, such as mining activities.[164] Similarly, Instruction 3 of

[157] 17 CFR 210.4–10(c).

[158] While not intended to represent fair value, costs that are written down because they exceed the ceiling limitation are accounted for in the same manner as impairments recognized under accounting generally. That is, once the asset is written down, it becomes the new historical cost basis and cannot be reinstated for subsequent increases in the ceiling. See Rule 4–10(c)(4)(i) of Regulation S–X [17 CFR 210–4–10(c)(4)(i)].

[159] The accounting guidance refers to our definition of proved reserves under existing Rule 4–10(a)(2), which currently uses a single-day, year-end price to establish reserves amounts.

[160] See Rule 4–10(c)(8) [17 CFR 210.4–10(c)(8)].

[161] Exchange Act Industry Guide 2 merely references, and therefore is identical to, Securities Act Industry Guide 2.

[162] See revised Instructions 4 and 8 to Item 102 [17 CFR 229.102].

[163] See revised Item 801 and 802 [17 CFR 229.801 and 802].

[164] See revised Instruction 5 to Item 102 [17 CFR 229.102]. Extractive enterprises include enterprises such as mining companies that extract resources from the ground.

Item 102, regarding production, reserves, locations, development and the nature of the company's interests, will no longer apply to oil and gas producing activities, so we also are limiting that instruction to mining activities.[165]

Finally, we are eliminating Instruction 4 to Item 102 regarding the ability of the Commission's staff to request supplemental information, including reserves reports. This instruction is duplicative of Securities Act Rule 418 [166] and Exchange Act 12b–4,[167] regarding the staff's general ability to request supplemental information.

B. Proposed New Subpart 1200 to Regulation S–K Codifying Industry Guide 2 Regarding Disclosures by Companies Engaged in Oil and Gas Producing Activities

1. Overview

We are adding a new Subpart 1200 to Regulation S–K that codifies the disclosure requirements related to companies engaged in oil and gas producing activities. This new subpart largely includes the existing requirements of Industry Guide 2. However, we have revised these requirements to update them, provide better clarity with respect to the level of detail required in oil and gas disclosures, including the geographic areas by which disclosures need to be made, and provide formats for tabular presentation of these disclosures. In addition, Subpart 1200 contains the following new disclosure requirements, many of which have been requested by industry participants:

- Disclosure of reserves from non-traditional sources (*e.g.*, bitumen, shale, coal) as oil and gas reserves;
- Optional disclosure of probable and possible reserves;
- Optional disclosure of oil and gas reserves' sensitivity to price;
- Disclosure of the development of proved undeveloped reserves;
- Disclosure of technologies used to establish additions to reserves estimates;
- Disclosure of a company's internal controls over reserves estimation and the qualifications of the business entity or individual preparing or auditing the reserves estimates; and
- Disclosure based on a new definition of the term ''by geographic area.''

We discuss each of these proposed new Items below.

2. Item 1201 (General Instructions to Oil and Gas Industry-Specific Disclosures)

We are adding new Item 1201 to Regulation S–K. This item sets forth the general instructions to Subpart 1200. The new item contains three paragraphs that perform the following tasks:

- Instruct companies for which oil and gas producing activities are material to provide the disclosures specified in Subpart 1200; [168]
- Clarify that, although a company must present specified Subpart 1200 information in tabular form, the company may modify the format of the table for ease of presentation, to add additional information or to combine two or more required tables;
- State that the definitions in Rule 4–10(a) of Regulation S–X apply to Subpart 1200; and
- Define the term ''by geographic area.''

a. Geographic Area

We received significant comments regarding the proposed definition of the term ''by geographic area.'' We proposed to require disclosure by continent, country containing 15% of more of the company's reserves, and sedimentary basin or field containing 10% or more of the company's reserves. Several commenters were concerned that the proposed definition would add too much detail to the disclosures, particularly at the basin or field level.[169] They were concerned that this amount of detail would make disclosures too complex and incoherent.[170] They were particularly concerned with the extension of this standard to disclosures other than reserves, such as production, wells, and acreage.[171] Commenters also believed that the disclosures, in particular by field, could cause competitive harm in future property sales transactions, unitization agreements, and other asset transfers.[172]

Some commenters also believed that some of these disclosures may be prohibited by foreign governments.[173] One commenter noted that separate determination of field or basin reserves within a larger production sharing agreement may not be possible due to concession-wide cost sharing terms.[174] Eight commenters recommended that the determination of appropriate geographic disclosure should remain with management, consistent with Statement of Financial Accounting Standard No. 69 (SFAS 69).[175] However, two commenters indicated that a country-by-country breakdown would be adequate.[176]

Four commenters supported the proposed percentage thresholds for geographic disclosure, stating that they would increase understanding of the total energy supply, leading to better decisions by policy makers.[177] One commenter supported the 15% threshold for countries.[178]

As we noted in the Proposing Release, there have been differing interpretations among oil and gas companies as to the level of specificity required when a company is breaking out its reserves disclosures based on geographic area as required by Instruction 3 of Item 102 of Regulation S–K.[179] Some companies currently broadly organize their reserves only by hemisphere or continent. SFAS 69 requires reserves disclosure to be separately disclosed for the company's home country and foreign geographic areas. It defines ''foreign geographic areas'' as ''individual countries or groups of countries as appropriate for meaningful disclosure in the circumstances.'' Since SFAS 69 was issued, the operations of oil and gas companies have become much more diversified globally. For many large U.S. oil and gas producers, the majority of reserves are now overseas, with material amounts in individual countries and even individual fields or basins.

We think that greater specificity than simply disclosing reserves within ''groups of countries'' would benefit investors and, in certain cases, may be necessary to meet the requirements of Item 102 of Regulation S–K. Some countries in which many of these companies operate and may have significant reserves are subject to unique risks, such as political instability.

[165] See revised Instruction 3 to Item 102 [17 CFR 229.102].

[166] 17 CFR 230.418.

[167] 17 CFR 240.12b–4.

[168] This paragraph would maintain the existing exclusion in Industry Guide 2 for limited partnerships and joint ventures that conduct, operate, manage, or report upon oil and gas drilling or income programs, that acquire properties either for drilling and production, or for production of oil, gas, or geothermal steam or water.

[169] See letters from Apache, CAPP, Devon, ExxonMobil, Imperial, Nexen, Repsol, Shell, and StatoilHydro.

[170] See letters from Apache, CAPP, ExxonMobil, Imperial, Nexen, and Repsol.

[171] See letters from ExxonMobil, Imperial, and Total.

[172] See letters from Apache, API, BHP, Canadian Natural, CAPP, Devon, EnCana, Eni, Newfield, Nexen, Petro-Canada, Shell, StatoilHydro, and Total.

[173] See letters from Apache, API, CAPP, Eni, Newfield, Petro-Canada, and Total.

[174] See letter from Apache.

[175] See letters from Apache, API, Canadian Natural, CAPP, Eni, ExxonMobil, Imperial, and Petro-Canada.

[176] See letters from ExxonMobil and Nexen.

[177] See letters from AAPG, CFA, Chesapeake, and E&Y.

[178] See letter from Shell.

[179] 17 CFR 229.102.

However, we recognize that disclosure that is too detailed may detract from the overall disclosure. Thus, we have revised the definition of the term ''by geographic area'' to mean, as appropriate for meaningful disclosure under a company's particular circumstances:

(1) By individual country;

(2) By groups of countries within a continent; or

(3) By continent.[180]

This definition is substantially the same as the definition currently provided in SFAS 69. However, as proposed, we are adopting specific percentage thresholds to the geographic breakdowns of reserves estimates and production. With respect to production, the final rules require disclosure of production in each country or field containing 15% or more of the company's proved reserves unless prohibited by the country in which the reserves are located. We are raising the proposed 10% threshold for field disclosure of production to 15% to make the threshold consistent. However, rather than requiring disclosure based on a percentage of the amount of the company's reserves of an individual product, as proposed, the final rules require disclosure based on a percentage of a company's total global oil and gas proved reserves, based on barrels of oil equivalent.[181]

With respect to reserves estimates, the final rules require disclosure of reserves in countries containing more than 15% of the company's proved reserves. As with the production disclosure, this 15% threshold would be based on the company's total global oil and gas proved reserves, rather than on individual products, as proposed.[182] A registrant need not provide disclosure of the reserves in a country containing 15% or more of the registrant's proved reserves if that country's government prohibits disclosure of reserves in that country.

We are not adopting the requirement that we proposed to disclose reserves by sedimentary basin or field. We share commenters' concerns that there is potential for competitive harm from such disclosure in future property sales transactions, unitization agreements, and other asset transfers. Moreover, we recognize that there may be situations in which a particular field may encompass a significant portion of a company's reserves in a foreign country. To avoid compelling a company to provide, in effect, field disclosure, the rule does not require disclosure of reserves in a country containing 15% of the company's reserves if that country prohibits disclosure of reserves in a particular field and disclosure of reserves in that country would have the effect of disclosing reserves in particular fields.[183] For example, if a company has 25% of its reserves in Country A and Country A's government prohibits disclosure of reserves by field within Country A, if almost all of that company's reserves in Country A are located in a single field, the company would not be required to specify the amount of its reserves located in Country A.

b. Tabular Disclosure

We proposed to require much of the reserves disclosures and other disclosures in Industry Guide 2 to be presented in tabular format. Two commenters encouraged using a standardized table for reserves disclosure.[184] Another believed that companies should be able to reorganize, supplement, or combine tables for better presentation of the company's strategy.[185] However, two commenters believed that the rules should not propose a specified tabular format in general.[186] These commenters believed that companies should have the flexibility to present data in a format that is most relevant and meaningful to investors, whether it is tabular or narrative.[187] We continue to believe that in certain circumstances, the required disclosures lend themselves to a tabular disclosure format. We believe that standardizing such tables will improve the readability and comparability of disclosures among companies. However, in response to comments received, we have made several revisions to the individual disclosure items, including whether the disclosure item must be presented in tabular format. We discuss each below.

3. Item 1202 (Disclosure of Reserves)

Existing Instruction 3 to Item 102 of Regulation S–K requires disclosure of an extractive enterprise's proved reserves. With respect to oil and gas producing companies, we are replacing this Instruction by adding a new Item 1202 to Regulation S–K that contains a similar disclosure requirement regarding a company's proved reserves.[188] However, new Item 1202 expands on the requirements of Item 102 by specifically permitting the disclosure of probable and possible reserves and permitting the disclosure of reserves from non-traditional sources. In addition, because we are no longer distinguishing between types of accumulations, the item contains only one table with separate columns for different final products, specifically, oil, gas, synthetic oil, synthetic gas, and other natural resources sold by the company.

a. Oil and Gas Reserves Tables

New Item 1202 requires disclosure, in the aggregate and by geographic area, of reserves estimates using prices and costs under existing economic conditions, for each product type, in the following categories:

- Proved developed reserves;
- Proved undeveloped reserves;
- Total proved reserves;
- Probable developed reserves (optional);
- Probable undeveloped reserves (optional);
- Possible developed reserves (optional); and
- Possible undeveloped reserves (optional).

A form of this table is set forth below:

SUMMARY OF OIL AND GAS RESERVES AS OF FISCAL-YEAR END BASED ON AVERAGE FISCAL-YEAR PRICES

Reserves category	Reserves				
	Oil (mbbls)	Natural gas (mmcf)	Synthetic oil (mbbls)	Synthetic gas (mmcf)	Product A (measure)
PROVED					
Developed:					
Continent A					

[180] See Item 1201(d) [17 CFR 229.1201(d)].

[181] See Item 1204(a) [17 CFR 229.1204(a)].

[182] See Item 1202(a)(2) [17 CFR 229.1202(a)(2)].

[183] See Instruction 4 to Item 1202(a)(2).

[184] See letters from Devon and Petrobras.

[185] See letter from Petro-Canada.

[186] See letters from Apache and ExxonMobil.

[187] See letters from Apache and ExxonMobil.

[188] See Item 1202 [17 CFR 229.1202].

SUMMARY OF OIL AND GAS RESERVES AS OF FISCAL-YEAR END BASED ON AVERAGE FISCAL-YEAR PRICES—Continued

Reserves category	Reserves				
	Oil (mbbls)	Natural gas (mmcf)	Synthetic oil (mbbls)	Synthetic gas (mmcf)	Product A (measure)
Continent B	....	....	....	....	....
Country A	....	....	....	....	....
Country B	....	....	....	....	....
Other Countries in Continent	....	....	....	....	....
Undeveloped:					
Continent A	....	....	....	....	....
Continent B	....	....	....	....	....
Country A	....	....	....	....	....
Country B	....	....	....	....	....
Other Countries in Continent B	....	....	....	....	....
TOTAL PROVED	....	....	....	....	....
PROBABLE					
Developed	....	....	....	....	....
Undeveloped	....	....	....	....	....
POSSIBLE					
Developed	....	....	....	....	....
Undeveloped	....	....	....	....	....

i. Disclosure by Final Product Sold

The table requires disclosure by final product sold by the company, specifically, oil, gas, synthetic oil, synthetic gas, or other natural resource. Thus, if the company processes a natural resource that it has extracted, such as bitumen, into synthetic oil or gas prior to selling the product, it may include such reserves under the synthetic oil or gas columns. As noted below, we have revised the proposal that would have required disclosure by type of accumulation. In addition, in response to commenters, we have revised the definition of ''oil and gas producing activities'' so that a company can use the price of that synthetic oil or gas to determine the economic producibility of the reserves because the economics of the processing activity are relevant to the determination of whether to extract the underlying resource.[189]

However, if a company extracts a resource other than oil or gas, such as bitumen, and sells the product without processing it into synthetic oil or gas, it must disclose reserves of that other natural resource. Although that company's extractive activities would be considered an oil and gas producing activity under the definition of that term, such a company would not benefit from the economics of processing of that resource because the price that determines whether such a company extracts the resource is the price of the unprocessed resource and therefore the company may not establish reserves estimates based on the price of the upgraded product. Similarly, if the company does not itself extract the natural resource, but purchases the natural resource for processing or is paid to process the natural resource, it may not claim reserves either of the resource or of the processed product.

ii. Aggregation

As proposed, the reserves to be reported in these tables would be aggregations (to the company total level) of reserves determined for individual wells, reservoirs, properties, fields, or projects. Regardless of whether the reserves were determined using deterministic or probabilistic methods, the reported reserves should be simple arithmetic sums of all estimates at the well, reservoir, property, field, or project level within each reserves category. Eight commenters agreed that aggregation should not be permitted beyond the field, property or project level, consistent with PRMS.[190]

iii. Optional Disclosure of Probable and Possible Reserves

A company may, but is not required to, disclose probable or possible reserves in these tables. If a company discloses probable or possible reserves, it must provide the same level of geographic detail as it must with respect to proved reserves and must state whether the reserves are developed or undeveloped. In addition, Item 1202 requires the company to disclose the relative uncertainty associated with these classifications of reserves estimations. By permitting disclosure of all three of these classifications of reserves, our objective is to enable companies to provide investors with more insight into the potential reserves base that managements of companies may use as their basis for decisions to invest in resource development.

Most commenters addressing this issue supported permitting the disclosure of probable and possible reserves in filed documents.[191] They believed that such disclosure would provide a more complete picture of a company's full portfolio of opportunities.[192] One commenter noted that this information often is already available on company Web sites and in press releases.[193] However, several commenters supporting the proposal cautioned that there could be significant variability among disclosures.[194]

Other commenters expressed concern about disclosure of unproved reserves, but conceded that voluntary disclosure would be acceptable.[195] These commenters were concerned that such disclosure may confuse investors and expose companies to increased litigation because of the inherent uncertainty associated with probable and possible reserves.[196] They noted that various

[189] See Section II.C.2 of this release.

[190] See letters from Devon, Evolution, ExxonMobil, Ryder Scott, Shell, SPE, Talisman, and Wagner.

[191] See letters from CFA, Chesapeake, Deloitte, EnCana, Evolution, McMoRan, Newfield, Petrobras, Petro-Canada, Questar, Ryder Scott, Sasol, Ryder Scott, Shell, SPE, Three Senators, Wagner, and Zakaib.

[192] See letters from CFA, Evolution, Petro-Canada, Ryder Scott, and Wagner.

[193] See letter from Evolution.

[194] See letter from EnCana.

[195] See letters from API, ExxonMobil, Imperial, Repsol, and Total.

[196] See letters from API, ExxonMobil, Imperial, and Repsol.

technologies may be used to support these estimates.[197]

Several commenters opposed permitting disclosure of probable and possible reserves in Commission filings for similar reasons.[198] Again, they were concerned that the inherent uncertainty associated with such reserves estimates may lead to investor confusion and misunderstanding.[199] They believed that the broad range of technologies and methods used by companies to support these estimates would lead to inconsistent disclosure among companies.[200]

We note that numerous oil and gas companies already disclose unproved reserves on their Web sites and in press releases. This practice does not appear to have created confusion in the market. However, we understand commenters' concerns that probable and possible reserves estimates are less certain than proved reserves estimates and so may increase litigation risk. By making these disclosures voluntary, a company could exercise its own discretion as to whether to provide the market with this disclosure.

Some commenters were concerned that voluntary disclosure by some companies may raise confusion as to why other companies do not disclose these classifications of reserves.[201] One commenter was concerned that voluntary disclosure may increase market pressure on all companies to disclose probable and possible reserves estimates.[202] Considering the fact that many companies already make these disclosures public, we do not believe that this is an adequate reason for prohibiting from filings disclosure that may be helpful to investors.

iv. Resources Not Considered Reserves

Because we are permitting disclosure of probable and possible reserves, we are revising existing Instruction 5 to Item 102 of Regulation S–K to continue to prohibit disclosure of estimates of oil or gas resources other than reserves, and any estimated values of such resources, in any document publicly filed with the Commission, unless such information is required to be disclosed in the document by foreign or state law.[203] Five commenters recommended that the rules permit disclosure of all categories of resources, including those that do not qualify as reserves.[204] One commenter believed that the prohibition against disclosing all resources deprives public markets of significant information without meaningfully enhancing investor protection and ultimately may harm the efficiency and development of U.S. markets and U.S. companies raising capital.[205] That commenter also thought such a restriction could also encourage companies to form outside of the U.S.[206] Another commenter believed that the uncertainty of resource estimates is best communicated by reporting the full range of estimates.[207] In addition, another commenter believed that clear disclosure would allay concerns about investor misunderstanding of estimates of resources that do not qualify as reserves.[208] That commenter noted that excluding resources that are not reserves is inconsistent with international standards and the fact that these resources are disclosed in the U.S. on Web sites and in press releases.[209] We continue to be concerned that such resources are too speculative and may lead investors to incorrect conclusions. Therefore, we are adopting the proposal to prohibit disclosure of resources other than reserves.

However, consistent with existing Instruction 5, a company may continue to disclose such estimates of non-reserves resources in a Commission filing related to an acquisition, merger, or consolidation if the company previously provided those estimates to a person that is offering to acquire, merge, or consolidate with the company or otherwise to acquire the company's securities.[210] Several commenters recommended that the Commission maintain this exception so that the company's shareholders would not be at an informational disadvantage compared to the counterparty when assessing a merger.[211] We agree with these commenters and have retained the exception in the revised Instruction 5 adopted today.

b. Optional Reserves Sensitivity Analysis Table

The rules that we are adopting require a company to determine whether its oil or gas resources are economically producible based on a 12-month average price. We also proposed, and are adopting, an optional reserves sensitivity table. This table would permit companies to disclose additional information to investors, such as the sensitivity that oil and gas reserves have to price fluctuations. If a company chooses to provide such disclosure, it may choose the different scenario or scenarios, if any, that it wishes to disclose in the table, provided that it also discloses the price and cost schedules and assumptions on which the alternate reserves estimates are based.

Twelve commenters supported permitting such sensitivity analyses.[212] Some believed that this would provide investors with a better view of management's analysis of future prices.[213] One recommended providing a set price change of 10% for the sensitivity analysis.[214] Two other commenters believed that different circumstances may require different types of sensitivity analyses, both with respect to the range of prices used and the format of the presentation.[215] We agree that the appropriate range for a sensitivity analysis may vary depending on the situation, and therefore, as proposed, we are not specifying a range of prices to be used.

However, five commenters specifically opposed requiring such an analysis.[216] They believed that such a requirement would cause confusion and harm comparability.[217] Three commenters opposed such a sensitivity analysis because using different prices could mislead investors.[218] We are adopting this table, as proposed, as a voluntary disclosure rather than a requirement. However, as proposed, the table would require disclosure of the assumptions behind varying estimates. We believe this disclosure will mitigate any investor confusion.

In addition, we remind companies that Item 303 of Regulation S–K (Management's Discussion and Analysis of Financial Condition and Results of Operations)[219] requires discussion of

[197] See letters from API, ExxonMobil, and Imperial.

[198] See letters from Apache, Devon, Energen, Eni, and Southwestern.

[199] See letters from Apache, Devon, Eni, and Southwestern.

[200] See letters from Devon, Eni, and Southwestern.

[201] See letters from Apache and Total.

[202] See letter from Eni.

[203] See Instruction 5 to Item 102 [17 CFR 229.102].

[204] See letters from Davis Polk, Petro-Canada, Shearman & Sterling, SPE, and Zakaib.

[205] See letter from Shearman & Sterling.

[206] *Id.*

[207] See letter from SPE.

[208] See letter from Davis Polk.

[209] See letter from Davis Polk.

[210] *Id.*

[211] See letters from Devon, ExxonMobil, Shell, and Total.

[212] See letters from Canadian Natural, CAPP, CFA, Chesapeake, Deloitte, Devon, Evolution, ExxonMobil, McMoRan, Nexen, Petro-Canada, and Total.

[213] See letters from Chesapeake, Deloitte, and McMoRan.

[214] See letter from CFA.

[215] See letters from Evolution and Total.

[216] See letters from Canadian Natural, CAPP, Devon, EnCana, and ExxonMobil.

[217] See letters from EnCana and Ryder Scott.

[218] See letters from Apache, Petrobras, and Wagner.

[219] See Item 303 of Regulation S–K [17 CFR 229.303].

known trends and uncertainties, which may include changes to prices and costs. A form of this optional reserves sensitivity analysis table is set forth below.

SENSITIVITY OF RESERVES TO PRICES BY PRINCIPAL PRODUCT TYPE AND PRICE SCENARIO

Price case	Proved reserves			Probable reserves			Possible reserves		
	Oil Mbbls	Gas mmcf	Product A measure	Oil mbbls	Gas mmcf	Product A measure	Oil mbbls	Gas mmcf	Product A measure
Scenario 1	....	....	....	....	....	....	....	....	....
Scenario 2	....	....	....	....	....	....	....	....	....

c. Separate Disclosure of Conventional and Continuous Accumulations

Under the proposal, new Item 1202 would have required companies to disclose reserves from conventional accumulations separately from reserves in continuous accumulations. Nine commenters recommended disclosure based on the final product.[220] These commenters opposed segregating disclosure based on the type of accumulation that is involved.[221] They believed that such disclosure would be too complex and detailed and of little use to investors.[222] In addition, seven commenters pointed out that separation may be impossible because some fields contain both conventional and continuous accumulations.[223] This would make allocation of costs arbitrary.[224] However, four commenters supported the definitions and separate disclosure by type of accumulation.[225] One commenter believed that such disclosure would allow investors to assess the impact of unconventional sources on reserves.[226]

Although we agree conceptually that the focus of reserves disclosure should be on the final product, we also recognize that the production of oil and gas from varying sources can have significantly different economics. Extraction of oil and gas from continuous accumulations can be much more labor and resource intensive than extraction of oil and gas from traditional wells. They often require greater ongoing efforts and expense after the initial extraction equipment is in place, making such operations more sensitive to price fluctuations.

We agree with the commenters that disclosure based on the end product sold would provide a more effective basis for distinguishing reserves that disclosure based on the type of accumulation in which the reserves are held. Therefore, we have revised the disclosure to be based on the end product that is sold by the company.[227] However, with respect to the end product, new Item 1202 makes a distinction between oil and gas, on the one hand, and synthetic oil and gas, on the other. Synthetic products require processing of the raw resource material, either while it is still in the ground (''in situ'') or after it is extracted, before it can be used as refinery feedstock or as natural gas. Such processes currently include bitumen upgrading as well as coal liquefaction and gasification. However, resources from some continuous accumulations, such as coalbed methane, do not require such processing and therefore are not associated with the same level of ongoing costs once a well has been drilled because the in-ground resource is already oil or gas (in the case of coalbed methane, the in-ground resource is methane, trapped in a coalbed). Thus, coalbed methane would not be considered a synthetic product.

d. Preparation of Reserves Estimates or Reserves Audits

In the Proposing Release, we proposed to require a company to disclose whether or not the technical person[228] primarily responsible for preparing the reserves estimate possessed certain specified qualifications and was subject to a list of controls for maintaining objectivity. Most commenters addressing the issue opposed this proposed requirement.[229] However, many of these commenters appeared to believe that the disclosure requirement would pertain to every person involved with the estimation process.[230] If adopted, they noted that such disclosure would be voluminous, adding unnecessary complexity to disclosures.[231] Four commenters suggested that we clarify that the disclosure is limited to the chief technical person who oversees the company's overall reserves estimation process,[232] which was the intent of the proposal. Five commenters supported this disclosure because it helps users understand the objectivity and quality of reserves estimates.[233]

It was our intent to limit the disclosure to the technical person primarily responsible for overseeing the reserves estimates. However, there may have been confusion with respect to this point based on a footnote which stated that we sought disclosure about the person who ''is primarily responsible for the actual calculations and estimation or audit.'' By that term, we did not intend to include *any* person making ''actual calculations.'' We recognize that, ultimately, the reserves estimates are overseen by top management, which may or may not have reserves estimation expertise. The focus of the final rule is the primary technical person responsible for overseeing the preparation of the reserves estimation process. We have

[220] See letters from Apache, API, Canadian Natural, CAPP, EnCana, ExxonMobil, Imperial, Petro-Canada, and Total.

[221] See letters from Apache, API, CAPP, Chesapeake, Devon, ExxonMobil, Imperial, Repsol, and Shell.

[222] See letters from Apache, API, BP, CAPP, Chesapeake, Chevron, Devon, E&Y, EnCana, ExxonMobil, Imperial, Petro-Canada, Repsol, and Southwestern.

[223] See letters from BP, Canadian Natural, CAPP, EnCana, Petro-Canada, Ryder Scott, and Talisman.

[224] See letters from EnCana and Ryder Scott.

[225] See letters from Davis Polk, EIA, Petrobras, and Wagner.

[226] See letter from Wagner.

[227] See Item 1202 [17 CFR 229.1202].

[228] With regard to the objectivity of a technical person, the ''person'' could be an individual or an entity, as appropriate. However, with regard to the qualifications of a person, the disclosure would relate to the individual who is primarily responsible for the technical aspects of the reserves estimation or audit. Thus, this individual is not necessarily the individual generally overseeing the estimation or audit, but the individual who is primarily responsible for the actual calculations and estimation or audit.

[229] See letters from Apache, API, Chevron, Energen, Eni, ExxonMobil, Newfield, Nexen, PEMEX, Petro-Canada, Ryder Scott, Shell, and Total.

[230] See letters from Apache, API, ExxonMobil, Newfield, Nexen, PEMEX, Ryder Scott, and Total.

[231] See letters from Apache, API, ExxonMobil, Newfield, Nexen, PEMEX, Repsol, and Total.

[232] See letters from API, ExxonMobil, PEMEX, and Petro-Canada.

[233] See letters from CFA, Devon, EnCana, Southwestern, and Wagner.

revised the language in the rule to clarify this point.[234]

Two commenters noted that it was inconsistent to require such precise disclosure about reserves experts, but not other experts.[235] One of those commenters recommended that the rule require expert language, including clear disclosure of which portion of the reserves estimate the third party is expertising and filed consents.[236] The concept of an expert under the Securities Act is different from the disclosures that we seek regarding the qualifications and objectivity of persons responsible for the preparation or audit of oil and gas reserves. Under the Securities Act, disclosure must be made when the company represents that disclosure is based on the authority of an expert. Although the Securities Act concept of experts will continue to be relevant when the reserves disclosures are in, or incorporated into, a Securities Act filing and the company represents that disclosure is based on the authority of an expert, the new rules requiring disclosure about the reserves preparer or auditor in a company's Exchange Act reports are intended to help investors determine whether reserves estimates, which are highly technical, have been prepared by a qualified, objective person, regardless of whether that person is an employee of the company.

However, we agree with commenters that a prescribed list of qualifications and objectivity requirements may be too rigid for all situations. With respect to technical qualifications, several commenters noted that licensing requirements can vary greatly among jurisdictions.[237] Commenters also believed that disclosure of a person's objectivity was unnecessary because management is required to install appropriate internal controls to ensure the reliability of reserves estimates.[238] In fact, some commenters recommended that we limit the disclosure to a description of a company's internal controls, including the company's technical assessment routine, management and board review and approval processes, the internal audit process, the extent to which the company uses external parties to estimate or audit reserves estimates, and a summary description of the qualifications of the company's typical reserves estimators.[239] We are following these commenters' recommendations and adopting a rule that requires a company to provide a general discussion of the internal controls that it uses to assure objectivity in the reserves estimation process and disclosure of the qualifications of the technical person primarily responsible for preparing the reserves estimates or conducting the reserves audit if the company discloses that such a reserves audit has been performed, regardless of whether the technical person is an employee or an outside third party.[240]

We did not propose, but sought comment on, whether the rules should require a company to retain an independent third party to prepare, or conduct a reserves audit of, the company's reserves estimates. Most commenters urged the Commission not to adopt such a requirement.[241] They believed that a company's internal staff, particularly at larger companies, is generally in a better position to prepare those estimates[242] and that there is a potential lack of qualified third party engineers and other professionals available to conduct the increased work that would result from such a requirement.[243] We agree with these commenters and are not adopting a requirement that an independent third party prepare, or conduct a reserves audit of, the company's reserves estimates.

e. Reserve Audits and The Contents of Third-Party Reports

In the Proposing Release, we proposed that, if a company represents that its estimates of reserves are prepared or audited by a third party, the company must file a report of the third party as an exhibit to the relevant registration statement or report. Two commenters believed that a company description of the third party's report would be sufficient because the reports can contain sensitive information.[244] However, another commenter was concerned that not filing the report may lead to mischaracterizations by the company.[245] This commenter supported the filing of a report by the third party reserves estimator or auditor, but believed that the Commission should determine the contents of such a report.[246] Two commenters supported the filing of the report "letter" as an exhibit, but not the full reserves report because it may contain proprietary information.[247]

As proposed, we are adopting a new rule to require that if the company represents that a third party prepared the reserves estimate or conducted a reserves audit of the reserves estimates, the company must file a report of the third party as an exhibit to the relevant registration statement or report.[248] These reports need not be the full "reserves report," which is often very detailed and voluminous. Rather, these reports could be shorter form reports that summarize the scope of work performed by, and conclusions of, the third party. These reports must include the following disclosure, based on the Society of Petroleum Evaluation Engineers's audit report guidelines:

- The purpose for which the report is being prepared and for whom it is prepared;
- The effective date of the report and the date on which the report was completed;
- The proportion of the company's total reserves covered by the report and the geographic area in which the covered reserves are located;
- The assumptions, data, methods, and procedures used to conduct the reserves audit, including the percentage of company's total reserves reviewed in connection with the preparation of the report, and a statement that such assumptions, data, methods, and procedures are appropriate for the purpose served by the report;
- A discussion of primary economic assumptions;
- A discussion of the possible effects of regulation on the ability of the registrant to recover the estimated reserves;
- A discussion regarding the inherent risks and uncertainties of reserves estimates;
- A statement that the third party has used all methods and procedures as it considered necessary under the circumstances to prepare the report; and
- The signature of the third party.

In addition, if the report is related to a reserves audit, it must contain a brief summary of the third party's conclusions with respect to the reserves estimates. Finally, if the disclosures are

[234] See Item 1202(a)(7) [17 CFR 229.1202(a)(7)].

[235] See letters from API and Deloitte.

[236] See letter from Deloitte.

[237] See letters from AAPG, API, Chevron, Eni, Petro-Canada, Questar, and SPE.

[238] See letters from API, Chevron, Energen, ExxonMobil, Newfield, Nexen, Petrobras, Ryder Scott, Shell, StatoilHydro, and Total.

[239] See letters from ExxonMobil, Nexen, Shell, and StatoilHydro.

[240] See Item 1202(a)(7) [17 CFR 229.1202(a)(7)].

[241] See letters from API, BHP, BP, CFA, CNOOC, Denbury, Devon, Eni, Energy Literacy, ExxonMobil, Imperial, R. Jones, D. McBride, Newfield, Nexen, Petro-Canada, Ross, D. Ryder, Sasol, Shell, Talisman, Total, and W. van de Vijver.

[242] See letters from API, Denbury, ExxonMobil, Imperial, Nexen, Shell, and Talisman.

[243] See letters from AAPG, API, BP, Devon, ExxonMobil, Imperial, D. McBride, Newfield, D. Ryder, and Sasol.

[244] See letters from Evolution and Petro-Canada.

[245] See letter from Wagner.

[246] See letter from Wagner.

[247] See letters from Devon and Ryder Scott.

[248] See Item 1202(a)(8) [17 CFR 229.1202(a)(8)].

made in, or incorporated into, a Securities Act registration statement, the company must file a consent of the third party as an exhibit to the filing.

In the Proposing Release, we proposed to define the term ''reserves audit'' as ''the process of reviewing certain of the pertinent facts interpreted and assumptions made that have resulted in an estimate of reserves prepared by others and the rendering of an opinion about the appropriateness of the methodologies employed, the adequacy and quality of the data relied upon, the depth and thoroughness of the reserves estimation process, the classification of reserves appropriate to the relevant definitions used, and the reasonableness of the estimated reserves quantities. In order to disclose that a 'reserves audit' has been conducted, the report resulting from this review must represent an examination of at least 80% of the portion of the registrant's reserves covered by the reserves audit.'' We are substantively adopting the first sentence of this definition as proposed.

However, in response to comments received, we are not adopting the proposed second sentence of the definition of the term ''reserves audit.'' Two commenters supported the proposed 80% threshold regarding the proportion of reserves that a reserves auditor must review in order for the company to characterize that auditor's work as a ''reserves audit.'' [249] Another commenter believed that the 80% threshold was appropriate for preparing reserves estimates.[250] But three commenters believed that an audit should simply disclose the percentage that was audited.[251] One of these noted that it has its reserves audit performed on a rolling basis.[252] We believe that disclosure of the work done in the required third-party report makes a bright-line percentage test unnecessary. If a company conducts its reserves audit on a rolling basis, it is appropriate for its shareholders to be aware of that fact. Therefore, we are not adopting the proposed 80% threshold. We believe that disclosure of the scope of the review will enable investors to assess the significance to attribute to a reserves audit.

f. Process Reviews

In the Proposing Release, we solicited comment regarding whether we should permit a company to disclose that it has hired a third party to perform a process review under the Society of Petroleum Engineers' (SPE's) reserves auditing standards.[253] Those standards define a process review as an investigation by a person who is qualified by experience and training equivalent to that of a reserves auditor to address the adequacy and effectiveness of an entity's internal processes and controls relative to reserves estimation. However, those standards also note that a process review should not include an opinion relative to the reasonableness of the reserves quantities and should be limited to the processes and control system reviewed. The SPE's standards state that, although such reviews may provide value to the entity, an external or internal process review is not of sufficient rigor to establish appropriate classifications and quantities of reserves and should not be represented to the public as being equivalent to a reserves audit.

Five commenters believed that internal process reviews are helpful in promoting accuracy and effectiveness, so companies should be permitted to disclose them.[254] However, one commenter was concerned that, although a process review can be helpful for a company, disclosure may give investors a false sense of security.[255] Two commenters suggested that, if a company discloses that it performed a process review, it should clearly disclose what a process review is.[256]

We agree that a process review can be helpful to the company and ultimately to investors. However, we also agree that if a company discloses that it has hired a third party to perform a process review, it must clearly disclose the details surrounding that process review. As such, the new rules treat a process review similar to a reserves audit. If the company discloses that it has hired a third party to conduct a process review, it must file a report of the third party as an exhibit to the relevant registration statement or report and, if the disclosures are made in, or incorporated into, a Securities Act registration statement, the company must file a consent of the third party as an exhibit to the filing.[257]

4. Item 1203 (Proved Undeveloped Reserves)

We proposed requiring tabular disclosure of the aging of proved undeveloped reserves (PUDs). Proposed Item 1203 would have required an oil and gas company to prepare a table showing, for each of the last five fiscal years and by product type, proved reserves estimated using current prices and costs in the following categories:

- Proved undeveloped reserves converted to proved developed reserves during the year; and
- Net investment required to convert proved undeveloped reserves to proved developed reserves during the year.[258]

Numerous commenters were concerned that the proposed five-year table would be too complex for investors to understand.[259] They expressed concern that the proposed table may mislead investors by not clearly attributing costs to the year in which the corresponding PUDs are converted because much of the costs may have been spent in previous years.[260] In addition, commenters noted that maintenance of such data would be costly [261] and that companies currently do not always capture this type of information because management does not use it to run the business.[262]

Eight commenters suggested an alternative of disclosing (1) the quantity of undeveloped reserves if material, (2) the progress in converting PUDs, and (3) any material changes in the current year.[263] Three U.S. Senators recommended requiring disclosure of development plans in addition to the table.[264] They believed that requiring reporting of investments and planned investments in oil and gas development would provide investors with certainty about companies' intentions to develop the federal lands that they have at their disposal.[265] However, three commenters opposed disclosure of a company's plans to drill and expected capital expenditures because disclosing their business plan may cause competitive harm and might expose them to litigation if results differ from their plan.[266] Six commenters supported the proposed table.[267]

[249] See letters from Evolution and Wagner.

[250] See letter from Ryder Scott.

[251] See letters from Devon, Ryder Scott, and Talisman.

[252] See letter from Talisman.

[253] See SPE Reserves Auditing Standards.

[254] See letters from Devon, ExxonMobil, Petro-Canada, Ryder Scott, and Shell.

[255] See letter from Wagner.

[256] See letters from Devon and Petro-Canada.

[257] See Item 1202(a)(8) [17 CFR 229.1202(a)(8)].

[258] See Item 1204 [17 CFR 229.1204].

[259] See letters from API, BP, Canadian Natural, CAPP, Chevron, Eni, Equitable, ExxonMobil, Nexen, Petrobras, Repsol, Shell, and Wagner.

[260] See letters from API, ExxonMobil, Petrobras, Ryder Scott, Total, and Wagner.

[261] See letters from API, Canadian Natural, CAPP, Chevron, Eni, Equitable, ExxonMobil, Nexen, Petrobras, Southwestern, and Wagner.

[262] See letter from Apache.

[263] See letters from API, Canadian Natural, Chevron, ExxonMobil, Newfield, Nexen, Petrobras, and Ryder Scott.

[264] See letter from Three Senators.

[265] See letter from Three Senators.

[266] See letters from Chesapeake, Devon, and Newfield.

[267] See letters from Chesapeake, Deloitte, Devon, Three Senators, Talisman, and Wagner.

We recognize the concern that the PUD table that we proposed may be confusing to investors because it would not attribute capital expenditures to the corresponding reserves as they are developed. As an alternative to the proposed table, we are adopting rules that require a company to disclose the following in narrative form:

- The total quantity of PUDs at year end;
- Any material changes in PUDs that occurred during the year, including PUDs converted into proved developed reserves;
- Investments and progress made during the year to convert PUDs to proved developed oil and gas reserves; and
- An explanation of the reasons why material concentrations of PUDs in individual fields or countries have remained undeveloped for five years or more after disclosure as PUDs.[268]

These disclosures would have been required under the proposal, but much of it would have been presented in tabular format. We believe that a narrative approach to these disclosures will provide companies with a better vehicle to explain the status of their PUDs and their track record for developing such reserves. Rather than requiring forward-looking information about a company's plans to develop reserves that may lead to exaggeration of a company's capability to actually convert such reserves, we believe that disclosure of a company's verifiable, established track record of converting such reserves, including its ability to obtain financing for such activities, would be a better indication of the likelihood of that company's success in developing reserves in the future. Specific required disclosure regarding a company's failure to develop material concentrations of PUDs for five or more years should address commenters' concerns that the company may have no intention to develop such reserves.

5. Item 1204 (Oil and Gas Production)

We proposed to codify the Industry Guide 2 disclosure regarding oil and gas production as Item 1204 of Regulation S–K, in tabular form and with greater detail. One commenter did not believe that separating production, sales price and production costs based on whether they were related oil wells or gas wells would be valuable to investors.[269] It believed that companies do not use this information to manage their business and do not maintain systems to capture this information on that basis, so tracking such data would require costly changes to their systems.[270] Two commenters also believed that it would not be possible to separate production cost by product because many units extract different products.[271] One commenter also recommended that production not be segregated by type of accumulation.[272]

We have decided not to adopt Item 1204 as proposed. Rather, we are codifying the existing Industry Guide 2 disclosure item with several revisions. Consistent with the Industry Guide 2 disclosure item, the Item 1204, as adopted, requires disclosure, for each of the prior three fiscal years, of production, by final product sold, of oil, gas, and other products. In addition, for the same time period, the company must disclose, by geographical area:

- The average sales price (including transfers) per unit of oil, gas and other products produced; and
- The average production cost, not including ad valorem and severance taxes, per unit of production.

However, unlike the Industry Guide disclosure item, this disclosure must be made by geographical area and for each country and field containing 15% or more of the registrant's proved reserves, expressed on an oil-equivalent-barrels basis.

Similarly, we are codifying the instructions to the Industry Guide 2 item. One commenter recommended that we maintain some of the existing instructions from the Industry Guide.[273] The first instruction codified from the Industry Guide clarifies that net production should include only production that is owned by the registrant and produced to its interest, less royalties and production due others. However, in special situations (*e.g.*, foreign production), net production before any royalties may be provided, if more appropriate. If ''net before royalty'' production figures are furnished, the change from the usage of ''net production'' should be noted.

The second instruction, which is also from the Industry Guide, states that production of natural gas should include only marketable production of natural gas on an ''as sold'' basis. Production will include dry, residue, and wet gas, depending on whether liquids have been extracted before the registrant transfers title. Flared gas, injected gas, and gas consumed in operations should be omitted. Recovered gas-lift gas and reproduced gas should not be included until sold. Synthetic gas, when marketed as such, should be included in natural gas sales.

We are adding a third instruction that was not in the Industry Guide. This instruction states that, if any product, such as bitumen, is sold or custody is transferred prior to conversion to synthetic oil or gas, the product's production, transfer prices, and production costs should be disclosed separately from all other products. This instruction is necessary because the existing Industry Guide 2 disclosure requirement only required separate disclosure based on whether the end product was oil or gas. This instruction merely clarifies that disclosures under this item must be based on the end product, which may not be oil or gas because the amendments will permit the disclosure of reserves of other end products, such as bitumen.

The fourth instruction codified from the Industry Guide states that the transfer price of oil and gas (natural and synthetic) produced should be determined in accordance with SFAS 69. And the fifth instruction codified from the Industry Guide clarifies that the average production cost per unit of production should be computed using production costs disclosed pursuant to SFAS 69. Units of production should be expressed in common units of production with oil, gas, and other products converted to a common unit of measure on the basis used in computing amortization. This instruction also adds products from unconventional sources to the existing disclosure Item in Industry Guide 2.

6. Item 1205 (Drilling and Other Exploratory and Development Activities)

We proposed to codify the Industry Guide 2 disclosure item regarding drilling activities as Item 1205 of Regulation S–K, in tabular form, with several revisions to that Industry Guide 2 disclosure item, including applying a new definition of the term ''geographic area'' and adding two categories of wells:

- Extension wells; and
- Suspended wells.

Three commenters believed that the disclosures required under this proposed Item would become too detailed.[274] One of these commenters also believed that the number of wells being drilled does not provide an accurate picture of a company's drilling

[268] See Item 1203 [17 CFR 229.1203].

[269] See letter from Apache.

[270] See letter from Apache.

[271] See letters from Total and ExxonMobil.

[272] See letter from ExxonMobil.

[273] See letter from ExxonMobil.

[274] See letters from Apache, ExxonMobil, and Total.

activities because of the increased usage of horizontal wells.[275]

Some commenters also did not believe that creating new categories for extension wells and suspended wells would be meaningful.[276] They noted the burden of the added detail would exceed the value of the information to investors.[277] One pointed out that determining whether a well constitutes an extension well would be difficult because of multipurpose drilling.[278]

After considering the above comments, we have decided not to adopt all of the proposed revisions to the existing Industry Guide 2 disclosure. We recognize that, for some companies that use advanced drilling techniques, the proposed disclosure may not be a good indicator of the extent of their exploratory and development activities, although we believe that this disclosure is still important for many companies. Therefore, we have decided to codify the existing disclosures found in Industry Guide 2 related to drilling activities without revision and to not require tabular disclosure.[279] However, as proposed, we are adding a new provision to this Item that requires companies to discuss their exploratory and development activities regarding oil and gas resources that are extracted by mining techniques because we are now including such resources under the definition of ''oil and gas producing activities.''

7. Item 1206 (Present Activities)

Item 1206 codifies existing Item 7 of Industry Guide 2, which calls for disclosure of present activities, including the number of wells in the process of being drilled (including wells temporarily suspended), waterfloods in process of being installed, pressure maintenance operations, and any other related activities of material importance.[280] We are adopting Item 1206 substantially as proposed.

8. Item 1207 (Delivery Commitments)

Item 1207 codifies existing Item 8 of Industry Guide 2, which calls for disclosure of arrangements under which the company is required to deliver specified amounts of oil or gas and how the company intends to meet such commitments.[281] We are not adopting any substantive changes to the disclosure currently called for by Item 8 of Industry Guide 2. However, we are restructuring and rewording the disclosure item to make it easier to understand, including separating embedded lists into separate subparagraphs and making general plain English revisions. As proposed, these revisions are not intended to change the substance of the disclosures.

9. Item 1208 (Oil and Gas Properties, Wells, Operations, and Acreage)

We proposed to codify disclosure about oil and gas properties, wells, operations, and acreage as Item 1208 of Regulation S–K, in tabular form, as well as make several revisions to the existing disclosures, including applying a new definition of the term ''geographic area'' and adding language that better illustrates the types of properties and the types of disclosures for those properties, including the following:

- Identification and description generally of the company's material properties, plants, facilities, and installations;
- Identification of the geographic area in which they are located;
- Indication of whether they are located onshore or offshore; and
- Description of any statutory or other mandatory relinquishments, surrenders, back-ins, or changes in ownership.

Six commenters believed that it is not necessary to enhance this section from Industry Guide 2 because the requirements are already covered by Item 102 of Regulation S–K.[282] Commenters were particularly concerned with the segmentation of this disclosure by product, by type of accumulation, and by geographic location.[283] They believed that this level of detail would not be helpful to investors and would impose added costs on companies because they currently do not collect this detailed information.[284] Moreover, seven commenters thought that the well count disclosure is no longer meaningful because of technologies such as horizontal drilling.[285] They thought that, in light of these new technologies, well count disclosure could be misleading.[286]

As with the case of drilling activities, we agree that the proposed added detail could make the disclosures too cumbersome. In addition, such disclosure may be of less importance to many companies because of new drilling technology. Therefore, we are merely codifying the existing Industry Guide 2 disclosure, without revision.[287]

V. Guidance for Management's Discussion and Analysis for Companies Engaged in Oil and Gas Producing Activities

We proposed to add a new Item 1209, which would have specified topics that a company should address either as part of its Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) or in a separate section.[288] Four commenters were concerned that, although the proposed Item was intended to provide more guidance regarding the disclosures required, it would effectively require companies to address all of the issues listed in the Item.[289] One recommended that, instead of a detailed list, the requirement should clarify that companies should address ''material changes due to technology, prices, concession conditions, commercial terms, known trends, demands, commitments, uncertainties and any events that are reasonably likely to have a material effect on reserves estimates and financial condition.'' [290] Similarly, another commenter recommended that the Commission clarify that the Item is limited to material impacts.[291]

We are not adopting the proposed Item as part of Regulation S–K because it is intended to be guidance, rather than a specific disclosure Item. We agree that, if companies were to discuss every issue provided in the list, the disclosure would be too long and detailed to be of much use to most investors. Important issues could be hidden amid unnecessary detail. However, we believe that added guidance would be beneficial to companies regarding the issues that the Commission's staff commented upon in its review of the MD&A section of filings made by oil and gas companies.

To begin, a fundamental premise of MD&A is that the information provided should be related to issues that are material to a company. Although we discuss a list of topics that a company might need to discuss, a company need only discuss a topic if it constitutes, involves, or indicates known trends, demands, commitments, uncertainties, and events that are reasonably likely to have a material effect on the company. These topics include:

[275] See letter from ExxonMobil.
[276] See letters from Apache, API, and Imperial.
[277] See letters from Apache and Southwestern.
[278] See letter from Total.
[279] See Item 1205 [17 CFR 229.1205].
[280] See Item 1206 [17 CFR 229.1206].
[281] See Item 1207 [17 CFR 229.1207].
[282] See letters from API, Chevron, ExxonMobil, Imperial, Shell, and Total.
[283] See letters from Apache, ExxonMobil, Shell, and Total.
[284] See letters from Apache, ExxonMobil, and Petro-Canada.
[285] See letters from API, BP, Chevron, ExxonMobil, Imperial, StatoilHydro, and Total.
[286] See letters from API and Imperial.
[287] See Item 1208 [17 CFR 229.1208].
[288] See Item 303 of Regulation S–K [17 CFR 229.303].
[289] See letters from Chevron, ExxonMobil, Petrobras, and Shell.
[290] See letter from Repsol.
[291] See letter from Total.

• Changes in proved reserves and, if disclosed, probable and possible reserves, and the sources to which such changes are attributable, including changes made due to:
  ○ Changes in prices;
  ○ Technical revisions; and
  ○ Changes in the status of any concessions held (such as terminations, renewals, or changes in provisions);
• Technologies used to establish the appropriate level of certainty for any material additions to, or increases in, reserves estimates, including any material additions or increases to reserves estimates that are the result of any of the final rules adopted in this release;
• Prices and costs, including the impact on depreciation, depletion and amortization as well as the full cost ceiling test;
• Performance of currently producing wells, including water production from such wells and the need to use enhanced recovery techniques to maintain production from such wells;
• Performance of any mining-type activities for the production of hydrocarbons;
• The company's recent ability to convert proved undeveloped reserves to proved developed reserves, and, if disclosed, probable reserves to proved reserves and possible reserves to probable or proved reserves;
• The minimum remaining terms of leases and concessions;
• Material changes to any line item in the tables described in Items 1202 through 1208 of Regulation S–K;
• Potential effects of different forms of rights to resources, such as production sharing contracts, on operations; and
• Geopolitical risks that apply to material concentrations of reserves.

The MD&A is typically presented in a self-contained section of the registration statement or report. However, the disclosure requirements that comprise new Subpart 1200 of Regulation S–K will cause a substantial amount of an oil and gas company's disclosure to appear in tabular format, providing an outline of much of a company's operations. Because the tables will present many of the types of changes that management often discusses in its MD&A, we believe it may be more helpful to investors to locate such discussion close to the tables themselves. Thus, to the extent that any discussion or analysis of known trends, demands, commitments, uncertainties, and events that are reasonably likely to have a material effect on the company is directly relevant to a particular disclosure required by Subpart 1200, the company may include that discussion or analysis with the relevant table, with appropriate cross-references, rather than including it in its general MD&A section.

VI. Conforming Changes to Form 20–F

Form 20–F is the form on which foreign private issuers file their annual reports and Exchange Act registration statements. Currently, Form 20–F contains instructions that are similar to those in Item 102 of Regulation S–K. However, rather than referring to Industry Guide 2 for disclosures regarding oil and gas producing activities, Form 20–F contains its own ''Appendix A to Item 4.D—Oil and Gas'' (Appendix A) that provides guidance for oil and gas disclosures for foreign private issuers.[292] Appendix A is significantly shorter, and provides far less guidance regarding disclosures, than Subpart 1200 or Industry Guide 2. We proposed to revise Form 20–F to eliminate the reference to Appendix A, and rather refer to Subpart 1200, which would expand the disclosures required by foreign private issuers.

Six commenters supported harmonizing the Form 20–F disclosures with Regulation S–K.[293] One noted that the proposal would make disclosure more consistent and comparable among oil companies.[294] It believed the proposal would put all oil companies on a level playing field.[295] However, one commenter recommended that the Commission exempt companies reporting under International Financial Reporting Standards (IFRS).[296] It also recommended that instead of applying the proposed Subpart 1200 to foreign private issuers, the Commission should revise Appendix A to Form 20–F itself, making appropriate limitations for foreign private issuers, such as eliminating the disclosure of wells and acreage.[297] Another commenter was concerned because the proposals may hinder, rather than facilitate, transition to the use of IFRS.[298]

We continue to believe that Subpart 1200 would be appropriate disclosure for all public companies engaged in oil and gas producing activities, including foreign private issuers. The added guidance in Subpart 1200 should promote more consistent and comparable disclosures among oil and gas companies. It is our understanding that many of the larger foreign private issuers already provide disclosure in their filings with the Commission comparable to the disclosure provided by domestic companies. Thus, we are revising Form 20–F to incorporate Subpart 1200 with respect to oil and gas disclosures and delete Appendix A to Item 4.D in that form. We recognize that this requirement may require a foreign private issuer to prepare two different reserves estimates if the rules in their home jurisdiction require a different pricing standard than the 12-month average that we adopt in this release. However, we believe the same conflict would have existed under our previous rule to the extent our pricing method differed from the home jurisdiction's method.

Appendix A currently allows a foreign private issuer to exclude required disclosures about reserves and agreements if its home country prohibits the disclosures. Two commenters suggested that the rule continue to provide an exception for disclosures about reserves and agreements that are prohibited by foreign laws.[299] However, another commenter believed that a company taking advantage of such an exception should be required to disclose the country, the citation of the relevant law or regulation, and the fact that the disclosed estimates do not include amounts from the named country.[300] We are not revising this provision. Rather, because these considerations still apply to such foreign private issuers, we are moving that provision from Appendix A and adopting it as Instruction 2 to Item 4 of Form 20–F, as proposed.[301]

One commenter recommended clarifying that the new disclosures would not apply to foreign private issuers under the Multi-Jurisdictional Disclosure System (MJDS) using Form 40—F that comply with NI 51–101 in Canada because those rules already are broadly consistent with PRMS.[302] We agree with this commenter and believe that such issuers need not provide disclosures beyond those required in Canada.

VII. Impact of Amendments on Accounting Literature

A. Consistency With FASB and IASB Rules

Numerous commenters recommended that the SEC generally coordinate its efforts with the IASB and FASB to create a cohesive whole and not adopt

[292] See Appendix A to Item 4.D—Oil and Gas of Form 20–F [17 CFR 249.220f].

[293] See letters from CAQ, Deloitte, ExxonMobil, KPMG, PWC, and Shell.

[294] See letter from ExxonMobil.

[295] See letter from ExxonMobil.

[296] See letter from Total.

[297] See letter from Total.

[298] See letter from Ross.

[299] See letters from Shell and Total.

[300] See letter from ExxonMobil.

[301] *Id.*

[302] See letter from Deloitte.

competing models.[303] We have begun, and will continue, to work with both of these organizations to ensure a smooth transition to the new reporting rules.

B. Change in Accounting Principle or Estimate

In the Proposing Release, we expressed our view that the change from using single-day year-end price to an average price should be treated as a change in accounting principle, or a change in the method of applying an accounting principle, that is inseparable from a change in accounting estimate. Therefore, this change would be considered a change in accounting estimate pursuant to Statement of Financial Accounting Standard No. 154 ''Accounting Changes and Error Corrections'' (SFAS 154) and would be accounted for prospectively.

Commenters believed that the change would be best described as:

- A change in accounting estimate;[304]
- A change in accounting principle that is inseparable from a change in accounting estimate; or[305]
- A change in accounting estimate effected by a change in accounting principle.[306]

We believe that any accounting change resulting from the changes in definitions and required pricing assumptions in Rule 4–10, should be treated as a change in accounting principle that is inseparable from a change in accounting estimate, which does not require retroactive revision. We note that pursuant to AU 420.13, such a change requires recognition in the independent auditor's report through the addition of an explanatory paragraph.

All commenters on the issue agreed that adoption of the rules should not require retroactive revision of past reserves estimates.[307] Some believed retroactive revision of reserves estimates would be very burdensome or impossible because such data was not maintained.[308] We agree with those commenters and believe that no retroactive revisions will be necessary.

Three commenters recommended that the FASB revise Statement of Financial Accounting Standard No. 19 (SFAS 19) to include unconventional resources currently accounted for as mining activities and also provide guidance that no retroactive revisions would be required in that scenario.[309] We will continue to work with the FASB on this issue.

C. Differing Capitalization Thresholds Between Mining Activities and Oil and Gas Producing Activities

As noted elsewhere in this release, extraction of products such as bitumen now will be considered oil and gas producing activities, and not mining activities. Under current U.S. accounting guidance, costs associated with proven plus probable mining reserves may be capitalized for operations extracting products through mining methods, like bitumen. Under the new rules, bitumen extraction and operations that produce oil or gas through mining methods are included under oil and gas accounting rules, which only permit capitalization of costs associated with proved reserves.[310] Moreover, the mining guidelines do not provide specified percentages for establishing levels of certainty for proven or probable reserves for mining activities. It is possible that these differences could result in changing reserves estimates for these resources during the transition to the new rules.

One commenter believed that the industry would need guidance regarding how to transition operations that are disclosed and accounted for as mining operations to oil and gas disclosure and accounting.[311] It noted that this issue would be relevant not only coincident with the new rules, but could be relevant to future events, such as a coal mining company that in subsequent years changes its operations to in situ coal gasification.[312] That commenter believed that, without guidance, the change from mining treatment to oil and gas treatment could be considered a change in accounting principle which requires retroactive revision.[313] We acknowledge this commenter's concerns. With respect to resources formerly considered mining activities, we view the change from mining treatment to oil and gas treatment as a change in accounting principle that is inseparable from a change in accounting estimate, which does not require retroactive revision.

VIII. Application of Interactive Data Format to Oil and Gas Disclosures

In the Proposing Release, we sought comment on the desirability of rules that would permit, or require, oil and gas companies to present the tabular disclosures in Subpart 1200 in interactive data format in addition to the currently required format. Most commenters addressing the topic supported the use of XBRL for oil and gas disclosures.[314] They believed using interactive data would be very helpful to investors and analysts.[315]

However, they also recommended that the Commission wait until a well-developed taxonomy exists.[316] Some recommended that the Commission implement it in stages, initially with a voluntary program.[317] One commenter recommended that the SEC work with other groups like SPE, IASB, and the United Nations to ensure tags ultimately become the industry standard.[318]

We agree that much of the disclosures regarding oil and gas companies would be conducive to interactive data. We intend to continue to work on developing a taxonomy for such disclosure. Once a well-developed taxonomy is created, we will address this issue further. We are not, however, adopting interactive data requirements in this release. We will continue to consider whether to require interactive oil and gas disclosure filings in the future and, if so, when such filings should be required based on the development status of an oil and gas disclosure taxonomy.

IX. Implementation Date

A. Mandatory Compliance

We proposed to require companies to begin complying with the disclosure requirements for registration statements filed on or after January 1, 2010, and for annual reports on Forms 10–K and 20–F for fiscal years ending on or after December 31, 2009. A company may not apply the new rules to disclosures in quarterly reports prior to the first annual report in which the revised disclosures are required.

[303] See letters from CAQ, CFA, Eni, Grant Thornton, KPMG, and PWC.

[304] See letters from CAQ, Canadian Natural, CAPP, Deloitte, Devon, KPMG, Petrobras, PWC, Repsol, Shell, and StatoilHydro.

[305] See letter from Deloitte.

[306] See letter from Petro-Canada.

[307] See letters from Apache, CAQ, Canadian Natural, CAPP, Deloitte, Devon, Evolution, ExxonMobil, Petrobras, Petro-Canada, PWC, Repsol, Shell, StatoilHydro, and Total.

[308] See letters from Canadian Natural, Deloitte, Evolution, Petrobras, and Shell.

[309] See letters from CAQ, Petrobras, and PWC.

[310] See Rule 4–10(c) of Regulation S–X [17 CFR 210.4–10(c)].

[311] See letter from KPMG.

[312] See letter from KPMG.

[313] See letter from KPMG.

[314] See letters from Audit Policy, CFA, Deloitte, Devon, E&Y, ExxonMobil, PWC, Shell, Standard Advantage, StatoilHydro, and Zakaib.

[315] See letters from CFA, Devon, E&Y, StatoilHydro, and Zakaib.

[316] See letters from Audit Policy, Deloitte, Devon, E&Y, ExxonMobil, PWC, Shell, StatoilHydro, and Zakaib.

[317] See letters from Audit Policy, Devon, E&Y, PWC, StatoilHydro, and Zakaib.

[318] See letter from Zakaib.

Fifteen commenters agreed that a delayed compliance date would be helpful in allowing companies to familiarize themselves with the new disclosure requirements before having to comply with them.[319] Four commenters supported the proposed January 1, 2010 compliance date of Securities Act filings and Exchange Act filings related to fiscal periods ending on or after December 31, 2009.[320] However, one conditioned this approval upon the adoption of the rules before December 31, 2008.[321] Another suggested one year after adoption of the rules.[322]

Four commenters believed that the proposed compliance date would be too soon.[323] One recommended a compliance date of December 31, 2010 to enable companies to make necessary changes in IT systems and data processing.[324] Another noted the magnitude of the proposed changes, length of time to design, program and implement system changes, and the goal of getting the best possible disclosure.[325] One commenter suggested delaying implementation for two years after adoption.[326]

We continue to believe that the proposed compliance dates are appropriate. However, as we discuss our revisions with the FASB and IASB, we will consider whether to delay the compliance date further.

B. Voluntary Early Compliance

Seven commenters recommended that early compliance not be permitted to maintain consistency and comparability of disclosure among issuers, which could be misleading or confusing to investors.[327] However, one commenter believed that the Commission should permit early adoption of the new rules because companies with different fiscal year ends are not comparable anyway.[328] One commenter suggested that the Commission permit companies to provide the new disclosures supplementally.[329] We agree that voluntary compliance may make disclosures incomparable. Therefore, companies may not elect to follow the new disclosure rules prior to the effective date.

X. Paperwork Reduction Act

A. Background

Our new rules and amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[330] We submitted the new rules and amendments to the Office of Management and Budget (OMB) for review in accordance with the PRA.[331] OMB has approved the revisions. The titles for these collections of information are:

(1) ''Regulation S–K'' (OMB Control No. 3235–0071); [332]
(2) ''Industry Guides'' (OMB Control No. 3235–0069);
(3) ''Regulation S–X'' (OMB Control No. 3235–0009);
(4) ''Form S–1'' (OMB Control No. 3235–0065);
(5) ''Form S–4'' (OMB Control No. 3235–0324);
(6) ''Form F–1'' (OMB Control No. 3235–0258);
(7) ''Form F–4'' (OMB Control No. 3235–0325);
(8) ''Form 10'' (OMB Control No. 3235–0064);
(9) ''Form 10–K'' (OMB Control No. 3235–0063); and
(10) ''Form 20–F'' (OMB Control No. 3235–0063).

We adopted all of the existing regulations and forms pursuant to the Securities Act and the Exchange Act. These regulations and forms set forth the disclosure requirements for annual reports [333] and registration statements that are prepared by issuers to provide investors with the information they need to make informed investment decisions in registered offerings and in secondary market transactions. The industry guides supplement the existing regulations and forms and provide guidance with respect to industry-specific disclosures.

Our amendments to these existing forms are intended to modernize and update our reserves definitions to better reflect changes in the oil and gas industry and markets and new technologies that have occurred in the decades since the current rules were adopted, including expanding the scope of permissible technologies for establishing certainty levels of reserves, reserves classifications that a company can disclose in a Commission filing, and the types of resources that can be included in a company's reserves, as well as providing information regarding a company's internal controls over reserves estimation and the qualifications of person preparing reserves estimates or conducting reserves audits. The new rules and amendments also are intended to codify, modernize, and centralize the disclosure items for oil and gas companies in Regulation S–K. Finally, the new rules and amendments are intended to harmonize oil and gas disclosures by foreign private issuers with disclosures by domestic companies. Overall, the new rules and amendments attempt to provide improved disclosure about an oil and gas company's business and prospects without sacrificing clarity and comparability, which provide protection and transparency to investors.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Many, but not all, of the information collection requirements related to annual reports and registration statements will be mandatory. There is no mandatory retention period for the information disclosed, and the information will be publicly available on the EDGAR filing system.

B. Summary of Information Collections

The new rules and amendments increase existing disclosure burdens for annual reports on Forms 10–K [334] and

[319] See letters from Apache, Chevron, Davis Polk, Deloitte, ExxonMobil, KPMG, Newfield, Petrobras, Petro-Canada, PWC, Ryder Scott, Shell, Southwestern, Talisman, and Total.

[320] See letters from Davis Polk, ExxonMobil, Shell, and StatoilHydro.

[321] See letter from ExxonMobil.

[322] See letter from Talisman.

[323] See letters from Apache, Petrobras, PWC, and Total.

[324] See letter from Petrobras.

[325] See letter from Apache.

[326] See letter from Devon.

[327] See letters from Davis Polk, Devon, ExxonMobil, Petrobras, Ryder Scott, Shell, and Wagner.

[328] See letter from Evolution.

[329] See letter from Davis Polk.

[330] 44 U.S.C. 3501 *et seq.*

[331] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[332] The paperwork burden from Regulation S–K and the Industry Guides is imposed through the forms that are subject to the disclosures in Regulation S–K and the Industry Guides and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience, we estimate the burdens imposed by each of Regulation S–K and the Industry Guides to be a total of one hour.

[333] The pertinent annual reports are those on Forms 10–K and 20–F.

[334] The disclosure requirements regarding oil and gas properties and activities are in Form 10–K as well as the annual report to security holders required pursuant to Rule 14a–3(b) [17 CFR 240.14a–3(b)]. Form 10–K permits the incorporation by reference of information from the Rule 14a–3(b) annual report to security holders to satisfy the Form 10–K disclosure requirements. The analysis that follows assumes that companies would either provide the proposed disclosure in a Form 10–K or incorporate the required disclosure into the Form 10–K by reference to the Rule 14a–3(b) annual report to security holders if the company is subject to the proxy rules. This approach takes into account the burden from the proposed disclosure

Continued

20–F and registration statements on Forms 10, 20–F, S–1, S–4, F–1, and F–4 by creating the following new disclosure requirements, many of which were requested by industry participants:

- Disclosure of reserves from non-traditional sources (*i.e.*, bitumen, shale, coalbed methane) as oil and gas reserves;
- Optional disclosure of probable and possible reserves;
- Optional disclosure of oil and gas reserves' sensitivity to price;
- Disclosure of the company's progress in converting proved undeveloped reserves into proved developed reserves, including those that are held for five years or more and an explanation of why they should continue to be considered proved;
- Disclosure of technologies used to establish reserves in a company's initial filing with the Commission and in filings which include material additions to reserves estimates;
- The company's internal controls over reserves estimates and the qualifications of the technical person primarily responsible for overseeing the preparation or audit of the reserves estimates;
- If a company represents that disclosure is based on the authority of a third party that prepared the reserves estimates or conducted a reserves audit or process review, filing a report prepared by the third party; and
- Disclosure based on a new definition of the term ''by geographic area.''

In addition, the amendments harmonize the disclosure requirements that apply to foreign private issuers with the disclosure requirements that apply to domestic issuers with respect to oil and gas activities. In particular, foreign private issuers must disclose the information required by Items 1205 through 1208 of Regulation S–K regarding drilling activities, present activities, delivery commitments, wells, and acreage, which previously were not specified in Appendix A to Form 20–F. These disclosure items codify the substantive disclosures called for by Items 4 through 8 of Industry Guide 2, although much of this disclosure may have been disclosed by some companies under the more general discussions of business and property on that form.

C. Revisions to PRA Burden Estimates

For purposes of the PRA, we estimated, in the Proposing Release, the total annual increase in the paperwork burden for all affected companies to comply with our proposed collection of information requirements to be approximately 7,472 hours of in-house company personnel time and to be approximately $1,659,000 for the services of outside professionals.[335] These estimates included the time and the cost of preparing and reviewing disclosure and filing documents. Our methodologies for deriving the above estimates are discussed below.

Our estimates represented the burden for all oil and gas companies that file annual reports or registration statements with the Commission. Based on filings received during the Commission's last fiscal year, we estimate that 241 oil and gas companies file annual reports and 67 oil and gas companies file registration statements. Most of the information called for by the new disclosure requirements, including the optional disclosure items, is readily available to oil and gas companies and includes information that is regularly used in their internal management systems. These disclosures include:

- Disclosure of reserves from non-traditional sources (*i.e.*, bitumen, shale, coalbed methane) as oil and gas reserves;
- Optional disclosure of probable and possible reserves;
- Optional disclosure of oil and gas reserves' sensitivity to price;
- Disclosure of the company's progress in converting proved undeveloped reserves into proved developed reserves, including those that are held for five years or more and an explanation of why they should continue to be considered proved;
- Disclosure of technologies used to establish reserves in a company's initial filing with the Commission and in filings which include material additions to reserves estimates;
- The company's internal controls over reserves estimates and the qualifications of the technical person primarily responsible for overseeing the preparation or audit of the reserves estimates;
- If a company represents that disclosure is based on the authority of a third party that prepared the reserves estimates or conducted a reserves audit or process review, filing a report prepared by the third party; and
- Disclosure based on a new definition of the term ''by geographic area.''

We estimated that, on average, each company would incur a burden of 35 hours to prepare these disclosures in an annual report or registration statement.

The amendments also apply several disclosure items to foreign private issuers that previously did not apply to them. As noted above, many of these disclosure items, such as drilling activities, wells and acreage, require the issuer to provide more specificity about its business and property. Foreign private issuers that do not currently provide such specificity would incur an added burden to present such disclosures in their filings. In the Proposing Release, we estimated that this burden would be 20 hours per foreign private issuer.

We received few comments regarding our estimates. Several large oil companies, and an industry organization that primarily represents large oil companies, believed that the estimates were too low. They believed that the new rules and amendments would increase their burden by 10,000 to 15,000 hours per year. However, these commenters included the initial cost to change their internal systems to provide the new required disclosures in their estimates. Based on conversations with these commenters, the staff understands that they believed that the ongoing burden would be approximately one-third of that estimate. For purposes of its Paperwork Reduction Act estimate, the staff considers the ongoing annual burden and spreads the initial transitional burden of compliance with new rules and regulations over a three-year period.

In addition, these commenters indicated that the two most significant burdens that stemmed from the proposed use of different prices for disclosure and accounting purposes and the increased detail in disclosures that would result from the proposed definition of the term ''geographic area'' and the proposed disclosure by type of accumulation. It should be noted that these commenters have significant reserves spread worldwide. Some of these large companies have as much as 10,000 times the amount of reserves of the median oil and gas company. These large companies likely would be more significantly impacted by the level of detailed disclosure that the proposals would have required compared to the vast majority of oil and gas companies in our reporting system, which do not have such extensive global operations. Therefore, we do not believe that the estimate provided by those large oil and gas companies necessarily would be applicable to most oil and gas companies. However, in response to the concerns that they expressed, the final rules do not require the use of different

requirements that are included in both Form 10–K and Regulation 14A or 14C.

[335] For administrative convenience, the presentation of the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals have been rounded to the nearest thousand.

prices for disclosure and full cost accounting purposes. We also intend to continue to work with the FASB to align the accounting standards with that pricing mechanism. In addition, we have significantly reduced the level of detailed geographic and product disclosure that the rules require. Finally, we are providing for a substantial transition period to allow companies to adjust their systems to comply with the new rules. We believe that these changes will help to mitigate the increased burden of the new rules.

We do, however, believe that our initial burden estimates may have been too low. We are therefore adjusting our burden estimate to reflect an additional increase of 100 hours per company per year. In addition, we are increasing our burden estimate for foreign private issuers by an additional 150 hours per company per year. Consistent with current Office of Management and Budget estimates and recent Commission rulemakings, we estimate that 25% of the burden of preparation of registration statements on Forms S–1, S–4, F–1, F–4, 10, and 20–F is carried by the company internally and that 75% of the burden is carried by outside professionals retained by the issuer at an average cost of $400 per hour.[336] We estimate that 75% of the burden of preparation of annual reports on Form 10–K or Form 20–F is carried by the company internally and that 25% of the burden is carried by outside professionals retained by the company at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours. The following tables summarize the additional changes to the PRA estimates:

TABLE 1—CALCULATION OF INCREMENTAL PAPERWORK REDUCTION ACT BURDEN ESTIMATES FOR EXCHANGE ACT PERIODIC REPORTS

Form	Annual responses	Incremental hours/form	Incremental burden	75% Issuer	25% Professional	$400 Professional cost
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.75	(E)=(C)*0.25	(F)=(E)*$400
10–K§ [337]	206	100	20,600	15,450	5,150	2,060,000
20–F	35	150	5,250	3,938	1,312	525,000
Total	241	....	25,850	19,388	6,462	2,585,000

TABLE 2—CALCULATION OF INCREMENTAL PAPERWORK REDUCTION ACT BURDEN ESTIMATES FOR SECURITIES ACT REGISTRATION STATEMENTS AND EXCHANGE ACT REGISTRATION STATEMENTS

Form	Annual responses	Incremental hours/form	Incremental burden	25% Issuer	75% Professional	$400 Professional cost
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.25	(E)=(C)*0.75	(F)=(E)*$400
10	5	100	500	125	375	150,000
20–F	2	150	300	75	225	90,000
S–1	38	100	3,800	950	2,850	1,140,000
S–4	17	100	1,700	425	1,275	510,000
F–1	2	150	300	75	225	90,000
F–4	3	150	450	112.5	337.5	135,000
Total	67	....	7,050	1762.5	5,287.5	2,115,000

D. Request for Comment

We request comment in order to evaluate the accuracy of our estimates of the burden of the revised information collections. Any member of the public may direct to us any comments concerning the accuracy of these burden estimates. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy of the comments to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–15–08. Requests for materials submitted to the OMB by us with regard to this collection of information should be in writing, refer to File No. S7–15–08, and be submitted to the Securities and Exchange Commission, Records Management Branch, 100 F Street, NE., Washington, DC 20549–1126. Because OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if OMB receives them within 30 days of publication.

XI. Cost-Benefit Analysis

A. Background

We are adopting revisions to the oil and gas reserves disclosure regime of Regulation S–K and Regulation S–X under the Securities Act of 1933 and the Securities Exchange Act of 1934 and Industry Guide 2. The revisions are intended to modernize and update oil and gas disclosure. The oil and gas industry has experienced significant changes since the Commission initially adopted its current rules and disclosure

[336] In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $400 as the average cost of outside professionals that assist issuers in preparing disclosures and conducting registered offerings.

[337] The burden estimates for Form 10–K assume that the requirements are satisfied by either including information directly in the annual reports or incorporating the information by reference from the Rule 14a–3(b) annual report to security holders.

regime between 1978 and 1982, including advancements in technology and changes in the types of projects in which oil and gas companies invest. The revisions also are intended to provide investors with improved disclosure about an oil and gas company's business and prospects without sacrificing clarity and comparability.

B. Description of New Rules and Amendments

Currently, Industry Guide 2 specifies many of the disclosure guidelines for oil and gas companies. The Industry Guide calls for disclosure relating to reserves, production, property, and operations in addition to that which is required by Regulation S–K. Generally, the new rules and amendments codify and update the existing Industry Guide 2 disclosures in a new Subpart 1200 of Regulation S–K, clarify the level of detail required to be disclosed, and require reserves disclosure in a tabular presentation. The changes relate primarily to disclosure of the following:

- Disclosure of reserves from non-traditional sources (*e.g.*, bitumen, shale) as oil and gas reserves;
- Optional disclosure of probable and possible reserves;
- Optional disclosure of oil and gas reserves' sensitivity to price;
- Disclosure of the company's progress in converting proved undeveloped reserves into proved developed reserves, including those that are held for five years or more and an explanation of why they should continue to be considered proved;
- Disclosure of technologies used to establish reserves in a company's initial filing with the Commission and in filings which include material additions to reserves estimates;
- The company's internal controls over reserves estimates and the qualifications of the technical person primarily responsible for overseeing the preparation or audit of the reserves estimates;
- If a company represents that disclosure is based on the authority of a third party that prepared the reserves estimates or conducted a reserves audit or process review, filing a report prepared by the third party; and
- Disclosure based on a new definition of the term ''by geographic area.''

The new rules and amendments also make revisions and additions to the definitions section of Rule 4–10 of Regulation S–X. These revisions update and extend reserves definitions to reflect changes in the oil and gas industry and new technologies. In particular, the new and revised definitions:

- Expand the definition of ''oil and gas producing activities'' to include the extraction of hydrocarbons from oil sands, shale, coalbeds, or other natural resources and activities undertaken with a view to such extraction;
- Add a definition of ''reasonable certainty'' to provide better guidance regarding the meaning of that term;
- Add a definition of ''reliable technology'' to permit the use of new technologies to establish proved reserves;
- Define probable and possible reserves estimates; and
- Add definitions to explain new terms used in the revised definitions.

In addition, the amendments harmonize the disclosure requirements that apply to foreign private issuers with the disclosure requirements that apply to domestic issuers with respect to oil and gas activities. In particular, the amendments to Form 20–F will require foreign private issuers to disclose the information required by Items 1205 through 1208 of Regulation S–K regarding drilling activities, present activities, delivery commitments, wells, and acreage, which are not currently specified under Appendix A to Form 20–F, although much of this disclosure is often disclosed by companies under the more general discussions of business and property on that form.

C. Benefits

We expect that the new rules and amendments will increase transparency in disclosure by oil and gas companies by providing improved reporting standards. The revisions to the definitions should align our disclosure rules with the realities of the modern oil and gas markets. For example, we believe that the inclusion of bitumen and other resources from continuous accumulations as oil and gas producing activities is consistent with company practice to treat these operations as part of, rather than separate from, their traditional oil and gas producing activities. Similarly, the expansion of permissible technologies for determining certainty levels of reserves recognizes that companies now take advantage of these technological advances to make business decisions. We expect these new rules and amendments to improve disclosure by aligning the required disclosure more closely with the way companies conduct their business.

Allowing companies to disclose probable and possible reserves is designed to improve investors' understanding of a company's unproved reserves. For those companies that already disclose such reserves on their Web sites, the new rules and amendments permit them to unify such disclosures into a single, filed document. Disclosure of these categories of reserves beyond proved reserves may foster better company valuations by investors, creditors, and analysts, thus improving capital allocation and reducing investment risk. Because some of the disclosure items are optional, the amount of increased transparency will depend on the extent to which companies elect to provide the additional disclosures permitted under the new rules. If companies elect not to provide the optional disclosure, then the benefits from increased transparency would be limited to the extent that the new rules improve the transparency of proved reserves disclosure.

By permitting increased disclosure and promoting more consistency and comparability among disclosures, the new rules and amendments provide a mechanism for oil and gas companies to seek more favorable financing terms through more disclosure and increased transparency. Investors may be able to request such additional disclosure in Commission filings during negotiations regarding bond and debt covenants. Thus, we expect that, as a result of competing factors in the marketplace, the new rules and amendments will result in increased transparency, either because companies elect to voluntarily provide increased disclosure, or because investors may discount companies that do not do so. We believe that the benefits and costs of disclosing unproved reserves ultimately will be determined by market conditions, rather than regulatory requirements.

We expect that permitting companies to disclose probable and possible reserves will increase market transparency, provide investors with more reserves information, and allow for more accurate production forecasts. By relating standards used in deterministic methods to comparable percentage thresholds used in probabilistic methods for establishing a given level of certainty, the new rules and amendments should result in increased standardization in reporting practices which would promote comparability of reserves across companies. The new rules would define the term ''reliable technology'' to permit oil and gas companies to prepare their reserves estimates using new types of technology that companies are not permitted to use under the current rules. This new definition also is designed to encompass new technologies as they are developed in the future, thereby

providing investors and the market with a more comprehensive understanding of a company's estimated reserves.

We expect that replacing the Industry Guide with new Regulation S–K items will provide greater certainty because the disclosure requirements would be in rules established by the Commission. In addition, we believe that disclosure of reserves concentrated in particular countries should provide better information to investors regarding the geopolitical risk to which some companies may be exposed. Overall, we believe that the amendments, as a whole, will provide investors with more information that management uses to make business decisions in the oil and gas industry.

1. Average Price and First of the Month Price

The revision to change the price used to calculate reserves from a year-end single-day price to a historical average price over the company's most recently ended fiscal year is expected to reduce the effects of seasonality. In particular, many commenters suggested the use of a 12-month average price to mitigate the risk of a year-end price affected by short-term price volatility such that it does not reflect the true nature of a company investment, planning, and performance. Our Office of Economic Analysis studied the publicly-available pricing data and found evidence of year-end price volatility. The historical volatility of year-end prices is between 16 percent and 41 percent higher than the volatility of annual average prices depending on the grade and geography of oil or gas prices considered. This difference demonstrates variability in oil and gas prices, likely due to seasonal demands, that does not reflect long term fundamental values, but that cannot be immediately corrected due to the costs of transportation and speed of delivery. Given this variability, it is likely that a 12-month average price will yield better reserves estimates—that reflect management planning and investment to the extent that they discount the short-term component of oil and gas prices—than a year-end spot price.

Many of the commenters to the Proposing Release supported the use of a historical price, even though this approach may be less useful in determining the fair value of a company's reserves compared to a futures market price. We believe investors are concerned not only about the quantity of a company's reserves, but also about the profitability of those reserves. We also recognize that some reserves will be of more value than others due to extraction and transportation costs. As a result, since the new rules and amendments require the use of a single price to estimate reserves and since that price may not be as informative of value as a futures price, the new rules and amendments also gives companies the option of providing a sensitivity analysis and reporting reserves based on additional price estimates.

If companies elect to provide a sensitivity analysis, we expect this to benefit investors by allowing them to formulate better projections of company prospects that are more consistent with management's planning price and prices higher and lower that may reasonably be achieved. In particular, it allows companies the flexibility to communicate how their reserves would change under alternative economic conditions, including those that they may believe better reflect their future prospects. We expect that companies would be more likely to adopt a sensitivity analysis approach if investors and other market participants determine that this information would reduce investment risk, or if companies believe such disclosure will reduce the cost of capital formation. The new rules and amendments should result in increased price stability in determining whether reserves are economically producible. This should mitigate seasonal effects, resulting in reserves estimates that more closely reflect those used by management in planning and investment decisions. We expect this to allow for more accurate company assessments and improve projections of company prospects.

In addition to an average annual price, many of the commenters suggested that the price be computed on the first day of the month. Two reasons were given. First, beginning month prices would allow an additional month of preparation time in calculating reserves for financial reporting. Second, some commenters suggested that month-end, and in particular year-end, prices were subject to additional short-term volatility because many oil and gas financial contracts expire on those days, resulting in higher than normal trading activity. While the staff of the Office of Economic Analysis did not find systematic evidence of increased volatility around month-end or year-end oil and gas prices relative to other days in the month, we agree that additional preparation time is beneficial because reserves estimations require significant time and resources. An additional month would help reduce errors that might otherwise result from the financial reporting time constraints.

Finally, we believe that revising the full cost accounting method to use the same pricing mechanism as the reserves disclosure requirements should provide consistency between the disclosure and accounting presentations. The use of a single pricing method should also minimize the incremental burden placed on companies as a result of the rule changes because they would not be required to prepare two separate estimates.

2. Probable and Possible Reserves

We anticipate that disclosure of probable and possible reserves, if companies elect to do so, will allow investors, creditors, and other users to better assess a company's reserves. In addition, the tabular format for disclosing probable and possible reserves should reduce investor search costs by making it easier to locate reserves disclosures and facilitating comparability among oil and gas companies.

While we recognize that many companies already communicate with investors about their unproved and other reserves through alternative means, such as company Web sites or press releases, some commenters remarked that an objective comparison among companies is difficult because different companies have defined such reserves classifications differently. We believe that permitting disclosure of this information in Commission filings will provide a more consistent means of comparison because disclosure in our filings must comply with our definitions. Although our new rules make disclosure of probable and possible reserves optional, and large oil and gas producers suggested in their comment letters that such disclosure would be of limited benefit because of the relative uncertainty of those estimates, we believe that competitive pressures within the industry might make it beneficial for large producers to disclose this information. Increased disclosure might, for example, improve credit quality and lower the cost of debt financing, or reduce the risk associated with business transactions between the company and its customers or suppliers. Regardless, since the disclosure decision is voluntary, it should occur only to the extent that companies find that the benefits justify the costs of doing so.

We believe that permitting the disclosure of probable and possible reserves will benefit smaller companies, in particular. Larger issuers tend to already have large amounts of proved reserves. The new rules and amendments permit smaller companies,

who often participate in a significant amount of exploratory activity, to better disclose their business prospects. Consequently, we anticipate that the new rules and amendments could lead to efficiencies in capital formation, as more information will be available regarding the prospects of smaller issuers.

3. Reserves Estimate Preparers and Reserves Auditors

We believe that investors would benefit from a greater level of assurance with respect to the reliability of reserve estimates, particularly if companies are allowed to disclose unproved reserves because unproved reserves are inherently less certain than proved reserves. We proposed disclosure requirements relating to whether the person primarily responsible for preparing reserves estimates or conducting a reserves audit, if the company represents that it has enlisted a third party to conduct a reserves audit, met a specified list of qualifications based on the Society of Petroleum Engineers's reserves audit guidelines. However, commenters expressed concern that many of these qualifications such as membership in professional societies were not standardized worldwide. Without control over those standards, the disclosures would not be comparable. We agree with those commenters and, as suggested, have adopted a more principles-based disclosure requirement. Under the adopted rules, a company must disclose its internal controls over reserves estimations and disclose the qualifications of the primary technical person in charge of overseeing the reserves estimations or reserves audit. We believe that disclosure of the individual qualifications, rather than simple acknowledgement of meeting certain criteria, which may differ within countries, will provide investors with better information to compare companies and the qualifications of persons in charge of the reserves estimations and reserves audits, which should enable more accurate assessments of the quality of audit reports. We believe that disclosure of a company's internal controls over reserves estimates will allow investors to assess whether a company has implemented appropriate controls without dictating to companies specified criteria for establishing those controls.

Although we do not expect all companies to undertake a third-party reserves audit because our rules do not require such a reserves audit, third party participation in the estimation of reserves should add credibility to a company's public disclosure. The opinion of an objective, qualified person on the reserves estimates is designed to increase the reliability of these estimates and investor confidence.

4. Development of Proved Undeveloped Reserves

The new rules and amendments also require disclosure of a company's progress in developing undeveloped reserves and the reasons why any PUDs have remained undeveloped for five years or more. We believe that such disclosure supplements our amendments that ease the requirements for recognizing PUDs and thereby should increase the amount of PUDs disclosed in filings, even though the properties representing such proved reserves have not yet been developed and therefore do not provide the company with cash flow. We believe that the disclosure requirements will increase the accountability of companies that disclose reserves for extended periods of time without adequate justification for their failure to develop those reserves.

5. Disclosure Guidance

The release also provides guidance about the type of information that companies should consider disclosing in Management's Discussion and Analysis, and allows companies to include this information with the relevant tables. Providing the additional guidance should assist companies in preparing their disclosure, improving the quality and consistency of this disclosure. Locating this discussion with the tables themselves should benefit investors by simplifying the presentation of disclosure, and providing insight into the information disclosed in the tables.

6. Updating of Definitions Related to Oil and Gas Activities

The new rules and amendments also update the definition of the term ''oil and gas producing activities'' as well as updating or creating new definitions for other terms related to such activities, including ''proved oil and gas reserves'' and ''reasonable certainty.'' We believe that updating these definitions will help companies disclose oil and gas operations in the same way that companies manage and assess those operations. This includes resources extracted from nontraditional sources that companies consider oil and gas activities, which previously were excluded them from the definition of ''oil and gas producing activities.'' In addition, adding definitions for terms like ''reasonable certainty'' (which currently is in the definition of ''proved oil and gas reserves,'' but not defined) will provide companies with added guidance and assist them in providing consistent disclosures between companies.

7. Harmonizing Foreign Private Issuer Disclosure

We believe that the harmonization of foreign private issuer disclosure will help make disclosures of foreign private issuers more comparable with domestic companies. The oil and gas industry has changed significantly since the rules were adopted. Today, many companies have interests that span the globe. In addition, many of these projects are joint ventures between foreign private issuers and domestic companies. Having differing levels of disclosure for companies that may be participating in the same projects harms comparability between investment choices. The harmonization of foreign private issuer disclosure is intended to promote comparability among all oil companies.

D. Costs

We expect that the new rules and amendments will result in initial and ongoing costs to oil and gas companies. These burdens will vary significantly among companies. Based on disclosures in company filings, the largest oil and gas companies can have as much as 10,000 times the reserves of the median reporting oil and gas company. As would be expected, companies that have more reserves and larger operations will have a correspondingly larger amount of information that they must disclose and, therefore, the burden of complying with our disclosure requirements would be greater for larger companies.

Although we are adding a new subpart to Regulation S–K to set forth the disclosure requirements that are unique to oil and gas companies, the subpart, for the most part, codifies the substantive disclosure called for by Industry Guide 2. The disclosure requirements have been updated and clarified, and require the disclosure to be presented in a tabular format, where appropriate.

Although many companies already present this information in tabular form, for companies that do not, this requirement could impose a burden on companies as they transition from a narrative to tabular disclosure format. We expect, however, that any increased preparation costs would be highest in the first year after adoption, but would decline in subsequent years as companies adjust to the new format. We

think this burden is justified because tabular disclosure will increase comparability and facilitate understanding and analysis by investors.

1. Probable and Possible Reserves

Allowing disclosure of probable and possible reserves could create an increased risk of litigation because these categories of reserves estimates are less certain than proved reserves. Companies may choose not to disclose such reserves, in part, because of the risk of incurring litigation costs to defend their disclosures due to the increased uncertainty of these categories. Disclosure of probable and possible reserves may also result in revealing competitive information because it might reveal a company's business strategy, such as the geographic location and nature of its exploration and discoveries. For example, if geographical detail can be inferred from estimates of unproved reserves, this might reveal information about the value of a company's assets to competitors and could put the producer at a competitive disadvantage. We have reduced the level of geographical detail to reduce the burden on companies, while still providing sufficient information to investors regarding concentrations of risk, including political risk.

We expect companies will incur costs in preparing the additional disclosures such as calculating and aggregating the reserve projections in a prescribed format. However, if probable and possible categories of reserves have different extraction cost structures and they are not disclosed separately from proved reserves, this could result in increased uncertainty in an investor's assessment of a company's prospects.

Companies also expressed concern that mandatory disclosure of probable and possible reserves could expose them to increased litigation risk. We believe that making these disclosures voluntary mitigates these concerns. Companies unwilling to bear the added risk can simply opt not to provide this disclosure.

2. Reserves Estimate Preparers and Reserves Auditors

If a company chooses to use a third party to prepare or audit reserve estimates, it will incur costs to hire these outside consultants. The new rules and amendments do not require companies to hire such a person. If enough companies that currently do not use such consultants begin to hire them, we believe that industry wages could potentially increase due to increased demand for reserves calculating specialists unless that demand is compensated by an increase in the supply of such persons. If wages increased, then all companies, not just those employing third party consultants, would incur added costs.

Large companies may be less likely to hire third parties because they tend to have staff to make reserves estimates. However, if such large companies chose to hire third-party consultants, third parties would expend significantly more effort on such projects than for smaller companies because larger companies have more properties to evaluate. Thus, we expect third-party fees, and the time required to conduct such projects, would scale upwards with the quantity of company reserves.

Disclosure of unproved reserves without third-party certification may present a risk with respect to smaller oil and gas producers because smaller companies are likely to have less in-house expertise and ability to accurately estimate such reserves than larger companies. However, we understand that the vast majority of smaller oil and gas companies already hire third parties to estimate their reserves or certify their estimates.

3. Consistency With IASB

Some commenters remarked that the International Accounting Standards Board is currently preparing a set of guidelines for oil and gas extractive activities, including definitions of oil and gas reserves, and recommended that the Commission align its regulations with those guidelines. We intend to monitor this initiative and work with the IASB, but our new rules may differ from the guidelines ultimately established by the International Accounting Standards Board. This could make it more difficult for investors to compare foreign and domestic companies.

4. Change in Pricing Mechanism

We do not anticipate significant costs with the change in pricing mechanisms for established reserves. Companies simply will apply a different price scenario to determine the economic producibility of reserves. It is possible that the use of a 12-month average price may reduce the cost of disclosure because it should reduce the volatility of reserves estimates and therefore reduce the need to make significant adjustments to those estimates on a yearly basis due to daily price swings.

5. Disclosure of PUD Development

The required disclosure of a company's progress in developing PUDs will increase the cost of reporting. However, we believe that companies regularly track their progress in this arena. Until a company develops a property, it cannot begin to realize the cash flows from production and the actual sale of products. Thus, the development of reserves is of utmost importance to an oil and gas company's business.

6. Increased Geographic Disclosure

The requirements to provide increased geographic disclosure of reserves and production, in certain circumstances, may increase the amount of disclosure that a company must present. However, because the threshold that we are adopting in the release is 15% of the company's total reserves, a company would be required to disclose, at most, reserves and production in six countries. Considering the relatively large proportion of reserves that must exist in a country before a company is required to provide country-level disclosure, we believe that such information is readily available to companies. As noted in the body of this release, we have attempted to draft this provision to minimize any competitive harm that such disclosure may cause a company.

7. Harmonizing Foreign Private Issuer Disclosure

The harmonization of foreign private issuer disclosure regarding oil and gas activities may increase the burden on foreign private issuers. However, it is our understanding that the large foreign private issuers already voluntarily provide disclosure comparable to the level required from domestic companies. Much of the added new disclosure relates to the day-to-day business and properties of these companies, including drilling activities, number of wells and acreage. This is information that is central to the activities of oil and gas companies, and therefore is readily known to these companies. We believe that applying Subpart 1200 to these companies could prompt more detailed disclosure regarding these activities, which would cause these companies to incur some cost. The provision permitting foreign private issuers to omit disclosures if prohibited from making those disclosures by their home jurisdiction could mitigate some of these costs.

XII. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Securities Act Section 2(b) [338] and Section 3(f) of the Exchange Act [339] require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act [340] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

We expect the new rules and amendments to increase efficiency and enhance capital formation, and thereby benefit investors, by providing the market with better information based on updated technology as well as increased information covering a broader range of reserves classifications held by a company and reserves found in non-traditional sources of oil and gas. Such increased and improved information should permit investors to better assess a company's prospects. In particular, the existing prohibitions against disclosing reserves other than proved reserves, using modern technology to determine the certainty level of reserves, and including resources from non-traditional sources can lead to incomplete disclosures about a company's actual resources and prospects. The new rules and amendments are designed to better align the disclosure requirements with the way companies make business decisions.

We believe that permitting the disclosure of probable and possible reserves will benefit smaller companies, in particular. Larger issuers tend to already have large amounts of proved reserves. The new rules and amendments permit smaller companies, who often participate in a significant amount of exploratory activity, to better disclose their business prospects. Consequently, we anticipate that the new rules and amendments could lead to efficiencies in capital formation, as more information will be available regarding the prospects of smaller issuers.

The effects of the new rules and amendments on competition are difficult to predict, but it is possible that permitting public issuers to disclose probable and possible reserves will lead to a reallocation of capital, as companies that previously could show few proved reserves will be able to disclose a broader range of its business prospects, making it easier for these issuers to raise capital and compete with companies that have large proved reserves. Although our new rules make disclosure of probable and possible reserves optional, and large oil and gas producers suggested in their comment letters that such disclosure would be of limited benefit because of the relative uncertainty associated with such reserves, we believe that competitive pressures within the industry might make it beneficial for large producers to disclose this information. Increased disclosure might, for example, improve credit quality and lower the cost of debt financing, or reduce the risk associated with business transactions between the company and its customers or suppliers.

XIII. Final Regulatory Flexibility Analysis

We have prepared this Final Regulatory Flexibility Analysis in accordance with Section 603 of the Regulatory Flexibility Act.[341] This analysis relates to the modernization of the oil and gas disclosure requirements. An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the Regulatory Flexibility Act in conjunction with the Proposing Release. The Proposing Release included, and solicited comment on, the IRFA.

A. Reasons for, and Objectives of, the New Rules and Amendments

The Commission adopted the current disclosure regime for oil and gas producing companies in 1978 and 1982, respectively. Since that time, there have been significant changes in the oil and gas industry and markets, including technological advances, and changes in the types of projects in which oil and gas companies invest their capital. On December 12, 2007, the Commission published a Concept Release on possible revisions to the disclosure requirements relating to oil and gas reserves.[342] Prior to our issuance of the Concept Release, many industry participants had expressed concern that our disclosure rules are no longer in alignment with current industry practices and therefore have limited usefulness to the market and investors.

Our new rules and amendments to these existing forms are intended to modernize and update our reserves definitions to reflect changes in the oil and gas industry and markets and new technologies that have occurred in the decades since the current rules were adopted, including expanding the scope of permissible technologies for establishing certainty levels of reserves, reserves classifications that a company can disclose in a Commission filing, and the types of resources that can be included in a company's reserves, as well as providing information regarding the objectivity and qualifications of any third party primarily responsible for preparing or auditing the reserves estimates, if the company represents that it has enlisted a third party to conduct a reserves audit, and the qualifications and measures taken to assure the independence and objectivity of any employee primarily responsible for preparing or auditing the reserves estimates. The amendments also harmonize our full cost accounting rules with the changes that we are adopting with respect to disclosure of oil and gas reserves. The new rules and amendments also are intended to codify, modernize and centralize the disclosure items for oil and gas companies into Regulation S–K. Finally, the new rules and amendments are intended to harmonize oil and gas disclosures by foreign private issuers with disclosures by domestic companies. Overall, the new rules and amendments attempt to provide improved disclosure about an oil and gas company's business and prospects without sacrificing clarity and comparability, which provide protection and transparency to investors.

B. Significant Issues Raised by Commenters

We did not receive comments specifically addressing the impact of the proposed rules and amendments on small entities. However, several of the comments related to burdens that would be placed on all companies affected by the proposals. In particular, commenters believed that the proposal to require the use of different prices for disclosure and accounting purposes would impose a significant burden on all oil and gas companies. We have considered those comments and are adopting amendments to our disclosure rules and the full cost accounting method that will require the use of a single price for both purposes. Similarly, commenters were concerned that certain aspects of

[338] 15 U.S.C. 77b(b).

[339] 15 U.S.C. 78c(f).

[340] 15 U.S.C. 78w(a)(2).

[341] 5 U.S.C. 603.

[342] See Release No. 33–8870 (Dec. 12, 2007) [72 FR 71610].

the proposal, such as the new definition of geographic area and disclosure by accumulation type would increase the detail in the disclosures significantly. We agree with those commenters and have significantly reduced the level of detail required in the disclosure requirements.

C. Small Entities Subject to the New Rules and Amendments

The new rules and amendments affect small entities that are engaged in oil and gas producing activities, the securities of which are registered under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Exchange Act. The new rules and amendments also would affect small entities that file, or have filed, a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn. Securities Act Rule 157 [343] and Exchange Act Rule 0–10(a) [344] define an issuer to be a ''small business'' or ''small organization'' for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. The new rules and amendments affect small entities that are operating companies and engage in oil and gas producing activities. Based on filings in 2007, we estimate that there are approximately 28 oil and gas companies that may be considered small entities.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The new rules and amendments to Regulation S–K expand some existing disclosures, and eliminate others. In particular, the new disclosure requirements, many of which were requested by industry participants, include the following:

- Disclosure of reserves from non-traditional sources (*e.g.*, bitumen and shale) as oil and gas reserves;
- Optional disclosure of probable and possible reserves;
- Optional disclosure of oil and gas reserves' sensitivity to price;
- Disclosure of the development of proved undeveloped reserves, including those that are held for 5 years or more and an explanation of why they should continue to be considered proved;
- Disclosure of technologies used to establish reserves in a company's initial filing with the Commission and in filings which include material additions to reserves estimates;
- Disclosure of the company's internal controls over reserves estimates and the qualifications the technical person primarily responsible for overseeing the preparation or audit of the reserves estimates;
- If a company represents that disclosure is based on the authority of a third party that prepared the reserves estimates or conducted a reserves audit or process review, filing a report prepared by the third party; and
- Disclosure based on a new definition of the term ''by geographic area.''

There would be no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on the EDGAR filing system.

E. Agency Action To Minimize Effect on Small Entities

We considered different compliance standards for the small entities that will be affected by the new rules and amendments. In the Proposing Release, we solicited comment regarding the possibility of different standards for small entities. We did not receive comment on this particular issue. However, we believe that such differences would be inconsistent with the purposes of the rules.

The new rules and amendments are designed to modernize the disclosure requirements for oil and gas companies. As such, we believe all oil and gas companies will benefit from the modernization of the rules. Under the new rules and amendments, all companies will be allowed to use modern technologies to establish reserves and include operations in unconventional resources in their oil and gas reserves estimates. Adopting differing standards for disclosure for small entities would significantly reduce the comparability between companies. However, the new rules and amendments do permit companies to disclose probable and possible reserves. We believe the removal of the prohibition against such reserves will enable companies to disclose a broader view of their prospects. We believe this will particularly benefit smaller oil and gas companies that may have significant unproved reserves in their portfolio. Such disclosure may assist smaller companies in raising capital for development projects in those properties.

XIV. Update to Codification of Financial Reporting Policies

The Commission amends the ''Codification of Financial Reporting Policies'' announced in Financial Reporting Release No. 1 (April 15, 1982) [47 FR 21028] as follows:

1. By removing the seven introductory paragraphs before Section 406.01, the last sentence of Section 406.01.c.vi., the first paragraph of Section 406.01.d, the introductory paragraph of Section 406.02.d, and removing and reserving Sections 406.01.a., 406.02.a, 406.02.b., 406.02.d.iii., and 406.02.e.

2. By revising Section 406.01B to read as follows:

The rules in Rule 4–10(b) specify that the application of successful efforts shall comply with SFAS 19. In 2008, the Commission published amendments to the definitions in Rule 4–10(a) that may not align completely with SFAS 19's existing terminology and application. Further, paragraph 7 of SFAS 25 states: ''For purposes of applying this Statement and Statement 19, the definition of proved reserves, proved developed reserves, and proved undeveloped reserves shall be the definitions adopted by the SEC for its reporting purposes that are in effect on the date(s) as of which the reserve disclosures are to be made. Previous reported quantities shall not be revised retroactively if the SEC definitions are changed.'' In any case, the Commission expects the practical application of SFAS 19 will remain unchanged other than incorporating the effects of the new definitions.

3. By removing the first three sentences of Section 406.02.c. and in the fourth sentence replacing the phrase ''this sort of information'' with ''information to assess the impact of oil and gas producing activities on near term cash flows and liquidity''.

4. By adding a new Section 406.03 entitled ''Transition'' and including the text of the 3rd paragraph of Section VII.B and the last sentence of the 2nd paragraph of Section VII.C of this release.

5. By adding a new Section 406.04 entitled ''MD&A Guidance'' and including the text beginning with the last sentence of the 2nd paragraph of Section V of this release through the end of that Section.

The Codification is a separate publication of the Commission. It will not be published in the **Federal Register** or Code of Federal Regulations. For more information on the Codification of Financial Reporting Policies, contact the Commission's Public Reference Room at 202–551–5850.

XV. Statutory Basis and Text of Amendments

We are adopting the amendments pursuant to Sections 3(b), 6, 7, 10 and 19(a) of the Securities Act and Sections 12, 13, 14(a), 15(d), and 23(a) of the Exchange Act, as amended.

[343] 17 CFR 230.157.

[344] 17 CFR 240.0–10(a).

Text of Amendments

List of Subjects

17 CFR Part 210

Accountants, Accounting, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 211, 229 and 249

Reporting and recordkeeping requirements, Securities.

■ For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 78c, 78j–1, 78*l*, 78m, 78n, 78o(d), 78q, 78u–5, 78w(a), 78*ll*, 78mm, 80a–8, 80a–20, 80a–29, 80a–30, 80a–31, 80a–37(a), 80b–3, 80b–11, 7202 and 7262, unless otherwise noted.

■ 2. Amend § 210.4–10 by:

■ a. Redesignating the subparagraphs in paragraph (a) as follows:

Old paragraph number	New paragraph number
(a)(1)	(a)(16)
(a)(2)	(a)(22)
(a)(5)	(a)(23)
(a)(6)	(a)(32)
(a)(7)	(a)(21)
(a)(8)	(a)(15)
(a)(9)	(a)(27)
(a)(10)	(a)(13)
(a)(11)	(a)(9)
(a)(12)	(a)(29)
(a)(13)	(a)(30)
(a)(14)	(a)(1)
(a)(15)	(a)(12)
(a)(16)	(a)(7)
(a)(17)	(a)(20)

■ b. Removing paragraphs (a)(3) and (a)(4);

■ c. Adding new paragraphs (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(8), (a)(10), (a)(11), (a)(14), (a)(17), (a)(18), (a)(19), (a)(24), (a)(25), (a)(26), (a)(28), (a)(31), and (c)(8);

■ d. Revising newly redesignated paragraphs (a)(13), (a)(16), (a)(22), and (a)(30); and

■ e. Removing the authority citations following the section.

The additions and revisions read as follows:

§ 210.4–10 Financial accounting and reporting for oil and gas producing activities pursuant to the Federal securities laws and the Energy Policy and Conservation Act of 1975.

* * * * *

(a) Definitions. * * *

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(2) *Analogous reservoir.* Analogous reservoirs, as used in resources assessments, have similar rock and fluid properties, reservoir conditions (depth, temperature, and pressure) and drive mechanisms, but are typically at a more advanced stage of development than the reservoir of interest and thus may provide concepts to assist in the interpretation of more limited data and estimation of recovery. When used to support proved reserves, an ''analogous reservoir'' refers to a reservoir that shares the following characteristics with the reservoir of interest:

(i) Same geological formation (but not necessarily in pressure communication with the reservoir of interest);

(ii) Same environment of deposition;

(iii) Similar geological structure; and

(iv) Same drive mechanism.

Instruction to paragraph (a)(2): Reservoir properties must, in the aggregate, be no more favorable in the analog than in the reservoir of interest.

(3) *Bitumen.* Bitumen, sometimes referred to as natural bitumen, is petroleum in a solid or semi-solid state in natural deposits with a viscosity greater than 10,000 centipoise measured at original temperature in the deposit and atmospheric pressure, on a gas free basis. In its natural state it usually contains sulfur, metals, and other non-hydrocarbons.

(4) *Condensate.* Condensate is a mixture of hydrocarbons that exists in the gaseous phase at original reservoir temperature and pressure, but that, when produced, is in the liquid phase at surface pressure and temperature.

(5) *Deterministic estimate.* The method of estimating reserves or resources is called deterministic when a single value for each parameter (from the geoscience, engineering, or economic data) in the reserves calculation is used in the reserves estimation procedure.

(6) *Developed oil and gas reserves.* Developed oil and gas reserves are reserves of any category that can be expected to be recovered:

(i) Through existing wells with existing equipment and operating methods or in which the cost of the required equipment is relatively minor compared to the cost of a new well; and

(ii) Through installed extraction equipment and infrastructure operational at the time of the reserves estimate if the extraction is by means not involving a well.

* * * * *

(8) *Development project.* A development project is the means by which petroleum resources are brought to the status of economically producible. As examples, the development of a single reservoir or field, an incremental development in a producing field, or the integrated development of a group of several fields and associated facilities with a common ownership may constitute a development project.

* * * * *

(10) *Economically producible.* The term economically producible, as it relates to a resource, means a resource which generates revenue that exceeds, or is reasonably expected to exceed, the costs of the operation. The value of the products that generate revenue shall be determined at the terminal point of oil and gas producing activities as defined in paragraph (a)(16) of this section.

(11) *Estimated ultimate recovery (EUR).* Estimated ultimate recovery is the sum of reserves remaining as of a given date and cumulative production as of that date.

* * * * *

(13) *Exploratory well.* An exploratory well is a well drilled to find a new field or to find a new reservoir in a field previously found to be productive of oil or gas in another reservoir. Generally, an exploratory well is any well that is not a development well, an extension well, a service well, or a stratigraphic test well as those items are defined in this section.

(14) *Extension well.* An extension well is a well drilled to extend the limits of a known reservoir.

* * * * *

(16) *Oil and gas producing activities.* (i) Oil and gas producing activities include:

(A) The search for crude oil, including condensate and natural gas liquids, or natural gas (''oil and gas'') in their natural states and original locations;

(B) The acquisition of property rights or properties for the purpose of further exploration or for the purpose of removing the oil or gas from such properties;

(C) The construction, drilling, and production activities necessary to retrieve oil and gas from their natural reservoirs, including the acquisition, construction, installation, and maintenance of field gathering and storage systems, such as:

(*1*) Lifting the oil and gas to the surface; and

(*2*) Gathering, treating, and field processing (as in the case of processing gas to extract liquid hydrocarbons); and

(D) Extraction of saleable hydrocarbons, in the solid, liquid, or gaseous state, from oil sands, shale, coalbeds, or other nonrenewable natural resources which are intended to be upgraded into synthetic oil or gas, and activities undertaken with a view to such extraction.

Instruction 1 to paragraph (a)(16)(i): The oil and gas production function shall be regarded as ending at a ''terminal point'', which is the outlet valve on the lease or field storage tank. If unusual physical or operational circumstances exist, it may be appropriate to regard the terminal point for the production function as:

a. The first point at which oil, gas, or gas liquids, natural or synthetic, are delivered to a main pipeline, a common carrier, a refinery, or a marine terminal; and

b. In the case of natural resources that are intended to be upgraded into synthetic oil or gas, if those natural resources are delivered to a purchaser prior to upgrading, the first point at which the natural resources are delivered to a main pipeline, a common carrier, a refinery, a marine terminal, or a facility which upgrades such natural resources into synthetic oil or gas.

Instruction 2 to paragraph (a)(16)(i): For purposes of this paragraph (a)(16), the term *saleable hydrocarbons* means hydrocarbons that are saleable in the state in which the hydrocarbons are delivered.

(ii) Oil and gas producing activities do not include:

(A) Transporting, refining, or marketing oil and gas;

(B) Processing of produced oil, gas or natural resources that can be upgraded into synthetic oil or gas by a registrant that does not have the legal right to produce or a revenue interest in such production;

(C) Activities relating to the production of natural resources other than oil, gas, or natural resources from which synthetic oil and gas can be extracted; or

(D) Production of geothermal steam.

(17) *Possible reserves.* Possible reserves are those additional reserves that are less certain to be recovered than probable reserves.

(i) When deterministic methods are used, the total quantities ultimately recovered from a project have a low probability of exceeding proved plus probable plus possible reserves. When probabilistic methods are used, there should be at least a 10% probability that the total quantities ultimately recovered will equal or exceed the proved plus probable plus possible reserves estimates.

(ii) Possible reserves may be assigned to areas of a reservoir adjacent to probable reserves where data control and interpretations of available data are progressively less certain. Frequently, this will be in areas where geoscience and engineering data are unable to define clearly the area and vertical limits of commercial production from the reservoir by a defined project.

(iii) Possible reserves also include incremental quantities associated with a greater percentage recovery of the hydrocarbons in place than the recovery quantities assumed for probable reserves.

(iv) The proved plus probable and proved plus probable plus possible reserves estimates must be based on reasonable alternative technical and commercial interpretations within the reservoir or subject project that are clearly documented, including comparisons to results in successful similar projects.

(v) Possible reserves may be assigned where geoscience and engineering data identify directly adjacent portions of a reservoir within the same accumulation that may be separated from proved areas by faults with displacement less than formation thickness or other geological discontinuities and that have not been penetrated by a wellbore, and the registrant believes that such adjacent portions are in communication with the known (proved) reservoir. Possible reserves may be assigned to areas that are structurally higher or lower than the proved area if these areas are in communication with the proved reservoir.

(vi) Pursuant to paragraph (a)(22)(iii) of this section, where direct observation has defined a highest known oil (HKO) elevation and the potential exists for an associated gas cap, proved oil reserves should be assigned in the structurally higher portions of the reservoir above the HKO only if the higher contact can be established with reasonable certainty through reliable technology. Portions of the reservoir that do not meet this reasonable certainty criterion may be assigned as probable and possible oil or gas based on reservoir fluid properties and pressure gradient interpretations.

(18) *Probable reserves.* Probable reserves are those additional reserves that are less certain to be recovered than proved reserves but which, together with proved reserves, are as likely as not to be recovered.

(i) When deterministic methods are used, it is as likely as not that actual remaining quantities recovered will exceed the sum of estimated proved plus probable reserves. When probabilistic methods are used, there should be at least a 50% probability that the actual quantities recovered will equal or exceed the proved plus probable reserves estimates.

(ii) Probable reserves may be assigned to areas of a reservoir adjacent to proved reserves where data control or interpretations of available data are less certain, even if the interpreted reservoir continuity of structure or productivity does not meet the reasonable certainty criterion. Probable reserves may be assigned to areas that are structurally higher than the proved area if these areas are in communication with the proved reservoir.

(iii) Probable reserves estimates also include potential incremental quantities associated with a greater percentage recovery of the hydrocarbons in place than assumed for proved reserves.

(iv) See also guidelines in paragraphs (a)(17)(iv) and (a)(17)(vi) of this section.

(19) *Probabilistic estimate.* The method of estimation of reserves or resources is called probabilistic when the full range of values that could reasonably occur for each unknown parameter (from the geoscience and engineering data) is used to generate a full range of possible outcomes and their associated probabilities of occurrence.

* * * * *

(22) *Proved oil and gas reserves.* Proved oil and gas reserves are those quantities of oil and gas, which, by analysis of geoscience and engineering data, can be estimated with reasonable certainty to be economically producible—from a given date forward, from known reservoirs, and under existing economic conditions, operating methods, and government regulations—prior to the time at which contracts providing the right to operate expire, unless evidence indicates that renewal is reasonably certain, regardless of whether deterministic or probabilistic methods are used for the estimation. The project to extract the hydrocarbons must have commenced or the operator must be reasonably certain that it will commence the project within a reasonable time.

(i) The area of the reservoir considered as proved includes:

(A) The area identified by drilling and limited by fluid contacts, if any, and

(B) Adjacent undrilled portions of the reservoir that can, with reasonable certainty, be judged to be continuous

with it and to contain economically producible oil or gas on the basis of available geoscience and engineering data.

(ii) In the absence of data on fluid contacts, proved quantities in a reservoir are limited by the lowest known hydrocarbons (LKH) as seen in a well penetration unless geoscience, engineering, or performance data and reliable technology establishes a lower contact with reasonable certainty.

(iii) Where direct observation from well penetrations has defined a highest known oil (HKO) elevation and the potential exists for an associated gas cap, proved oil reserves may be assigned in the structurally higher portions of the reservoir only if geoscience, engineering, or performance data and reliable technology establish the higher contact with reasonable certainty.

(iv) Reserves which can be produced economically through application of improved recovery techniques (including, but not limited to, fluid injection) are included in the proved classification when:

(A) Successful testing by a pilot project in an area of the reservoir with properties no more favorable than in the reservoir as a whole, the operation of an installed program in the reservoir or an analogous reservoir, or other evidence using reliable technology establishes the reasonable certainty of the engineering analysis on which the project or program was based; and

(B) The project has been approved for development by all necessary parties and entities, including governmental entities.

(v) Existing economic conditions include prices and costs at which economic producibility from a reservoir is to be determined. The price shall be the average price during the 12-month period prior to the ending date of the period covered by the report, determined as an unweighted arithmetic average of the first-day-of-the-month price for each month within such period, unless prices are defined by contractual arrangements, excluding escalations based upon future conditions.

* * * * *

(24) *Reasonable certainty.* If deterministic methods are used, reasonable certainty means a high degree of confidence that the quantities will be recovered. If probabilistic methods are used, there should be at least a 90% probability that the quantities actually recovered will equal or exceed the estimate. A high degree of confidence exists if the quantity is much more likely to be achieved than not, and, as changes due to increased availability of geoscience (geological, geophysical, and geochemical), engineering, and economic data are made to estimated ultimate recovery (EUR) with time, reasonably certain EUR is much more likely to increase or remain constant than to decrease.

(25) *Reliable technology.* Reliable technology is a grouping of one or more technologies (including computational methods) that has been field tested and has been demonstrated to provide reasonably certain results with consistency and repeatability in the formation being evaluated or in an analogous formation.

(26) *Reserves.* Reserves are estimated remaining quantities of oil and gas and related substances anticipated to be economically producible, as of a given date, by application of development projects to known accumulations. In addition, there must exist, or there must be a reasonable expectation that there will exist, the legal right to produce or a revenue interest in the production, installed means of delivering oil and gas or related substances to market, and all permits and financing required to implement the project.

Note to paragraph (a)(26): Reserves should not be assigned to adjacent reservoirs isolated by major, potentially sealing, faults until those reservoirs are penetrated and evaluated as economically producible. Reserves should not be assigned to areas that are clearly separated from a known accumulation by a non-productive reservoir (*i.e.*, absence of reservoir, structurally low reservoir, or negative test results). Such areas may contain prospective resources (*i.e.*, potentially recoverable resources from undiscovered accumulations).

* * * * *

(28) *Resources.* Resources are quantities of oil and gas estimated to exist in naturally occurring accumulations. A portion of the resources may be estimated to be recoverable, and another portion may be considered to be unrecoverable. Resources include both discovered and undiscovered accumulations.

* * * * *

(30) *Stratigraphic test well.* A stratigraphic test well is a drilling effort, geologically directed, to obtain information pertaining to a specific geologic condition. Such wells customarily are drilled without the intent of being completed for hydrocarbon production. The classification also includes tests identified as core tests and all types of expendable holes related to hydrocarbon exploration. Stratigraphic tests are classified as ''exploratory type'' if not drilled in a known area or ''development type'' if drilled in a known area.

(31) *Undeveloped oil and gas reserves.* Undeveloped oil and gas reserves are reserves of any category that are expected to be recovered from new wells on undrilled acreage, or from existing wells where a relatively major expenditure is required for recompletion.

(i) Reserves on undrilled acreage shall be limited to those directly offsetting development spacing areas that are reasonably certain of production when drilled, unless evidence using reliable technology exists that establishes reasonable certainty of economic producibility at greater distances.

(ii) Undrilled locations can be classified as having undeveloped reserves only if a development plan has been adopted indicating that they are scheduled to be drilled within five years, unless the specific circumstances, justify a longer time.

(iii) Under no circumstances shall estimates for undeveloped reserves be attributable to any acreage for which an application of fluid injection or other improved recovery technique is contemplated, unless such techniques have been proved effective by actual projects in the same reservoir or an analogous reservoir, as defined in paragraph (a)(2) of this section, or by other evidence using reliable technology establishing reasonable certainty.

* * * * *

(c) * * *

(8) For purposes of this paragraph (c), the term ''current price'' shall mean the average price during the 12-month period prior to the ending date of the period covered by the report, determined as an unweighted arithmetic average of the first-day-of-the-month price for each month within such period, unless prices are defined by contractual arrangements, excluding escalations based upon future conditions.

* * * * *

PART 211—INTERPRETATIONS RELATING TO FINANCIAL REPORTING MATTERS

■ 3. Amend Part 211, subpart A, by adding ''Modernization of Oil and Gas Reporting,'' Release No. FR–78 and the release date of December 31, 2008, to the list of interpretive releases.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 4. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

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■ 5. Amend § 229.102 by revising the introductory text of Instruction 3 and Instructions 4, 5 and 8 to read as follows.

§ 229.102 (Item 102) Description of property.

* * * * *

Instructions to Item 102: * * *

3. In the case of an extractive enterprise, not involved in oil and gas producing activities, material information shall be given as to production, reserves, locations, development, and the nature of the registrant's interest. If individual properties are of major significance to an industry segment:

* * * * *

4. A registrant engaged in oil and gas producing activities shall provide the information required by Subpart 1200 of Regulation S–K.

5. In the case of extractive reserves other than oil and gas reserves, estimates other than proven or probable reserves (and any estimated values of such reserves) shall not be disclosed in any document publicly filed with the Commission, unless such information is required to be disclosed in the document by foreign or state law; provided, however, that where such estimates previously have been provided to a person (or any of its affiliates) that is offering to acquire, merge, or consolidate with the registrant, or otherwise to acquire the registrant's securities, such estimates may be included in documents relating to such acquisition.

* * * * *

8. The attention of certain issuers engaged in oil and gas producing activities is directed to the information called for in Securities Act Industry Guide 4 (referred to in § 229.801(d)).

* * * * *

■ 6. Amend § 229.801 by removing and reserving paragraph (b) and removing the authority citation following the section.

■ 7. Amend § 229.802 by removing and reserving paragraph (b) and removing the authority citation following the section.

■ 8. Add Subpart 229.1200 to read as follows:

Subpart 229.1200—Disclosure by Registrants Engaged in Oil and Gas Producing Activities

Sec.

229.1201 (Item 1201) General instructions to oil and gas industry-specific disclosures.
229.1202 (Item 1202) Disclosure of reserves.
229.1203 (Item 1203) Proved undeveloped reserves.
229.1204 (Item 1204) Oil and gas production, production prices and production costs.
229.1205 (Item 1205) Drilling and other exploratory and development activities.
229.1206 (Item 1206) Present activities.
229.1207 (Item 1207) Delivery commitments.
229.1208 (Item 1208) Oil and gas properties, wells, operations, and acreage.

Subpart 229.1200—Disclosure by Registrants Engaged in Oil and Gas Producing Activities

§ 229.1201 (Item 1201) General instructions to oil and gas industry-specific disclosures.

(a) If oil and gas producing activities are material to the registrant's or its subsidiaries' business operations or financial position, the disclosure specified in this Subpart 229.1200 should be included under appropriate captions (with cross references, where applicable, to related information disclosed in financial statements). However, limited partnerships and joint ventures that conduct, operate, manage, or report upon oil and gas drilling or income programs, that acquire properties either for drilling and production, or for production of oil, gas, or geothermal steam or water, need not include such disclosure.

(b) To the extent that Items 1202 through 1208 (§§ 229.1202–229.1208) call for disclosures in tabular format, as specified in the particular Item, a registrant may modify such format for ease of presentation, to add information or to combine two or more required tables.

(c) The definitions in Rule 4–10(a) of Regulation S–X (17 CFR 210.4–10(a)) shall apply for purposes of this Subpart 229.1200.

(d) For purposes of this Subpart 229.1200, the term *by geographic area* means, as appropriate for meaningful disclosure in the circumstances:

(1) By individual country;

(2) By groups of countries within a continent; or

(3) By continent.

§ 229.1202 (Item 1202) Disclosure of reserves.

(a) *Summary of oil and gas reserves at fiscal year end.* (1) Provide the information specified in paragraph (a)(2) of this Item in tabular format as provided below:

SUMMARY OF OIL AND GAS RESERVES AS OF FISCAL-YEAR END BASED ON AVERAGE FISCAL-YEAR PRICES

Reserves category	Reserves				
	Oil (mbbls)	Natural gas (mmcf)	Synthetic oil (mbbls)	Synthetic gas (mmcf)	Product A (measure)
PROVED					
Developed:					
Continent A					
Continent B					
Country A					
Country B					
Other Countries in Continent B					
Undeveloped:					
Continent A					
Continent B					

SUMMARY OF OIL AND GAS RESERVES AS OF FISCAL-YEAR END BASED ON AVERAGE FISCAL-YEAR PRICES—Continued

Reserves category	Reserves				
	Oil (mbbls)	Natural gas (mmcf)	Synthetic oil (mbbls)	Synthetic gas (mmcf)	Product A (measure)
Country A					
Country B					
Other Countries in Continent B					
TOTAL PROVED					
PROBABLE					
Developed					
Undeveloped					
POSSIBLE					
Developed					
Undeveloped					

(2) Disclose, in the aggregate and by geographic area and for each country containing 15% or more of the registrant's proved reserves, expressed on an oil-equivalent-barrels basis, reserves estimated using prices and costs under existing economic conditions, for the product types listed in paragraph (a)(4) of this Item, in the following categories:

(i) Proved developed reserves;

(ii) Proved undeveloped reserves;

(iii) Total proved reserves;

(iv) Probable developed reserves (optional);

(v) Probable undeveloped reserves (optional);

(vi) Possible developed reserves (optional); and

(vii) Possible undeveloped reserves (optional).

Instruction 1 to paragraph (a)(2): Disclose updated reserves tables as of the close of each fiscal year.

Instruction 2 to paragraph (a)(2): The registrant is permitted, but not required, to disclose probable or possible reserves pursuant to paragraphs (a)(2)(iv) through (a)(2)(vii) of this Item.

Instruction 3 to paragraph (a)(2): If the registrant discloses amounts of a product in barrels of oil equivalent, disclose the basis for such equivalency.

Instruction 4 to paragraph (a)(2): A registrant need not provide disclosure of the reserves in a country containing 15% or more of the registrant's proved reserves if that country's government prohibits disclosure of reserves in that country. In addition, a registrant need not provide disclosure of the reserves in a country containing 15% or more of the registrant's proved reserves if that country's government prohibits disclosure in a particular field and disclosure of reserves in that country would have the effect of disclosing reserves in particular fields.

(3) Reported total reserves shall be simple arithmetic sums of all estimates for individual properties or fields within each reserves category. When probabilistic methods are used, reserves should not be aggregated probabilistically beyond the field or property level; instead, they should be aggregated by simple arithmetic summation.

(4) Disclose separately material reserves of the following product types:

(i) Oil;

(ii) Natural gas;

(iii) Synthetic oil;

(iv) Synthetic gas; and

(v) Sales products of other non-renewable natural resources that are intended to be upgraded into synthetic oil and gas.

(5) If the registrant discloses probable or possible reserves, discuss the uncertainty related to such reserves estimates.

(6) If the registrant has not previously disclosed reserves estimates in a filing with the Commission or is disclosing material additions to its reserves estimates, the registrant shall provide a general discussion of the technologies used to establish the appropriate level of certainty for reserves estimates from material properties included in the total reserves disclosed. The particular properties do not need to be identified.

(7) *Preparation of reserves estimates or reserves audit.* Disclose and describe the internal controls the registrant uses in its reserves estimation effort. In addition, disclose the qualifications of the technical person primarily responsible for overseeing the preparation of the reserves estimates and, if the registrant represents that a third party conducted a reserves audit, disclose the qualifications of the technical person primarily responsible for overseeing such reserves audit.

(8) *Third party reports.* If the registrant represents that a third party prepared, or conducted a reserves audit of, the registrant's reserves estimates, or any estimated valuation thereof, or conducted a process review, the registrant shall file a report of the third party as an exhibit to the relevant registration statement or other Commission filing. If the report relates to the preparation of, or a reserves audit of, the registrant's reserves estimates, it must include the following disclosure, if applicable to the type of filing:

(i) The purpose for which the report was prepared and for whom it was prepared;

(ii) The effective date of the report and the date on which the report was completed;

(iii) The proportion of the registrant's total reserves covered by the report and the geographic area in which the covered reserves are located;

(iv) The assumptions, data, methods, and procedures used, including the percentage of the registrant's total reserves reviewed in connection with the preparation of the report, and a statement that such assumptions, data, methods, and procedures are appropriate for the purpose served by the report;

(v) A discussion of primary economic assumptions;

(vi) A discussion of the possible effects of regulation on the ability of the registrant to recover the estimated reserves;

(vii) A discussion regarding the inherent uncertainties of reserves estimates;

(viii) A statement that the third party has used all methods and procedures as it considered necessary under the circumstances to prepare the report;

(ix) A brief summary of the third party's conclusions with respect to the reserves estimates; and

(x) The signature of the third party.

(9) For purposes of this Item 1202, the term *reserves audit* means the process of reviewing certain of the pertinent facts interpreted and assumptions underlying a reserves estimate prepared by another party and the rendering of an opinion about the appropriateness of the methodologies employed, the adequacy and quality of the data relied upon, the depth and thoroughness of the reserves estimation process, the classification of reserves appropriate to the relevant definitions used, and the reasonableness of the estimated reserves quantities.

(b) *Reserves sensitivity analysis (optional).* (1) The registrant may, but is not required to, provide the information specified in paragraph (b)(2) of this Item in tabular format as provided below:

SENSITIVITY OF RESERVES TO PRICES BY PRINCIPAL PRODUCT TYPE AND PRICE SCENARIO

Price case	Proved reserves					Probable reserves					Possible reserves				
	Oil	Gas	Syn. oil	Syn. gas	Product A	Oil	Gas	Syn. oil	Syn. gas	Product A	Oil	Gas	Syn. oil	Syn. gas	Product A
	mbbls	mmcf	mbbls	mmcf	measure	mbbls	mmcf	mbbls	mmcf	measure	mbbls	mmcf	mbbls	mmcf	measure
Scenario 1.															
Scenario 2.															

(2) The registrant may, but is not required to, disclose, in the aggregate, an estimate of reserves estimated for each product type based on different price and cost criteria, such as a range of prices and costs that may reasonably be achieved, including standardized futures prices or management's own forecasts.

(3) If the registrant provides disclosure under this paragraph (b), disclose the price and cost schedules and assumptions on which the disclosed values are based.

Instruction to Item 1202: Estimates of oil or gas resources other than reserves, and any estimated values of such resources, shall not be disclosed in any document publicly filed with the Commission, unless such information is required to be disclosed in the document by foreign or state law; provided, however, that where such estimates previously have been provided to a person (or any of its affiliates) that is offering to acquire, merge, or consolidate with the registrant or otherwise to acquire the registrant's securities, such estimate may be included in documents related to such acquisition.

§ 229.1203 (Item 1203) Proved undeveloped reserves.

(a) Disclose the total quantity of proved undeveloped reserves at year end.

(b) Disclose material changes in proved undeveloped reserves that occurred during the year, including proved undeveloped reserves converted into proved developed reserves.

(c) Discuss investments and progress made during the year to convert proved undeveloped reserves to proved developed reserves, including, but not limited to, capital expenditures.

(d) Explain the reasons why material amounts of proved undeveloped reserves in individual fields or countries remain undeveloped for five years or more after disclosure as proved undeveloped reserves.

§ 229.1204 (Item 1204) Oil and gas production, production prices and production costs.

(a) For each of the last three fiscal years disclose production, by final product sold, of oil, gas, and other products. Disclosure shall be made by geographical area and for each country and field that contains 15% or more of the registrant's total proved reserves expressed on an oil-equivalent-barrels basis unless prohibited by the country in which the reserves are located.

(b) For each of the last three fiscal years disclose, by geographical area:

(1) The average sales price (including transfers) per unit of oil, gas and other products produced; and

(2) The average production cost, not including ad valorem and severance taxes, per unit of production.

Instruction 1 to Item 1204: Generally, net production should include only production that is owned by the registrant and produced to its interest, less royalties and production due others. However, in special situations (*e.g.*, foreign production) net production before any royalties may be provided, if more appropriate. If ''net before royalty'' production figures are furnished, the change from the usage of ''net production'' should be noted.

Instruction 2 to Item 1204: Production of natural gas should include only marketable production of natural gas on an ''as sold'' basis. Production will include dry, residue, and wet gas, depending on whether liquids have been extracted before the registrant transfers title. Flared gas, injected gas, and gas consumed in operations should be omitted. Recovered gas-lift gas and reproduced gas should not be included until sold. Synthetic gas, when marketed as such, should be included in natural gas sales.

Instruction 3 to Item 1204: If any product, such as bitumen, is sold or custody is transferred prior to conversion to synthetic oil or gas, the product's production, transfer prices, and production costs should be disclosed separately from all other products.

Instruction 4 to Item 1204: The transfer price of oil and gas (natural and synthetic) produced should be determined in accordance with SFAS 69.

Instruction 5 to Item 1204: The average production cost, not including ad valorem and severance taxes, per unit of production should be computed using production costs disclosed pursuant to SFAS 69. Units of production should be expressed in common units of production with oil, gas, and other products converted to a common unit of measure on the basis used in computing amortization.

§ 229.1205 (Item 1205) Drilling and other exploratory and development activities.

(a) For each of the last three fiscal years, by geographical area, disclose:

(1) The number of net productive and dry exploratory wells drilled; and

(2) The number of net productive and dry development wells drilled.

(b) *Definitions.* For purposes of this Item 1205, the following terms shall be defined as follows:

(1) A *dry well* is an exploratory, development, or extension well that proves to be incapable of producing either oil or gas in sufficient quantities to justify completion as an oil or gas well.

(2) A *productive well* is an exploratory, development, or extension well that is not a dry well.

(3) *Completion* refers to installation of permanent equipment for production of oil or gas, or, in the case of a dry well, to reporting to the appropriate authority that the well has been abandoned.

(4) The *number of wells drilled* refers to the number of wells completed at any time during the fiscal year, regardless of when drilling was initiated.

(c) Disclose, by geographic area, for each of the last three years, any other exploratory or development activities conducted, including implementation of mining methods for purposes of oil and gas producing activities.

§ 229.1206 (Item 1206) Present activities.

(a) Disclose, by geographical area, the registrant's present activities, such as the number of wells in the process of being drilled (including wells temporarily suspended), waterfloods in process of being installed, pressure maintenance operations, and any other related activities of material importance.

(b) Provide the description of present activities as of a date at the end of the most recent fiscal year or as close to the date that the registrant files the document as reasonably possible.

(c) Include only those wells in the process of being drilled at the ''as of'' date and express them in terms of both gross and net wells.

(d) Do not include wells that the registrant plans to drill, but has not commenced drilling unless there are factors that make such information material.

§ 229.1207 (Item 1207) Delivery commitments.

(a) If the registrant is committed to provide a fixed and determinable quantity of oil or gas in the near future under existing contracts or agreements, disclose material information concerning the estimated availability of oil and gas from any principal sources, including the following:

(1) The principal sources of oil and gas that the registrant will rely upon and the total amounts that the registrant expects to receive from each principal source and from all sources combined;

(2) The total quantities of oil and gas that are subject to delivery commitments; and

(3) The steps that the registrant has taken to ensure that available reserves and supplies are sufficient to meet such commitments for the next one to three years.

(b) Disclose the information required by this Item:

(1) In a form understandable to investors; and

(2) Based upon the facts and circumstances of the particular situation, including, but not limited to:

(i) Disclosure by geographic area;

(ii) Significant supplies dedicated or contracted to the registrant;

(iii) Any significant reserves or supplies subject to priorities or curtailments which may affect quantities delivered to certain classes of customers, such as customers receiving services under low priority and interruptible contracts;

(iv) Any priority allocations or price limitations imposed by Federal or State regulatory agencies, as well as other factors beyond the registrant's control that may affect the registrant's ability to meet its contractual obligations (the registrant need not provide detailed discussions of price regulation);

(v) Any other factors beyond the registrant's control, such as other parties having control over drilling new wells, competition for the acquisition of reserves and supplies, and the availability of foreign reserves and supplies, which may affect the registrant's ability to acquire additional reserves and supplies or to maintain or increase the availability of reserves and supplies; and

(vi) Any impact on the registrant's earnings and financing needs resulting from its inability to meet short-term or long-term contractual obligations. (See Items 303 and 1209 of Regulation S–K (§§ 229.303 and 229.1209).)

(c) If the registrant has been unable to meet any significant delivery commitments in the last three years, describe the circumstances concerning such events and their impact on the registrant.

(d) For purposes of this Item, *available reserves* are estimates of the amounts of oil and gas which the registrant can produce from current proved developed reserves using presently installed equipment under existing economic and operating conditions and an estimate of amounts that others can deliver to the registrant under long-term contracts or agreements on a per-day, per-month, or per-year basis.

§ 229.1208 (Item 1208) Oil and gas properties, wells, operations, and acreage.

(a) Disclose, as of a reasonably current date or as of the end of the fiscal year, the total gross and net productive wells, expressed separately for oil and gas (including synthetic oil and gas produced through wells) and the total gross and net developed acreage (*i.e.*, acreage assignable to productive wells) by geographic area.

(b) Disclose, as of a reasonably current date or as of the end of the fiscal year, the amount of undeveloped acreage, both leases and concessions, if any, expressed in both gross and net acres by geographic area, together with an indication of acreage concentrations, and, if material, the minimum remaining terms of leases and concessions.

(c) *Definitions.* For purposes of this Item 1208, the following terms shall be defined as indicated:

(1) A *gross well or acre* is a well or acre in which the registrant owns a working interest. The number of gross wells is the total number of wells in which the registrant owns a working interest. Count one or more completions in the same bore hole as one well. In a footnote, disclose the number of wells with multiple completions. If one of the multiple completions in a well is an oil completion, classify the well as an oil well.

(2) A *net well or acre* is deemed to exist when the sum of fractional ownership working interests in gross wells or acres equals one. The number of net wells or acres is the sum of the fractional working interests owned in gross wells or acres expressed as whole numbers and fractions of whole numbers.

(3) *Productive wells* include producing wells and wells mechanically capable of production.

(4) *Undeveloped acreage* encompasses those leased acres on which wells have not been drilled or completed to a point that would permit the production of economic quantities of oil or gas regardless of whether such acreage contains proved reserves. Do not confuse undeveloped acreage with undrilled acreage held by production under the terms of the lease.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 9. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 10. Amend Form 20–F (referenced in § 249.220f) by:

■ a. Revising ''Instruction to Item 4'' and the introductory text and paragraph (b) of ''Instructions to Item 4.D''; and

■ b. Removing paragraph (c) of ''Instructions to Item 4.D'' and ''Appendix A to Item 4.D—Oil and Gas.''

The revisions read as follows:

[**Note:** The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.]

Form 20–F

* * * * *

Item 4. Information on the Company

* * * * *

Instructions to Item 4

1. Furnish the information specified in any industry guide listed in Subpart 229.800 of Regulation S–K (§ 229.801 *et seq.* of this chapter) that applies to you.

2. If oil and gas operations are material to you or your subsidiaries' business operations or financial position, provide the information specified in Subpart 1200 of Regulation S–K (§ 229.1200 *et seq.* of this chapter).

* * * * *

Instruction to Item 4.D: In the case of an extractive enterprise, other than an oil and gas producing activity:

* * * * *

(b) In documents that you file publicly with the Commission, do not disclose estimates of reserves unless the reserves are proven or probable and do not give estimated values of those reserves, unless foreign law requires you to disclose the information. If these types of estimates have already been provided to any person that is offering to acquire you, however, you may include the estimates in documents relating to the acquisition.

* * * * *

Dated: December 31, 2008.

By the Commission.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–409 Filed 1–13–09; 8:45 am]

BILLING CODE 8011–01–P

Federal Register

Wednesday,
January 14, 2009

Part III

Department of Transportation

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 171, 172, 173, et al.

Hazardous Materials: Revision to Requirements for the Transportation of Batteries and Battery-Powered Devices; and Harmonization With the United Nations Recommendations, International Maritime Dangerous Goods Code, and International Civil Aviation Organization's Technical Instructions; Final Rule

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 171, 172, 173, 175, 176, and 178

[Docket Nos. PHMSA–2007–0065 (HM–224D) and PHMSA–2008–0005 (HM–215J)]

RIN 2137–AE31

Hazardous Materials: Revision to Requirements for the Transportation of Batteries and Battery-Powered Devices; and Harmonization With the United Nations Recommendations, International Maritime Dangerous Goods Code, and International Civil Aviation Organization's Technical Instructions

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Final rule.

SUMMARY: This final rule revises the Hazardous Materials Regulations to maintain alignment with international standards by incorporating various amendments, including changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations, and vessel stowage requirements. These revisions are necessary to harmonize the Hazardous Materials Regulations with recent changes to the International Maritime Dangerous Goods Code, the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air, Transport Canada's Transportation of Dangerous Goods Regulations, and the United Nations Recommendations on the Transport of Dangerous Goods.

These revisions also include amendments and clarifications addressing the safe transportation of batteries and battery-powered devices. Consistent with recent changes to the International Civil Aviation Organization's Technical Instructions, PHMSA is clarifying the prohibition against transporting electrical devices, including batteries and battery-powered devices that are likely to create sparks or generate a dangerous amount of heat. PHMSA is also modifying and enhancing requirements for the packaging and handling of batteries and battery-powered devices, particularly in air commerce, to emphasize the safety precautions that are necessary to prevent incidents during transportation. PHMSA developed these revisions in conjunction with the Federal Aviation Administration to enhance the safe transportation of batteries and battery-powered devices.

DATES: *Effective date:* February 13, 2009.

Voluntary Compliance Date: PHMSA is authorizing voluntary compliance beginning January 1, 2009.

Delayed Compliance Date: Except as specified in §§ 171.14, 171.25, 172.102, 172.448, and 178.703 as amended herein, compliance with the amendments adopted in this final rule is required beginning January 1, 2010.

Incorporation by Reference Date: The incorporation by reference of the publications adopted in § 171.7 of this final rule has been approved by the Director of the Federal Register as of February 13, 2009.

FOR FURTHER INFORMATION CONTACT: T. Glenn Foster or Charles Betts, Office of Hazardous Materials Standards, telephone (202) 366–8553, or Shane Kelley, International Standards, telephone (202) 366–0656, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., 2nd Floor, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background
II. Overview
A. Amendments To Enhance the Safe Transportation of Batteries and Battery-Powered Devices
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I. Background

In a notice of proposed rulemaking (NPRM) published July 31, 2008 [73 FR 44804], PHMSA proposed a number of revisions to the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) to incorporate recent updates and revisions to Transport Canada's Transportation of Dangerous Goods (TDG) regulations, the United Nations Recommendations on the Transport of Dangerous Goods (UN Recommendations), the International Maritime Dangerous Goods (IMDG) Code, and the International Civil Aviation Organization Technical Instructions (ICAO TI) for the Transport of Dangerous Goods by Air. The UN Recommendations are amended and updated biennially by the UN Committee of Experts on the Transport of Dangerous Goods and on the Globally Harmonized System of Classification and Labeling of Chemicals and serve as the basis for national, regional, and international modal regulations, including the IMDG Code, and the ICAO Technical Instructions. The revisions proposed in the July NPRM cover classification of materials, hazard communication, and packaging requirements.

The most noteworthy proposals in the July NPRM concerned the transportation of batteries and battery-powered devices. Specifically, the NPRM proposed enhanced packaging and hazardous communication requirements consistent with international standards that address the electrical hazards posed by batteries and battery-powered devices. In the NPRM, we proposed the following amendments applicable to the transportation of batteries and battery-powered devices:

- Require reporting of incidents involving batteries and battery-powered devices (devices include equipment) or vehicles.
- Clarify the requirement that batteries, and battery-powered devices and vehicles, be offered for transportation and transported in a manner that prevents short-circuiting, dangerous evolution of heat, damage to terminals, and, in the case of transportation by aircraft, unintentional activation.
- Clarify the requirements for determining whether a battery is considered non-spillable. This included designation of a new section outlining conditions for packaging and transport of batteries determined to be non-spillable.
- Require a certification on the shipping documentation that batteries and battery-powered devices have met the conditions and all requirements for transport as specified in the applicable exception or special provision.
- Eliminate the requirement to disconnect the terminals when a battery-powered wheelchair or mobility aid is transported as checked baggage, provided the wheelchair or mobility aid design provides an effective means of preventing unintentional activation.
- Clarify the requirements for transport of dry batteries including a

revision of the proper shipping name used to describe dry batteries.

The measures proposed in the NPRM for batteries and battery-powered devices were intended to harmonize the HMR with applicable international standards. More importantly, the proposals to amend the incident reporting requirements related to the transport of batteries and battery-powered devices would enable the agency to acquire and assess data on the causes of battery incidents in transportation. We could then use that information to develop strategies to reduce the associated risks.

Harmonization of domestic and international standards becomes increasingly important as the volume of hazardous materials transported in international commerce grows. Harmonization facilitates international trade by minimizing the costs and other burdens of complying with multiple or inconsistent safety requirements for transportation of hazardous materials to and from the United States. By facilitating compliance, harmonization enhances safety for international movements, but only if the international standards themselves provide an appropriate level of safety. To that end, PHMSA actively participates in the development of international standards for the transportation of hazardous materials, frequently advocating the adoption in international standards of particular HMR requirements. When considering the adoption of international standards under the HMR, we review and consider each amendment on its own merit, including an assessment of its overall impact on transportation safety and the economic implications associated with its adoption into the HMR. Our goal is to harmonize without diminishing the level of safety currently provided by the HMR and without imposing undue burdens on the regulated public.

To maintain alignment of the HMR with international requirements, in this final rule, we are incorporating changes based on the Fifteenth revised edition of the UN Recommendations, Amendment 34 to the IMDG Code, and the 2009–2010 ICAO TI, all of which become effective January 1, 2009. We are also addressing petitions for rulemaking concerning harmonization with international standards and additional measures to facilitate international transportation.

The July NPRM incorporated two separate rulemaking dockets—HM–224D addressing battery safety issues and HM–215J addressing more general harmonization issues. The comment period for the proposed rule closed on September 29, 2008. A total of 33 persons submitted comments in response to the NPRM. Some of the comments we received were provided in duplicate to both Docket Nos. PHMSA–2007–0065 (HM–224D) and PHMSA–2008–0005 (HM–215J). For reader utility, we have listed all comments received in numerical order by the Document ID number assigned when submitted, including those submitted in duplicate to each docket. The following individuals, companies, and organizations submitted comments to the Docket for HM–224D:

(1) Adrien Tusek (Tusek; PHMSA–2007–0065–0013);
(2) FedEx Express (FedEx; PHMSA–2007–0065–0016);
(3) National Air Carrier Association (NACA; PHMSA–2007–0065–0017);
(4) HMT Associates, LLC (HMT; PHMSA–2007–0065–0018);
(5) Robert Herman (Paralyzed Veterans of America) (PVA; PHMSA–2007–0065–0020);
(6) Independent Pilots Association (IPA; PHMSA–2007–0065–0021);
(7) United Parcel Service (UPS; PHMSA–2007–0065–0019, 0022);
(8) Arkema, Inc. (Arkema; PHMSA–2007–0065–0023);
(9) Procter & Gamble Company (P & G; PHMSA–2007–0065–0024);
(10) Fedco Electronics, Inc. (Fedco; PHMSA–2007–0065–0025);
(11) U.S. Fuel Cell Council (FCC; PHMSA–2007–0065–0026);
(12) Joseph Schohn (Tyco International) (Tyco; PHMSA–2007–0065–0027, 0034);
(13) Omni Air International (Omni; PHMSA–2007–0065–0029);
(14) URS Corporation (URS; PHMSA–2007–0065–0030, 0031);
(15) Air Line Pilots Association, International (ALPA; PHMSA–2007–0065–0032); and
(16) Dangerous Goods Advisory Council (DGAC; PHMSA–2007–0065–0037).

The following individuals, companies and organizations submitted comments to the Docket for HM–215J:

(1) Signal Administration, Inc. (Signal; PHMSA–2008–0005–0002);
(2) Omni Air International (Omni; PHMSA–2008–0005–0003);
(3) The Fertilizer Institute (TFI; PHMSA–2008–0005–0004);
(4) FedEx Express (FedEx; PHMSA–2008–0005–0005);
(5) HMT Associates, LLC (HMT; PHMSA–2008–0005–0006);
(6) Air Transport Association (ATA; PHMSA–2008–0005–0008);
(7) National Electrical Manufacturer's Association (NEMA; PHMSA–2008–0005–0009);
(8) Chemical Products and Technology Division (American Chemistry Council) (CPTD; PHMSA–2008–0005–0010);
(9) Lilliputian Systems, Inc. (Lilliputian; PHMSA–2008–0005–0011);
(10) Association of Hazmat Shippers, Inc. (AHS; PHMSA–2008–0005–0012);
(11) American Trucking Associations (American Trucking Associations) (PHMSA–2008–0005–0013);
(12) The Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA; PHMSA–2008–0005–0014);
(13) Battery Council International (BCI; PHMSA–2008–0005–0015);
(14) Portable Rechargeable Battery Association (PRBA; PHMSA–2008–0005–0017);
(15) International Vessel Operators Hazardous Materials Association, Inc. (VOHMA; PHMSA–2008–0005–0018);
(16) URS Corporation (URS; PHMSA–2008–0005–0019);
(17) Deeds (Industrial Health & Safety Consultants, Inc.) (Deeds; PHMSA–2008–0005–0020);
(18) Anderson Products, Inc. (API; PHMSA–2008–0005–0021);
(19) National Transportation Safety Board (NTSB; PHMSA–2008–0005–0022); and
(20) Dangerous Goods Advisory Council (DGAC; PHMSA–2008–0005–0023).

Commenters were supportive of PHMSA's efforts to harmonize the HMR with international standards. Many of the proposals in the NPRM are fully supported by commenters, while others received little or no comment; these amendments are adopted as proposed. Several comments were beyond the scope of this rulemaking and are not addressed in this final rule. Comments are addressed in more detail in the Section-by-Section Review.

II. Overview

A. Amendments To Enhance the Safe Transportation of Batteries and Battery-Powered Devices

The most noteworthy amendments in this final rule address the transportation of batteries and battery-powered devices. Currently, batteries and battery-powered devices are subject to a number of requirements in the HMR. Most importantly, the HMR restrict the transportation of electrical devices, including batteries and battery-powered devices, that are likely to create sparks or generate a dangerous amount of heat that could cause fire, smoke, or otherwise adversely affect the packaging material or means of conveyance. These batteries and battery-powered devices

are forbidden from transportation unless packaged in a manner that prevents such an occurrence (§ 173.21(c)). Additionally, the following types of batteries and devices powered by batteries are subject to packaging and hazard communication requirements:

- Wet (electric storage) batteries (§ 173.159);
- Batteries containing sodium (§ 173.189);
- Lithium cells and batteries (§ 173.185);
- Solid potassium hydroxide batteries (§ 173.213); and
- Battery-powered vehicles and equipment (§ 173.220).

These requirements primarily address the hazards posed by the chemicals contained in the batteries as opposed to the stored electrical energy. For instance, wet cell batteries are required to be packaged in a manner to prevent leakage of the corrosive battery fluid in the event of an accident. The electrical hazard of the battery is addressed through general requirements to prevent short-circuiting, and the general prohibition on transporting electrical devices without proper protection and packaging (§ 173.21). However, the HMR currently prescribe no separate or unique classification for identifying materials that present a hazard in transport based on their stored electrical energy. This final rule addresses the electrical hazards posed by batteries and battery-powered devices by enhancing packaging and hazard communication requirements.

A growing number of incidents involving batteries and battery-powered devices transported by aircraft have highlighted the transportation safety risks. Additionally, several factors are contributing to a heightened concern for the future transport of these devices, with particular attention to the risk onboard aircraft, including: (1) The increasing number of batteries and battery-powered portable and handheld devices (*e.g.,* laptops, cellular phones, etc.) carried by airline passengers and otherwise transported in commerce; (2) the development and use of batteries with extended operating life and greater stored energy; and (3) the increasing number of counterfeit batteries in distribution and use. If not adequately protected from damage, short circuiting or, for devices containing batteries, inadvertent activation, batteries and battery-powered devices of all types can create or cause sparks or a dangerous amount of heat for extended periods, and in some cases, cause a fire. Cargo fires are a significant hazard in all modes of transportation and can have particularly catastrophic results in air transportation. If located aboard an aircraft during flight, inadequately protected batteries and battery-powered devices can pose a significant threat to the safety of people, property, and the environment.

PHMSA and the Federal Aviation Administration (FAA) are aware of more than 96 incidents involving batteries or battery-powered devices in air transportation since 1996 that produced smoke, fire or a dangerous amount of heat. These incidents have occurred either on board an aircraft in cargo, checked, or carry-on baggage, or in ground transport facilities associated with air transportation. Many of these incidents involved shipments of batteries as cargo. The remainder involved shipments of electrically powered vehicles, equipment, or apparatus containing batteries. Since most batteries are excepted from the incident reporting requirements in the HMR, it is likely there have been additional incidents in all modes of transportation that were not reported.

One major injury and several minor injuries were reported from these incidents. In some cases, the property damage and business interruption costs resulting from the incidents were significant. Most incidents occurred or were discovered on the ground in air transport facilities or vehicles. Three incidents occurred in flight on passenger and cargo planes, resulting in emergency landings or flight plan diversions.

In response to these incidents, PHMSA's predecessor agency (the Research and Special Programs Administration) issued a public advisory on July 7, 1999 (64 FR 36743), reminding the transportation industry and public that batteries and electric devices that contain batteries are forbidden for transport unless properly packaged to prevent the creation of sparks or generation of a dangerous amount of heat (§ 173.21). The FAA issued safety advisories to the airline industry on July 2, 1999, and again on May 23, 2002.

In addition, due to a series of incidents involving batteries carried by airline passengers, PHMSA initiated a campaign to educate the public about ways to reduce the risks posed in the transportation of batteries and battery-powered devices. The campaign included establishing a dedicated Web page for air travelers and developing a battery safety guide that includes safety measures and tips for the general public, for distribution at airports, in retail outlets, and through electronic media. As part of our battery safety campaign, we recommended various practical measures for complying with the regulations and reducing transportation risks. Recommended practices include keeping batteries installed in electronic devices; packing spare batteries individually in carry-on baggage; keeping spare batteries in their original retail packaging; separating batteries from other metallic objects, such as keys, coins, and jewelry; securely packing battery-powered devices in a manner to prevent accidental activation; and ensuring batteries are undamaged and purchased from reputable sources. On March 26, 2007, PHMSA issued a safety advisory notice (72 FR 14167) to further inform the traveling public and airline employees about the importance of properly packing and handling batteries and battery-powered devices when they are carried on board an aircraft.

We have also initiated a comprehensive strategy aimed at reducing the risks posed by batteries and battery-powered devices in transportation. On February 22, 2007; April 26, 2007; May 24–25 2007; and April 11, 2008, PHMSA hosted meetings with public and private sector stakeholders who share our concern for the safe transportation of batteries and battery-powered devices. The meetings provided an opportunity for representatives of the National Transportation Safety Board (NTSB), the Consumer Product Safety Commission, manufacturers of batteries and battery-powered devices, airlines, airline employee organizations, testing laboratories, and the emergency response and law enforcement communities to share and disseminate information about battery-related risks and developments. Understanding these risks is essential to promote improvements in industry standards and best practices. Together we identified a series of immediate and longer-term actions that participants are taking or will take to enhance safety, including:

- Comprehensive reporting and investigation of battery-related incidents;
- Improved battery, consumer product, and software design;
- Development and implementation of a technical standards agenda;
- Consideration and implementation of improved regulatory standards;
- Focused enforcement; and
- Development and implementation of a public outreach and education campaign.

The requirements adopted in this final rule are an important element of the safety strategy designed to address specific battery-related hazards not

adequately addressed by existing HMR requirements.

In this final rule, we are adopting the following amendments to enhance the safe transportation of batteries and battery-powered devices:

- Requirement to report incidents involving batteries and battery-powered devices including those that result in a fire, violent rupture, explosion, or dangerous evolution of heat. Immediate notice requirements are limited to air transport of batteries and battery-powered devices.
- Clarification of the requirement that batteries and battery-powered devices and vehicles be offered for transportation and transported in a manner that prevents short-circuiting, the potential of a dangerous evolution of heat, damage to terminals, and, in the case of transportation by aircraft, unintentional activation.
- Clarification of the requirements for determining whether a battery is considered non-spillable. This clarification includes the designation of a new section outlining conditions for packaging and transport of batteries determined to be non-spillable.
- Requirement for a shipper of batteries dry, sealed to indicate compliance with applicable special provisions and exceptions by marking each package with the words ''not restricted'' or, if a transport document such as an air waybill accompanies a shipment, by including the words ''not restricted'' on the document.
- Elimination of the requirement to disconnect the terminals when a battery-powered wheelchair or mobility aid is transported as checked baggage, provided the wheelchair or mobility aid design provides an effective means of preventing unintentional activation.
- Clarification of the requirements for the transport of dry batteries including a revision of the proper shipping name used to describe dry batteries and a provision to limit the applicability of transport requirements to a certain size of battery.

As indicated earlier, these amendments will harmonize the HMR with international standards applicable to the transportation of batteries and battery-powered devices, improve communication of the standards pertaining to the transport of batteries and battery-powered devices to facilitate safe transport of these materials especially by aircraft, relieve burdens associated with compliance requirements, and provide data and information to enable PHMSA to develop an understanding of the causes of battery incidents in transportation and assist us in the reduction of the associated risks.

Incident reporting. Most batteries are currently excepted from the incident reporting requirements in the HMR. We believe it is likely that numerous incidents involving batteries and battery-powered devices in all modes of transportation are not reported. This under-reporting has made it difficult to analyze the full body of incidents in transportation and to assess the full extent of the hazards associated with transporting batteries and battery-powered devices. In the July NPRM, we proposed to require immediate (telephonic) notice in accordance with § 171.15 for all incidents involving shipments of batteries or battery-powered devices that result in a fire, violent rupture, explosion, or a dangerous evolution of heat. In addition, we proposed to require submission of a written incident report in accordance with § 171.16 for battery related incidents, including incidents involving battery shipments that are prepared and offered as excepted from HMR requirements.

We received a number of comments [ALPA, American Trucking Associations, COSTHA, NEMA, UPS, and VOHMA] supporting the proposal to require written reports in accordance with § 171.16 of the HMR for incidents involving shipments of batteries or battery-powered devices that result in a fire, violent rupture, explosion, or a dangerous evolution of heat. We also received a number of comments [ALPA, COSTHA, NEMA, VOHMA] supporting the proposal to require immediate (telephonic) notice in accordance with § 171.15. However, three commenters [American Trucking Associations, DGAC, UPS] oppose our proposal to require immediate notice of incidents involving shipments of batteries and battery-powered devices as unwarranted and burdensome, especially on carriers. DGAC does not believe, ''* * * a battery incident would warrant [an emergency response] and therefore consider[s] reporting of battery incidents to the NRC an unnecessary reporting burden.'' Additionally, commenters note it would be difficult to determine whether batteries or battery-powered devices were involved and whether they were the cause of the incident within the time constraints of immediate reporting requirements. As indicated by the American Trucking Associations, experience has shown that for trailer fires ''* * * it is very difficult to determine the cause of the fire and carriers may not even know that batteries were present until after the fire is extinguished.'' UPS indicates ''* * * the new language will create significant challenges for carriers.'' UPS also notes that ''[e]xperience demonstrates that there are occasions when fires occur but the cause cannot be determined'' and ''many hours or even days may be required to identify that the batteries were in the trailer.'' Both commenters express concern that fire fighters may shift or remove contents, thus complicating efforts to determine the cause of a fire. The American Trucking Associations and VOHMA specifically recommend that immediate notice should apply to air transportation only.

Given the recent incidents involving batteries and battery-powered devices, we believe incident reporting will provide the data to enable us to identify the causes of battery incidents and determine whether additional measures would improve safe transport and help prevent future incidents. However, we agree with the commenters that immediate telephonic reporting of incidents that occur during ground transportation may not be necessary for this purpose. A written report of the incident submitted in accordance with § 171.16 should provide sufficient information for us to identify and assess incident causes without imposing an undue burden on carriers. Since most of the anecdotal information about battery incidents is associated with aircraft incidents and because of the inherent safety hazards of air transport, we continue to believe that air carriers should be required to provide immediate notice of battery related incidents. Therefore, in this final rule, we are adopting the amendment to § 171.15 to include a requirement for immediate notice of incidents involving shipments of batteries or battery-powered devices transported by aircraft resulting in a fire, violent rupture, explosion, or dangerous evolution of heat. Because this change from the incident reporting provisions proposed in the NPRM will revise the estimated reporting burden, we are re-calculating the information collection pertaining to incident reporting and will submit a revised package to the Office of Management and Budget (OMB). A separate **Federal Register** notice will be published pending OMB review (see discussion under ''Paperwork Reduction Act'').

One of the reporting criteria proposed in the NPRM was for an incident involving a ''dangerous evolution of heat.'' Several commenters [American Trucking Associations, COSTHA, FedEx, UPS, VOHMA] express concern that the criterion is vague and open to interpretation. The commenters request that we clarify the meaning of a

''dangerous evolution of heat'' or remove the condition altogether in order to relieve any potential ambiguity from the incident reporting requirements for the shipment of batteries or battery-powered devices. As FedEx states, ''this [term] is subjective and certainly requires further review or additional clarification.'' We continue to believe that a requirement to report incidents involving a ''dangerous evolution of heat'' will assist us to evaluate the potential fire risks associated with the transportation of batteries and battery-powered devices. However, we agree that clarification would be helpful. VOHMA suggests that the reporting requirement should be triggered by visible evidence of an amount of heat sufficient to be dangerous to packaging or personal safety to include ''* * * charring of packaging, melting of packaging, scorching of packaging, or other evidence.'' We agree and are adding this clarification to the reporting requirements.

Battery safety. In this final rule, we are adopting a number of revisions to clarify that batteries of all types and battery-powered devices, equipment, and vehicles must be packaged for transportation in a manner that prevents short-circuiting, damage to terminals, the potential of a dangerous evolution of heat, and, for transportation by aircraft, unintentional activation. We are including several examples of packaging methods that may meet this performance standard, including packaging each battery or each battery-powered device in fully enclosed inner packagings made of non-conductive material, and separating batteries and battery-powered devices in a manner to prevent contact with other batteries, devices or conductive materials (*e.g.,* metal) in the packagings. Batteries designed with exposed terminals or connectors should have the exposed terminals or connectors protected with non-conductive caps. We have included language in §§ 171.15, 171.16, 172.102 Special Provision 130, 173.21, 173.159, 173.220, and 175.10 to further clarify these requirements.

The HMR include a number of provisions applicable to batteries installed in vehicles, machinery, or other types of equipment. Section 173.220 establishes transportation requirements for internal combustion engines, self-propelled vehicles, mechanical equipment containing internal combustion engines, and battery powered vehicles or equipment. Generally, this section excepts battery-powered vehicles, machinery, and equipment from the HMR, provided they meet certain minimal requirements. We are aware of several incidents resulting in a dangerous evolution of heat initiated by batteries of this design which have been inadequately protected. In this final rule, we are adopting an amendment to require battery-powered vehicles, machinery, and equipment, including battery-powered wheelchairs and mobility aids, to conform to the new requirements in § 173.159, paragraphs (a) and (b), including requirements for protecting terminals and preventing short-circuiting and unintentional activation. In addition, we are clarifying that battery-powered vehicles, machinery, and equipment are forbidden to be transported unless packaged in a manner preventing the creation of sparks, a dangerous amount of heat and, in air transportation, unintentional activation.

Non-spillable batteries. Section 173.159 establishes requirements for the transportation of wet batteries, including non-spillable batteries. If certain conditions are met, non-spillable batteries are excepted from the HMR. Non-spillable batteries meeting additional requirements are excepted from all other requirements of the HMR. Unless all of the conditions specified in § 173.159(d) are met, a non-spillable battery is fully subject to the HMR as a wet electric storage battery. International regulations outline the conditions under which a battery is considered non-spillable and provide packaging requirements specific to non-spillable batteries. In this final rule, we are describing in § 173.159(f) the conditions under which a battery is considered non-spillable and relocating the exceptions pertaining to non-spillable batteries to a new § 173.159a. Consistent with international requirements, we are specifying that batteries are considered ''non-spillable'' when they are capable of passing a vibration test and a pressure differential test without leakage. We are also adopting the requirement that non-spillable batteries must be packaged in strong outer packaging and securely fastened in the battery holder or the equipment when the battery is an integral part of the operation of mechanical or electronic equipment. In addition, we are specifying that, except for the incident reporting requirements of §§ 171.15 and 171.16, non-spillable batteries are not subject to the requirements of the HMR if they meet the following additional conditions:

- At a temperature of 55 °C (131 °F), the battery does not contain any unabsorbed free-flowing liquid, and is designed so that electrolyte will not flow from a ruptured or cracked case;
- The battery is protected against short-circuiting and securely packaged in strong outer packaging;
- The battery is marked ''NONSPILLABLE'' or ''NONSPILLABLE BATTERY''; and
- For transportation by aircraft:
- The battery must meet the provisions of § 173.159(b)(2).

One commenter [Tyco] expresses concern regarding shipments of non-spillable batteries that otherwise appear to meet the requirements for transport of non-spillable batteries (see § 173.159a), but leak after being damaged during transportation. The commenter states that it conducted an internal investigation, which involved test samples of all non-spillable batteries it utilizes, to determine if those batteries met the criteria of a ''non-spillable'' battery because they leaked and contained free liquids. According to the commenter, a number of the tested batteries exhibited observable leakage, although the manufacturers and distributors of the batteries had provided certification and laboratory results showing no failures. Based on this information, the commenter recommends that PHMSA clarify any ambiguity surrounding the methodology used to determine whether a battery is ''non-spillable'' to improve safety during the transportation of these materials. Specifically, the commenter requests PHMSA identify a testing protocol to determine whether a battery is designed so that electrolyte will not flow from a ruptured or cracked case.

We commend the efforts of the commenter and appreciate the information provided in its comments. However, the recommendation provided by the commenter is outside the scope of this rulemaking as revisions to the criteria for determination of a non-spillable battery were not proposed in the NPRM. We will consider this information as part of our comprehensive strategy aimed at reducing the risks posed by batteries and battery-powered devices in transportation.

We received two comments [BCI, PRBA] expressing disappointment that PHMSA did not consider provisions for shipments of non-spillable batteries transported for recycling or disposal. The commenters indicate that ''* * * it is almost impossible for shippers of used batteries to know if nonspillable batteries have been subject to the required vibration, pressure differential, and 'crack test' at 55 °C (131 °F) or marked NONSPILLABLE or NONSPILLABLE BATTERY * * *'' Both commenters request that PHMSA include a new paragraph in § 173.159

which would provide relief from these tests for batteries transported for disposal or recycling. The request by the commenters is beyond the scope of this rulemaking. We did not propose the addition of a new paragraph which provides relief from non-spillable test requirements for shipments of non-spillable batteries intended for recycling or disposal. However, we will review the merits of this request and consider it for a future rulemaking.

One commenter [BCI] requests that PHMSA remove the reference to ''batteries manufactured after September 30, 1995'' in the new § 173.159a for exceptions for non-spillable batteries. BCI notes that ''* * * it is safe to assume that all nonspillable batteries being shipped today and in the future are manufactured after this date * * *'' We agree and in this final rule, we are removing the phrase ''batteries manufactured after September 30, 1995'' from the new § 173.159a.

Battery-powered wheelchairs or other mobility aids. Section 175.10 establishes exceptions for passengers, crewmembers, and air operators. Currently, the HMR permit a wheelchair or other battery-powered mobility aid to be carried on board a passenger aircraft as checked baggage provided that (1) visual inspection, including removal of the battery if necessary, reveals no obvious defects; (2) the battery is disconnected and terminals are insulated to prevent short-circuiting; and (3) the battery is securely attached to the wheelchair or mobility aid or removed and separately packaged. We are concerned, however, that repeated handling of the battery in a wheelchair or other mobility aid could result in damage or other problems that could compromise safety. Moreover, the design batteries and their housing have significantly improved in recent years. Therefore, in the NPRM, we proposed to revise § 175.10(a)(15) to eliminate the requirement to disconnect the terminals when a battery-powered wheelchair or other mobility aid is transported as checked baggage provided the device provides an effective means of preventing unintentional activation. Battery terminals must continue to be protected from short-circuiting, but such protection is inherent in the design of most wheelchairs and mobility aids.

Three commenters [ALPA, Omni, PVA] support PHMSA's proposal to eliminate the current requirement to disconnect the terminals when a battery-powered wheelchair or other mobility aid is transported as checked baggage provided the wheelchair or mobility aid has an effective means of preventing unintentional activation. ALPA states, ''* * * [w]e believe this provides an equivalent level of safety and will prevent inadvertent damage to wheelchairs by airline personnel, which could lead to a battery incident.'' However, one commenter [Tusek] expresses concern regarding the proposal to disconnect the battery if the wheelchair or mobility aid design does not provide an effective means of preventing unintentional activation. The commenter is concerned that such a requirement can be satisfied by merely unplugging a cable from a control unit rather than disconnecting the battery at the terminal(s). The commenter notes that the cable is still ''live'' and susceptible to ''arcing'' (short-circuiting) if the cable remains attached to the battery. The commenter provides information about an incident involving a wheelchair to illustrate the risk associated with unplugging a wheelchair but allowing the cable or wiring to remain connected to a battery.

We acknowledge the concerns of the commenter and believe that additional clarification is warranted. Our review indicates that the referenced incident could have been prevented by thorough visual inspection, proper handling, and proper insulation of the terminals. Additionally, we note that the intent of the provision to disconnect the battery is to disconnect the battery at the terminals (and insulate the terminals to prevent short circuits). Unplugging a cable and leaving it connected to the terminal(s) does not satisfy the requirement to disconnect the battery and insulate the terminals. However, requiring the disconnection of batteries at the terminal results in repeated handling of the battery and increases the potential of damage or other problems that could compromise safety. Our intent is to diminish this potential by allowing the battery to remain connected to the wheelchair or mobility aid if the design provides an effective means of preventing unintentional activation. Therefore, in this final rule, we are adopting the requirements as proposed, and including additional language in the regulatory text in § 175.10(a)(15) to clarify that when the battery is disconnected, the battery terminals must also be protected to prevent short circuits.

Waybill notation. In the July NPRM, we proposed to require a notation to be included on the air waybill accompanying a shipment to indicate that batteries and battery-powered devices have met all conditions and requirements for transport as specified in the HMR without further restriction. A number of commenters [ALPA, American Trucking Associations, BCI, COSTHA, DGAC, Fedco, FedEx, NEMA, Omni, PRBA, UPS, URS] addressed the proposed notation. Most commenters oppose the proposal based on current air carrier practice, inconsistency with the ICAO TI, and concern that air waybills are not required shipping documents under the HMR.

Commenters oppose the certification provisions because the HMR do not specifically require an air waybill. As COSTHA notes, ''* * * [u]se of an air waybill is not mandated by the HMR and there are few if any references to an air waybill.'' Additionally, UPS points out that ''[t]his commercial document, used by many air carriers as a contract of carriage, does not really have any status in the HMR * * *'' Commenters state that the language as written suggests that the required words ''not restricted'' must appear on an air waybill, in effect, requiring shipments to be accompanied by an air waybill. Other commenters stress that the language as proposed in the NPRM is not consistent with ICAO TI requirements, which require the words ''not restricted'' *when an air waybill is issued.* PRBA asserts that ''* * * PHMSA should clarify that this requirement only applies when an air waybill is issued * * *'' Two commenters [COSTHA, Omni] suggest that it would be more appropriate to revise the language to require confirmation of compliance on an accompanying air waybill or other document. COSTHA specifically suggests using language similar to language provided in new section § 173.4a(h)(1), ''* * * if a document such as an air waybill accompanies a shipment * * *.''

Commenters are also concerned about implementation of such a hazard communication requirement. Some indicate an inequitable burden on carriers, especially non-air transport modal carriers. The American Trucking Associations indicates, ''* * * if a shipper of batteries fails to indicate this statement on an air waybill used as a shipping paper, it is extremely unlikely that a motor carrier will be able to identify the deficiency * * *'' UPS urges PHMSA to proceed carefully with new documentation requirements and states, ''PHMSA should not expect carrier personnel routinely to seek information related to hazardous materials on a document other than a hazardous materials shipping paper, particularly when the package does not otherwise require special handling * * *.'' Commenters also note that use of an air waybill is not standard across the air carrier industry, and that carriers and industry are becoming more

automated and moving towards a paperless system for shipments. According to UPS, ''Millions of air shipments, including those in the UPS small package service, move every day without an accompanying air waybill. The vast majority of such small package service shipments are transported with an address label affixed to the package * * * PHMSA's proposal depends on the unfounded assumption that an air waybill will be generated for every air shipment * * *.'' FedEx adds, ''We estimate that well over 50% of shipments offered to FedEx Express do not have a paper air waybill.''

Two commenters [NACA, Omni] note that in many cases the carrier or freight forwarder prepares the air waybill and disagree with PHMSA's premise that including the words ''not restricted'' on an air waybill allows a carrier or freight forwarder to verify that the shipper has complied with applicable requirements. According to Omni, ''* * *[w]here the consignor tenders a material or article to an aircraft operator or freight forwarder and the operator's or freight forwarder's agent prepares the air waybill, the stated intent of the PHMSA may not be satisfied.'' Omni suggests PHMSA require the confirmation of compliance on the accompanying air waybill or other transport document to permit the endorsement in a form other than the air waybill prepared by the operator or freight forwarder. NACA suggests requiring the shipper to submit written verification that the shipment is determined to be ''not restricted'' or requiring the shipper endorsement of an air waybill prepared by a carrier or the freight forwarder.

Recent incidents involving batteries and battery-powered devices suggest that shippers may not be aware of all the HMR requirements applicable to shipments of these items. Moreover, the lack of a declaration or some other type of shipment identification accompanying these shipments to air carriers may result in unsafe handling during transportation. We believe that a requirement to indicate on a shipping document or other media that the shipment conforms to all applicable requirements will enhance safety through increased awareness on the part of both shippers and carriers.

It was not our intent to specifically require the use of an air waybill to communicate conformance. We agree with commenters that recommend consistency with ICAO TI requirements to include the words ''not restricted'' when an air waybill is issued. However, in light of comments submitted indicating that not all shipments are accompanied by an air waybill, limiting the requirement to ''when an air waybill is issued'' does not satisfy the intent of communicating conformance with the HMR. Therefore, as suggested by COSTHA, we are revising the language to be similar to the ''excepted quantities'' documentation requirements to specify that ''if a document such as an air waybill accompanies a shipment, the words 'not restricted' must be provided on the document.'' The documentation we refer to is some form of transport documentation prepared to accompany the shipment. To assist the communication process, we recommend including the words ''not restricted'' on the top page of a multiple page document in a manner clearly distinguishing the required words from other text. In addition, to reduce the paperwork burden that may result from this requirement, in this final rule, we are adopting an alternative means of communicating conformance. Specifically, a shipper may elect to mark each package containing batteries or battery-powered devices with the words ''not restricted'' in lieu of placing the words on a transport document accompanying the shipment. Finally, in response to commenters' concerns that this amendment will impose additional documentation-related burdens, we are recalculating the related information collection pertaining to shipping papers and will submit a revised package to OMB. A separate **Federal Register** notice will be published pending OMB review (See discussion under ''Paperwork Reduction Act'').

Note that the requirement to include the notation ''not restricted'' on an air waybill, shipping document, or as a package marking applies to cargo shipments of dry, sealed batteries that are greater than 9 volts. Other types of batteries, including lithium batteries and non-spillable batteries, are already subject to hazard communication requirements in the form of shipping documentation and/or package markings and labels.

We are not adopting our proposal for an air waybill certification requirement for other types of hazardous materials shipments. See the discussion later in this preamble.

Conforming amendments. In the July NPRM, we proposed a number of conforming amendments to ensure that batteries are transported in accordance with the proposed requirements in § 173.159. For example, § 173.21 currently prohibits the transportation of electrical devices unless packaged to prevent the creation of sparks or generation of a dangerous amount of heat. In the NPRM, we proposed to revise this paragraph to clarify that the term ''electrical devices'' includes ''batteries'' and ''battery-powered devices.'' We also proposed to revise Special Provision 130 to specify that ''Batteries, dry, sealed, n.o.s.'' are not subject to the requirements of the HMR except those pertaining to incident reporting, short circuit protection, damage to terminals, prevention of the potential of a dangerous evolution of heat, and when transported by aircraft, unintentional activation and an indication on the air waybill that all conditions for transport have been met (Special Provision 130). In addition to the proposed amendments, in this final rule, we are adding clarifying language that the requirements in Special Provision 130 for dry batteries transported by air only apply to shipments of batteries whose voltage (electrical potential) exceeds 9 volts.

We received a number of comments [BCI, NEMA, Omni, PRBA,UPS, URS] generally supporting our efforts to clarify requirements for preventing short circuits and inadvertent activation as well as our proposal to include examples of packaging methods to meet performance standards. However, several commenters [NEMA, PRBA, URS] oppose the current structure of the regulatory text outlining examples of packaging methods to prevent short circuits for batteries excepted under § 172.102, Special Provision 130. Specifically, commenters are concerned with the examples we provided to package each battery when practicable in fully enclosed inner packagings or separating the batteries in a manner to prevent contact with other batteries, devices or conductive materials. The commenters are also concerned that this language would disallow the current practice of retail packaging commonly referred to as ''blister packs'' and volume packaging of batteries. Commenters note that during volume packaging of batteries, batteries are packaged in such a manner that the metal sides or jackets of the batteries contact one another, but are positioned and packaged so that there is no terminal-to-terminal contact or terminal-to-metal contact, and there is no shifting of the contents to allow such contact.

We agree with the commenters that clarification of the proposed language may be warranted. The intent of including the examples of methods to protect from short circuits is to assist shippers to identify specific methods of achieving the standard. As UPS notes ''[t]he inclusion of these examples will lead to better understanding of the specific steps required to prevent incidents in transportation.'' Our intent is not to prohibit a method of packaging

that has a track record of safe transport. Indeed, we have issued previous interpretive guidance indicating that battery-to-battery contact is not prohibited provided there is no contact between battery terminals, battery terminals and conductive material, or shifting that would allow such contact. Therefore, in this final rule, we are revising the proposed language in §§ 172.102, Special Provision 130 and 173.159 to clarify the requirements.

One commenter [Omni] expresses concern that FAA requirements in 14 CFR Part 382 no longer align with the requirements in Parts 171 through 175 because of proposed revisions to §§ 173.159 and 175.10. Omni encourages agencies within DOT to coordinate efforts to ensure requirements from the respective agencies align. We agree that alignment within the agencies is necessary; however, we are not aware of any conflict.

One commenter [BCI] indicates that we did not clearly state the numerous ways protection against short circuits and generating a dangerous quantity of heat can be achieved. BCI points out that ''* * *certain batteries are designed in such a way to prevent short circuits, and thus need not be subject to additional packaging requirements. (Examples include, but are not limited to, recessed battery terminals.)* * *'' BCI recommends that PHMSA incorporate design considerations into the transport requirements for batteries or battery-powered devices. We agree. The requirements are not intended to regulate the design of these materials but allow for designs that conform to the requirements. For instance, the requirements allow for compliance with the requirement to protect against damage to terminals through design implementation such as recessed battery terminals.

In the July NPRM, we also proposed to amend certain entries in the Hazardous Materials Table (HMT) in § 172.101. Currently, under the HMR, dry batteries are not subject to incident reporting or measures to prevent unintentional activation until a dangerous amount of heat has developed. As indicated above, in this final rule, we are extending the requirements for incident reporting and enhanced packaging to cover all batteries and battery-powered devices. Therefore, we are removing the entry ''Batteries, dry, *not subject to the requirements of this subchapter*'' and adding a new entry, ''Batteries, dry, sealed, n.o.s.'' to the HMT.

It should be noted that shippers must distinguish between the proper shipping name ''Batteries, dry, sealed, n.o.s.,'' and the existing proper shipping name ''Batteries, wet, non-spillable, *electric storage.*'' Batteries described as ''Batteries, wet, non-spillable, *electric storage*'' have metallic lead and lead oxide electrodes and sulfuric acid electrolytes just like regular ''wet'' batteries, but the acid is either gelled with silica or absorbed in a mat of micro-glass fibers. These batteries are not truly ''sealed'' (non-spillable) but are ''valve regulated'' (they are technically termed ''valve-regulated lead-acid'' or ''VRLA''). The resealable valves prevent the entrance of oxygen from the outside air, but release excess hydrogen and oxygen formed during overcharging. These types of batteries are generally used for 12-volt vehicular starting applications and uninterruptible power supply applications.

Batteries described under the new proper shipping name ''Batteries, dry, sealed, n.o.s'' are hermetically sealed and generally utilize other metals and/or carbon as electrodes. These batteries are typically used for portable power applications. The rechargeable (and some nonrechargeable) types have gelled alkaline electrolytes (rather than acidic) making it difficult for them to generate hydrogen or oxygen when overcharged.

The entry ''Batteries, dry, containing potassium hydroxide solid, *electric storage*'' is being revised by adding to column (7) a reference to new Special Provision 237. The new special provision specifies that ''Batteries, dry, containing potassium hydroxide solid, *electric storage*'' must be prepared and packaged in accordance with the requirements of § 173.159(a), (b), and (c), and for transportation by aircraft, § 173.159(b)(2). The entry ''Batteries, wet, non-spillable, *electric storage*'' is revised by adding to column (8A), a reference to new § 173.159a.

Section 173.189 establishes transportation requirements for batteries containing sodium or cells containing sodium. In the NPRM, we proposed to revise paragraph (e) to specify that vehicles, machinery and equipment powered by sodium batteries must be consigned under the entry ''Battery-powered vehicle *or* Battery-powered equipment.'' This amendment is being adopted as proposed.

Section 176.84 contains additional stowage and segregation requirements for hazardous materials on cargo and passenger vessels. In this final rule, in order to align the HMR with the IMDG Code, a new vessel stowage code ''146'' is added to the § 176.84(b) table to specify that, ''Category B stowage applies for unit loads in open cargo transport units.'' The new vessel stowage code ''146'' is assigned to ''Batteries, wet, filled with acid, *electric storage,*'' UN2794 and ''Batteries, wet, filled with alkali, *electric storage,*'' UN2795 in column (10B) of the HMT.

Lithium batteries. Except for incident reporting requirements, the July NPRM did not propose any amendments pertaining to the transportation of lithium batteries. PHMSA is continuing to evaluate and reduce lithium battery risks through targeted enforcement; inspections and testing, including root cause investigation of all incidents; public outreach; and other non-regulatory initiatives.

Three commenters [ALPA, Fedco, Omni] express disappointment that PHMSA is not proposing any amendments pertaining to the transportation of lithium batteries. One commenter [Fedco] is, ''appalled to find * * * Amendments to the HMR pertaining to lithium batteries based on the Fifteenth revised edition of the UN Recommendations are not being proposed in this rulemaking.'' Fedco notes the burden this places on its company by requiring ''extreme diligence'' when shipping lithium cells and batteries because of the dual shipping and packaging requirements and strongly urges PHMSA to fully harmonize with the UN Recommendations. Omni also expresses concern but requests that, ''* * * at a minimum, the PHMSA incorporate in to § 172.101 the three new lithium ion battery proper shipping names and the three replacement lithium metal battery proper shipping names that come into effect internationally * * *'' as of January 1, 2009. An additional commenter [NEMA] requests clarification of the weight limitations for packages of small lithium cell and batteries.

We appreciate the concerns expressed by shippers about the challenges involved with complying with differing regulatory standards and requirements. However, it should be noted that because the HMR permit compliance with ICAO requirements for air shipments, the new proper shipping names may be used for air transportation, both domestically and internationally, and for transportation by motor vehicle and rail immediately before or after being transported by aircraft. Further, as stated in the NPRM, we plan to complete an assessment of the costs and benefits of further restrictions and available alternatives before developing additional lithium battery rulemaking proposals. Therefore, except for incident reporting

requirements and some clarifying language for protection against short circuits, this final rule does not adopt amendments pertaining to the transportation of lithium batteries. In the meantime, we will continue to monitor and evaluate the safety performance of lithium batteries in transportation, identify and target counterfeit and other non-conforming batteries, and encourage the development and introduction of safer battery designs.

B. Additional Amendments Adopted in This Final Rule

In addition to the battery-related amendments detailed above, in this final rule, we are adopting the following amendments to harmonize the HMR with the most recent revisions to the UN Recommendations, ICAO TI, and IMDG Code:

• *Hazardous Materials Table (HMT):* Amendments to the § 172.101 HMT to add, revise, or remove certain proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, bulk packaging requirements, passenger and cargo aircraft maximum quantity limitations and vessels stowage provisions. Additionally, we are revising several entries in the HMT to correct typographical errors.

• *Fuel Cells:* Amendments to the HMT to add four new proper shipping names to describe the range of fuel used in fuel cell cartridges: (1) Corrosive substances (UN3477); (2) liquefied flammable gas (UN3478); (3) hydrogen in metal hydride (UN3479); and (4) water-reactive substances (UN3476). In addition, we are adopting amendments to expand the types of fuel cell cartridges permitted in carry-on baggage to include water-reactive substances and hydrogen in a metal hydride. Amendments to § 173.230 provide packaging requirements for fuel cells and, except for transportation by aircraft, limited quantity exceptions for the various types of fuel cell cartridges specified above.

• *Small Quantity Exceptions:* Amendments maintaining current allowances for small quantities of Division 2.2, Class 3, Division 4.1, Division 4.2 (PG II and III), Division 4.3 (PG II and III), Division 5.1, Division 5.2, Division 6.1, Class 7, Class 8, and Class 9 materials transported by highway and rail and adopting the UN and ICAO excepted quantity provisions for transportation by aircraft or vessel.

• *Incident Reporting:* Amendments to provisions that except certain hazardous materials or commodities from the requirements of the HMR, including incident reporting requirements. The HMR contain overriding provisions in §§ 171.15 and 171.16 requiring notice of specific types of incidents to the National Response Center (NRC) and submission of a Hazardous Materials Incident Report, DOT Form F 5800.1, when in possession of a hazardous material at the time of an incident. The NRC relies on notices to gather and distribute spill data to emergency responders, and the DOT hazardous materials transportation safety program relies on DOT Form F 5800.1 to gather basic information on incidents that occur during transportation. We proposed to amend several provisions to emphasize the need to provide notice to the NRC and to address the need to obtain more accurate and complete data on incidents. Based on our review of comments regarding the proposed air waybill requirements for ''not restricted'' materials and based on past history of safe transportation of these excepted materials, in this final rule, we are not adopting the incident reporting requirement as proposed for those materials excepted in §§ 173.162, 173.164, 173.166, 173.186, 173.306, and 173.307. However, we are adopting our proposals to revise the exceptions and Special provisions applicable to batteries to include incident reporting requirements because there is a greater need to collect data as is discussed in the above Section A. We will continue to review the merits of the proposal and may reconsider the proposed amendments for a future rulemaking.

• *Organic Peroxide Tables:* Amendments to the Organic Peroxide Tables to add, revise, or remove certain hazardous materials and provisions.

• *Incorporation by Reference:* Amendments to incorporate by reference the updated ICAO TI, IMDG Code, TDG, UN Recommendations, and the addition of two new International Organization for Standardization (ISO) standards.

• *Petitions for Rulemaking:* In this final rule, we are addressing several petitions for rulemaking: P–1490, requesting PHMSA to remove the requirement that the type of package must be included on the notification of pilot-in-command; P–1494, requesting PHMSA to specify that pictograms described in the UN Globally Harmonized System of Classification and Labelling of Chemicals (GHS) are not prohibited under the HMR; P–1505, requesting PHMSA to include a new proper shipping name ''Powder, smokeless,'' UN0509, to the HMT and to include the new entry among the explosives assigned Packaging Instruction 114(b) in § 173.62; and P–1516, requesting PHMSA to allow the marine pollutant list to remain the basis in domestic transportation for regulating substances hazardous to the environment while permitting substances meeting the new IMDG Code criteria to be transported as substances hazardous to the environment. We are also addressing petitions P–1517 and P–1518, requesting PHMSA to align provisions for the transport of fuel cell systems and cartridges in the HMR with international standards.

• *Requirements for Marine Pollutants:* Recently, the classification criteria for marine pollutants in the IMDG Code were amended for consistency with the aquatic toxicity criteria adopted within the GHS. The HMR currently allow materials meeting the criteria of a marine pollutant under the prior IMDG Code criteria to be classed as such for domestic or international transportation (see paragraph 4 of the introduction to Appendix B of § 172.101). The new classification system adopted in the IMDG Code is complicated, and the associated criteria for classifying mixtures containing marine pollutants would involve an additional layer of complexity without a corresponding public benefit. Therefore, in the NPRM, we did not propose to adopt the new IMDG Code environmental classification system. Instead, we proposed to maintain the current regulatory approach to facilitate transportation without mandating use of the new GHS-based criteria. We also proposed to adopt a new marking for marine pollutants consistent with the marking adopted within the IMDG Code. These amendments are being adopted as proposed. These actions will provide the greatest possible harmonization with international requirements without imposing an undue burden on industry. This amendment is also consistent with a Petition for Rulemaking (P–1516) filed by DGAC. DGAC requested that for domestic transportation the marine pollutant list be maintained as the basis for regulating substances hazardous to the environment while permitting a substance meeting the new IMDG Code criteria to be transported as a substance hazardous to the aquatic environment. DGAC also recommended that the current 10 percent rule for classifying mixtures containing marine pollutants be used while allowing compliance with the mixture calculation in the IMDG Code. Though we did not propose to implement a 10 percent rule for marine pollutants irrespective of whether they are identified as a severe marine pollutant, we requested comments on that recommendation. In particular, we

were interested in the environmental impacts of such a change and its effect on human health and the environment. We invited comments on the practical consequences of the differing approaches, for instance, in the event of release of such substances into aquatic resources and drinking water. We did not receive any comments specifically addressing the release of substances into aquatic resources and drinking water. However, comments pertaining to the proposal to maintain the current regulatory approach to facilitate transportation without mandating use of the new GHS-based criteria are discussed under the section entitled ''Appendix B to § 172.101'' in this rulemaking.

C. Amendments Not Being Adopted in This Final Rule

This final rule makes changes to the HMR based on amendments to the Fifteenth revised edition of the UN Recommendations, Amendment 34 to the IMDG Code, and the 2009–2010 ICAO TI, which become effective January 1, 2009. However, we are not adopting all of the amendments to those documents into the HMR. In many cases, amendments to the international recommendations and regulations have not been adopted because the framework or structure of the HMR makes adoption unnecessary. In other cases, we have handled, or will be handling, the amendments in separate rulemaking proceedings. If we have inadvertently omitted a proposed amendment in the NPRM, we will attempt to include the omission in this final rule. However, our ability to make changes in a final rule is limited by requirements of the Administrative Procedure Act (5 U.S.C. 553). In some instances, we can adopt a provision inadvertently omitted in the NPRM if it is clearly within the scope of changes proposed in the notice, does not require substantive changes from the international standard on which it is based, and imposes minimal or no cost impacts on persons subject to the requirement. Otherwise, in order to provide opportunity for notice and comment, the change must be proposed in an NPRM.

One of the goals of this rulemaking is to continue to maintain consistency between the HMR and the international requirements. We are not striving to make the HMR identical to the international regulations, but rather to remove or avoid potential barriers to international transportation.

Below is a listing of significant amendments to the international regulations that we are not adopting in this final rule with a brief explanation of why the amendment was not included:

- *Requirements for Hazardous Materials Security.* The UN and ICAO have adopted minimal requirements pertaining to hazardous materials security. On March 25, 2003, we published a final rule to enhance the security of hazardous materials transported in commerce (68 FR 14510). Pursuant to that final rule, shippers and carriers of certain highly hazardous materials are required to develop and implement security plans. In addition, all shippers and carriers of hazardous materials are required to include a security component. The security plan requirements apply to shipments of hazardous materials that must be placarded and to select agents. In a separate rulemaking [PHMSA–06–25885 (HM–232F); 73 FR 52558, September 9, 2008] we proposed revisions to the list of materials for which security plans are required to ensure that the requirements apply only to those materials that pose a true security risk in transportation. We expect to publish a final rule in the spring of 2009.
- *Requirements for Radioactive Materials.* We are not adopting provisions pertaining to the transportation of Class 7 (radioactive) materials. Amendments to requirements pertaining to the transportation of Class 7 (radioactive) materials are based on changes contained in the International Atomic Energy Agency (IAEA) publication, ''IAEA Safety Standards: Regulations for the Safe Transport of Radioactive Materials.'' Due to their complexity, these changes are being addressed in a separate rulemaking under Docket HM–250.
- *Requirements for Infectious Substances.* The UN and ICAO have adopted minimal standards applicable to the transportation of human remains and animal carcasses as to which there is minimal likelihood that pathogens are present. For purposes of the HMR, such specimens are not considered hazardous, and their transportation is not subject to the HMR. These specimens are currently regulated by the Food and Drug Administration of the U.S. Department of Health and Human Services, the U.S. Department of Agriculture, and State and local authorities. Therefore, we are not adopting the new international provisions into the HMR.
- *Requirement for Definition of ''Target'' for Use During Packaging Testing.* Amendments to the HMR pertaining to the definition of a ''target'' for a drop test performed on non-bulk packagings are not being adopted in this rulemaking. The UN Recommendations amended the description to specify that the surface of a target must be immovable, free of defects, rigid, and large enough to ensure that the test package falls entirely upon the surface. We believe the current provisions in the HMR pertaining to the drop test method for non-bulk packagings adequately address this issue.
- *Requirement for Vibration Test for All Intermediate Bulk Containers (IBCs).* Amendments to the HMR pertaining to the test method and duration of a vibration test for IBCs are not being adopted in this rulemaking. PHMSA successfully helped to introduce to the UN Recommendations a vibration test requirement for IBCs that would both enhance safety and help to establish a more equivalent testing protocol for manufacturers of IBCs worldwide. However, the vibration test adopted by the UN may be conducted as a ''stand-alone'' design-type test on an otherwise untested IBC. In contrast, the vibration test originally introduced by PHMSA would require the vibration test to be conducted in sequence with other required tests. We believe this method provides a higher degree of safety, and therefore, are not amending the vibration test requirements currently in the HMR.
- *Requirement for Bromine (UN1744).* In the most current edition of the UN Recommendations, a packing instruction and a special packing provision for ''Bromine,'' UN1744 were consolidated into a new packing instruction specifically for Bromine. After reviewing this new packing instruction, we believe the current provisions in the HMR pertaining to the packaging of Bromine are adequate. The most noteworthy revision to the UN packing instruction which was initially adopted by the UN, was the removal of the intermediate packaging requirement for combination packagings. This decision was later reversed. Therefore, because the HMR already require an intermediate packaging, we are not adopting this amendment in this rulemaking.
- *Exceptions to Packaging for Paint and Paint-Related Material.* Amendments authorizing certain exceptions from performance testing of packagings containing paint and certain paint-related materials are not being adopted in this rulemaking. Currently, both the UN Recommendations and the HMR contain certain packaging exceptions for specific adhesives, printing inks, printing ink related materials, paint, paint-related materials and resin solutions (see UN Packing Instruction P001, Special Packing

Provision PP1 and 49 CFR 173.173(b)(2)). The Fifteenth revised edition of the UN Recommendations expands the exceptions to also include such materials when classified as environmentally hazardous substances. We are currently reviewing the incident data related to these exceptions and may consider this issue for a future rulemaking.

- *Requirements for Lithium Batteries.* Amendments to the HMR pertaining to lithium batteries based on the Fifteenth revised edition of the UN Recommendations are not being adopted in this rulemaking. We are reviewing these requirements and may consider them for a future rulemaking.
- *Requirements for Additional Signage.* Amendments to the HMR pertaining to additional signage in airports are not being adopted in this rulemaking. We are reviewing these amendments, including the related cost impacts, and may consider them for a future rulemaking. In the NPRM, we requested comments to provide information and suggestions that we can use during a future review. One commenter [ATA] states that it does not support airport signage as a primary means of hazard communication and that the ICAO requirements for more information on signage are not effective or efficient. Further, the commenter urges PHMSA not to adopt the ICAO signage requirements. We acknowledge the commenter's remarks and will include them in our consideration of a future rulemaking.
- *Requirement for Hazard Communication on an Air Waybill:* Amendment to require the consignor to indicate on the air waybill that certain hazardous materials or articles have met the conditions for transport as specified in applicable exceptions or special provisions. Based on comments received in response to the NPRM and the past history of the safe transport of the hazardous materials that would be subject to these amendments, we are not adopting the amendments in this final rule. However, we will continue to review the merits of this hazard communication amendment and may reconsider incorporating the amendment or a similar revised version of the amendment in a future rulemaking.

III. Section-by-Section Review

Following is a section-by-section review of the amendments adopted in this final rule. Note that this section-by-section review excludes the amendments applicable to the transportation of batteries and battery-powered devices, which are detailed in section II of this Notice.

Part 171

Section 171.7

The ''National Technology Transfer and Advancement Act of 1996'' directs agencies to use voluntary consensus standards. According to OMB Circular A–119, ''Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,'' government agencies must use voluntary consensus standards wherever practical in the development of regulations. Agency adoption of industry standards promotes productivity and efficiency in government and industry, expands opportunities for international trade, conserves resources, improves health and safety, and protects the environment.

To these ends, PHMSA actively participates in the development and updating of consensus standards through representation on more than 20 consensus standards bodies. PHMSA regularly reviews updated consensus standards and considers their merit for inclusion in the HMR.

Section 171.7 lists all standards incorporated by reference into the HMR. For this rulemaking, we evaluated updated international consensus standards pertaining to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations, and vessel stowage requirements and determined that the revised standards provide an enhanced level of safety without imposing significant compliance burdens.

One commenter [TFI] requests that we amend the HMR to include the most current edition of the Transport Canada's TDG Regulations by referencing ''Amendment 6'' in the § 171.7 list of standards incorporated by reference. Amendment 6 of the TDG was published in Part II of the Canada Gazette on February 20, 2008. The § 171.7 list of standards of the HMR currently lists Amendment 5. We acknowledge the commenter's request to include Amendment 6 in our list of standards incorporated by reference. We are currently evaluating the changes in Amendment 6 of the TDG to determine whether the revised standards provide an enhanced level of safety without imposing significant compliance burdens, and will consider its inclusion in the HMR in a future rulemaking. However, in this final rule we are incorporating the new subsection 4.18(5) of Amendment 6 pertaining to placarding of anhydrous ammonia, UN1005. This amendment will maintain our long-standing policy of accepting the TDG placards in the U.S. and will facilitate the safe and efficient transportation of anhydrous ammonia between the U.S. and Canada.

We did not receive comments opposing the incorporations by reference proposed in the NPRM; therefore we are updating the addresses and the incorporation by reference materials for the ICAO TI, the IMDG Code, and the UN Recommendations. In addition, we are updating the ISO address and adding two new ISO Standards. The updated editions of these standards become effective January 1, 2009.

The following currently referenced standards will be updated as shown in the amended § 171.7:

- *International Civil Aviation Organization (ICAO),* Technical Instructions for the Safe Transport of Dangerous Goods by Air, 2007–2008 Edition.
- *International Maritime Organization (IMO),* International Convention for the Safety of Life at Sea (SOLAS) Amendments 2000, Chapter II–2, Regulation 19, 2001 and The International Maritime Organization's International Maritime Dangerous Goods Code, 2006 Edition, Incorporating Amendment 33–06, English Edition, Volumes 1 and 2.
- *International Organization for Standardization,* ISO 10156:1996, Gases and Gas Mixtures—Determination of fire potential and oxidizing ability for the selection of cylinder valve outlets, Second edition February 1996 (E) and ISO 10156—2:2005, Gas cylinders—Gases and gas mixtures—Part 2: Determination of oxidizing ability of toxic and corrosive gases and gas mixtures, First edition, August 2005, (E).
- *Transport Canada,* Transportation of Dangerous Goods Regulations (Transport Canada TDG Regulations), August 2001 including Clear Language Amendments SOR/2001–286, Amendment 1 (SOR/2002–306) August 8, 2002; Amendment 2 (SOR/2003–273) July 24, 2003; Amendment 3 (SOR/2003–400) December 3, 2003; Amendment 4 (SOR/2005–216) July 13, 2005; and Amendment 5 (SOR/2005–279) September 21, 2005.
- *United Nations,* The UN Recommendations on the Transport of Dangerous Goods, Fourteenth revised edition (2005), Volumes I and II.

Section 171.14

This section prescribes transitional provisions for recently adopted

regulatory changes in the HMR. In a final rule, under Docket HM–218D (73 FR 4699; on January 28, 2008), we added a new entry for ''Ethanol and gasoline mixture *or* Ethanol and motor spirit *or* Ethanol and petrol mixture, *with more than 10% ethanol,* 3, UN3475, II'' in the HMT. Although we included a delayed compliance date for the implementation of the new identification number marking requirements in § 172.332(c)(6) and (c)(7), we did not provide the same transition period in the regulatory text for the continued use of the proper shipping names for these materials that were in effect prior to the publication of the HM–218D final rule. For example, for a gasoline and alcohol fuel blend containing 85 percent alcohol (E85), the most appropriate description prior to the HM–218D rulemaking was ''Flammable liquid, n.o.s., (ethanol, gasoline), 3, UN1993.'' Our intent was to minimize the costs of transitioning to this new description by allowing the continued use of shipping names for these materials that were in effect prior to publication of the HM–218D final rule for a period of two years from the effective date, as discussed in the HM–218D final rule preamble. To correct this oversight, in this rulemaking, we are adding a new paragraph (h) to specify that effective October 1, 2010, the new proper shipping name ''Ethanol and gasoline mixture or ethanol and motor spirit mixture or ethanol and petrol mixture,'' and the revised proper shipping name ''Gasohol *gasoline mixed with ethyl alcohol, with not more than 10% alcohol* must be used, as appropriate.

Section 171.25

Section 171.25 specifies additional requirements for the use of the IMDG Code when a hazardous material is offered for transportation to, from, or within the U.S. by vessel, and by motor carrier and rail, provided all or part of the movement is by vessel. Recently, an incident occurred in which a portable tank containing ''Argon, refrigerated liquid (cryogenic liquid),'' UN1951, stowed below the deck of a vessel released its contents, resulting in the asphyxiation deaths of three individuals who entered the confined cargo space where the portable tank was stowed. The HMR currently prohibit the stowage of such materials below deck (§ 176.76(g)) because of the potential hazard of asphyxiation when large volumes of refrigerated liquefied gases are released below the deck of a vessel in confined spaces. However, the IMDG Code does not prohibit the stowage of tanks below deck in all cases. Some refrigerated liquefied gases, including argon, are assigned to stowage ''Category B'' in column (16) of the dangerous goods list of the IMDG Code. Therefore, in the NPRM, we proposed to revise § 171.25(c)(5) to specify that portable tanks, cargo tanks, and tank cars containing cryogenic liquids must be ''on deck'' regardless of the stowage authorized in the IMDG Code.

Two commenters [Signal, VOHMA] support the proposal, but both express concern pertaining to its implementation. VOHMA states that ''we are concerned that vessels transiting U.S. ports and in compliance with the current IMDG Code authorization for ''under-deck'' stowage may be problematic'' and requests that PHMSA ensure that shippers are made aware of the requirement. We agree with the commenter. PHMSA submitted a proposal to the IMO Subcommittee on Dangerous Goods, Solid Cargoes and Containers to address the issue of stowage of cryogenic liquids as discussed above. IMO will adopt the provisions in the IMDG Code under Amendment 35–10. In the interim period between adoption in the HMR and adoption in the IMDG Code, PHMSA will work with the IMO and various trade associations to advise shippers and carriers of this new provision.

Signal recommends that PHMSA revise paragraph (d) of this section (*Use of the IMDG Code in port areas*) to clarify that the provision to store portable tanks, cargo tanks, and tank cars containing cryogenic liquids ''on deck'' is also applicable to port areas. The commenter expresses concern regarding vessels passing through U.S. port areas where cryogenic liquids may be stowed ''under-deck'' in accordance with the IMDG Code stowage requirements. The commenter believes the hazard is just as great to U.S. maritime workers even though the cargo may not be loaded or unloaded in the U.S. port of call. Additionally, pending a revision to paragraph (d), Signal also urges PHMSA to waive the proposed one year transition period and make the provisions for stowage of cryogenic liquids effective on the date of publication of this rulemaking. We agree with the commenter's concern regarding the applicability of the provision in U.S. port areas and due to the immediate nature of the risk associated with stowing bulk packagings of cryogenic liquids ''under-deck,'' in this final rule, we are adding a new paragraph (d)(3) to specify that this provision is applicable to U.S. port areas. We also agree with the recommendation to make the provisions effective immediately. Therefore, in this final rule, we are revising paragraphs (c)(5) and (d)(3) of § 171.25 to indicate that these specific requirements are effective 30 days after the date of publication of the rulemaking, except for shipments transporting these materials prior to the effective date of this amendment.

Part 172

Section 172.101 Hazardous Materials Table (HMT)

Section 172.101 contains the HMT and explanatory text for each of the columns in the HMT. We proposed to make various amendments to the HMT. Readers should review all changes for a complete understanding of the amendments. For purposes of the Government Printing Office's typesetting procedures, changes to the HMT appear under three sections of the Table, ''remove,'' ''add,'' and ''revise.'' Certain entries in the HMT, such as those with revisions to the proper shipping names, appear as a ''remove'' and ''add.'' Amendments to the HMT for the purpose of harmonizing with international standards include, but are not limited to, the following:

In the final rule for Docket HM–215G (69 FR 76044; December 20, 2004), we added new generic entries for Organometallic substances consistent with descriptions added to the UN Recommendations. In the final rule, we allowed the continued use of certain specific Organometallic entries; however, we anticipated removing the specific Organometallic entries from the HMT by January 1, 2007. The entries were to be removed because they were superseded by more appropriate generic entries, but were inadvertently overlooked. Therefore, in this final rule, we are removing the following Organometallic entries for consistency with the intent of HM–215G:

UN3052 Aluminum alkyl halides, liquid
UN3461 Aluminum alkyl halides, solid
UN3076 Aluminum alkyl hydrides
UN3051 Aluminum alkyls
UN1366 Diethylzinc
UN1370 Dimethylzinc
UN2445 Lithium alkyls, liquid
UN3433 Lithium alkyls, solid
UN3053 Magnesium alkyls
UN2005 Magnesium diphenyl

Portable tank Special Provision TP12 states, ''This material is considered highly corrosive to steel.'' The phrase ''highly corrosive to steel'' is not defined by any specific criteria. Further, ''TP12,'' unlike other TP codes, is simply a statement and does not apply any regulatory requirement. It is unclear

if all highly corrosive materials are assigned Special Provision TP12, or if this statement provides any useful guidance for selecting an appropriate portable tank. Therefore, we are revising the following entries by removing Special Provision TP12:

UN1716 Acetyl bromide
UN1717 Acetyl chloride
UN2584 Alkyl sulfonic acids, liquid or Aryl sulfonic acids, liquid with more than 5 percent free sulfuric acid
UN2571 Alkyl sulfuric acids
UN2817 Ammonium hydrogendifluoride, solution, PG II and III
UN2796 Battery fluid, acid
UN1736 Benzoyl chloride
UN1737 Benzyl bromide
UN1738 Benzyl chloride
UN1738 Benzyl chloride unstabilized
UN1739 Benzyl chloroformate
UN2692 Boron tribromide
UN1742 Boron trifluoride acetic acid complex, liquid
UN1743 Boron trifluoride propionic acid complex, liquid
UN1744 Bromine
UN1745 Bromine pentafluoride
UN1744 Bromine solutions
UN1746 Bromine trifluoride
UN2513 Bromoacetyl bromide
NA2742 sec-Butyl chloroformate
UN2353 Butyryl chloride
NA9263 Chloropivaloyl chloride
UN1754 Chlorosulfonic acid *with or without sulfur trioxide*
UN1755 Chromic acid solution, PG II and PG III
UN1758 Chromium oxychloride
UN2240 Chromosulfuric acid
NA9264 3,5-Dichloro-2,4,6-trifluoropyridine
UN1764 Dichloroacetic acid
UN1768 Difluorophosphoric acid, anhydrous
NA2927 Ethyl phosphonothioic dichloride, anhydrous or Ethyl phosphorodichloridate
NA2845 Ethyl phosphonous dichloride, anhydrous *pyrophoric liquid*
UN1776 Fluorophosphoric acid anhydrous
UN1778 Fluorosilicic acid
UN1777 Fluorosulfonic acid
UN1782 Hexafluorophosphoric acid
UN1789 Hydrochloric acid PG II and PG III
UN1786 Hydrofluoric acid and Sulfuric acid mixtures
UN1790 Hydrofluoric acid, *with more than 60 percent strength*
UN1790 Hydrofluoric acid, *with not more than 60 percent strength*
NA2742 Isobutyl chloroformate
UN3246 Methanesulfonyl chloride
NA9206 Methyl phosphonic dichloride
NA2845 Methyl phosphonous dichloride, *pyrophoric liquid*
NA1556 Methyldichloroarsine
UN1826 Nitrating acid mixtures, spent *with more than 50 percent nitric acid*
UN1826 Nitrating acid mixtures, spent *with not more than 50 percent nitric acid*
UN1796 Nitrating acid mixtures *with more than 50 percent nitric acid*
UN1796 Nitrating acid mixtures *with not more than 50 percent nitric acid*
UN2031 Nitric acid *other than red fuming, with more than 70 percent nitric acid*
UN2031 Nitric acid *other than red fuming, with not more than 20 percent nitric acid*
UN2031 Nitric acid *other than red fuming, with not more than 70 percent nitric acid*
UN2032 Nitric acid, red fuming
UN1798 Nitrohydrochloric acid
UN2308 Nitrosylsulfuric acid, liquid
UN1873 Perchloric acid *with more than 50 percent but not more than 72 percent acid, by mass*
UN1817 Pyrosulfuryl chloride
UN2879 Selenium oxychloride
UN1906 Sludge, acid
UN1828 Sulfur chlorides
UN1829 Sulfur trioxide, stabilized
UN1831 Sulfuric acid, fuming *with less than 30 percent free sulfur trioxide*
UN1831 Sulfuric acid, fuming *with 30 percent or more free sulfur trioxide*
UN1832 Sulfuric acid, spent
UN1830 Sulfuric acid *with more than 51 percent acid*
UN2796 Sulfuric acid *with not more than 51 percent acid*
UN1834 Sulfuryl chloride
UN1836 Thionyl chloride
UN2699 Trifluoroacetic acid
NA9269 Trimethoxysilane

We proposed to add a new non-bulk packaging section (§ 173.206) for the transportation of certain flammable, corrosive and toxic materials, specifically, chlorosilanes that have water-reactive properties. For a detailed summary of the rationale, see the discussion under § 173.206 in this section of the rulemaking. The following entries are revised in Column (8B) by replacing the current non-bulk packaging provision with ''206'':

UN1724 Allyltrichlorosilane, stabilized
UN1728 Amyltrichorosilane
UN1747 Butyltrichlorosilane
UN1753 Chlorophenyltrichlorosilane
UN2986 Chlorosilanes, corrosive, flammable, n.o.s.
UN2987 Chlorosilanes, corrosive, n.o.s.
UN2985 Chlorosilanes, flammable, corrosive, n.o.s.
UN3362 Chlorosilanes, toxic, corrosive, flammable, n.o.s.
UN3361 Chlorosilanes, toxic, corrosive, n.o.s.
UN1762 Cyclohexenyltrichlorosilane
UN1763 Cyclohexyltrichlorosilane
UN2434 Dibenzyldichlorosilane
UN1766 Dichlorophenyltrichlorosilane
UN1767 Diethyldichlorosilane
UN1162 Dimethyldichlorosilane
UN1769 Diphenyldichlorosilane
UN1771 Dodecyltrichlorosilane
UN2435 Ethylphenyldichlorosilane
UN1196 Ethyltrichlorosilane
UN1781 Hexadecyltrichlorosilane
UN1784 Hexyltrichlorosilane
UN2437 Methylphenyldichlorosilane
UN1250 Methyltrichlorosilane
UN1799 Nonyltrichlorosilane
UN1800 Octadecyltrichlorosilane
UN1801 Octyltrichlorosilane
UN1804 Phenyltrichlorosilane
UN1816 Propyltrichlorosilane
UN1298 Trimethylchlorosilane
UN1305 Vinyltrichlorosilane, stabilized

For consistency in the assignment of Portable tank Special Provision TP13 (which requires provision of self-contained breathing apparatus when certain hazardous materials are transported by vessel) to all chlorosilanes, the following entries are revised in Column (7) by adding Special Provision TP13:

UN2987 Chlorosilanes, corrosive, n.o.s.
UN1781 Hexadecyltrichlorosilane
UN1804 Phenyltrichlorosilane
UN1818 Silicon tetrachloride

We consider Portable tank Special Provision TP7 essential for the safe transport of chlorosilanes. This special provision requires the vapor space to be purged of air by nitrogen or other means. However, there is no consistent assignment of ''TP7'' to chlorosilanes. For enhanced safety and consistency with international regulations, the following entries are revised in Column (7) by adding Special Provision TP7:

UN3362 Chlorosilanes, toxic, corrosive, flammable, n.o.s.
UN3361 Chlorosilanes, toxic, corrosive, n.o.s.
UN1250 Methyltrichlorosilane
UN1305 Vinyltrichlorosilane, stabilized

Chlorosilanes of Class 3 and Class 8 are currently authorized for transport in metal IBCs under Special Provisions IB1 and IB2. Because metal IBCs have lift-up lids with clamp screws, we are concerned that the overturn of a metal IBC during an accident may lead to an opening of a lift-up lid and result in a

release of chlorosilanes from these packagings. To address these concerns, we are prohibiting the use of metal IBCs by removing the respective Special Provisions IB1 or Special Provision IB2 provisions from the following entries. We are also adding Special Provision TP7 to require the vapor space to be purged of air, as discussed above:

UN2986 Chlorosilanes, corrosive, flammable, n.o.s.
UN2987 Chlorosilanes, corrosive, n.o.s.
UN2985 Chlorosilanes, flammable, corrosive, n.o.s.

Bottom discharge openings are currently allowed on portable tanks used for the transport of most chlorosilanes. For example, some chlorosilane entries are assigned Portable tank Special Provision T7, which provides for bottom opening requirements. As part of a voluntary initiative to enhance safety, portions of the regulated community have begun to use only portable tanks without bottom discharge connections. To further enhance safety and to prohibit the use of portable tanks with bottom discharge openings, we are revising the following entries by replacing Special Provision T7 with Special Provision T10. Special Provision T10 prohibits the use of bottom discharge openings. We are also deleting the respective IBC Special Provisions IB1 or IB2 to prohibit the use of metal IBCs and adding Special Provision TP7 to require the vapor space to be purged of air, as discussed above:

UN1724 Allyltrichlorosilane, stabilized
UN1728 Amyltrichlorosilane
UN1747 Butyltrichlorosilane
UN1753 Chlorophenyltrichlorosilane
UN1762 Cyclohexenyltrichlorosilane
UN1763 Cyclohexyltrichlorosilane
UN2434 Dibenzyldichlorosilane
UN1766 Dichlorophenyltrichlorosilane
UN1767 Diethyldichlorosilane
UN1162 Dimethyldichlorosilane
UN1769 Diphenyldichlorosilane
UN1771 Dodecyltrichlorosilane
UN2435 Ethylphenyldichlorosilane
UN1196 Ethyltrichlorosilane
UN1781 Hexadecyltrichlorosilane
UN1784 Hexyltrichlorosilane
UN2437 Methylphenyldichlorosilane
UN1799 Nonyltrichlorosilane
UN1800 Octadecyltrichlorosilane
UN1801 Octyltrichlorosilane
UN1804 Phenyltrichlorosilane
UN1816 Propyltrichlorosilane
UN1298 Trimethylchlorosilane

As a safety measure for the transport of most chlorosilanes, we are applying Special Provision T10, to prohibit bottom discharge openings on portable tanks used to transport chlorosilanes. However, for chlorosilanes meeting the criteria of Division 4.3 and for ''n.o.s.'' entries meeting the criteria for Classes 3, 8 and Division 6.1 that have been assigned Special Provision T10, we are adopting the general assignment of Special Provision T14 rather than Special Provision T10. In addition to prohibiting bottom outlet openings, Special Provision T14 requires a higher minimum test pressure for the periodic hydrostatic pressure test. We believe a higher minimum test pressure would provide an increased level of safety when transporting these types of chlorosilanes in portable tanks. Some chlorosilanes meeting the above classification criteria (*e.g.*, UN2987 and UN1295) have already been assigned Special Provision T14. Therefore, to enhance safety and for consistency in assigning special provisions, we are revising the following entries by replacing Special Provision T10 with Special Provision T14 in Column (7):

UN2988 Chlorosilanes, water-reactive, flammable, corrosive, n.o.s.
UN1183 Ethyldichlorosilane
UN1242 Methyldichlorosilane

The following entries are revised by assigning PG II in column (5) rather than PG I. The flammability properties (*i.e.*, the flashpoint) place them in PG II, and no additional evidence indicates the entries are more corrosive than all the other chlorosilanes classed as a Class 3, subsidiary Class 8, PG II (*e.g.*, UN1126). Therefore, in accordance with the Precedence of hazard table (§ 173.2a), the entries are classed as Class 3, subsidiary Class 8, PG II materials. In addition, as discussed above, we are replacing Special Provision T7 with Special Provision T10 for most chlorosilanes, however, for these entries Special Provision T10 replaces the previously assigned Special Provision T11. The entries are revised in Column (5) by assigning PG II, and in Column (7) by replacing Special Provision T11 with Special Provision T10:

UN1250 Methyltrichlorosilane
UN1305 Vinyltrichlorosilane, stabilized

As discussed above, for most chlorosilanes, we are replacing Special Provision T7 with Special Provision T10, which prohibits bottom discharge openings. In addition, we are revising the following entries by replacing Special Provision T11 with Special Provision T14 which also prohibits bottom discharge openings in portable tanks:

UN2986 Chlorosilanes, corrosive, flammable, n.o.s.
UN2985 Chlorosilanes, flammable, corrosive, n.o.s.
UN3362 Chlorosilanes, toxic, corrosive, flammable, n.o.s.
UN3361 Chlorosilanes, toxic, corrosive, n.o.s.

Chlorosilanes of Division 6.1 are authorized for transport in metal IBCs under Special Provision IB1. As discussed above, we are prohibiting the use of metal IBCs for the transport of chlorosilanes. Additionally, Special Provision TP27 is recommended for chlorosilanes assigned Special Provision T14. If found acceptable according to the test pressure definition in § 178.274, Special Provision TP27 allows a test pressure of 4 bar instead of 6 bar. We are assigning Portable tank Special Provision TP27 to all ''n.o.s.'' entries of Classes 3, 8 and Division 6.1. Entries for Division 4.3 are assigned Special Provision TP27 because of higher risk of a possible release of a flammable gas. The following entries are revised in Column (7) by deleting Special Provision IB1 and adding Special Provision TP27:

UN3362 Chlorosilanes, toxic, corrosive, flammable, n.o.s.
UN3361 Chlorosilanes, toxic, corrosive, n.o.s.

The following entries are revised by adding Special Provision IP2 to correct an inconsistency. When a hazardous material is assigned Special Provision IP2, the material must be offered for transportation in a closed freight container or a closed transport vehicle. ''Chloroacetic acid, solid,'' UN1751 is the only Division 6.1, PG II material assigned Special Provision IB8 that is not also assigned Special Provision IP2. Similarly, the remaining entries listed below are Division 5.1, PG II materials assigned Special Provision IB8 but not Special Provision IP2. For consistency in the assignment of Special Provision IP2, the following entries are revised in Column (7) by adding Special Provision IP2:

UN1751 Chloroacetic acid, solid
UN1463 Chromium trioxide, anhydrous.
UN2465 Dichloroisocyanuric acid, dry or Dichloroisocyanuric acid salts
UN1473 Magnesium bromate
UN2627 Nitrites, inorganic, n.o.s.
UN1484 Potassium bromate
UN1485 Potassium chlorate
UN1487 Potassium nitrate and sodium nitrite mixtures
UN1488 Potassium nitrite
UN1490 Potassium permanganate
UN1493 Silver nitrate
UN1494 Sodium bromate
UN1495 Sodium chlorate
UN3247 Sodium peroxoborate, anhydrous

UN2468 Trichloroisocyanuric acid, dry
UN1512 Zinc ammonium nitrite
UN1514 Zinc nitrate

Special Provision 36 places net quantity limits per package for medicines classed as hazardous materials. However, the quantity limits in the special provision are inconsistent with the net quantity packaging limits authorized under the limited quantities exceptions for these materials in §§ 173.150 and 173.153 of the HMR. Therefore, the following entries are revised in Column (7) by removing Special Provision 36:

UN3248 Medicine, liquid, flammable, toxic, n.o.s.
UN1851 Medicine, liquid, toxic, n.o.s.
UN3249 Medicine, solid, toxic, n.o.s.

Chemical oxygen generators are subject to stringent packaging and shipping requirements. We are adding a new Special Provision 62 to the following entries to emphasize that chemical oxygen generators are not authorized to be transported under the generic ''oxidizer, n.o.s.'' entries.

UN3098 Oxidizing liquid, corrosive, n.o.s.
UN3139 Oxidizing liquid, n.o.s.
UN3099 Oxidizing liquid, toxic, n.o.s.
UN3085 Oxidizing solid, corrosive, n.o.s.
UN3137 Oxidizing solid, flammable, n.o.s.
UN1479 Oxidizing solid, n.o.s.
UN3100 Oxidizing solid, self-heating, n.o.s.
UN3087 Oxidizing solid, toxic, n.o.s.
UN3121 Oxidizing solid, water-reactive, n.o.s.

The following entries are revised by adding a reference to packaging section ''307'' to Column (8A) for consistency with international regulations regarding exception from the requirements for manufactured articles and apparatuses containing minimal amounts of inert gas. See the discussion under § 173.307 in this section of the rulemaking for additional information regarding this change.

UN1006 Argon, compressed
UN1046 Helium, compressed
UN1970 Krypton, compressed
UN1065 Neon, compressed
UN2036 Xenon, compressed

The entry ''Amines, flammable, corrosive, n.o.s. *or* Polyamines, flammable, corrosive, n.o.s.,'' UN2733 is revised to include the PG II and PG III entries in proper order to correct inadvertent assignment of the entries to UN2734. This revision appears as a ''Remove/Add'' in this rulemaking.

The entry ''Amines, liquid, corrosive, flammable n.o.s. *or* Polyamines, liquid corrosive, flammable n.o.s.,'' UN2734 is revised to include a comma after flammable in both proper shipping names and a comma between liquid and corrosive in the second proper shipping name in Column (2) and to remove the PG II and PG III entries for ''flammable, corrosive'' to correct inadvertent assignment of these entries. This revision appears as a ''Remove/Add'' in this rulemaking.

The entry ''Batteries, dry, containing potassium hydroxide solid, *electric storage*,'' UN3028 is revised by adding to Column (7) a reference to new Special Provision 237.

The entries ''Boron trifluoride,'' UN1008 and ''Hydrogen iodide, anhydrous'' UN2197 are revised by adding the Class 8 subsidiary hazard label to Column (6) for consistency with international regulations and for consistency with all other Division 2.3 toxic gas entries in the HMT that also have the Class 8 subsidiary hazard.

The entry ''Calcium manganese silicon,'' UN2844 is revised in Column (7) by removing Special Provision IP2. When this material is transported in other than metal or rigid plastic IBCs, Special Provision IP2 specifies they must be transported in a closed freight container or a closed transport vehicle. However, this is inconsistent with other Division 4.3, PG III materials that are not subject to this special provision.

For consistency with UN Recommendations, the entry ''Chlorine,'' UN1017 is revised in Column (6) by adding the Division 5.1 subsidiary hazard label. This label will help communicate that this material may cause or enhance the combustion of other materials.

The hazardous materials descriptions for the entries ''Chloronitrobenzene, liquid *ortho*,'' UN3409 and ''Chloronitrobenzenes, solid *meta or para*,'' UN1578 are revised in Column (2) by removing the italicized word(s). The italicized word(s) associated with the proper shipping names are a potential source of confusion and are removed for clarification and consistency with the same entries in the UN Recommendations. This revision appears as a ''Remove/Add'' in this rulemaking.

The instruction for the entry ''*Cartridges, sporting, see* Cartridges for weapons, inert, porjectile, *or* Cartridges, small arms'' is revised in Column (2) by correcting the misspelling of ''projectile.'' This revision appears as a ''Remove/Add'' in this rulemaking.

The proper shipping name for the entry ''Corrosive, liquid, acidic, inorganic, n.o.s.,'' UN3264 is revised in Column (2) by removing the comma appearing between ''corrosive'' and ''liquid'' to read ''Corrosive liquid, acidic, inorganic, n.o.s.'' This revision appears as a ''Remove/Add'' in this rulemaking.

The proper shipping name for the entry ''Dyes, liquid, corrosive, n.o.s., or Dye intermediates, liquid, corrosive, n.o.s.,'' UN2801 is revised in Column (2) by italicizing the ''or'' in the proper shipping name. This revision appears as a ''Remove/Add'' in this rulemaking.

The entries ''Environmentally hazardous substances, liquid, n.o.s.,'' UN3082 and ''Environmentally hazardous substances, solid, n.o.s.,'' UN3077 are revised by adding a new Special Provision 335 in Column (7). Special Provision 335 clarifies that mixtures of non-hazardous solids and environmentally hazardous liquids or solids may be classified as UN3077 provided there is no free liquid visible at the time the substance is loaded or at the time the packaging or transport unit is closed.

In addition to flammable liquid fuel cell cartridges already provided for by the HMR, there are a number of other rapidly advancing fuel cell technologies employing a range of fuels. In this final rule, we are revising the entry for fuel cells containing a flammable liquid (UN3473) to include fuel cell cartridges containing a flammable liquid packed with or contained in equipment, and are adding four new proper shipping names to the HMT to describe the range of fuel used in fuel cell cartridges. These entries are: (1) Water-reactive substances (UN3476); (2) corrosive substances (UN3477); (3) liquefied flammable gas (UN3478); and (4) hydrogen in metal hydride (UN3479)). Readers should note that liquefied flammable gases and hydrogen in a metal hydride are both Division 2.1 materials used in fuel cell cartridges. However, the provisions necessary for the safe transportation of these articles are quite different and therefore, it is necessary to distinguish them with separate shipping descriptions.

A new entry ''Fuel cell cartridges or Fuel cell cartridges contained in equipment or Fuel cell cartridges packed with equipment, *containing corrosive substances*,'' UN3477 is added.

The proper shipping name for the entry ''Fuel cell cartridges, *containing flammable liquids*,'' UN3473 is revised in Column (2) to read ''Fuel cell cartridges *or* Fuel cell cartridges contained in equipment *or* Fuel cell cartridges packed with equipment, *containing flammable liquids*.'' This revision appears as a ''Remove/Add'' in this rulemaking.

A new entry ''Fuel cell cartridges *or* Fuel cell cartridges contained in equipment *or* Fuel cell cartridges packed with equipment, *containing hydrogen in metal hydride*,'' UN3479 is added.

A new entry ''Fuel cell cartridges *or* Fuel cell cartridges contained in equipment *or* Fuel cell cartridges packed with equipment, *containing liquefied flammable gas*,'' UN3478 is added.

A new entry ''Fuel cell cartridges *or* Fuel cell cartridges contained in equipment *or* Fuel cell cartridges packed with equipment, *containing water-reactive substances*,'' UN3476 is added.

The entry ''Gasohol,'' NA1203 is revised in Column (7) by adding Special Provision 177 to indicate that mixtures of gasoline and ethanol with less than 10 percent ethanol for use in internal combustion engines (*e.g.*, automobiles) must be assigned the PG II entry regardless of variations in volatility.

The entry ''Gasoline,'' UN1203, is revised in Column (7) by adding Special Provision 177 and Special Provision IB2. Special Provision 177 is added to indicate that gasoline for use in an internal combustion engine (*e.g.*, automobiles) must be assigned the PG II entry regardless of variations in volatility. Special Provision IB2 was inadvertently removed under Docket No. HM–213 (68 FR 52363; September 3, 2003).

The proper shipping name for the entry ''Hydrogen in a metal hydride storage system,'' UN3468 is revised in Column (2) to read ''Hydrogen in a metal hydride storage system *or* Hydrogen in a metal hydride storage system contained in equipment *or* Hydrogen in a metal hydride storage system packed with equipment.'' This revision appears as a ''Remove/Add'' in this rulemaking.

A new entry ''1-Hydroxybenzotriazole, anhydrous, *dry or wetted with less than 20 percent water, by mass*,'' UN0508 is added.

A new entry ''1-Hydroxybenzotriazole, anhydrous, wetted *with not less than 20 percent water, by mass*,'' UN3474 is added. One commenter [AHS] requests that PHMSA revise this entry to reflect the modified entry agreed upon by a recent UN Sub-Committee meeting. The modified entry, ''1-Hydroxybenzotriazole, monohydrate,'' UN3474 would also have Special Provision 162 deleted from the entry. AHS notes that, ''* * * The U.S. supported this change and * * * was instrumental in getting the modification accepted'' by the UN Subcommittee. AHS also indicates the modified entry is, ''* * * a more accurate description of this material.'' Additionally, the commenter requests that PHMSA add the modified entry in the same manner as the addition of the new entry ''Powder, smokeless,'' UN0509, where the entry has a ''D'' in Column (1) indicating it is appropriate for domestic transport but may not be appropriate for international commerce. [The rationale for including ''D'' in Column (1) for the entry ''Powder, smokeless,'' UN0509 is explained in greater detail in the discussion of changes to § 173.62 in this section of the rulemaking.] Because the modified entry for UN3474 was not proposed in the NPRM, the request to include the modified version of the entry in the HMT (including the deletion of Special Provision 162 from the entry) is beyond the scope of this rulemaking. However, we will treat the commenter's remarks as a petition for rulemaking and consider the request for the modified hazardous materials description for inclusion in the HMT in a future rulemaking. No other comments opposing this proposal to add this entry were received; therefore, in this final rule, we are adopting the proposal without change. This appears as an ''Add'' in this rulemaking.

The entry ''Hypochlorite solutions,'' UN1791 is revised by adding the PG III description and associated packaging provisions to Columns (5) and (8), respectively. The PG III information was inadvertently omitted in a final rule under Docket HM–215I (71 FR 78596; December 29, 2006). This revision appears as a ''Remove/Add'' in this rulemaking.

The entry ''Magnesium nitrate,'' UN1474 is revised in Column (7) by adding a new Special Provision 332. Special Provision 332 specifies that magnesium nitrate hexahydrate is not subject to the HMR. Testing conducted by independent laboratories on magnesium nitrate hexahydrate in accordance with Test O.1: *Test for Oxidizing Solids* of the *UN Manual of Tests and Criteria* indicated magnesium nitrate hexahydrate does not have a burning rate to meet the criteria as a Division 5.1 oxidizer.

The hazardous materials description for the entry ''Nitric acid, *other than red fuming, with not more than 70 percent nitric acid*,'' UN2031, PG II is revised in Column (2) to read ''Nitric acid, *other than red fuming, with at least 65 percent, but not more than 70 percent nitric acid*'' to conform with proper shipping names that have similar descriptions (*e.g.*, UN3366). This entry is also revised in Column (7) by adding Special Provision IP15, and in Column (10B) by removing vessel stowage codes ''44,'' ''110,'' and ''111,'' and adding ''74.'' Special Provision IP15 specifies that for UN2031 with more than 55% nitric acid, the use of rigid plastic IBCs and composite IBCs with a rigid plastic inner receptacle would be authorized for two years from the date of manufacture of the IBC. Finally, the entry is revised by adding a Division 5.1 subsidiary hazard label to column (6). This revision appears as a ''Remove/Add'' in this rulemaking.

A new entry ''Nitric acid, *other than red fuming, with less than 65 percent nitric acid*,'' UN2031, PG II is added.

The entry ''Nitrocellulose, solution, flammable *with not more than 12.6 percent nitrogen, by mass, and not more than 55 percent nitrocellulose*,'' UN 2059, PG I, PG II and PG III is revised in Column (7) by adding a new Special Provision 198. Special Provision 198 authorizes nitrocellulose solutions containing less than 20% nitrocellulose to be transported as paint or printing ink.

The instruction for the entry ''*2,5-Norbornadiene, stabilized, see* Bicyclo 2,2,1 hepta-2,5-diene, stabilized'' is revised in Column (2) by enclosing ''2,2,1'' in brackets to denote the correct spelling and to be consistent with the proper shipping name entry ''Bicyclo [2,2,1] hepta-2,5-diene, stabilized or 2,5-Norbornadiene, stabilized,'' UN2251. This revision appears as a ''Remove/Add'' in this rulemaking.

The entry ''Organometallic substance, liquid, water-reactive, flammable,'' UN3399, PG I and PG II, is revised in Column (10A) by removing vessel stowage location code ''E'' and adding ''D'' to harmonize with the IMDG Code and SOLAS. Amendments were also made to SOLAS Chapter II–2/Regulation 19 strictly prohibiting the stowage of 4.3 liquids having a flashpoint less than 23 °C under deck or in enclosed roll-on/roll-off (ro-ro) vessel spaces. SOLAS Chapter II–2/Regulation 19 sets out fire-fighting construction and equipment requirements for vessels carrying dangerous goods. We believe this amendment is necessary to avoid the risk of a carrier stowing a package in an enclosed space that is not properly equipped for a Class 4.3 material with a subsidiary Class 3 and a flashpoint less than 23 °C. When a flammable liquid with a flashpoint less than 23 °C is stowed under deck, the space must be ventilated but cannot have electrical equipment in the space. In most cases, natural or mechanical ventilation is used. However, powered ventilation is required for Class 4.3 under deck due to the risk of moisture in the air and the entry of sea water into the hold through

the ventilation openings. This change would prohibit only UN3399 from under deck stowage. All other Class 4.3 liquids, with a subsidiary Class 3 and flashpoint less than 23 °C, are not permitted under deck or in enclosed ro-ro spaces under the IMDG Code.

The entry ''Organometallic substance, solid, water-reactive,'' UN3395 is revised to include the letter ''G'' in Column (1) to correct an inadvertent omission.

The entry ''Organometallic substance, solid, water-reactive,'' UN3395 is revised by adding the letter ''G'' in Column (1) to correct an inadvertent omission.

The entry ''Organophosphorus compound, toxic, flammable, n.o.s,'' UN3279 is revised by adding the letter ''G'' in Column (1) to correct an inadvertent omission.

The proper shipping name for the entry ''Pentaerythrite tetranitrate mixture, desensitized, solid, n.o.s.,'' UN3344 is revised in Column (2) to read ''Pentaerythrite tetranitrate mixture, desensitized, solid, n.o.s. *or* Pentaerythritol tetranitrate mixture, desensitized, solid, n.o.s. *or* PETN mixture, desensitized, solid, n.o.s.,'' to conform to proper shipping names that have similar descriptions (*e.g.*, UN0411). This revision appears as a ''Remove/Add'' in this rulemaking.

The entry ''Polychlorinated biphenyls, solid,'' UN3432 is revised in Column (7) by adding Special Provisions IP2 and IP4 for consistency with similar requirements for ''Polyhalogenated biphenyls, solid *or* Polyhalogenated terphenyls, solid,'' UN3152. Special Provisions IP2 and IP4 require IBCs other than metal or rigid plastic to be offered for transportation in a closed freight container or closed transport vehicle and require flexible, fiberboard, or wooden IBCs to be sift-proof and water-resistant or be fitted with a sift-proof or water-resistant liner, respectively.

The entries ''Potassium persulfate,'' UN1492 and ''Sodium persulfate,'' UN1505, are revised in Column (10B) by removing vessel stowage code ''56'' and adding ''145.''

A new entry ''Powder, smokeless,'' UN0509, is added. A discussion of changes to § 173.62 in this section of the rulemaking provides an explanation of the addition of this entry.

The proper shipping name for the entry ''Receptacles, small, containing a gas (gas cartridges) *non-flammable without release device, not refillable and not exceeding 1 L capacity*,'' UN2037, 2.2 (5.1) is revised in Column (2) by correcting the word ''agas'' to read ''gas.'' Additionally, to harmonize this proper shipping name and punctuation with international regulations and standards, the word ''non-flammable'' is revised to read ''oxidizing'' and enclosed in parentheses, the word ''or'' is added and italicized before the words ''gas cartridges,'' and the parentheses enclosing the words ''gas cartridges'' are removed. The proper shipping name is corrected to read ''Receptacles, small, containing gas *or* gas cartridges *(oxidizing) without release device, not refillable and not exceeding 1 L capacity*.'' This revision appears as a ''Remove/Add'' in this rulemaking.

The proper shipping name for the entry ''Receptacles, small, containing gas (gas cartridges) *flammable without release device, not refillable and not exceeding 1 L capacity*,'' UN2037, 2.1 is revised in Column (2) to harmonize proper shipping name with international regulations and standards. The parentheses enclosing ''gas cartridges'' are removed and the word ''flammable'' is enclosed in parentheses. Additionally, the word ''or'' is added and italicized before the words ''gas cartridges.'' The proper shipping name is corrected to read ''Receptacles, small, containing gas *or* gas cartridges *(flammable) without release device, not refillable and not exceeding 1 L capacity*.'' This revision appears as a ''Remove/Add'' in this rulemaking.

The proper shipping name for the entry ''Receptacles, small, containing gas (gas cartridges) *non-flammable without release device, not refillable and not exceeding 1 L capacity*,'' UN2037, 2.2 is revised in Column (2) to harmonize proper shipping name with international regulations and standards. The parentheses enclosing ''gas cartridges'' are removed and the word ''non-flammable'' is enclosed in parentheses. Additionally, the word ''or'' is added and italicized before the words ''gas cartridges.'' The proper shipping name is corrected to read ''Receptacles, small, containing gas *or* gas cartridges *(non-flammable) without release device, not refillable and not exceeding 1 L capacity*.'' This revision appears as a ''Remove/Add'' in this rulemaking.

The proper shipping name for the entry ''Regulated medical waste, n.o.s. *or* Clinical waste, unspecified, n.o.s. or (BIO) Medical waste, n.o.s.,'' UN3291 is revised in Column (2) to include ''Biomedical waste, n.o.s.'' and ''Medical waste, n.o.s.'' to clarify that these names may also be used under the HMR and to harmonize the proper shipping names for regulated medical waste with those prescribed in international regulations. This revision appears as a ''Remove/Add'' in this rulemaking.

The proper shipping names for several ''Self-heating solid'' materials, specifically UN3088, UN3126, UN3127, UN3128, are revised in Column (2) to remove a comma following the word ''Self-heating.'' These revisions appear as ''Remove/Add'' in this rulemaking.

The proper shipping name for the entry ''Trinitrophenol, wetted,'' UN1344 is revised in Column (2) to read ''Trinitrophenol, *or* Picric acid, wetted,'' to conform to proper shipping names that have similar descriptions (*e.g.*, UN3364). This revision appears as a ''Remove/Add'' in this rulemaking.

The proper shipping name for the entry ''Trinitrotoluene, wetted,'' UN1356 is revised to read ''Trinitrotoluene, wetted or TNT, wetted,'' to conform to proper shipping names that have similar descriptions (*e.g.*, UN3366). This revision appears as a ''Remove/Add'' in this rulemaking.

A new entry ''Signals, distress, *ship*,'' UN0505 is added.

A new entry ''Signals, distress, *ship*,'' UN0506 is added.

A new entry ''Signals, smoke,'' UN0507 is added.

Currently, no portable tank instructions are assigned to ''Water-reactive liquid, corrosive, n.o.s.,'' UN3129; ''Water-reactive liquid, n.o.s.,'' UN3148; or to the PG I entries for ''Water reactive solid, corrosive, n.o.s.,'' UN3131; and ''Water-reactive solid, n.o.s.,'' UN2813. We are adding portable tank assignments (portable tank special provisions) consistent with the ''Guidelines for Assigning Portable Tank Requirements to Substances in Classes 3 to 9.'' These assignments are consistent with similarly classed entries in the HMT. The entries are revised in Column (7) as follows:

The entry ''Water-reactive liquid, corrosive, n.o.s.,'' UN3129, PG I, is revised by adding Special Provisions T14, TP2, and TP7.

The entry ''Water-reactive liquid, corrosive, n.o.s.,'' UN3129, PG II, is revised by adding Special Provisions T11 and TP2.

The entry ''Water-reactive liquid, corrosive, n.o.s.,'' UN3129, PG III, is revised by adding Special Provisions T7 and TP1.

The entry ''Water-reactive liquid, n.o.s.,'' UN3148, PG I, is revised by adding Special Provisions T9, TP2, and TP7.

The entry ''Water-reactive liquid, n.o.s.,'' UN3148, PG II, is revised by adding Special Provisions T7 and TP2.

The entry ''Water-reactive liquid, n.o.s.,'' UN3148, PG III, is revised by adding Special Provisions T7 and TP1.

The entry ''Water-reactive solid, corrosive, n.o.s,'' UN3131, PG I, is revised by adding Special Provisions T9, TP7, and TP33.

The entry ''Water-reactive solid, n.o.s.,'' UN2813, PG I, is revised by adding Special Provisions T9, TP7, and TP33.

The proper shipping name for the entry ''Xenon,'' UN2036, is revised to read ''Xenon, compressed,'' UN2036, for consistency with proper shipping names for other compressed gases (*i.e.*, inert gases). This revision appears as a ''Remove/Add'' in this rulemaking.

Appendix B to § 172.101

Appendix B to § 172.101 lists Marine Pollutants regulated under the HMR and prescribes requirements for classifying and describing a marine pollutant. In the NPRM, we proposed to amend the introductory text and the List of Marine Pollutants to add an allowance for the use of the GHS-based classification criteria for materials toxic to the aquatic environment (marine pollutants) contained in the IMDG Code.

We received several comments [CPTD, COSTHA, DGAC, Deeds, VOHMA] supporting our proposal to maintain the current regulatory approach to facilitate transportation without mandating use of the new GHS-based criteria for determination of a marine pollutant. COSTHA ''* * * supports PHMSA's decision not to adopt the new IMDG classification criteria for Marine Pollutants and not to remove Appendix B from the 172.101.'' CPTD indicates, ''* * * this new classification system is unnecessarily complicated, and * * * would involve an additional layer of complexity without a corresponding public benefit.'' Deeds recommends that if we maintain the differentiation between marine pollutants and severe marine pollutants in the List of Marine Pollutants, then PHMSA should adopt the GHS-based criteria in the IMDG Code as the basis for determining whether a marine pollutant is a severe marine pollutant. We disagree. Using the GHS-based criteria to determine a severe marine pollutant runs counter to our proposal not to mandate the use of such criteria. Therefore, for these reasons, in this final rule, we are adopting the amendment as proposed.

We also proposed to remove a number of entries that no longer meet the criteria for a marine pollutant. These entries were inadvertently retained in a rulemaking under Docket HM–215D (66 FR 33316; June 21, 2001 and 67 FR 15743; April 3, 2002). We did not receive any comments opposing the removal of these entries and, therefore, are removing the following entries from the List of Marine Pollutants: ''5-Ethyl-2-picoline,'' ''Ethyl propenoate, inhibited,'' ''Isopropenylbenzene,'' and ''2-Phenylpropene.''

One commenter [CPTD] requests that we remove an additional entry (low aromatic mineral spirit (white spirit, low 15–20%)) from the List of Marine Pollutants in Appendix B to § 172.101 because it would not meet the criteria for a marine pollutant using the IMDG Code. The removal of additional entries from the List of Marine Pollutants in Appendix B to § 172.101 is beyond the scope of this rulemaking. We did not propose to remove entries other than those being removed as a correction to an oversight from the HM–215D rulemaking, nor did we request comments on entries based on use of the GHS-based classification criteria in the IMDG Code that should be removed. However, we encourage the commenter to petition PHMSA to remove the entry with data demonstrating that the material would not meet the criteria under the IMDG Code or to apply for approval to have the material excepted as a marine pollutant in accordance with paragraph 5 of the introduction to Appendix B of § 172.101.

Section 172.102

Section 172.102 lists a number of special provisions applicable to the transportation of specific hazardous materials. Special provisions contain packaging requirements, prohibitions, and exceptions applicable to particular quantities or forms of hazardous materials. Unless otherwise noted, we received no comments opposing these proposals; therefore, in this final rule, we are adopting these proposals without change.

For consistency with international regulations, we are amending § 172.102 Special provisions, as follows:

Special Provision 36 specifies maximum net quantity limits per package for the transport of medicines classified as flammable or toxic (*i.e.*, UN1851, UN3248, and UN3249). These limits are inconsistent with the packaging limits authorized in limited quantity exceptions for these materials in §§ 173.150 and 173.153 of the HMR. The entries were initially introduced to the UN Recommendations with a special provision limiting the materials to PG II and III and requiring the materials to have a maximum net quantity per package of 5 L or 5 kg. However, since then, these materials have been authorized in the HMR as limited quantities and consumer commodities. This has created an inconsistency between the quantity limits per package in Special Provision 36 and the limits outlined in the limited quantity exceptions. Therefore, to resolve this inconsistency, we are removing Special Provision 36.

Special Provision 137 specifies conditions for exception from the HMR for certain types of vegetable fibers. We are revising this special provision to include ''tampico fiber, dry'' having a minimum baling density of 360 kg/m^3 as being eligible for this exception.

Special Provision 138 specifies insolubility criteria for lead compounds. We are revising the special provision by adding clarifying language that specifies lead compounds meeting the insolubility criteria outlined in the special provision are not subject to the HMR unless they meet the criteria for one of the other hazard classes.

Special Provision 150 specifies composition limits for uniform mixtures of fertilizers containing ammonium nitrate as the main ingredient. We are revising the composition limits outlined in paragraph (b) of the provision by adding the words ''and/or mineral calcium sulphate'' after ''dolomite.''

In the final rule under Docket HM–215G (69 FR 76044; December 20, 2004), we added new generic entries to describe Organometallic materials consistent with descriptions added to the UN Recommendations but allowed the continued use of several specific Organometallic entries (*e.g.*, Dimethylzinc, UN1370) that were currently in the HMT. We anticipated removing these remaining entries from the HMT by January 1, 2007. The entries were to be removed because they were superseded by the addition of the more appropriate generic entries. However, they currently remain in the HMT. Therefore, we are removing the remaining specific Organometallic entries for consistency with the original intent of HM–215G to remove the entries by January 1, 2007. In addition, we are removing Special Provision 173. Special Provision 173 provides the option to use an appropriate generic entry listed in the HMT to describe a specific Organometallic material and was only assigned to those Organometallic materials. Because new generic entries have been added to the HMT this special provision only applies to the rulemaking entries that are to be removed, this special provision has become obsolete.

Special Provision 177 requires materials for use in internal combustion engines (*e.g.*, in automobiles) to be assigned the PG II entry regardless of variations in volatility of the material. Currently, we assign Special Provision 177 to the entry ''Ethanol and gasoline

mixture *or* ethanol and motor spirit mixture or ethanol and petrol mixture,'' UN3475. In the NPRM, we proposed to revise Special Provision 177 to specify its application to both gasoline and ethanol/gas mixtures for consistency with UN Recommendations that assign similar provisions to gasoline and mixtures of ethanol and gasoline. One commenter [American Trucking Associations] suggests that the language in Special Provision 177 is confusing in that, as written, Special Provision 177 requires that ''gasoline or ethanol and gasoline mixtures must be assigned to *this entry* regardless of variations in volatility,'' indicating assignment to a single entry when the special provision is actually assigned to multiple entries. We agree. Therefore, in this final rule, we are revising Special Provision 177 to read ''gasoline or ethanol and gasoline mixtures must be assigned to Packing Group II regardless of variations in volatility.''

Special Provision 188 specifies conditions for exception from the HMR for small lithium cells and batteries. We are revising the special provision to require the reporting of incidents that occur as a direct result of a fire, violent rupture, explosion, or a dangerous evolution of heat.

Special Provision 189 specifies conditions for exception from the HMR for medium lithium cells and batteries. We are revising the special provision to require the reporting of incidents that occur as a direct result of a fire, violent rupture, explosion, or a dangerous evolution of heat.

A new Special Provision 198 is being added to permit nitrocellulose solutions containing less than 20% nitrocellulose to be transported as paint or printing ink, as applicable.

A new Special Provision 237 is being added to specify that ''Batteries, dry, containing potassium hydroxide solid, *electric storage*'' must be prepared and packaged in accordance with the requirements of § 173.159(a) and for transportation by aircraft, § 173.159(b)(2).

A new Special Provision 332 is added to specify magnesium nitrate hexahydrate is not subject to the HMR.

A new Special Provision 335 is added to clarify proper classification of mixtures of solids which are not subject to the HMR and environmentally hazardous liquids or solids. Special Provision 335 specifies these mixtures would be classified as UN3077 and may be transported under that entry provided there is no free liquid visible at the time the material is loaded or the packaging or transport unit is closed.

A new Special Provision IP15 is added to indicate that for ''Nitric acid,'' UN2031, with more than 55% nitric acid, the use of rigid plastic IBCs and composite IBCs with a rigid plastic inner receptacle is permitted for two years from the date of manufacture of the IBC.

Special Provision N82 references § 173.306 for classification criteria for flammable aerosols. However, classification criteria for flammable aerosols are found in § 173.115, specifically, in paragraph (k). Special Provision N82 is revised to reference § 173.115.

A new Special Provision N90 is added to prohibit the use of metal packagings for transport of ''1-Hydroxybenzotriazole, anhydrous, wetted *not less than 20 percent water, by mass*,'' UN3474.

Special Provision TP12 is removed. This provision states, ''this material is considered highly corrosive to steel.'' The phrase ''highly corrosive to steel'' is not defined by any specific criteria. Further, TP12, unlike other TP codes, is simply a statement and does not apply any regulatory requirement. It is unclear if all highly corrosive materials are assigned Special Provision TP12 or if this statement provides any useful guidance for selecting an appropriate portable tank. Therefore, we are deleting Special Provision TP12 from § 172.102(c)(8) ''*TP*'' *Codes*.

Section 172.202

Section 172.202 establishes the requirements for the description of hazardous materials on shipping papers. The UN Recommendations do not require the subsidiary hazard to be indicated on the shipping paper when a subsidiary hazard label is not required. We agree that the requirement to indicate the subsidiary hazard on the shipping paper should be consistent with the requirement to apply a subsidiary risk label. Therefore, in the NPRM, we proposed to harmonize with the UN Recommendations by making an appropriate revision to § 172.202(a)(3) to specify that the subsidiary hazard class or division number is not required to be entered when a corresponding subsidiary hazard label is not required.

One commenter [Omni] supports the proposal to amend § 172.202(a)(3) to specify that the subsidiary hazard class or division number is not required to be entered when the corresponding subsidiary hazard label is not required. Another commenter [Arkema] requests that we revise § 172.202(a)(3) to clarify that the subsidiary hazard must be entered on shipping papers corresponding to the additional subsidiary labeling required by § 172.402(a)(2), even though the subsidiary hazard is not indicated in Column (6) of the HMT in association with a hazardous material description. The commenter notes that ''* * * enforcement personnel take exception to the fact that we identify subsidiary hazards on the shipping papers for some of our materials when a named material does not list a subsidiary in the 172.101 table.''

We do not believe that a revision to § 172.202(a)(3) is necessary for clarification of the requirements as requested by Arkema. Paragraph (a)(3) of this section clearly states that the subsidiary hazard class(es) and division number(s) must be entered in parentheses immediately following the primary hazard class or division number regardless of whether the subsidiary hazard(s) is listed in Column (6) of the HMT. Therefore, in this final rule, we are adopting the revisions to § 172.202(a)(3) as proposed.

We are also revising paragraph (a)(4) to clarify that the packing group is not required to be indicated on a shipping paper for explosives, self-reactive substances, batteries other than those containing sodium, and organic peroxides in addition to entries that are not assigned a packing group. In addition, we also are revising paragraph (a)(6) to clarify that for all articles where ''No Limit'' is shown in Column (9A) or (9B) of the HMT, the quantity must be the gross mass, followed by the letter ''G.'' We received no comments opposing these proposals; therefore, in this final rule, we are revising paragraph (c) to include a similar exception.

Section 172.322

Section 172.322 specifies marking requirements for vessel transportation of each non-bulk packaging and bulk packaging that contains a marine pollutant. In this final rule, we are adopting the new marking for marine pollutants that has been incorporated into the IMDG Code.

We received one comment [DGAC] indicating a difference between our proposal and the UN Recommendations regarding types of packaging for which the marine pollutant marking is not required. DGAC notes, ''* * * [t]he proposal is to except combination packagings whereas the [UN Recommendations] excepts all packagings with a capacity of 5 L or 5 kg.''

We agree with DGAC that the exception applies to both single and combination packagings containing marine pollutants. Therefore, in this final rule, we are revising the

amendment to state that for packages containing marine pollutants, the marine pollutant mark is not required on single packagings or combinations packagings with a net capacity of 5 L or less for liquids or 5 kg or less for solids. We are requiring use of this new marking one year after publication of the final rule.

Section 172.400a

Section 172.400a establishes exceptions for labeling requirements. Currently, the UN Recommendations do not require a package labeled with a Division 4.2 label to bear a Division 4.1 subsidiary hazard label. This is primarily because the Division 4.2 label communicates a more severe spontaneously combustible flammability hazard and as such the Division 4.1 label is not considered to provide additional hazard communication value.

Section 172.401

Section 172.401 establishes specific requirements for prohibited labeling. We received a petition (P–1494) from DGAC requesting that PHMSA specify that pictograms described in the United Nations Globally Harmonized System of Classification and Labelling are not prohibited under the HMR. In its petition, DGAC states that the UN Economic and Social Council's Committee of Experts on the Transport of Dangerous Goods and on the GHS established the goal of implementing the GHS in 2008. DGAC contends that to facilitate international trade, it is important that packages bearing GHS pictograms are acceptable for transportation in the U.S. DGAC also states that GHS pictograms may already appear on packages used in transportation and cites Annex 7 of the GHS showing examples of GHS pictograms appearing on drums. Pictograms prescribed by GHS are not identical to labels required under the UN Recommendations or the HMR; such pictograms typically consist of a red bordered diamond with a hazard symbol such as a ''flame'' or a ''skull and cross bones.'' DGAC expects these GHS pictograms to be smaller in size than the transport labels required under the HMR and international regulations.

We received no comments on our proposal to permit use of the GHS pictograms. Therefore, in this final rule, we are amending § 172.401 which prohibits the transportation of packages bearing any mark or label that could be confused or conflict with a label required under the HMR, to specify that restrictions under this section do not apply to packages labeled in conformance with the GHS.

Section 172.446

Section 172.446 specifies the requirements for Class 9 labels. Unlike the HMR, the international regulations do not have a solid horizontal line dividing the lower and upper half of the Class 9 label. The Class 9 label in § 172.446 depicts a solid horizontal line. For consistency with international regulations and to provide relief to the regulated community, in this final rule, we are revising paragraph (b) to allow a solid horizontal line as an option.

Section 172.448

Section 172.448 establishes the specifications for the ''CARGO AIRCRAFT ONLY'' label. For consistency with international regulations, we are replacing the current label. The symbol of this label is not altered; however the text is revised to read, ''Forbidden in Passenger Aircraft.'' In addition, we are authorizing continued use of the current label until January 1, 2013.

Part 173

Section 173.4, 173.4a, 173.4b

Section 173.4 establishes the requirements for exceptions to the HMR for small quantities of Class 3, Division 4.1, Division 4.2 (PG II and III), Division 4.3 (PG II and III), Division 5.1, Division 5.2, Division 6.1, Class 7, Class 8, and Class 9 materials. Recently, provisions for the transport of hazardous materials in excepted quantities were incorporated into the UN Regulations and the IMDG Code. These provisions are based largely on existing excepted quantity provisions provided by the ICAO TI. The provisions permit certain small quantities of hazardous materials to be transported with minimal regulation, but ensure a high level of safety through stringent packaging and testing requirements.

The excepted quantity provisions in the UN Regulations and the small quantity provisions of the HMR are similar, but not identical. For example, differences include variations in the authorized hazard classes and packing groups; differences in the quantities authorized per package; and differences in marking, documentation and incident reporting requirements. We believe that aligning the existing small quantity provisions in the HMR with the excepted quantity provisions for air and vessel transportation will enhance harmonization and increase safety. Therefore, for consistency with the UN Recommendations and to increase safety and facilitate international transportation, we are adopting a new excepted quantity provision for transportation by aircraft and vessel into a new § 173.4a. We stress that we are not removing the existing small quantity provisions in 173.4, but rather limiting the use of these provisions to domestic highway and rail transportation. We also are moving the exception for small quantities—less than 1 gram for solids and less than 1 milliliter for liquids per inner packaging currently found in § 173.4(e)—to a new § 173.4b. This will align the requirements of the HMR with those of the ICAO TI and the IMDG Code for transport by air and vessel, while maintaining the existing small quantity exceptions for domestic highway and rail transport. However in this final rule we are not applying the full training requirements of Part 172 Subpart H to excepted quantities. Instead we are requiring that persons who offer or transport excepted quantities be familiar with the requirements of 173.4a. Small quantity exceptions are separated into the following three sections:

(1) Section 173.4 for small quantities transported by domestic highway and rail only;

(2) Section 173.4a for excepted quantities transported by aircraft and vessel; and

(3) Section 173.4b for *de minimis* quantities of material (less than 1 gram for solids and less than 1 milliliter for liquids per inner packaging) transported by all modes.

In the NPRM, we solicited comments regarding the potential for confusion and any cost impacts resulting from this change. One commenter [DGAC] indicates the proposed method is complex and unduly restrictive. DGAC notes, ''* * * that for the most part the excepted quantity requirements mirror the existing requirements in § 173.4(a)'' and ''* * * [f]urther, the proposal is disruptive to multimodal consistency with one set of requirements * * * applicable to land transport and the other applicable to air and sea transport.'' Additionally, DGAC indicates that the new § 173.4a is more restrictive that current § 173.4 and sees no safety basis for imposing these additional restrictions. DGAC recommends against incorporating the excepted quantities directly into the HMR but rather to allow domestic transport of excepted quantities under the ICAO TI or IMDG Code in accordance with authorizations provided in Subchapter C of Part 171 and recommends revising § 173.4(a)(10) by adding an alternative to allow transport of small quantities of

hazardous materials in accordance with excepted quantities provisions in the ICAO TI.

Another commenter [API] notes that Special Provision A59 continues to reference § 173.4 even though the section is no longer applicable to transport by aircraft. Special Provision A59 allows devices containing ethylene oxide to be transported by aircraft in accordance with packaging provisions in § 173.4. API recommends PHMSA revise the language in Special Provision A59 to reference new § 173.4a for excepted quantities which is applicable to air transport. API notes this would be consistent with ICAO TI Special Provision 131 which allows devices containing ethylene oxide to be transported in accordance with ''excepted quantities'' provisions. We agree. In this final rule, we are revising Special Provision A59 to reference the excepted quantities packaging requirements in § 173.4a. We are also making several additional conforming amendments to other provisions in the HMR to reflect the new § 173.4a. The sections we are revising are as follows:

—§ 172.102, Special Provisions 136, A59, A60;
—§ 172.402(d)(1);
—§ 172.500(b)(5);
—§ 173.24(c)(2); and
—§ 175.700(a).

Finally, UPS is concerned that the one-year transition period prior to prohibiting the air transport of packages of small quantities in conformance with § 173.4 is insufficient. UPS indicates, ''* * * This will be a very hard transition for air carriers to enforce, as the current package marking for a Small Quantity shipment * * * does not stand out, and therefore cannot easily be identified and rejected by package handlers.'' UPS adds that it anticipates shippers will continue to transport small quantities domestically by air according to current § 173.4 beyond the transition date after which shippers would be required to conform with § 173.4a. UPS recommends that PHMSA allow the air transport of small quantities in conformance with § 173.4 for a period of several years to allow for transport of packages filled prior to the January 1, 2009 effective date until they are used up. We disagree. The current provisions of § 173.4 require a marking certifying conformance with the section. This certification requirement signifies knowledge of the requirements of the section even though training is not prescribed. We expect shippers benefiting from the exceptions provided in § 173.4 to take steps to ensure awareness of any changes that may be made to the requirements of the section and to respond accordingly, just as we would expect air carriers to be diligent in their acceptance practices with regard to small quantities prepared under § 173.4 even though training is not required. We believe a one-year transition period is sufficient for air shippers and air carriers to make necessary changes and conform to the revised requirements of § 173.4. Therefore, in this final rule, we are not revising the transition date for small quantities transported in accordance § 173.4. However, we are revising the certification marking in § 173.4(a)(10) to communicate that the packages prepared in conformance with the section may only be transported domestically by highway or rail. Also, to further clarify, where domestic transport by highway or rail is impractical, materials must be transported in conformance with the requirements for excepted quantities in § 173.4a.

Two commenters [DGAC, FCC] express disappointment that we did not include fuel cell cartridges as part of the small quantity exceptions in § 173.4. FCC notes, ''* * * We see no safety basis for precluding use of the small quantity exception provision for fuel cells * * *'' Both DGAC and FCC recommend not adopting this amendment. While we considered extending the allowance for fuel cell cartridges to the excepted quantity provisions this would create a confusing inconsistency with the ICAO TI. Fuel cell cartridges by design offer a high degree of integrity and may contain a relatively small amount of hazardous material. Therefore, we believe the relative hazard associated with surface transportation of these materials is minimal. In this final rule we will permit fuel cell cartridges to be transported by highway or rail in accordance with the small quantity exceptions in § 173.4.

One commenter [UPS] notes a concern that packages of materials shipped as de minimus quantities could be misunderstood as undeclared shipments by carriers processing damaged or stray packages. UPS recommends that PHMSA require a marking on the package to certify conformance with the de minimus exceptions section. We disagree. Based on our determination that de minimus materials do not pose an unreasonable risk to health and safety or property, we do not believe a hazard communication marking is necessary. Therefore, in this final rule, we are adopting the new § 173.4b as proposed.

Sections 173.12 and 173.134

Section 173.12 establishes exceptions for shipments of waste materials. Section 173.134 establishes definitions, classification criteria, and exceptions for Division 6.2 materials (infectious substances). Under the Docket HM–218D final rule, we added a new paragraph (f) in § 173.12 to specify that household waste, as defined in § 171.8, is not subject to the HMR. In addition, we revised a household waste exception in § 173.134(b)(13)(i) to reference the household waste definition in § 171.8. Upon publication of the final rule, we received a comment expressing concern with the implementation of these amendments. One commenter [Regulatory Resources Inc.] expresses concern that this amendment was too broad and would allow entities such as large hotels undergoing renovation to offer their waste, including hazardous materials, for transportation as non-regulated materials. This was not our intention. In an effort to reduce confusion, we are revising these two sections to specify that household waste is not subject to the HMR when transported in accordance with applicable state, local, or tribal requirements.

Section 173.24b

Section 173.24b establishes additional general requirements for bulk packagings. In this final rule, we are adding a new paragraph to clarify that IBCs and Large Packagings that are not designed and tested for stacking may not be stacked during transportation. In addition, we are clarifying that IBCs and Large Packagings that are intended for stacking may not have more weight superimposed upon them than is marked on the packaging.

Section 173.62

Section 173.62 establishes specific packaging requirements for explosives. We received a petition (P–1505) from the Sporting Arms & Ammunition Manufacturers' Institute (SAAMI) requesting that PHMSA include a new proper shipping name ''Powder, smokeless,'' UN0509, in the § 172.101 HMT and add the new entry to the explosives assigned Packaging Instruction 114(b) in § 173.62. In its petition, SAAMI states that the UN Sub-Committee of Experts (UNSCOE) on the Transport of Dangerous Goods adopted a proposal by SAAMI to add the new entry to its Dangerous Goods List and a related change to the packing provisions in the UN Recommendations.

Typically, we harmonize with the UN following the formal adoption of a

proposal into the published version of the UN Recommendations. However, because of the limited scope of this amendment and because the new entry allows for a more accurate classification of smokeless powder, we are amending § 173.62 to include a new entry UN0509 to the Explosives Table, which specifies the Packing Instruction assigned to each explosive, and adding a reference to the new entry in Packing Instruction 114(b). We also are including a ''D'' in column 1 of the table entry to designate that the entry is appropriate for domestic use but may not be appropriate for international transportation. Following the adoption of the entry within the IMDG Code and the ICAO TI, this indication would no longer be necessary. It is our intention to remove the ''D'' in a future rulemaking consistent with the adoption of the entry within the aforementioned international regulations.

Additionally, consistent with our addition to add new entry 1-Hydroxybenzotriazole, anhydrous, dry or wetted with less than 20% water, by mass,'' Division 1.3C, UN0508, to the HMT, we are adding this material under Packing instruction ''114(b).'' We are revising this instruction to specify that, for UN0508, inner packagings are not required if drums are used as the outer packaging. We also are adding a new sentence under Packing instruction 114(b) to prohibit metal packagings for UN0508. In addition, we are clarifying that inner packagings are not necessary if drums are used as the outer packaging for UN0160 and UN0161.

Section 173.115

The HMR define a Division 2.2 material (non-flammable, nonpoisonous compressed gas—including compressed gas, liquefied gas, pressurized cryogenic gas, compressed gas in solution, asphyxiant gas and oxidizing gas) as any material or mixture that ''exerts in the packaging an absolute pressure of 280 kPa (40.6 psia) or greater at 20° (68 °F), or is a cryogenic liquid, and does not meet the definition of Division 2.1 or 2.3.'' Recently, the definition of Division 2.2 gases in the UN Recommendations was amended to include all liquefied gases, irrespective of their pressure. This amendment was made on the basis that certain liquefied gases that pose no pressure hazard at ambient pressures and temperatures may exhibit a pressure hazard under conditions normally encountered in transport, such as increased temperature. In addition, the pressure of a Division 2.2 gas was amended to be 200 kPa gauge (29 psig). In order to enhance safety and to maintain global uniformity with respect to the classification of Division 2.2 gases, we are adopting these amendments. With respect to the revised pressure limit, for the convenience of the reader the pressure is now expressed as both gauge pressure and absolute pressure. In order to enhance safety and to maintain global uniformity with respect to the classification of Division 2.2 gases, we are adopting these amendments. Additionally, we are re-designating current paragraph (k) as a new paragraph (l). The new paragraph (k) would read ''For Division 2.2 gases, the oxidizing ability shall be determined by tests or by calculation in accordance with ISO 10156:1996 and ISO 10156–2:2005 (IBR, see § 171.7 of this subchapter.)'' This revision requires the use of specific test and calculation methods for a more accurate determination of the oxidizing ability of Division 2.2 gases. Additionally, we are revising § 171.7 to incorporate these ISO standards.

Section 173.137

Section 173.137 establishes packing group criteria for corrosive (Class 8) materials. In this final rule, we are adding a note to clarify that an additional test on the second material is not required when the initial test on either steel or aluminum indicates the material is corrosive.

Sections 173.162, 173.164, 173.166, 173.186, 173.306, and 173.307

The ICAO TI recently adopted new amendments to require additional information to be included on the air waybill for certain hazardous materials. Currently, a number of hazardous materials are excepted from the full regime of the hazard communication requirements that generally apply to the transport of hazardous materials in the ICAO TI when certain conditions are met to ensure an appropriate level of safety. An example is articles containing not more than 100 mg of mercury, gallium or an inert gas, which are excepted if certain conditions specified in Special Provision A69 of the ICAO TI are met. Frequently, the ICAO TI contain more restrictive or additional requirements and conditions that apply for air transportation. The special provisions that address these requirements contain packaging provisions, prohibitions, and exceptions from requirements for particular quantities or forms of materials. To enable air carriers to ascertain that a shipment conforms to applicable requirements, in the July NPRM, we proposed to adopt a number of amendments consistent with recently adopted amendments in the ICAO TI. Specifically we proposed to require the shipper to include on the air waybill accompanying a shipment an indication that a hazardous material or article has met the applicable conditions for transport. We stated that this indication would allow freight forwarders and operators to verify that the shipper is aware of, and has complied with, the applicable regulatory requirements. Additionally, we stated that it would reduce the likelihood of unnecessary carrier delays through improved communication.

As discussed earlier in this preamble, a number of commenters oppose this proposal. For example, commenters oppose the certification provisions because the HMR do not specifically require an air waybill and express concern that the proposed certification requirement means that all air shipments must now be accompanied by a waybill. Commenters also note that use of an air waybill is not standard across the air carrier industry, and that the industry is moving towards a paperless system for shipments. In addition, commenters state that in many cases the carrier or the freight forwarder prepares the air waybill; these commenters thus disagree with PHMSA's premise that including certification on an air waybill allows a carrier or freight forwarder to verify that the shipper has complied with applicable requirements. Commenters also suggest that we significantly under-estimated the paperwork burden that would result from implementation of the proposed certification requirement.

Based on our review of comments and on past history of safe transportation of these excepted materials, in this final rule, we are not adopting the requirement as proposed. We will continue to review the merits of the proposal and may reconsider the proposed amendments or a similar revised amendment for a future rulemaking.

Section 173.168

Section 173.168 establishes the requirements for the transportation of chemical oxygen generators. A chemical oxygen generator that is transported with a means of initiation attached must be approved prior to shipment. This approval requirement applies to chemical oxygen generators with either an explosive or non-explosive means of initiation attached. As currently drafted, it appears that the requirement to obtain an approval applies only to oxygen generators with an explosive means of initiation. In this final rule, we are revising paragraph (a) to clarify the

approval requirements for a chemical oxygen generator.

Section 173.196

Section 173.196 establishes packaging requirements for Category A infectious substances. In this final rule, we are revising paragraphs (a)(1) and (a)(2) by replacing the word ''watertight'' with ''leakproof.'' These proposed revisions are consistent with international regulations. No substantive changes to the packaging requirements are intended by this wording change.

Section 173.206

In this final rule, we are adding a new packaging section (§ 173.206) to the HMR to harmonize with new packaging requirements for water-reactive chlorosilanes adopted in the Fifteenth revised edition of the UN Recommendations. The enhanced packaging requirements more adequately address the water-reactive properties of these materials. We are also evaluating whether packaging for other water-reactive materials should also be enhanced. Depending on the outcome of our evaluation, we may propose further amendments to the UN Recommendations and the HMR. In the meantime, the entries affected by the addition of new packaging § 173.206 are as follows:

UN1724 Allyltrichlorosilane, stabilized
UN1728 Amyltrichorosilane
UN1747 Butyltrichlorosilane
UN1753 Chlorophenyltrichlorosilane
UN2986 Chlorosilanes, corrosive, flammable, n.o.s.
UN2987 Chlorosilanes, corrosive, n.o.s.
UN2985 Chlorosilanes, flammable, corrosive, n.o.s.
UN3362 Chlorosilanes, toxic, corrosive, flammable, n.o.s.
UN3361 Chlorosilanes, toxic, corrosive, n.o.s.
UN1762 Cyclohexenyltrichlorosilane
UN1763 Cyclohexyltrichlorosilane
UN2434 Dibenzyldichlorosilane
UN1766 Dichlorophenyltrichlorosilane
UN1767 Diethyldichlorosilane
UN1162 Dimethyldichlorosilane
UN1769 Diphenyldichlorosilane
UN1771 Dodecyltrichlorosilane
UN2435 Ethylphenyldichlorosilane
UN1196 Ethyltrichlorosilane
UN1781 Hexadecyltrichlorosilane
UN1784 Hexyltrichlorosilane
UN2437 Methylphenyldichlorosilane
UN1250 Methyltrichlorosilane
UN1799 Nonyltrichlorosilane
UN1800 Octadecyltrichlorosilane
UN1801 Octyltrichlorosilane
UN1804 Phenyltrichlorosilane
UN1816 Propyltrichlorosilane
UN1298 Trimethylchlorosilane
UN1305 Vinyltrichlorosilane, stabilized

Section 173.222

Section 173.222 specifies the requirements for dangerous goods in machinery or apparatus. Paragraph (c) of this section specifies the total net quantity limits contained in one item of machinery or apparatus. Consistent with the ICAO TI, we are revising this section to prohibit Division 2.2 gases with subsidiary risks and refrigerated liquefied gases for transportation by aircraft as dangerous goods in machinery or apparatus.

Section 173.225

Section 173.225 specifies packaging requirements and other provisions for organic peroxides. When the § 172.101 table specifies this section, the organic peroxide must be packaged and offered for transportation in accordance with the provisions of this section. Each packaging must also conform to the general requirements of Subpart B of Part 173 and to the applicable requirements of Part 178 of the HMR. Specifically, organic peroxides that require temperature control are subject to § 173.21(f). When an IBC or bulk packaging is authorized and meets the requirements of paragraph (f) or (h) of § 173.225, respectively, lower control temperatures than those specified for non-bulk packaging may be required. An organic peroxide not identified in paragraph (c), (e), or (g) of § 173.225 by technical name, or not assigned to a generic type in accordance with paragraph (b)(3) of this section, must conform to the requirements in paragraph (c) of § 173.128.

The Organic Peroxides Table specifies by technical name those organic peroxides that are authorized for transportation and not subject to the approval provisions of § 173.128. An organic peroxide identified by technical name is authorized for transportation only if it conforms to all applicable provisions of the table. In this final rule, we are amending the Organic Peroxides Tables by adding new entries, revising current entries, and adding new Notes ''29,'' ''30,'' and ''31'' following the Organic Peroxides Table. New Note ''29'' indicates that specific entries are not subject to the requirements of this subchapter for Division 5.2. New Notes ''30'' and ''31'' indicate that for specific entries, organic peroxides with a boiling point greater than 130 °C (266 °F) or available oxygen less than or equal to 6.7% are acceptable. We are also adding new entries to the Organic Peroxide IBC Table in paragraph (e) of this section.

The following entries in the Organic Peroxides Table are being amended:

UN3101 tert-Amyl peroxy-3,5,5-trimethylhexanoate
UN3117 Di-(2-ethylhexyl) peroxydicarbonate [as a stable dispersion in water]

The following entries are added to the Organic Peroxides Table:

UN3119 tert-Amyl peroxyneodecanoate
UN3119 tert-Amyl peroxypivalate
UN3106 tert-Butyl peroxy 3,5,5-trimethlyhexanoate
UN3115 Cumyl peroxyneodecanoate
Exempt Cyclohexanone peroxide(s)
UN3105 2,2-Di-(tert-amylperoxy)-butane
Exempt Dibenzoyl peroxide
UN3109 tert-Butyl peroxybenzoate
UN3103 1,1-Di-(tert-butylperoxy)-cyclohexane
UN3109 1,1-Di-(tert-butylperoxy)-cyclohexane
UN3105 1,1-Di-(tert-butylperoxy)-cyclohexane + tert-butylperoxy-2-ethylhexanoate
Exempt Di-(2-tert-butylperoxyisopropyl) benzene(s)
UN3103 1,1-Di-(tert-butylperoxy)-3,3,5-trimethylcyclohexane
UN3118 Di-2,4-dichlorobenzoyl peroxide
Exempt Di-4-chlorobenzoyl peroxide
Exempt Dicumyl peroxide
UN3119 Di-(2-ethylhexyl) peroxydicarbonate [as a stable dispersion in water]
UN3119 Di-(2-neodecanoyl-peroxyisopropyl) benzene, as stable dispersion in water
UN3115 3-Hydroxy-1,1-dimethylbutyl peroxyneodecanoate
UN3117 3-Hydroxy-1,1-dimethylbutyl peroxyneodecanoate
UN3119 3-Hydroxy-1,1-dimethylbutyl peroxyneodecanoate [as a stable dispersion in water]
UN3109 Methyl isopropyl ketone peroxide(s)
UN3107 3,3,5,7,7-Pentamethyl-1,2,4-trioxepane

A new Note ''30'' is added following the Organic Peroxides Table to read: ''Diluent type B with boiling point > 130 °C (266 °F).''

A new ''Note ''31'' is added following the Organic Peroxides Table to read: ''Active oxygen ≤ 6.7%.''

The following entries are being revised or added to the Organic Peroxide IBC Table as follows:

UN3109 tert-Butyl peroxybenzoate, not more than 32% in diluent type A
UN3109 1,1-Di-(tert-butylperoxy)-cyclohexane, not more than 37% in diluent type A

UN3119 tert-Amyl peroxypivalate, not more than 32% in diluent type A
UN3119 tert-Butyl peroxyneodecanoate, not more than 52%, stable dispersion, in water
UN3119 Di-(2-neodecanoylperoxyisopropyl) benzene, not more than 42%, stable dispersion, in water
UN3119 3-Hydroxy-1,1-dimethylbutyl peroxy-neodecanoate, not more than 52%, stable dispersion, in water

In addition, in the Organic Peroxide Portable Tank Table, UN3119 ''Di-(3,5,5-trimethyl-hexanoyl) peroxide, not more than 38% in diluent type A'' is being revised, and UN3119 ''tert-Amyl peroxyneodecanoate, not more than 47% in diluent type A'' is being added as a new entry.

Section 173.226

Section 173.226 establishes non-bulk packaging requirements for Division 6.1 PG I, Hazard Zone A materials. In this final rule, we are editorially revising paragraph (c) to enhance accuracy, reduce misunderstanding, and provide a more user-friendly format.

Section 173.230

Currently § 173.230 provides regulations for the transportation of fuel cell cartridges containing flammable liquids. As portable electronic devices continue to evolve, developers of fuel cell cartridge technologies are considering various types of fuel sources to meet increasing power demands. Provisions addressing these other fuel types have already been adopted in the Fifteenth revised edition of the UN Recommendations, the ICAO Technical Instructions and the IMDG Code. Additionally, we received petitions from HMT, L.L.C. (P–1517) and the U.S. Fuel Cell Council (P–1518) requesting that we align the HMR provisions for fuel cell systems and cartridges with international standards. Consistent with several of PHMSA's strategic goals of ensuring safety and advancing technology solutions to support energy independence and environmental protection, we are adding four new proper shipping names to the HMT to describe the range of fuel used in fuel cell cartridges: ''Water-reactive substances,'' UN3476; ''Corrosive substances,'' UN3477; ''Liquefied flammable gas,'' UN3478; and ''Hydrogen in metal hydride,'' UN3479. These additions will provide guidance for the safe transportation of fuel cells and will introduce a greater variety of technology into the global marketplace.

The type of hazard would not be included in the proper shipping name but, instead, would be identified by the hazard class or division (*e.g.*, 2.1; 3; etc.). Readers should note that liquefied flammable gases and hydrogen in a metal hydride are both Division 2.1 materials used in fuel cell cartridges. However, the provisions necessary for the safe transportation of these articles are quite different and therefore, it is necessary to distinguish them with separate shipping descriptions. In addition, because fuel cell cartridges may contain hazardous materials of different hazard classes, we are revising § 173.230 to provide a comprehensive section to address the requirements for all fuel cell cartridges containing hazardous materials as fuel. In addition, consistent with the ICAO Technical Instructions, in § 175.10, we are expanding the types of fuel cell cartridges permitted in carry-on baggage by airline passengers and crew members to include water-reactive substances and hydrogen in a metal hydride. Fuel cell cartridges permitted for transport by passengers and crew members must continue to conform to certain rigorous performance criteria outlined in § 175.10.

One commenter [HMT] requests that we adopt the definition of fuel cell cartridge or fuel cartridge provided in the Fifteenth edition of the UN Model Regulations. The commenter notes that the current definition for fuel cell cartridge or fuel cartridge adopted in a separate final rule (Docket No. HM–243; 73 FR 23362; April 30, 2008) does not align with the definition provided in the UN Model Regulations. The commenter further states that the definition currently provided in § 171.8 would limit fuel cells to those for micro power units and would prohibit fuel cells from being refilled by the user. The commenter states that most hydrogen in metal hydride fuel cell cartridges are intended to be filled by the user and fuel cell cartridges intended for military and industrial applications would be excluded from the current definition of fuel cell cartridge or fuel cartridge.

We agree with the commenter. The definition in the Fifteenth edition of the UN Recommendations provides an adequate definition of fuel cell cartridges and addresses the various applications of this technology. Therefore, in this final rule we are revising the definition in § 171.8 for fuel cell cartridge or fuel cartridge consistent with the definition provided in the Fifteenth edition of the UN Recommendations.

Two commenters [HMT, FCC] request that we remove the phrase ''be free of electric charge generating components'' from the last sentence of paragraph (a). The commenters correctly note this phrase was removed from the Fifteenth edition of the UN Recommendations when provisions for fuel cell cartridges were expanded to fuels other than flammable liquids. HMT suggests the meaning of the requirement is unclear and appears to have little relevance to fuel cell cartridges containing non-flammable fuels. We agree with the commenters. The regulations pertaining to fuel cell cartridges should be clear, enforceable and consistent with international standards to the extent possible. Therefore, in this final rule we are removing the phrase ''be free of electric charge generating components'' from paragraph (a).

Paragraph (d) outlines additional requirements and tests for fuel cell cartridges containing hydrogen in a metal hydride. HMT suggests several editorial revisions to the proposed language in paragraph (d) for consistency with the Fifteenth edition of the UN Recommendations. We agree; these are minor revisions and will provide greater clarity to the regulations. Specifically, in this final rule we are clearly distinguishing between design qualification tests and production tests and correcting various figures and units of measure.

Paragraph (e) describes the various package configurations authorized for the transport of fuel cell cartridges. One commenter [FCC] suggests several revisions to this paragraph for consistency with the UN Recommendations and the ICAO Technical Instructions. We agree with the commenter and in this final rule we are revising paragraph (e)(2) to be consistent with the UN Recommendations and the ICAO Technical Instructions.

Paragraph (f) outlines additional requirements for the transportation of fuel cell cartridges by aircraft. HMT and FCC note that the proposed paragraph (f)(3) is inconsistent with the ICAO Technical Instructions and request we clarify our intent to only require fuel cell cartridges and fuel cell systems to comply with IEC PAS 62282–6–1 Ed. 1 when contained in equipment. We agree with the commenters and are revising this paragraph consistent with the 2009–2010 edition of the ICAO Technical Instructions.

Paragraphs (f)(4) and (f)(5) apply to fuel cells cartridges packed with equipment. One commenter, [HMT] requests we combine paragraphs (f)(4) and (f)(5) for clarity since both paragraphs apply to fuel cells cartridges packed with equipment. While we agree with the commenter, we do not see a reason to restate requirements in

paragraph (f)(4) that are already stated in paragraph (e)(2)(i). In this final rule we are deleting the proposed paragraph (f)(4) and the proposed (f)(5) is now (f)(4). In addition, we are reordering the remaining paragraphs appropriately.

The ICAO Technical Instructions contain additional provisions applicable to fuel cell cartridges containing Division 4.3 and Class 8 material. This provision restricts the mass of each fuel cell cartridge to 1.0 kg (2.2 lbs.) Although this requirement was not proposed, it is our intention to harmonize to the extent possible with the ICAO Technical Instructions. Therefore, in this final rule, we are adding this requirement to paragraph (f)(7) of this section.

Paragraph (f)(8) states fuel cell cartridges intended for transport in carry-on baggage must also meet the applicable provisions of § 175.10. HMT requests that we revise paragraph (f)(8) to specify only the requirements of paragraphs (a) through (d) apply in this case since the additional requirements of paragraphs (e) and (f) would preclude a passenger from using a fuel cell while on board an aircraft. We agree with the commenter. The provisions outlined in this section and § 175.10 are intended to permit passengers to safely carry on and use fuel cell cartridges consistent with their intended use onboard aircraft. In this final, rule we are revising paragraph (f)(8) to specify fuel cell cartridges carried by aircraft passengers or crewmembers are subject to paragraphs (a) through (d) of this section and the applicable provisions of § 175.10.

Paragraph (g) provides limited quantity exceptions for fuel cell cartridges. In the NPRM, we proposed to limit the amount of fuel permitted in the fuel cell cartridge by limiting the capacity of the reservoir in the fuel cell cartridge. This is consistent with other limited quantity exceptions outlined in §§ 173.150 through 173.154 that limit the size of inner packagings. HMT notes that the UN Model Regulations specify an authorized quantity limitation based on the maximum quantity of fuel per cartridge. The commenter requests we revise the limited quantity exceptions in this paragraph to minimize the amount of hazardous materials contained in the cartridge consistent with the UN Recommendations. Although this change would permit slightly more hazardous material in a fuel cell cartridge for fuel cell cartridges containing a Class 3, Division 4.3 or Class 8 material, we believe the additional risk associated with this change would be negligible, considering the robust nature of fuel cell cartridges and the design type and production testing that must be conducted prior to offering fuel cell cartridges for transportation. We agree with the commenter, and in this final rule, we are revising paragraphs (g)(1), (2) and (3) to express the quantity limitations based on the quantity of liquid or solid fuel contained in the article.

Section 173.304(b)

Section 173.304(b) specifies additional requirements for liquefied compressed gases in UN pressure receptacles. In a final rule published on June 12, 2006, under Docket PHMSA–2005–17463 (HM–220E) entitled ''UN Cylinders,'' (71 FR 33858), we adopted the filling limits for liquefied compressed gases and mixtures in UN pressure receptacles specified in the UN Recommendations. Based on a review of the P200 filling limits, we lowered the filling limits for ten gases and added a table under paragraph (c) in § 173.304b to specify the revised filling limits. The UN Recommendations subsequently adopted these revised filling limits. Since there is no longer a need for the revised filling limits for liquefied compressed gases in the HMR, in this final rule, we are removing paragraph (c) of § 173.304b in its entirety. Current paragraphs (d) and (e) are being re-designated accordingly.

Section 173.306

Section 173.306 establishes transportation requirements for limited quantities of compressed gases. The ICAO TI have incorporated provisions for the transportation of limited quantities of compressed gases in inner nonrefillable plastic receptacles to keep abreast with new technology and on the basis that inner nonrefillable plastic receptacles provide a level of safety equivalent to other authorized packagings. Although the HMR do not currently allow the transportation of these plastic receptacles by air, PHMSA has issued several Special Permits authorizing such transportation with certain restrictions, such as shipping paper, labeling, marking, and packaging requirements. We have reviewed these materials from a risk/safety perspective, and based on an equivalent level of safety determination established by the Special Permits, and a record of the safe transportation of plastic receptacles, we are adopting requirements for the construction and use of plastic containers within the HMR. We believe this amendment will also enhance international harmonization and provide relief to the regulated community by reducing the need for Special Permits to transport these materials. A new aerosol container specification ''2S'' is included in § 173.306, with corresponding requirements as detailed in a new § 178.33b. One commenter [P&G] expresses support for the allowance of limited quantities of Division 2.2 materials with no subsidiary hazard to be transported in plastic containers and also provides recommendations for the testing and material requirements of these packagings [See discussion under § 178.33b]. The same commenter [P&G] suggests alternatives to the hot water bath tests for leak detection for both plastic and metal aerosol containers. Specifically, the commenter requests that we modify the hot water bath test protocol to permit a reduction in temperature if the receptacles are made of a plastic material that softens at higher temperatures. As noted in the NPRM, we proposed to add § 173.306(a)(5) to allow an alternative hot water bath test for aerosol dispensers made of plastic materials which soften at higher temperatures. We received no additional comments opposing this proposal; therefore, in this final rule, we are adopting this proposal without change.

We are also revising paragraph (j) to require the consignor to include on an air waybill or other shipping documentation an indication that a hazardous material or article has met the applicable conditions for air transport. This indication will allow freight forwarders and operators to verify that the consignor is aware of, and has complied with, the applicable regulatory requirements.

Section 173.307

Section 173.307 specifies exceptions for compressed gases. The ICAO TI have Special Provision (A69) excepting from regulation articles containing minimal amounts of gallium, mercury, or inert gas. Based on a review that indicated the special provision was not assigned appropriately among all inert gases, ICAO proposed to assign the special provision to all the inert gases concerned. The HMR do not currently have a similar provision for inert gases, although the HMR have the same exception for articles containing gallium or mercury in §§ 173.162 and 173.164, respectively. Rather than adding a new special provision, we are adding to this section a general exception for articles containing inert gas. This exception specifies that manufactured articles or apparatuses, each containing not more than 100 mg of inert gas and packaged so that the quantity of inert gas per package does not exceed 1 g, are not subject to the HMR.

Section 173.322

Section 173.322 establishes specific packaging requirements for ethyl chloride (UN1037). Recently, PHMSA became aware of an incident involving an aluminum compressed gas cylinder containing ethyl chloride. The investigation of this incident suggests the possibility that a reaction occurred within the aluminum cylinder as a result of the incompatibility between the ethyl chloride gas and the aluminum cylinder. The HMR currently prohibit the transportation of ethyl chloride in UN pressure receptacles constructed of aluminum alloy but have no such prohibition for specification cylinders. To address this occurrence, in this final rule, we are revising this section to prohibit the filling of specification cylinders made of aluminum alloy (*e.g.*, DOT 3AL) with ethyl chloride.

Part 175

Section 175.10

Section 175.10 establishes exceptions for the transportation of certain hazardous materials by aircraft, including hazardous materials that may be carried by passengers or crewmembers in checked or carry-on baggage. In this final rule, we are revising the exception for dry ice in paragraph (a)(10) to clarify that dry ice carried in both carry-on and checked baggage is subject to the approval of the aircraft operator.

We are also revising § 175.10(a)(15) to clarify that when the battery is disconnected, the battery terminals must also be protected to prevent short circuits. (See discussion under ''Amendments to Enhance the Safe Transportation of Batteries and Battery-Powered Devices'' of this rulemaking.) In response to the proposals in the NPRM pertaining to this section, one commenter [URS] points out a discrepancy in terminology in reference to exceptions for passengers, crewmembers, and air operators under § 175.10. URS notes that under § 175.10(a)(17), PHMSA uses the terminology ''consumer electronic'' to describe devices powered by lithium batteries carried on board an aircraft, whereas under revised § 175.10(a)(18), PHMSA use the terminology ''portable electronic'' to describe the same types of devices but powered by fuel cell cartridges and carried on board an aircraft. The commenter requests PHMSA replace ''consumer electronic and medical'' with ''portable'' for consistency between the two exceptions. We agree, and in this final rule, we are revising § 175.10(a)(17) to indicate ''portable electronic devices.''

As noted under the discussion in § 173.230, we are revising paragraph (a)(18) to expand the types of fuel cell cartridges permitted in carry-on baggage by airline passengers and crew. Fuel cell cartridges permitted for transport by passengers and crewmembers must continue to conform to the rigorous performance criteria outlined in § 175.10.

Finally, we are revising paragraph (a) and adding a new paragraph (c) to specify that the requirements to submit incident reports under §§ 171.15 and 171.16 of this subchapter apply to the air carrier.

Section 175.33

Section 175.33 establishes requirements for shipping papers and notification of pilot-in-command for hazardous materials transported by aircraft. We are adopting several amendments to strengthen and clarify these requirements, harmonize with international standards, and address a recommendation of the NTSB from a 2006 incident.

On February 7, 2006, United Parcel Service Company (UPS) flight 1307, landed at its destination, Philadelphia International Airport, after a cargo smoke indication in the cockpit. The crewmembers evacuated the aircraft upon landing and sustained minor injuries. The aircraft and most of the cargo, however, were destroyed. In its investigation of the incident, the NTSB determined that UPS personnel were able to retrieve the notice to captain (NOTOC), which contained information on the hazardous materials on board the airplane. However, NTSB also determined that personnel did not provide emergency responders with detailed information about the hazardous materials on board the aircraft in a timely manner, and such a delay could have potentially created a safety hazard. As a result of its findings, NTSB recommended that PHMSA ''require aircraft operators that transport hazardous materials to immediately provide consolidated and specific information about hazardous materials on board an aircraft, including proper shipping name, hazard class, quantity, number of packages, and location to on-scene emergency responders upon notification of an accident or incident.'' (NTSB Recommendation A–07–106)

The HMR currently require aircraft operators to make available, upon request, to an authorized official of a Federal, State, or local government agency, including an emergency responder, at reasonable times and locations, the documents or information required by § 175.33, which include shipping papers and notification of pilot-in-command. However, aircraft operators are not required to provide hazardous materials information to emergency responders immediately upon notification of an accident or incident. We agree with NTSB that delays in the transmittal of information to emergency responders could delay timely and effective response to incidents. Therefore, in the NPRM, we proposed to revise paragraph (c)(4) of this section to require aircraft operators that transport hazardous materials to provide immediate and specific information about hazardous materials on board an aircraft, including proper shipping name, hazard class, quantity, number of packages, and location, to on-scene emergency responders in the event of an accident or incident.

One commenter [ALPA] does not support the proposal to require aircraft operators that transport hazardous materials to provide immediate and specific information about hazardous materials on board an aircraft, including proper shipping name, hazard class, quantity, number of packages, and location, to on-scene emergency responders in the event of an accident or incident. ALPA states, ''* * * we are concerned that the proposed wording in the current rulemaking effort is not specific enough in how the information is to be provided to first response personnel, or in what is considered immediate notification.'' ALPA expresses concern that operators will task a flight crew with providing the information on the NOTOC to emergency responders during an incident when the flight crew's focus should be on safely evacuating an aircraft. ALPA recommends that PHMSA require operators to find a method of providing the required information to emergency responders without involving the flight crew.

We acknowledge ALPA's concern with involvement of the flight crew and as indicated previously in the preamble to Docket HM–206C, in an emergency situation, retrieval of the information from the flight crew may not be practical during an in-flight emergency because the flight crew may be attending to more pressing tasks. However, we believe the method for providing immediate notification to emergency responders is best determined by the operators. Therefore, in this final rule, we are adopting the revision as proposed.

In response to a FedEx petition, [P–1490], in the NPRM, we also proposed to revise § 175.33(a)(1)(i) to remove the requirement that the type of package must be included on the notification of

pilot-in-command. Three commenters [FedEx, IPA, UPS] indicate support for our proposal to remove the requirement to include the type of packaging on the notification of pilot-in-command. One commenter [IPA] requests that PHMSA require special notice to the flight crew through the notification of pilot-in-command any time cargo aircraft only hazardous material is loaded in an inaccessible location. We disagree. The notification of pilot-in-command requirements already require information on the loading location of packages aboard aircraft and confirmation that the package must be carried only on cargo aircraft if its transportation aboard passenger-carrying aircraft is forbidden, in § 175.75(a)(4) and (a)(9), respectively. We did not receive other comments opposing this proposal; therefore, in this final rule, we are removing the requirement as proposed.

In addition, for consistency with international regulations, in the NPRM, we proposed to add a new paragraph (a)(11) to specify that for ''Carbon dioxide, solid (dry ice),'' UN1845, only the UN number, proper shipping name, class, total quantity, exact location aboard the aircraft, and the airport at which the package(s) is to be unloaded need be provided.

Two commenters [Omni, UPS] express concern regarding the language provided in new paragraph (a)(11). Specifically, Omni, notes that ''* * * In the proposed language to be added relative to UN1845 * * * the aircraft operator is required to provide the exact location aboard the aircraft.'' Omni requests clarification of the meaning of ''exact location'' because the language is not the same for the requirement to inform the pilot-in-command of the location of the packages aboard aircraft required for other hazardous materials, and urges PHMSA to remove the word ''exact'' from the requirement. UPS points out an inconsistency with the ICAO TI by indicating, ''* * * ICAO has determined to allow the dry ice information to be aggregated for each hold in an aircraft, not just the loading position.'' UPS recommends that PHMSA revise the language to be consistent with ICAO TI. The ICAO TI requires the ''total quantity in each hold on the aircraft.'' This is different in meaning from the ''exact location'' as written in the NPRM in that, as UPS points out, an aircraft hold encompasses several loading locations.

We agree with the commenters, the use of the word ''exact'' is inconsistent with the provision to provide the location of packages under § 175.33(a)(4) and the provision for ''dry ice'' added to the ICAO TI. Therefore, we are revising the language by removing the word ''exact'' from paragraph (a)(11).

Another commenter [COSTHA] requests that we clarify paragraph (a)(11) to indicate the provision applies only when notification of pilot-in-command is required because not all shipments of ''dry ice'' are subject to the notification of pilot-in-command requirements (see § 172.217(c)(5)). We agree with the commenter that not all shipments of ''dry ice'' require notification, but we disagree that a clarifier is needed for new paragraph (a)(11). The paragraph (a) introductory text already indicates that the section applies to hazardous materials subject to the provisions of the HMR that are carried in an aircraft. If a shipment of dry ice is excepted from all other requirements of the HMR under § 173.217(c)(5), the shipper of dry ice does not need to consult § 175.33 for air shipping paper and notification of pilot-in-command requirements as these requirements no longer apply.

Section 175.75

Section 175.75 specifies the requirements for quantity limitations and cargo locations for hazardous materials transported by aircraft. With few exceptions, paragraph (d) requires each package containing a hazardous material acceptable only for cargo aircraft to be loaded in such a manner that a crew member or other authorized person can access, handle and when size and weight permit, separate such packages from other cargo during flight. To increase flexibility in these stowage requirements, in the NPRM we proposed to expand this requirement to allow for the stowage of these materials in inaccessible cargo compartments, provided the compartment has an FAA-approved fire or smoke detection system and a fire-suppression system.

Five commenters [FedEx, IPA, NACA, Omni, UPS] support our proposal to allow the loading of cargo aircraft only hazardous materials in a cargo compartment that has an FAA-approved fire or smoke detection and a fire-suppression system. However, several commenters request clarification of the regulatory language and recommend revisions or additional changes. UPS is concerned that the proposed language to require an FAA-approved fire or smoke detection and a fire-suppression system is inconsistent with ICAO TI because it may allow for an FAA-approved system that is not identical to the certification requirements for a Class C compartment. The commenter notes ''* * * In the Technical Instructions, the new provision will refer specifically to Class C compartments.'' We disagree. The FAA defines a Class C cargo compartment as a compartment in which there is a separate approved smoke detector or fire detector system to give warning at the pilot or flight engineer station and there is an approved built-in fire extinguishing or suppression system controllable from the cockpit. An FAA-approved system would be a system meeting the requirements for a Class C compartment as certified by FAA. Secondly, with regard to the use of freight containers, the ICAO TI allow for variation in the type of system as long as the system is ''equivalent to that required by the certification requirements for a Class C aircraft cargo compartment as determined by the appropriate national authority.'' However, we believe clarification of the language is beneficial, and, in this final rule, we are revising § 175.75(d) to reference Class C cargo compartment requirements specified in the FAA cargo compartment requirements in 14 CFR 25.857. Additionally, based on a recommendation from Omni to be more consistent with ICAO TI, we are also adding a provision to § 175.75(d) for the use of an FAA-certified freight container which has an approved fire or smoke detection system and fire suppression system equivalent to a Class C aircraft cargo compartment.

Two commenters [UPS, FedEx] request clarification whether packages eligible for carriage aboard passenger aircraft should also be allowed to be loaded in an inaccessible Class C cargo compartment on a passenger aircraft, and whether any weight limitations should be applied to packages authorized for passenger aircraft that are loaded in a Class C cargo compartment on a cargo aircraft. FedEx indicates, ''* * * We do not believe it was PHMSA's intent to prohibit DG acceptable for Passenger Aircraft from also being loaded [in an] inaccessible [compartment] provided the compartment has an FAA-approved fire or smoke detection system and a fire-suppression system.'' FedEx suggests revising § 175.75(c) to accommodate loading in inaccessible cargo compartments aboard passenger aircraft and notes that this would also require a revision of the tables in § 175.75(e). In its comments, UPS suggests that the proposed requirements would place no limit on the amount of cargo aircraft only hazardous materials that can be loaded in an inaccessible compartment provided the compartment meets the certification requirements for a Class C

compartment. UPS adds, ''* * * in light of the changes proposed for loading CAO shipments, the unlimited loading of [packages authorized for passenger aircraft] in Class C cargo compartments seems both reasonable and justified.'' UPS recommends PHMSA also revise § 175.75(c) to except packages authorized for passenger aircraft and loaded in Class C cargo compartments from the net weight limitations and revise the table in § 175.75(e) to reflect any changes made in paragraphs (c) and (d).

We acknowledge UPS' comments and will work with FAA to consider revisions to the table in a future rulemaking. However, in this final rule, we are revising the introductory language to the quantity and loading tables to clarify that loading cargo aircraft only packages in conformance with paragraph (d) of § 175.75 is considered accessible for quantity limit purposes of the table in § 175.75(f).

One commenter [Omni] believes consideration should be given to eliminate the restriction to limit the net weight of hazardous materials loaded in an inaccessible manner to 25 kg with an additional 75 kg of Division 2.2. Based on comments we received under Docket HM–228 (71 FR 14586; March 22, 2006), we determined such a restriction is necessary for the safety of cargo aircraft transporting hazardous materials, and that greater quantities of hazardous materials in inaccessible compartments on cargo aircraft would unnecessarily compound a situation faced by the crew in an unrelated fire. Therefore, we did not adopt a proposal to eliminate the restriction.

One commenter [NACA] supports our proposal for all materials except Class 8 corrosive materials. NACA states, ''* * * A leaking corrosive substance would then not be discovered until substantial damage has possibly been done to the aircraft and/or other cargo. We disagree. The suggestion to restrict a class of hazardous material from being loaded in an inaccessible cargo compartment may have merit but is beyond the scope of this rulemaking. We did not propose any restrictions on classes of hazardous materials that can be loaded in accordance with § 175.75(d).

Finally, for clarity and greater understanding of the quantity limitations and cargo location requirements in § 175.75, we are revising this section by re-designating paragraph (e)(5) to new paragraph (f) to indicate the Quantity and Loading Tables are a ''stand-alone'' summary of the requirements found in paragraphs (a) through (e).

Section 175.88

Section 175.88 specifies the requirements for the inspection, orientation and securing of packages of hazardous materials transported by aircraft. In the NPRM, we proposed to revise paragraph (c) to specify that packages of hazardous materials must be secured at all times in an aircraft in a manner that will prevent shifting or prevent a change in the position of the packages in the cargo compartment. Two commenters [COSTHA, Omni] support our proposal to specify that packages of hazards materials aboard aircraft must be secured at all times. However, COSTHA requests that we clarify paragraph (c) pertaining to the meaning of the provision to require securing of packages in a manner to prevent a change in position of the packages. The commenter believes the use of the term ''position'' is unclear and can be misinterpreted to mean the location of the package rather than its orientation. The commenter recommends that PHMSA revise the language to be more consistent with the language in the ICAO TI. We agree that the use of the term may be confusing, and therefore, for clarity and greater consistency with ICAO TI, in this final rule, we are revising paragraph (c) to clarify that packages containing hazardous materials must be secured at all times in an aircraft in a manner that will prevent any shifting or any change in the orientation of the packages.

Part 176

Section 176.2

Section 176.2 establishes definitions specific to the transportation of hazardous materials by vessel. In this final rule, we are editorially revising the definition for ''Commandant'' to update a routing designation.

Section 176.3

Section 176.3 establishes requirements for shipments of hazardous materials that are unacceptable for transportation by vessel, and requires compliance with parts 172 and 173 of the HMR. In this final rule, we are specifying that compliance with subpart C of part 171 is also required.

Section 176.84

Section 176.84 establishes requirements for stowage and segregation for cargo vessels and passenger vessels. Consistent with revisions for certain materials in the HMT, we are removing stowage codes ''134,'' ''139,'' and ''140,'' and adding a new stowage code ''145.'' Stowage code 140 is assigned to ''Aluminum alkyl halides, liquid,'' UN3052, and ''Aluminum alkyl halides, solid,'' UN3461. Both of these shipping descriptions are being removed consistent with the adoption of appropriate generic organometallic entries. Stowage code ''139'' provides instruction to ''stow 'separated from' mercury salts.'' The provision is a duplication of stowage code ''70,'' and both codes are assigned to the entry ''1,4-Butynediol,'' UN2716. Additionally, stowage code ''139'' is only assigned to this specific entry. Therefore, we are removing stowage code ''139.'' Stowage code ''140'' provides instruction to ''stow 'separated from' UN3052 and UN3461,'' which are identification numbers for aluminum alkyl halides in liquid and solid form, respectively. These entries are being removed in this final rule. Consistent with the removal of these UN numbers from the hazardous materials table, we are removing stowage code ''140.'' Stowage code ''145'' provides instruction to ''stow 'separated from' ammonium compounds except for UN1444.'' The stowage code is assigned to ''Potassium persulfate,'' UN1492, and ''Sodium persulfate,'' UN1505. These materials may form explosive mixtures with ammonium compounds; however, they do not react dangerously or form explosive mixtures when in contact with ''Ammonium persulphate,'' UN1444. Finally, in order to fully align the HMR with the IMDG Code, a new vessel stowage code ''146'' is being added to specify that, ''Category B stowage applies for unit loads in open cargo transport units.'' The new vessel stowage code ''146'' is assigned to ''Batteries, wet, filled with acid, *electric storage,*'' UN2794 and ''Batteries, wet, filled with alkali, *electric storage,*'' UN2795 in column (10B) of the HMT.

Section 176.172

Section 176.172 establishes the structural serviceability requirements for freight containers and vehicles carrying Class 1 (explosive) materials on vessels. The IMDG Code, as recently amended, establishes similar requirements; however, unlike the HMR, the IMDG requirements expressly except containers carrying Division 1.4 explosives. Under the HMR, as provided in § 176.172(c), Division 1.4 explosive materials need not be accompanied by a statement certifying that the freight container is structurally serviceable. However, this certification exception does not explicitly except freight containers carrying Division 1.4 explosives from the underlying serviceability requirements. Because

Division 1.4 explosives are of a comparatively lower risk relative to 1.1, 1.2, and 1.3 explosives, the structural serviceability requirements, like an accompanying certification, become correspondingly less valuable as a safety control. Therefore, in this final rule, we are amending paragraph (a) of this section for consistency with the requirements of the IMDG Code, by excluding freight containers containing Division 1.4 explosive materials from the structural serviceability requirements.

Part 178

Section 178.33b

As noted in the discussion under § 173.306, we are adding a new section to define the design, construction, and testing requirements for inner nonrefillable plastic containers for aerosols. Specifically, we are adding a new § 178.33b to specify packaging; compliance; type and size; inspection; duties of an inspector; material; manufacture; design qualification, production, and leak testing; and marking requirements for inner nonrefillable plastic receptacles.

One commenter [P&G] requests we amend the drop test criteria in § 178.33b–7 to specify that the container should not be dropped on the valve. We acknowledge the commenter's concern about impacting and possibly damaging the valve during the drop test. Therefore, we are amending § 178.33b–7 to specify that orientation of the test containers at drop is statistically random, but that direct impact on the valve or valve closure is to be avoided. We received no additional comments opposing these proposals; therefore, in this final rule, we are adopting these proposals without further change.

In addition, this same commenter requests that we permit the use of recycled plastics in plastic containers. We disagree. We do not believe that the use of recycled plastic in plastic containers ensures the quality of the material. In addition, we believe that the design qualification testing of the containers will not be representative of the production containers if each batch of plastic is unknown. Therefore, we are adopting without change, these requirements as proposed in the NPRM.

Section 178.502

Section 178.502 establishes the identification codes for marking packagings to certify conformance with UN performance standards. We are including a note at the end of this section to indicate that plastic materials include other polymeric materials such as rubber and, thus, the code used to designate plastic packagings may also be used for packagings constructed of other polymeric materials.

Section 178.703

Section 178.703 establishes marking requirements for IBCs. We are including an additional marking requirement to specify the maximum permitted stacking load applicable when an IBC is in use, with a transition date until January 1, 2011. The symbol must be not less than 100 mm (3.9 inches) × 100 mm (3.9 inches), and must be durable and clearly visible. The letters and numbers must be at least 12 mm high (.48 inches). The mass marked above the symbol must not exceed the load imposed during the design test divided by 1.8.

One commenter [American Trucking Associations] strongly supports our proposal to add a marking requirement to indicate whether or not an IBC is capable of being stacked and to include the maximum permitted stacking load applicable. However, the commenter recommends that the marking be used for all packagings that have stacking restrictions. Additionally, the commenter recommends that we shorten the transition period for use of the new marking to 90 days following the effective date for newly manufactured and remanufactured packagings, and require an effective date on or before January 1, 2011 for all other packagings.

We disagree. PHMSA did not propose to include the marking for all packagings subject to stacking restrictions. Additionally, we believe the January 1, 2011 date provides an adequate transitional period for use of the new stacking marking. Therefore, in this final rule, we are adopting the stacking symbol marking for IBCs as proposed, and clarifying the language to clarify the instructions for use of the marking.

Section 178.801

Section 178.801 establishes general requirements for the testing of IBCs. For clarification, in this final rule, we are adding a sentence to paragraph (f) to specify that the IBC must be fitted with the primary bottom closure during production testing and inspection.

Section 178.810

Section 178.810 establishes the requirements for a drop test conducted for the qualification of all IBC design types. In this final rule, we are revising the criteria in paragraph (e) for passing the drop test to specify that no damage is permitted which renders the IBC unsafe to be transported for salvage or for disposal, or results in a loss of contents. In addition, we are revising this paragraph to specify that the IBC must be capable of being lifted by an appropriate means until clear of the floor for five minutes.

IV. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This final rule is published under the following statutory authorities:

1. 49 U.S.C. 5103(b) authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. This final rule amends regulations to maintain alignment with international standards by incorporating various amendments, including changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations and vessel stowage requirements. To this end, as discussed in detail above, the final rule amends the HMR to more fully align them with the biennial updates of the UN Recommendations, the IMDG Code and the ICAO TI; this will facilitate the transport of hazardous materials in international commerce.

Harmonization serves to facilitate international transportation; at the same time, harmonization promotes the safety of people, property, and the environment by reducing the potential for confusion and misunderstanding that could result if shippers and transporters were required to comply with two or more conflicting sets of regulatory requirements. While the intent of this rulemaking is to align the HMR with international standards, we review and consider each amendment on its own merit based on its overall impact on transportation safety and the economic implications associated with its adoption into the HMR. Our goal is to harmonize without sacrificing the current HMR level of safety and without imposing undue burdens on the regulated public. Thus, as explained in the corresponding sections above, we are not adopting harmonization with certain specific provisions of the UN Recommendations, the IMDG Code, and the ICAO TI. Moreover, we are maintaining a number of current exceptions for domestic transportation that should minimize the compliance burden on the regulated community.

2. 49 U.S.C. 5120(b) authorizes the Secretary of Transportation to ensure that, to the extent practicable,

regulations governing the transportation of hazardous materials in commerce are consistent with standards adopted by international authorities. This rule amends the HMR to maintain alignment with international standards by incorporating various amendments to facilitate the transport of hazardous material in international commerce. To this end, as discussed in detail above, the rule incorporates changes into the HMR based on the Fifteenth revised edition of the UN Recommendations, Amendment 34 to the IMDG Code, and the 2009–2010 ICAO TI, which become effective January 1, 2009. The continually increasing amount of hazardous materials transported in international commerce warrants the harmonization of domestic and international requirements to the greatest extent possible.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. The final rule is not considered a significant rule under the Regulatory Policies and Procedures of the Department of Transportation [44 FR 11034]. This final rule applies to offerors and carriers of hazardous materials, such as chemical manufacturers, chemical users and suppliers, packaging manufacturers, distributors, battery manufacturers, radiopharmaceutical companies, and training companies. Benefits resulting from the adoption of the amendments in this final rule include enhanced transportation safety resulting from the consistency of domestic and international hazard communications and continued access to foreign markets by U.S. manufacturers of hazardous materials.

The majority of amendments in this final rule should result in cost savings and ease the regulatory compliance burden for shippers engaged in domestic and international commerce, including trans-border shipments within North America.

We propose a one-year transition period to allow for training of employees and to ease any burden on entities affected by the amendments. The total net increase in costs to businesses in implementing the final rule is considered to be minimal. Initial start-up and inventory costs would result from these changes; however, the costs would be offset by greater long-term savings of conformance with one set of regulations and a one-year transition period. A regulatory evaluation is available for review in the public docket for this rulemaking.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This final rule preempts State, local and Indian tribe requirements but does not propose any regulation that has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The Federal hazardous material transportation law, 49 U.S.C. 5101–5128, contains an express preemption provision (49 U.S.C. 5125(b)) that preempts State, local, and Indian tribe requirements on certain covered subjects, as follows:

(1) The designation, description, and classification of hazardous material;

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous material;

(3) The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents;

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; and

(5) The design, manufacture, fabrication, inspection, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

This final rule addresses covered subject items (1), (2), (3), (4) and (5) above and preempts State, local, and Indian tribe requirements not meeting the ''substantively the same'' standard. This final rule is necessary to incorporate changes adopted in international standards, effective January 1, 2009. If the changes in this final rule are not adopted in the HMR, U.S. companies, including numerous small entities competing in foreign markets, would be at an economic disadvantage. These companies would be forced to comply with a dual system of regulations. The changes in this final rule are intended to avoid this result. Federal hazardous materials transportation law provides at section 5125(b)(2) that, if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. The effective date of Federal preemption is April 14, 2009.

D. Executive Order 13175

This final rule was analyzed in accordance with the principles and criteria contained in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments''). Because this final rule does not have tribal implications and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities, unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. This final rule facilitates the transportation of hazardous materials in international commerce by providing consistency with international standards. This final rule applies to offerors and carriers of hazardous materials, some of whom are small entities, such as chemical users and suppliers, packaging manufacturers, distributors, battery manufacturers, and training companies. As discussed above, under *Executive Order 12866*, the majority of amendments in this final rule should result in cost savings and ease the regulatory compliance burden for shippers engaged in domestic and international commerce, including trans-border shipments within North America.

Many companies will realize economic benefits as a result of these amendments. Additionally, the changes affected by this final rule will relieve U.S. companies, including small entities competing in foreign markets, from the burden of complying with a dual system of regulations. Therefore, I certify that these amendments will not, if promulgated, have a significant economic impact on a substantial number of small entities.

This final rule has been developed in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential

impacts of draft rules on small entities are properly considered.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, no person is required to respond to an information collection unless it displays a valid OMB control number.

PHMSA currently has approved information collections under OMB Control Number 2137–0034, ''Hazardous Materials Shipping Papers and Emergency Response Information'' with 6,500,834 burden hours, and an expiration date of May 31, 2011; and OMB Control Number 2137–0039, ''Hazardous Materials Incidents Reports'' with 23,746 burden hours, and an expiration date of August 31, 2010. Based on comments received in response to the NPRM, this final rule may result in an information collection and recordkeeping burden increase under these information collections. PHMSA will submit revised information collection requests to the Office of Management and Budget (OMB) for approval, and publish the results in a separate **Federal Register** notice.

Section 1320.8(d), Title 5, Code of Federal Regulations requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. Requests for a copy of these information collections should be directed to Deborah Boothe or T. Glenn Foster, Office of Hazardous Materials Standards (PHH–11), Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., 2nd Floor, Washington, DC 20590–0001.

G. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

H. Unfunded Mandates Reform Act

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $132 million or more, adjusted for inflation, to either State, local or tribal governments, in the aggregate, or to the private sector in any one year, and is the least burdensome alternative that achieves the objective of the rule.

I. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires that federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations order federal agencies to conduct an environmental review considering (1) the need for the proposed action, (2) alternatives to the proposed action, (3) probable environmental impacts of the proposed action and alternatives, and (4) the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b).

1. Purpose and Need

PHMSA is amending the Hazardous Materials Regulations to maintain alignment with international standards by incorporating various amendments, including changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations, and vessel stowage requirements. These revisions are necessary to harmonize the Hazardous Materials Regulations with recent changes to the International Maritime Dangerous Goods Code, the International Civil Aviation Organization's Technical Instructions for the Transport of Dangerous Goods by Air, and the United Nations Recommendations on the Transport of Dangerous Goods. The amendments are intended to enhance the safety of international hazardous materials transportation through better understanding of the regulations, an increased level of industry compliance, the smooth flow of hazardous materials from their points of origin to their points of destination, and effective emergency response in the event of a hazardous materials incident.

The HMR regulate materials that meet the definition of a marine pollutant in all modes of transportation. The intended effect is to increase the level of safety associated with the transportation of substances hazardous to the marine environment by way of improved communication of their presence in transportation and establishing appropriate requirements for their packaging. The HMR uses a list based system designed to help shippers determine if a material meets the definition of a marine pollutant. Recently, the IMO adopted a criteria based system for identification of materials hazardous to the marine environment based on the Globally Harmonized System of Classification and Labelling of Chemicals (GHS).

2. Alternatives

In developing this final rule, we considered three alternatives:

(1) Do nothing.

(2) Adopt the international standards in their entirety.

(3) Adopt most of the international standards, with certain modifications based on safety or economic considerations.

Alternative 1

Because our goal is to facilitate uniformity, compliance, commerce and safety in the transportation of hazardous materials, we rejected this alternative.

Alternative 2

Under this alternative, we would adopt the classification criteria for marine pollutants in the IMDG Code consistent with the aquatic toxicity criteria adopted within the GHS. However, the new classification system adopted into the IMDG Code is complicated and the associated criteria for classifying mixtures containing marine pollutants would involve an additional layer of complexity without a corresponding public benefit. Therefore, we are not requiring the use of the new IMDG Code environmental classification system.

Alternative 3

Consistency between U.S. and international regulations helps to assure the safety of international hazardous materials transportation through better understanding of the regulations, an increased level of industry compliance, the smooth flow of hazardous materials from their points of origin to their points of destination, and effective emergency response in the event of a hazardous materials incident. Under Alternative 3, we would harmonize the HMR with international standards to the extent consistent with U.S. safety and economic goals. As indicated above, we are not adopting provisions that, in our view, do not provide an adequate safety level. Further, we provide for exceptions and extended compliance periods to minimize the potential economic impact of any revisions on the regulated community.

Under this alternative, we maintain the current marine pollutant criteria and list while permitting the use of the GHS Criteria. If a material not listed as a marine pollutant in the HMR meets the definition of a marine pollutant in accordance with the GHS, that material may be transported as a marine pollutant in accordance with the

applicable regulations. Alternative 3 is the only alternative that addresses, in all respects, the purpose of this regulatory action, which is to facilitate the safe and efficient transportation of hazardous materials in international commerce. These actions will provide the greatest possible harmonization with international requirements without posing an undue increased cost burden on industry. For these reasons, alternative 3 is our recommended alternative.

3. Analysis of Environmental Impacts

Hazardous materials are transported by aircraft, vessel, rail, and highway. The potential for environmental damage or contamination exists when packages of hazardous materials are involved in accidents or en route incidents resulting from cargo shifts, valve failures, package failures, or loading, unloading, or handling problems. The ecosystems that could be affected by a release include air, water, soil, and ecological resources (for example, wildlife habitats). The adverse environmental impacts associated with releases of most hazardous materials are short-term impacts that can be greatly reduced or eliminated through prompt clean-up of the accident scene. Most hazardous materials are not transported in quantities sufficient to cause significant, long-term environmental damage if they are released.

The hazardous material regulatory system is a risk-management system that is prevention-oriented and focused on identifying hazards and reducing the probability and quantity of a hazardous material release. Amending the Hazardous Materials Regulations to maintain alignment with international standards enhances the safe transportation of hazardous materials in domestic and international commerce. When considering the adoption of international standards under the HMR, we review and consider each amendment on its own merit and assess their impact on transportation safety and the environment.

Alternative 1 would maintain the current marine pollutant classification system without change. We do not believe this would result in any significant impacts on the environment. Alternative 2 may result in a significant environmental impact if a material listed in the current marine pollutant list does not meet the GHS criteria. The recommended alternative 3 maintains the marine pollutant criteria and allows the voluntary use of the GHS criteria adopted by the IMDG Code. When a material meets the criteria under the GHS criteria but not the HMR, the material may still be transported under the applicable requirements for a marine pollutant. This would communicate the presence of an environmentally hazardous material consistent with the IMDG Code. Conversely, if a listed marine pollutant does not meet the GHS criteria, the material must be transported as a marine pollutant under the HMR unless approved by the Associate Administrator. The recommended alternative 3 would not result in any significant impact on the environment.

4. Consultations and Public Comment

On June 22, 2005, November 16, 2005, June 21, 2006, and November 29, 2006, PHMSA hosted public meetings with public and private stakeholders to discuss draft U.S. positions on the United Nation's Sub-Committee of Experts on the Transport of Dangerous Goods proposals for the Fifteenth revised edition of the UN Recommendations on the Transport of Dangerous Goods Model Regulations. In addition, PHMSA and the U.S. Coast Guard hosted a public meeting on August 29, 2006, and hosted a second meeting on September 6, 2007, to discuss amendments to the IMDG Code. A public meeting was held in October 2007 to discuss amendments to the ICAO TI. During these public meetings, U.S. positions on proposed amendments to the UN Recommendations were considered and discussed. Positions were established based on input received during these meetings in conjunction with internal review, including thorough technical review.

We have identified a number of immediate and long-term actions that participants in the international community are taking or will take to enhance the safe transportation of hazardous materials. Through this integrated and cooperative approach, we believe we can be most successful in reducing incidents, enhancing safety, and protecting the public.

J. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://www.dot.gov/privacy.html.*

K. International Trade Analysis

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 any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude 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. PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we have assessed the effects of the final rule to ensure that it does not exclude imports that meet this objective. Accordingly, this rulemaking is consistent with PHMSA's obligations under the Trade Agreement Act, as amended.

List of Subjects

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

49 CFR Part 172

Education, Hazardous materials transportation, Hazardous waste, Incorporation by reference, Labeling, Markings, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Incorporation by reference, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 175

Air carriers, Hazardous materials transportation, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 176

Hazardous materials transportation, Incorporation by reference, Maritime carriers, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 178

Hazardous materials transportation, Incorporation by reference, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, 49 CFR Chapter I is amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

■ 1. The authority citation for part 171 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.45 and 1.53; Public Law 101–410 section 4 (28 U.S.C. 2461 note); Public Law 104–134 section 31001.

■ 2. In § 171.7, in the paragraph (a)(3) table, the following changes are made:

■ a. Under the entry ''International Civil Aviation Organization (ICAO),'' the organization's mailing address and the entry ''Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions), 2007–2008 Edition'' are revised;

■ b. Under the entry ''International Maritime Organization (IMO)'' the organization's mailing address and the entries ''International Convention for the Safety of Life at Sea (SOLAS) Amendments 2000, Chapter II–2, Regulation 19, 2001,'' and ''International Maritime Dangerous Goods Code (IMDG Code), 2006 Edition, Incorporating Amendment 33–06 (English Edition), Volumes 1 and 2'' are revised;

■ c. Under the entry ''International Organization for Standardization,'' the organization's mailing address is revised and the entries ''ISO 10156:1996, Gases and Gas Mixtures—Determination of fire potential and oxidizing ability for the selection of cylinder valve outlets, Second edition, May 2005 (E)'' and ''ISO 10156–2:2005, Gas cylinders—Gases and gas mixtures—Part 2: Determination of oxidizing ability of toxic and corrosive gases and gas mixtures, First edition, August 2005, (E)'' are added in appropriate numerical order;

■ d. Revise the entry ''Transport Canada''; and

■ e. Under the entry ''United Nations,'' the organization's mailing address and the entry ''UN Recommendations on the Transport of Dangerous Goods, Fourteenth revised edition (2005), Volumes I and II'' are revised.

The additions and revisions read as follows:

§ 171.7 Reference material

(a) * * *

(3) *Table of material incorporated by reference.* * * *

Source and name of material	49 CFR reference
* * * *	* * *
International Civil Aviation Organization (''ICAO''), P.O. Box 400, Place de l'Aviation International, 1000 Sherbrooke Street West, Montreal, Quebec, Canada H3A 2R2, 1–514–954–8219, *http://www.icao.int*: ICAO Technical Instructions available from: INTEREG, International Regulations, Publishing and Distribution Organization, P.O. Box 60105, Chicago, IL 60660.	
* * * *	* * *
Technical Instructions for the Safe Transport of Dangerous Goods by Air (''ICAO Technical Instructions''), 2009–2010 Edition.	171.8; 171.22; 171.23; 171.24; 172.202; 172.401; 172.512; 172.602; 173.56; 173.320; 175.33; 178.3.
* * * *	* * *
International Maritime Organization (''IMO''), 4 Albert Embankment, London, SE1 7SR, United Kingdom or New York Nautical Instrument & Service Corporation, 140 West Broadway, New York, NY 10013, +44 (0) 20 7735 7611, *http://www.imo.org*: International Convention for the Safety of Life at Sea, (''SOLAS'') 176.63, 176.84. Amendments 2002, Chapter II–2/Regulation 19, Consolidated Edition 2004.	
International Maritime Dangerous Goods Code (''IMDG Code''), 2008 Edition, Incorporating Amendment 34–08 (English Edition), Volumes 1 and 2.	171.22; 171.23; 171.25; 172.101 Appendix B; 172.202; 172.401; 172.502; 172.602; 173.21; 173.56; 176.2; 176.5; 176.11; 176.27; 176.30; 176.84; 178.3; 178.274.
International Organization for Standardization, Case Postale 56, CH–1211, Geneve 20, Switzerland, +41 22 749 01 11, *http://www.iso.org*; Also available from: ANSI 25, West 43rd Street, New York, NY 10036, 1–212–642–4900, *http://www.ansi.org*.	
* * * *	* * *
ISO 10156:1996, Gases and Gas Mixtures—Determination of fire potential and oxidizing ability for the selection of cylinder valve outlets, Second edition, February 1996 (E).	173.115.
ISO 10156–2:2005, Gas cylinders—Gases and gas mixtures—Part 2: Determination of oxidizing ability of toxic and corrosive gases and gas mixtures, First edition, August 2005, (E).	173.115.
* * * *	* * *
Transport Canada, TDG Canadian Government Publishing Center, Supply and Services, Canada, Ottawa, Ontario, Canada K1A 059, 416–973–1868, *http://www.tc.gc.ca*: Transportation of Dangerous Goods Regulations (Transport Canada TDG Regulations), August 2001 including Clear Language Amendments SOR 2001–286, Amendment 1 (SOR/2002–306) August 8, 2002; Amendment 2 (SOR/2003–273) July 24, 2003; Amendment 3 (SOR/2003–400) December 3, 2003; Amendment 4 (SOR/2005–216) July 13, 2005; Amendment 5 (SOR/2005–279) September 21, 2005; and subsection 4.18(5) of Amendment 6 (SOR/2008–34) February 7, 2008.	171.12; 171.22; 171.23; 172.401; 172.502; 172.519; 172.602; 173.31; 173.32; 173.33.

Source and name of material	49 CFR reference
* * * * * * *	
United Nations, Publications, 2 United Nations Plaza, Room DC2–853, New York, NY 10017, 1–212–963–8302, *http://unp.un.org*.	
UN Recommendations on the Transport of Dangerous Goods, Fifteenth revised edition (2007). Volumes I and II.	171.8; 171.12; 171.22; 171.23; 172.202; 172.401; 172.502; 173.22; 173.24; 173.24b; 173.40; 173.56; 173.192; 173.197; 173.302b; 173.304b; 178.75; 178.274; 178.801.
* * * * * * *	

■ 3. Section 171.8, the definitions for ''Fuel cell cartridge'' or ''Fuel cartridge'' is revised to read as follows:

Section 171.8 Definitions and abbreviations.

* * * * *

Fuel cell cartridge or fuel cartridge means an article that stores fuel for discharge into the fuel cell through a valve(s) that controls the discharge of fuel into the fuel cell.

* * * * *

■ 4. In § 171.14, revise paragraph (h) is to read as follows:

§ 171.14 Transitional provisions for implementing certain requirements.

* * * * *

(h) The proper shipping name ''Gasohol *gasoline mixed with ethyl alcohol, with not more than 20 percent alcohol*'' in effect on January 28, 2008, may continue to be used until October 1, 2010. Effective October 1, 2010, the new proper shipping name ''Ethanol and gasoline mixture *or* ethanol and motor spirit mixture or ethanol and petrol mixture,'' and the revised proper shipping name ''Gasohol *gasoline mixed with ethyl alcohol, with not more than 10% alcohol*'' must be used, as appropriate.

■ 5. In § 171.15, paragraphs (b)(4) and (b)(5) are revised and a new paragraph (b)(6) is added to read as follows:

§ 171.15 Immediate notice of certain hazardous materials incidents.

* * * * *

(b) * * *

(4) A release of a marine pollutant occurs in a quantity exceeding 450 L (119 gallons) for a liquid or 400 kg (882 pounds) for a solid;

(5) A situation exists of such a nature (*e.g.*, a continuing danger to life exists at the scene of the incident) that, in the judgment of the person in possession of the hazardous material, it should be reported to the NRC even though it does not meet the criteria of paragraphs (b)(1), (2), (3) or (4) of this section; or

(6) During transportation by aircraft, a fire, violent rupture, explosion or dangerous evolution of heat (*i.e.*, an amount of heat sufficient to be dangerous to packaging or personal safety to include charring of packaging, melting of packaging, scorching of packaging, or other evidence) occurs as a direct result of a battery or battery-powered device.

* * * * *

■ 6. In § 171.16, paragraph (a)(3) and (a)(4) are revised and a new paragraph (a)(5) is added to read as follows:

§ 171.16 Detailed hazardous materials incident reports.

(a) * * *

(3) A specification cargo tank with a capacity of 1,000 gallons or greater containing any hazardous material suffers structural damage to the lading retention system or damage that requires repair to a system intended to protect the lading retention system, even if there is no release of hazardous material;

(4) An undeclared hazardous material is discovered; or

(5) A fire, violent rupture, explosion or dangerous evolution of heat (*i.e.*, an amount of heat sufficient to be dangerous to packaging or personal safety to include charring of packaging, melting of packaging, scorching of packaging, or other evidence) occurs as a direct result of a battery or battery-powered device.

* * * * *

■ 7. In § 171.25, paragraphs (c)(5) and (d)(3) are added to read as follows:

§ 171.25 Additional requirements for the use of the IMDG Code.

* * * * *

(c) * * *

(5) Effective February 13, 2009, portable tanks, cargo tanks, and tank cars containing cryogenic liquids must be stowed ''on deck'' regardless of the stowage authorized in the IMDG Code. Cargo tanks or tank cars containing cryogenic liquids may be stowed one deck below the weather deck when transported on a trailership or trainship that is unable to provide ''on deck'' stowage because of the vessel's design. Tank cars must be Class DOT–113 or AAR–204W tank cars. Portable tanks, cargo tanks, and tank cars containing cryogenic liquids that are in transportation and stowed below deck on or before February 13, 2009 may continue to be transported to their final destination.

(d) * * *

(3) Notwithstanding § 171.25(d)(1), except for portable tanks, cargo tanks, and tank cars transporting cryogenic liquids before February 13, 2009. Effective February 13, 2009, portable tanks, cargo tanks, and tank cars containing cryogenic liquids, which are transported by a vessel passing through the United States in the course of being shipped between locations outside of the United States must be stowed ''on deck'' regardless of the stowage authorized in the IMDG Code. Cargo tanks or tank cars containing cryogenic liquids may be stowed one deck below the weather deck when transported on a trailership or trainship that is unable to provide ''on deck'' stowage because of the vessel's design. Tank cars must be Class DOT–113 or AAR–204W tank cars. Portable tanks, cargo tanks, and tank cars containing cryogenic liquids that are in transportation and stowed below deck on or before February 13, 2009, may continue to be transported to their final destination.

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, TRAINING REQUIREMENTS, AND SECURITY PLANS

■ 8. The authority citation for part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 44701; 49 CFR 1.53.

■ 9. In § 172.101, in the Hazardous Materials Table, in Column (7), remove ''TP12'' each place it appears.

■ 10. In § 172.101, the Hazardous Materials Table is amended by removing, adding and revising entries, in the appropriate alphabetical sequence, to read as follows:

§ 172.101—HAZARDOUS MATERIALS TABLE

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification No.	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	[Remove].												
	*		*	*		*	*		*	*			
G	Amine, flammable, corrosive, n.o.s. *or* Polyamines, flammable, corrosive, n.o.s.	3	UN2733	I	3, 8	T14, TP1, TP27	None	201	243	0.5 L	2.5 L	D	40, 52
	Amine, liquid, corrosive, flammable n.o.s. *or* Polyamines, liquid corrosive, flammable n.o.s.	8	UN2734	I	8, 3	A3, A6, N34, T14, TP2, TP27.	None	201	243	0.5 L	2.5 L	A	52
				II	3, 8	IB2, T11, TP1, TP27.	150	202	243	1 L	5 L	B	40, 52
				III	3, 8	B1, IB3, T7, TP1, TP28.	150	203	242	5 L	60 L	A	40, 52
				II	8, 3	IB2, T11, TP2, TP27.	None	202	243	1 L	30 L	A	52
	*		*	*		*	*		*	*			
	Aluminum alkyl halides, liquid	4.2	UN3052	I	4.2, 4.3	173, B9, B11, T21, TP2, TP7.	None	181	244	Forbidden	Forbidden	D	134
	Aluminum alkyl halides, solid	4.2	UN3461	I	4.2, 4.3	173, T21, TP7, TP33.	None	181	244	Forbidden	Forbidden	D	134
	Aluminum alkyl hydrides	4.2	UN3076	I	4.2, 4.3	173, B9, B11, T21, TP2, TP7.	None	181	244	Forbidden	Forbidden	D.	
	Aluminum alkyls	4.2	UN3051	I	4.2, 4.3	173, B9, B11, T21, TP2, TP7.	None	181	244	Forbidden	Forbidden	D.	
	*		*	*		*	*		*	*			
	Batteries, dry, *not subject to the requirements of this subchapter.*					130.							
	*		*	*		*	*		*	*			
	Cartridges, sporting, see Cartridges for weapons, inert projectile, *or* Cartridges, small arms.												
	*		*	*		*	*		*	*			
+	Chloronitrobenzene, liquid *ortho*	6.1	UN3409	II	6.1	IB2, T7, TP2	153	202	243	5 L	60 L	A.	
+	Chloronitrobenzenes, solid *meta or para.*	6.1	UN1578	II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	A.	
	*		*	*		*	*		*	*			
	Chlorosilanes, toxic, corrosive, n.o.s.	6.1	UN3361	II	6.1, 8	IB1, T11, TP2, TP13.	None	202	243	1 L	30 L	C	40
	Chlorosilanes, toxic, corrosive, flammable, n.o.s.	6.1	UN3362	II	6.1, 3, 8.	IB1, T11, TP2, TP13.	None	202	243	1 L	30 L	C	40, 125
	*		*	*		*	*		*	*			
G	Corrosive, liquid, acidic, inorganic, n.o.s.	8	UN 3264	I	8	A6, B10, T14, TP2, TP27.	None	201	243	0.5 L	2.5 L	B	40
				II	8	B2, IB2, T11, TP2, TP27.	154	202	242	1 L	30 L	B	40
				III	8	IB3, T7, TP1, TP28.	154	203	241	5 L	60 L	A	40

	*		*		*	*	*		*		*		
G	Dyes, liquid, corrosive, n.o.s. or Dye intermediates, liquid, corrosive, n.o.s.	8	UN 2801	I	8	11, A6, B10, T14, TP2, TP27.	None	201	243	0.5 L	2.5 L	A.	
				II	8	11, B2, IB2, T11, TP2, TP27.	154	202	242	1 L	30 L	A.	
				III	8	11, IB3, T7, TP1, TP28.	154	203	241	5 L	60 L	A.	
	*		*		*	*	*		*		*		
	Diethylzinc	4.2	UN1366	I	4.2, 4.3	173, B11, T21, TP2, TP7.	None	181	244	Forbidden	Forbidden	D	18
	*		*		*	*	*		*		*		
	Dimethylzinc	4.2	UN1370	I	4.2, 4.3	173, B11, B16, T21, TP2, TP7.	None	181	244	Forbidden	Forbidden	D	18
	*		*		*	*	*		*		*		
	Fuel cell cartridges *containing flammable liquids*.	3	UN3473	II	3		150	230	None	5 L	60 L	A.	
	*		*		*	*	*		*		*		
	Hydrogen in a metal hydride storage system.	2.1	UN3468		2.1	167	None	214	None	Forbidden	100 kg gross	D.	
	*		*		*	*	*		*		*		
	Hypochlorite solutions	8	UN1791	II	8	A7, B2, B15, IB2, IP5, N34, T7, TP2, TP24.	154	202	242	1 L	30 L	B	26
	*		*		*	*	*		*		*		
	Lithium alkyls, liquid	4.2	UN2445	I	4.2, 4.3	173, B11, T21, TP2, TP7.	None	181	244	Forbidden	Forbidden	D.	
	Lithium alkyls, solid	4.2	UN3433	I	4.2, 4.3	173, B11, T21, TP7, TP33.	None	181	244	Forbidden	Forbidden	D.	
	*		*		*	*	*		*		*		
	Magnesium alkyls	4.2	UN3053	I	4.2, 4.3	B11, T21, TP2, TP7.	None	181	244	Forbidden	Forbidden	D	18
	*		*		*	*	*		*		*		
	Magnesium diphenyl	4.2	UN2005	I	4.2	173, T21, TP7, TP33.	None	187	244	Forbidden	Forbidden	C.	
	*		*		*	*	*		*		*		
	Nitric acid *other than red fuming, with not more than 70 percent nitric acid*.	8	UN2031	II	8	A6, B2, B47, B53, IB2, T8, TP2, TP12.	None	158	242	Forbidden	30 L	D	44, 66, 89, 90, 110, 111
	*		*		*	*	*		*		*		
	2,5-Norbornadiene, stabilized, see Bicyclo 2,2,1 hepta-2,5-diene, stabilized.												
	*		*		*	*	*		*		*		
	Pentaerythrite tetranitrate mixture, desensitized, solid, n.o.s. *with more than 10 percent but not more than 20 percent PETN, by mass*.	4.1	UN3344	II	4.1	118, N85	None	214	None	Forbidden	Forbidden	E.	

§ 172.101—HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification No.	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	* * * * * * *												
	Receptacles, small, containing agas (gas cartridges) *non-flammable, without release device, not refillable and not exceeding 1 L capacity.*	2.2	UN2037		2.2, 5.1	A14	306	304	None	1 kg	15 kg	B	40
	Receptacles, small, containing gas (gas cartridges) *flammable, without release device, not refillable and not exceeding 1 L capacity.*	2.1	UN2037		2.1		306	304	None	1 kg	15 kg	B	40
	Receptacles, small, containing gas (gas cartridges) *non-flammable, without release device, not refillable and not exceeding 1 L capacity.*	2.2	UN 2037		2.2		306	304	None	1 kg	15 kg	B	40
	* * * * * * *												
	Regulated medical waste, n.o.s. or Clinical waste, unspecified, n.o.s. *or* (BIO) Medical waste, n.o.s.	6.2	UN 3291	II	6.2	A13	134	197	197	No limit	No limit	B	40
	* * * * * * *												
G	Self-heating, solid, corrosive, organic, n.o.s.	4.2	UN 3126	II	4.2, 8	IB5, IP2, T3, TP33.	None	212	242	15 kg	50 kg	C.	
				III	4.2, 8	IB8, IP3, T1, TP33.	None	213	242	25 kg	100 kg	C.	
	* * * * * * *												
G	Self-heating, solid, organic, n.o.s	4.2	UN 3088	II	4.2	IB6, IP2, T3, TP33.	None	212	241	15 kg	50 kg	C.	
				III	4.2	IB8, IP3, T1, TP33.	None	213	241	25 kg	100 kg	C.	
G	Self-heating, solid, oxidizing, n.o.s	4.2	UN 3127		4.2, 5.1		None	214	214	Forbidden	Forbidden.		
	* * * * * * *												
G	Self-heating, solid, toxic, organic, n.o.s.	4.2	UN 3128	II	4.2, 6.1	IB5, IP2, T3, TP33.	None	212	242	15 kg	50 kg	C.	
				III	4.2, 6.1	IB8, IP3, T1, TP33.	None	213	242	25 kg	100 kg	C.	
	* * * * * * *												
	Trinitrophenol, wetted *with not less than 30 percent water, by mass.*	4.1	UN1344	I	4.1	23, A8, A19, N41	None	211	None	1 kg	15 kg	E	28, 36
	* * * * * * *												
	Trinitrotoluene, wetted *with not less than 30 percent water, by mass.*	4.1	UN1356	I	4.1	23, A2, A8, A19, N41.	None	211	None	0.5 kg	0.5 kg	E	28
	* * * * * * *												
	Xenon	2.2	UN2036	2.2			306	302	None	75 kg	150 kg	A.	

	*		*		*	*	*		*	*			
	[Add].												
	*		*		*	*	*		*	*			
G	Amine, flammable, corrosive, n.o.s. or Polyamines, flammable, corrosive, n.o.s.	3	UN2733	I	3, 8	T14, TP1, TP27	None	201	243	0.5 L	2.5 L	D	40, 52
				II	3, 8	IB2, T11, TP1, TP27.	150	202	243	1 L	5 L	B	40, 52
				III	3, 8	B1, IB3, T7, TP1, TP28.	150	203	242	5 L	60 L	A	40, 52
G	Amine, liquid, corrosive, flammable, n.o.s. *or* Polyamines, liquid, corrosive, flammable, n.o.s.	8	UN2734	I	8, 3	A3, A6, N34, T14, TP2, TP27.	None	201	243	0.5 L	2.5 L	A	52
				II	8, 3	IB2, T11, TP2, TP27.	None	202	243	1 L	30 L	A	52
	*		*		*	*	*		*	*			
	Batteries, dry, sealed, n.o.s.					130.							
	*		*		*	*	*		*	*			
	Cartridges, sporting, see Cartridges for weapons, inert projectile, *or* Cartridges, small arms.												
	*		*		*	*	*		*	*			
+	Chloronitrobenzenes, liquid	6.1	UN3409	II	6.1	IB2, T7, TP2	153	202	243	5 L	60 L	A.	
+	Chloronitrobenzenes, solid	6.1	UN1578	II	6.1	IB8, IP2, IP4, T3, TP33.	153	212	242	25 kg	100 kg	A.	
	*		*		*	*	*		*	*			
	Chlorosilanes, corrosive, flammable, n.o.s.	8	UN2986	II	8, 3	T14, TP2, TP7, TP13, TP27.	None	206	243	1 L	30 L	C	40
	*		*		*	*	*		*	*			
	Chlorosilanes, toxic, corrosive, flammable, n.o.s.	6.1	UN3362	II	6.1, 3, 8.	T14, TP2, TP7, TP13, TP27.	None	206	243	1 L	30 L	C	40, 125
	Chlorosilanes, toxic, corrosive, n.o.s.	6.1	UN3361	II	6.1, 8	T14, TP2, TP7, TP13, TP27.	None	206	243	1 L	30 L	C	40
	*		*		*	*	*		*	*			
G	Corrosive liquid, acidic, inorganic, n.o.s.	8	UN 3264	I	8	A6, B10, T14, TP2, TP27.	None	201	243	0.5 L	2.5 L	B	40
				II	8	B2, IB2, T11, TP2, TP27.	154	202	242	1 L	30 L	B	40
				III	8	IB3, T7, TP1, TP28.	154	203	241	5 L	60 L	A	40
	*		*		*	*	*		*	*			
G	Dyes, liquid, corrosive, n.o.s. *or* Dye intermediates, liquid, corrosive, n.o.s.	8	UN 2801	I	8	11, A6, B10, T14, TP2, TP27.	None	201	243	0.5 L	2.5 L	A.	
				II	8	11, B2, IB2, T11, TP2, TP27.	154	202	242	1 L	30 L	A.	
				III	8	11, IB3, T7, TP1, TP28.	154	203	241	5 L	60 L	A.	
	*		*		*	*	*		*	*			
	Fuel cell cartridges *or* Fuel cell cartridges contained in equipment *or* Fuel cell cartridges packed with equipment, *containing corrosive substances*.	8	UN3477		8		230	230	230	5 kg	50 kg	A.	

§ 172.101—HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification No.	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	Fuel cell cartridges *or* Fuel cell cartridges contained in equipment *or* Fuel cell cartridges packed with equipment, *containing flammable liquids*.	3	UN3473		3		230	230	230	5 kg	50 kg	A.	
	Fuel cell cartridges *or* Fuel cell cartridges contained in equipment *or* Fuel cell cartridges packed with equipment, *containing hydrogen in metal hydride*.	2.1	UN3479		2.1		230	230	230	1 kg	15 kg	B.	
	Fuel cell cartridges *or* Fuel cell cartridges contained in equipment *or* Fuel cell cartridges packed with equipment, *containing liquefied flammable gas*.	2.1	UN3478		2.1		230	230	230	1 kg	15 kg	B.	
	Fuel cell cartridges *or* Fuel cell cartridges contained in equipment *or* Fuel cell cartridges packed with equipment, *containing water-reactive substances*.	4.3	UN3476		4.3		230	230	230	5 kg	50 kg	A.	
	*	*	*			*	*	*		*			
	Hydrogen in a metal hydride storage system *or* Hydrogen in a metal hydride storage system contained in equipment *or* Hydrogen in a metal hydride storage system packed with equipment.	2.1	UN3468		2.1	167	None	214	None	Forbidden	100 kg gross	D.	
	*	*	*			*	*	*		*			
	1-Hydroxybenzotriazole, anhydrous, *dry or wetted with less than 20 percent water, by mass*.	1.3C	UN0508		1.3C		None	62	None	Forbidden	Forbidden	10.	
	1-Hydroxybenzotriazole, anhydrous, wetted *with not less than 20 percent water, by mass*.	4.1	UN3474	I	4.1	162, N90	None	211	None	0.5 kg	0.5 kg	D	28, 36
	*	*	*			*	*	*		*			
	Hypochlorite solutions	8	UN1791	II	8	A7, B2, B15, IB2, IP5, N34, T7, TP2, TP24.	154	202	242	1 L	30 L	B	26
				III	8	IB3, N34, T4, TP2, TP24.	154	203	241	5 L	60 L	B	26
	*	*	*			*	*	*		*			
	Nitric acid *other than red fuming, with at least 65 percent, but not more than 70 percent nitric acid*.	8	UN2031	II	8, 5.1	A6, B2, B47, B53, IB2, IP15, T8, TP2.	None	158	242	Forbidden	30 L	D	66, 74, 89, 90
	Nitric acid, *other than red fuming, with less than 65 percent nitric acid*.	8	UN2031	II	8	A6, B2, B47, B53, IB2, IP15, T8, TP2.	None	158	242	Forbidden	30 L	D	44, 66, 74, 89, 90

	*	*	*		*		*		*				
	2,5-Norbornadiene, stabilized, see Bicyclo [2,2,1] hepta-2,5-diene, stabilized.												
	*	*	*		*		*		*				
	Pentaerythrite tetranitrate mixture, desensitized, solid, n.o.s. *or* Pentaerythritol tetranitrate mixture, desensitized, solid, n.o.s. *or* PETN mixture, desensitized, solid, n.o.s., *with more than 10 percent but not more than 20 percent PETN, by mass.*	4.1	UN3344	II	4.1	118, N85	None	214	None	Forbidden	Forbidden	E.	
	*	*	*		*		*		*				
D	Powder, smokeless	1.4C	UN0509		1.4C		None	62	None	Forbidden	Forbidden	06.	
	*	*	*		*		*		*				
	Receptacles, small, containing gas *or* gas cartridges *(flammable) without release device, not refillable and not exceeding 1 L capacity.*	2.1	UN 2037		2.1		306	304	None	1 kg	15 kg	B	40
	Receptacles, small, containing gas *or* gas cartridges *(non-flammable) without release device, not refillable and not exceeding 1 L capacity.*	2.2	UN 2037		2.2		306	304	None	1 kg	15 kg	B	40
	Receptacles, small, containing gas *or* gas cartridges *(oxidizing) without release device, not refillable and not exceeding 1 L capacity.*	2.2	UN 2037		2.2, 5.1	A14	306	304	None	1 kg	15 kg	B	40
	*	*	*		*		*		*				
	Regulated medical waste, n.o.s. *or* Clinical waste, unspecified, n.o.s. *or* (BIO)Medical waste, n.o.s., *or* Biomedical waste, n.o.s. *or* Medical waste, n.o.s.	6.2	UN 3291	II	6.2	A13	134	197	197	No limit	No limit	B	40
	*	*	*		*		*		*				
G	Self-heating solid, corrosive, organic, n.o.s.	4.2	UN 3126	II	4.2, 8	IB5, IP2, T3, TP33.	None	212	242	15 kg	50 kg	C.	
				III	4.2, 8	IB8, IP3, T1, TP33.	None	213	242	25 kg	100 kg	C.	
	*	*	*		*		*		*				
G	Self-heating solid, organic, n.o.s.	4.2	UN 3088	II	4.2	IB6, IP2, T3, TP33.	None	212	241	15 kg	50 kg	C.	
				III	4.2	IB8, IP3, T1, TP33.	None	213	241	25 kg	100 kg	C.	
G	Self-heating solid, oxidizing, n.o.s.	4.2	UN 3127		4.2, 5.1		None	214	214	Forbidden	Forbidden.		
	*	*	*		*		*		*				
G	Self-heating solid, toxic, organic, n.o.s.	4.2	UN 3128	II	4.2, 6.1	IB5, IP2, T3, TP33.	None	212	242	15 kg	50 kg	C.	
				III	4.2, 6.1	IB8, IP3, T1, TP33.	None	213	242	25 kg	100 kg	C.	
	*	*	*		*		*		*				
	Signals, distress, *ship*	1.4G	UN0505		1.4G		None	62	None	Forbidden	75 kg	06.	
	Signals, distress, *ship*	1.4S	UN0506		1.4S		None	62	None	25 kg	100 kg	05.	

§ 172.101—HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification No.	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	*		*		*	*	*		*	*			
	Signals, smoke	1.4S	UN0507		1.4S		None	62	None	25 kg	100 kg	05.	
	*		*		*	*	*		*	*			
	Trinitrophenol, wetted *or* Picric acid, wetted, *with not less than 30 percent water by mass.*	4.1	UN1344	I	4.1	23, A8, A19, N41	None	211	None	1 kg	15 kg	E	28, 36
	*		*		*	*	*		*	*			
	Trinitrotoluene, wetted *or* TNT, wetted, *with not less than 30 percent water by mass.*	4.1	UN1356	I	4.1	23, A2, A8, A19, N41.	None	211	None	0.5 kg	0.5 kg	E	28, 36
	*		*		*	*	*		*	*			
	Xenon, compressed	2.2	UN2036		2.2		306, 307	302	None	75 kg	150 kg	A.	
	*		*		*	*	*		*	*			
	[Revise].												
	*		*		*	*	*		*	*			
	Allyltrichlorosilane, stabilized	8	UN1724	II	8, 3	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	243	Forbidden	30 L	C	40
	*		*		*	*	*		*	*			
	Amyltrichlorosilane	8	UN1728	II	8	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
	*		*		*	*	*		*	*			
	Argon, compressed	2.2	UN1006		2.2		306, 307	302	314, 315	75 kg	150 kg	A.	
	*		*		*	*	*		*	*			
	Batteries, dry, containing potassium hydroxide solid, *electric, storage.*	8	UN3028	III	8	237	None	213	None	25 kg gross	230 kg gross	A	52
	Batteries, wet, filled with acid, *electric storage.*	8	UN2794	III	8		159	159	159	30 kg gross	No limit	A	146
	Batteries, wet, filled with alkali, *electric storage.*	8	UN2795	III	8		159	159	159	30 kg gross	No limit	A	52, 146
	Batteries, wet, non-spillable, *electric storage.*	8	UN2800	III	8		159a	159	159	No limit	No limit	A.	
	*		*		*	*	*		*	*			
	Boron trifluoride	2.3	UN1008		2.3, 8	2, B9, B14	None	302	314, 315	Forbidden	Forbidden	D	40
	*		*		*	*	*		*	*			
	Butyltrichlorosilane	8	UN1747	II	8, 3	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	243	Forbidden	30 L	C	40
	*		*		*	*	*		*	*			
	1,4-Butynediol	6.1	UN2716	III	6.1	A1, IB8, IP3, T1, TP33.	None	213	240	100 kg	200 kg	C	52, 53, 70

*		*		*		*		*		*		
Calcium manganese silicon	4.3	UN2844	III	4.3	A1, A19, IB8, IP4, T1, TP33.	151	213	241	25 kg	100 kg	A	52, 85, 103
*		*		*		*		*		*		
Chlorine	2.3	UN1017		2.3, 5.1, 8.	2, B9, B14, N86, T50, TP19.	None	304	314, 315	Forbidden	Forbidden	D	40, 51, 55, 62, 68, 89, 90
*		*		*		*		*		*		
Chloroacetic acid, solid	6.1	UN1751	II	6.1, 8	A3, A7, IB8, IP2, IP4, N34, T3, TP33.	153	212	242	15 kg	50 kg	C	40
*		*		*		*		*		*		
Chlorophenyltrichlorosilane	8	UN1753	II	8	A7, B2, B6, N34, T10, TP2, TP7.	None	206	242	Forbidden	30 L	C	40
*		*		*		*		*		*		
Chlorosilanes, corrosive, n.o.s.	8	UN2987	II	8	B2, T14, TP2, TP7, TP13, TP27.	None	206	242	1 L	30 L	C	40
Chlorosilanes, flammable, corrosive, n.o.s.	3	UN2985	II	3, 8	T14, TP2, TP7, TP13, TP27.	None	206	243	1 L	5 L	B	40
*		*		*		*		*		*		
Chlorosilanes, water-reactive, flammable, corrosive, n.o.s.	4.3	UN2988	I	4.3, 3, 8.	A2, T14, TP2, TP7, TP13.	None	201	244	Forbidden	1 L	D	21, 28, 40, 49, 100
*		*		*		*		*		*		
Chromium trioxide, anhydrous	5.1	UN1463	II	5.1, 6.1, 8.	IB8, IP2, IP4, T3, TP33.	None	212	242	5 kg	25 kg	A	66, 90
*		*		*		*		*		*		
Cyclohexenyltrichlorosilane	8	UN1762	II	8	A7, B2, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
*		*		*		*		*		*		
Cyclohexyltrichlorosilane	8	UN1763	II	8	A7, B2, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
*		*		*		*		*		*		
Dibenzyldichlorosilane	8	UN2434	II	8	B2, T10, TP2, TP7, TP13.	154	206	242	1 L	30 L	C	40
*		*		*		*		*		*		
Dichloroisocyanuric acid, dry *or* Dichloroisocyanuric acid salts.	5.1	UN2465	II	5.1	28, IB8, IP2, IP4, T3, TP33.	152	212	240	5 kg	25 kg	A	13
*		*		*		*		*		*		
Dichlorophenyltrichlorosilane	8	UN1766	II	8	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
*		*		*		*		*		*		
Diethyldichlorosilane	8	UN1767	II	8, 3	A7, B6, N34, T10, TP2, TP7, TP13.	None	206	243	Forbidden	30 L	C	40

§ 172.101—HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification No.	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	*	*	*	*	*	*	*						
	Dimethyldichlorosilane	3	UN1162	II	3, 8	B77, T10, TP2, TP7, TP13.	None	206	243	Forbidden	Forbidden	B	40
	*	*	*	*	*	*	*						
	Diphenyldichlorosilane	8	UN1769	II	8	A7, B2, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
	*	*	*	*	*	*	*						
	Dodecyltrichlorosilane	8	UN1771	II	8	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
	*	*	*	*	*	*	*						
G	Environmentally hazardous substance, liquid, n.o.s.	9	UN3082	III	9	8, 146, 335, IB3, T4, TP1, TP29.	155	203	241	No limit	No limit	A.	
G	Environmentally hazardous substance, solid, n.o.s.	9	UN3077	III	9	8, 146, 335, B54, IB8, IP3, N20, T1, TP33.	155	213	240	No limit	No limit	A.	
	*	*	*	*	*	*	*						
	Ethyldichlorosilane	4.3	UN1183	I	4.3, 8, 3.	A2, A3, A7, N34, T14, TP2, TP7, TP13.	None	201	244	Forbidden	1 L	D	21, 28, 40, 49, 100
	*	*	*	*	*	*	*						
	Ethylphenyldichlorosilane	8	UN2435	II	8	A7, B2, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C.	
	*	*	*	*	*	*	*						
	Ethyltrichlorosilane	3	UN1196	II	3, 8	A7, N34, T10, TP2, TP7, TP13.	None	206	243	1 L	5 L	B	40
	*	*	*	*	*	*	*						
D	Gasohol *gasoline mixed with ethyl alcohol, with not more than 10% alcohol.*	3	NA1203	II	3	144, 177	150	202	242	5 L	60 L	E.	
	Gasoline *includes gasoline mixed with ethyl alcohol, with not more than 10% alcohol.*	3	UN1203	II	3	144, 177, B1, B33, IB2, T8.	150	202	242	5 L	60 L	E.	
	*	*	*	*	*	*	*						
	Helium, compressed	2.2	UN1046		2.2		306, 307	302	302, 314	75 kg	150 kg	A.	
	*	*	*	*	*	*	*						
	Hexadecyltrichlorosilane	8	UN1781	II	8	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40

*		*		*	*	*		*	*			
Hexyltrichlorosilane	8	UN1784	II	8	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
*		*		*	*	*		*	*			
Hydrogen iodide, anhydrous	2.3	UN2197		2.3, 8	3, B14, N86, N89	None	304	314, 315	Forbidden	Forbidden	D	40
*		*		*	*	*		*	*			
Krypton, compressed	2.2	UN1056		2.2		306, 307	302	None	75 kg	150 kg	A.	
*		*		*	*	*		*	*			
Magnesium bromate	5.1	UN1473	II	5.1	A1, IB8, IP2, IP4, T3, TP33.	152	212	242	5 kg	25 kg	A	56, 58
*		*		*	*	*		*	*			
Magnesium nitrate	5.1	UN1474	III	5.1	332, A1, IB8, IP3, T1, TP33.	152	213	240	25 kg	100 kg	A.	
*		*		*	*	*		*	*			
Medicine, liquid, flammable, toxic, n.o.s..	3	UN3248	II	3, 6.1	IB2	150	202	None	1 L	5 L	B	40
			III	3, 6.1	IB3	150	203	None	5 L	5 L	A.	
Medicine, liquid, toxic, n.o.s.	6.1	UN1851	II	6.1		153	202	243	5 L	5 L	C	40
			III	6.1		153	203	241	5 L	5 L	C	40
Medicine, solid, toxic, n.o.s.	6.1	UN3249	II	6.1	T3, TP33	153	212	None	5 kg	5 kg	C	40
			III	6.1	T1, TP33	153	213	None	5 kg	5 kg	C	40
*		*		*	*	*		*	*			
Methyl Chloromethyl Ether	6.1	UN1239	I	6.1, 3	1, B9, B14, B30, B72, T22, TP2, TP13, TP38, TP44.	None	226	244	Forbidden	Forbidden	D	40
*		*		*	*	*		*	*			
Methyldichlorosilane	4.3	UN1242	I	4.3, 8, 3.	A2, A3, A7, B6, B77, N34, T14, TP2, TP7, TP13.	None	201	243	Forbidden	1 L	D	21, 28, 40, 49, 100
*		*		*	*	*		*	*			
Methylphenyldichlorosilane	8	UN2437	II	8	T10, TP2, TP7, TP13.	None	206	242	1 L	30 L	C	40
*		*		*	*	*		*	*			
Methyltrichlorosilane	3	UN1250	II	3, 8	A7, B6, B77, N34, T10, TP2, TP7, TP13.	None	206	243	1 L	5 L	B	40
*		*		*	*	*		*	*			
Neon, compressed	2.2	UN1065		2.2		306, 307	302	None	75 kg	150 kg	A.	
*		*		*	*	*		*	*			
Nitrites, inorganic, n.o.s.	5.1	UN2627	II	5.1	33, IB8, IP2, IP4, T3, TP33.	152	212	None	5 kg	25 kg	A	46, 56, 58, 133
*		*		*	*	*		*	*			
Nitrocellulose, *with not more than 12.6 percent, by dry mass* mixture with *or* without plasticizer, with *or* without pigment.	4.1	UN2557	II	4.1	44	151	212	None	1 kg	15 kg	D	28, 36

§ 172.101—HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification No.	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	*		*	*		*	*		*	*			
	Nitrocellulose, solution, flammable *with not more than 12.6 percent nitrogen, by mass, and not more than 55 percent nitrocellulose*.	3	UN2059	I	3	198, T11, TP1, TP8, TP27.	None	201	243	1 L	30 L	E.	
				II	3	198, IB2, T4, TP1, TP8.	150	202	242	5 L	60 L	B.	
				III	3	198, B1, IB3, T2, TP1.	150	203	242	60 L	220 L	A.	
	*		*	*		*	*		*	*			
	Nitrocellulose with alcohol *with not less than 25 percent alcohol by mass, and with not more than 12.6 percent nitrogen, by dry mass*.	4.1	UN2556	II	4.1		151	212	None	1 kg	15 kg	D	28, 36
	Nitrocellulose with water *with not less than 25 percent water by mass*.	4.1	UN2555	II	4.1		151	212	None	15 kg	50 kg	E	28, 36
	*		*	*		*	*		*	*			
	Nitroguanidine, wetted *or* Picrite, wetted *with not less than 20 percent water, by mass*.	4.1	UN1336	I	4.1	23, A8, A19, A20, N41.	None	211	None	1 kg	15 kg	E	28, 36
	*		*	*		*	*		*	*			
	4-Nitrophenylhydrazine, *with not less than 30 percent water, by mass*.	4.1	UN3376	I	4.1	162, A8, A19, A20, N41.	None	211	None	Forbidden	15 kg	E	28, 36
	*		*	*		*	*		*	*			
	Nitrostarch, wetted *with not less than 20 percent water, by mass*.	4.1	UN1337	I	4.1	23, A8, A19, A20, N41.	None	211	None	1 kg	15 kg	D	28, 36
	*		*	*		*	*		*	*			
	Nonyltrichlorosilane	8	UN1799	II	8	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
	*		*	*		*	*		*	*			
	Octadecyltrichlorosilane	8	UN1800	II	8	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
	*		*	*		*	*		*	*			
	Octyltrichlorosilane	8	UN1801	II	8	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
	*		*	*		*	*		*	*			
G	Organometallic substance, liquid, water-reactive, flammable.	4.3	UN3399	I	4.3, 3	T13, TP2, TP7	None	201	244	Forbidden	1 L	D	40, 52
				II	4.3, 3	IB1, IP2, T7, TP2, TP7.	None	202	243	1 L	5 L	D	40, 52
				III	4.3, 3	IB2, IP4, T7, TP2, TP7.	None	203	242	5 L	60 L	E	40, 52

	*		*	*		*	*		*		*		
G	Organometallic substance, solid, water-reactive.	4.3	UN3395	I	4.3	N40, T9, TP7, TP33.	None	211	242	Forbidden	Forbidden	E	40, 52
	*		*	*		*	*		*		*		
G	Oxidizing liquid, corrosive, n.o.s.	5.1	UN3098	I	5.1, 8	62, A6	None	201	244	Forbidden	2.5 L	D	13, 56, 58, 106, 138
				II	5.1, 8	62, IB1	None	202	243	1 L	5 L	B	13, 34, 56, 58, 106, 138
				III	5.1, 8	62, IB2	152	203	242	2.5 L	30 L	B	13, 34, 56, 58, 106, 138
G	Oxidizing liquid, n.o.s.	5.1	UN3139	I	5.1	62, 127, A2, A6	None	201	243	Forbidden	2.5 L	D	56, 58, 106, 138
				II	5.1	62, 127, A2, IB2	152	202	242	1 L	5 L	B	56, 58, 106, 138
				III	5.1	62, 127, A2, IB2	152	203	241	2.5 L	30 L	B	56, 58, 106, 138
G	Oxidizing liquid, toxic, n.o.s.	5.1	UN3099	I	5.1, 6.1	62, A6	None	201	244	Forbidden	2.5 L	D	56, 58, 106, 138
				II	5.1, 6.1	62, IB1	152	202	243	1 L	5 L	B	56, 58, 95, 106, 138
				III	5.1, 6.1	62, IB2	152	203	242	2.5 L	30 L	B	56, 58, 95, 106, 138
G	Oxidizing solid, corrosive, n.o.s.	5.1	UN3085	I	5.1, 8	62	None	211	242	1 kg	15 kg	D	13, 56, 58, 106, 138
				II	5.1, 8	62, IB6, IP2, T3, TP33.	None	212	242	5 kg	25 kg	B	13, 34, 56, 58, 106, 138
				III	5.1, 8	62, IB8, IP3, T1, TP33.	152	213	240	25 kg	100 kg	B	13, 34, 56, 58, 106, 138
G	Oxidizing solid, flammable, n.o.s.	5.1	UN3137	I	5.1, 4.1	62	None	214	214	Forbidden	Forbidden.		
G	Oxidizing solid, n.o.s.	5.1	UN1479	I	5.1	62, IB5, IP1	None	211	242	1 kg	15 kg	D	56, 58, 106, 138
				II	5.1	62, IB8, IP2, IP4, T3, TP33.	152	212	240	5 kg	25 kg	B	56, 58, 106, 138
				III	5.1	62, IB8, IP3, T1, TP33.	152	213	240	25 kg	100 kg	B	56, 58, 106, 138
G	Oxidizing solid, self-heating, n.o.s.	5.1	UN3100	I	5.1, 4.2	62	None	214	214	Forbidden	Forbidden.		

§ 172.101—HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification No.	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
				II	5.1, 4.2	62	None	214	214	Forbidden	Forbidden.		
G	Oxidizing solid, toxic, n.o.s.	5.1	UN3087	I	5.1, 6.1	62	None	211	242	1 kg	15 kg	D	56, 58, 106, 138
				II	5.1, 6.1	62, IB6, IP2, T3, TP33.	152	212	242	5 kg	25 kg	B	56, 58, 95, 106, 138
				III	5.1, 6.1	62, IB8, IP3, T1, TP33.	152	213	240	25 kg	100 kg	B	56, 58, 95, 106, 138
G	Oxidizing solid, water-reactive, n.o.s..	5.1	UN3121		5.1, 4.3	62	None	214	214	Forbidden	Forbidden.		
	*		*	*		*	*		*	*			
	Paint or Paint related material	8	UN3066	II	8	B2, IB2, T7, TP2, TP28.	154	173	242	1 L	30 L	A	40
				III	8	B52, IB3, T4, TP1, TP29.	154	173	241	5 L	60 L	A	40
	*		*	*		*	*		*	*			
	Phenyltrichlorosilane	8	UN1804	II	8	A7, B6, N34, T10, TP2, TP7, TP13.	None	206	242	Forbidden	30 L	C	40
	*		*	*		*	*		*	*			
	Polychlorinated biphenyls, solid	9	UN3432	II	9	9, 81,140, IB8, IP2, IP4, T3, TP33.	155	212	240	100 kg	200 kg	A	95
	*		*	*		*	*		*	*			
	Potassium bromate	5.1	UN1484	II	5.1	IB8, IP2, IP4, T3, TP33.	152	212	242	5 kg	25 kg	A	56, 58
	*		*	*		*	*		*	*			
	Potassium chlorate	5.1	UN1485	II	5.1	A9, IB8, IP2, IP4, N34, T3, TP33.	152	212	242	5 kg	25 kg	A	56, 58
	*		*	*		*	*		*	*			
	Potassium nitrate and sodium nitrite mixtures.	5.1	UN1487	II	5.1	B78, IB8, IP2, IP4, T3, TP33.	152	212	240	5 kg	25 kg	A	56, 58
	*		*	*		*	*		*	*			
	Potassium nitrite	5.1	UN1488	II	5.1	IB8, IP2, IP4, T3, TP33.	152	212	242	5 kg	25 kg	A	56, 58
	*		*	*		*	*		*	*			
	Potassium permanganate	5.1	UN1490	II	5.1	IB8, IP2, IP4, T3, TP33.	152	212	240	5 kg	25 kg	D	56, 58, 138
	*		*	*		*	*		*	*			
	Potassium persulfate	5.1	UN1492	III	5.1	A1, A29, IB8, IP3, T1, TP33.	152	213	240	25 kg	100 kg	A	58, 145

	*		*		*	*	*		*		*		
	Propyltrichlorosilane	8	UN1816	II	8, 3	A7, B2, B6, N34, T10, TP2, TP7, TP13.	None	206	243	Forbidden	30 L	C	40
	*		*		*	*	*		*		*		
	Silicon tetrachloride	8	UN1818	II	8	A3, A6, B2, B6, T10, TP2, TP7, TP13.	None	202	242	1 L	30 L	C	40
	*		*		*	*	*		*		*		
	Silver nitrate	5.1	UN1493	II	5.1	IB8, IP2, IP4, T3, TP33.	152	212	242	5 kg	25 kg	A.	
	*		*		*	*	*		*		*		
	Sodium bromate	5.1	UN1494	II	5.1	IB8, IP2, IP4, T3, TP33.	152	212	242	5 kg	25 kg	A	56, 58
	*		*		*	*	*		*		*		
	Sodium chlorate	5.1	UN1495	II	5.1	A9, IB8, IP2, IP4, N34, T3, TP33.	152	212	240	5 kg	25 kg	A	56, 58
	*		*		*	*	*		*		*		
	Sodium peroxoborate, anhydrous	5.1	UN3247	II	5.1	IB8, IP2, IP4, T3, TP33.	152	212	240	5 kg	25 kg	A	13, 25
	Sodium persulfate	5.1	UN1505	III	5.1	A1, IB8, IP3, T1, TP33.	152	213	240	25 kg	100 kg	A	58, 145
	*		*		*	*	*		*		*		
	Trichloroisocyanuric acid, dry	5.1	UN2468	II	5.1	IB8, IP2, IP4, T3, TP33.	152	212	240	5 kg	25 kg	A	13
	*		*		*	*	*		*		*		
	Trimethyltrichlorosilane	3	UN1298	II	3, 8	A3, A7, B77, N34, T10, TP2, TP7, TP13.	None	206	243	1 L	5 L	E	40
	*		*		*	*	*		*		*		
	Vinyltrichlorosilane, stabilized	3	UN1305	II	3, 8	A3, A7, B6, N34, T10, TP2, TP7, TP13.	None	206	243	1 L	5 L	B	40
	*		*		*	*	*		*		*		
G	Water-reactive liquid, corrosive, n.o.s.	4.3	UN3129	I	4.3, 8	T14, TP2, TP7	None	201	243	Forbidden	1 L	D.	
				II	4.3, 8	IB1, T11, TP2	None	202	243	1 L	5 L	E	85
				III	4.3, 8	IB2, T7, TP1	None	203	242	5 L	60 L	E.	
G	Water-reactive liquid, n.o.s.	4.3	UN3148	I	4.3	T9, TP2, TP7	None	201	244	Forbidden	1 L	E	40
				II	4.3	IB1, T7, TP2	None	202	243	1 L	5 L	E	40
				III	4.3	IB2, T7, TP1	None	203	242	5 L	60 L	E	40
	*		*		*	*	*		*		*		
G	Water-reactive solid, corrosive, n.o.s.	4.3	UN3131	I	4.3, 8	IB4, IP1, N40, T9, TP7, TP33.	None	211	242	Forbidden	15 kg	D.	
				II	4.3, 8	IB6, IP2, T3, TP33.	151	212	242	15 kg	50 kg	E	85
				III	4.3, 8	IB8, IP4, T1, TP33.	151	213	241	25 kg	100 kg	E	85
	*		*		*	*	*		*		*		
G	Water-reactive solid, n.o.s.	4.3	UN2813	I	4.3	IB4, N40, T9, TP7, TP33.	None	211	242	Forbidden	15 kg	E	40
				II	4.3	IB7, IP2, T3, TP33.	151	212	242	15 kg	50 kg	E	40
				III	4.3	IB8, IP4, T1, TP33.	151	213	241	25 kg	100 kg	E	40

§ 172.101—HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification No.	PG	Label codes	Special provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	*	*	*	*	*	*	*		*	*			
	Zinc ammonium nitrite	5.1	UN1512	II	5.1	IB8, IP2, IP4, T3, TP33.	None	212	242	5 kg	25 kg	E.	
	*	*	*	*	*	*	*		*	*			
	Zinc nitrate	5.1	UN1514	II	5.1	IB8, IP2, IP4, T3, TP33.	152	212	240	5 kg	25 kg	A.	
	*	*	*	*	*	*	*		*	*			

* * * * *

■ 11. In Appendix B to § 172.101, introductory paragraphs 4 and 5 are revised and four entries from the table are removed to read as follows:

APPENDIX B TO § 172.101—LIST OF MARINE POLLUTANTS

* * * * *

4. If a material is not listed in this appendix and meets the criteria for a marine pollutant as provided in Chapter 2.9 of the IMDG Code, (incorporated by reference; see § 171.7 of this subchapter), the material may be transported as a marine pollutant in accordance with the applicable requirements of this subchapter.

5. If a material or a solution meeting the definition of a marine pollutant in § 171.8 of this subchapter does not meet the criteria for a marine pollutant as provided in section 2.9.3.3 and 2.9.3.4 of the IMDG Code, (incorporated by reference; see § 171.7 of this subchapter), it may be excepted from the requirements of this subchapter as a marine pollutant if that exception is approved by the Associate Administrator.

LIST OF MARINE POLLUTANTS

S.M.P. (1)	Marine pollutant (2)
[REMOVE]	
*	* * * * * *
	5-Ethyl-2-picoline
	Ethyl propenoate, inhibited
*	* * * * * *
	Isopropenylbenzene
*	* * * * * *
	2-Phenylpropene
*	* * * * * *

■ 12. In § 172.102:

■ a. In paragraph (c)(1), Special Provisions 130, 136 b., 137, 138, 150, 177, 188 and 189 are revised; new Special Provisions 62, 198, 237, 332, and 335 are added; and Special Provisions 36 and 173 are removed.

■ b. In paragraph (c)(2), Special Provisions A59 and A60 are revised.

■ c. In paragraph (c)(4), revise The table 2IP Codes.

■ d. In paragraph (c)(5), Special Provision N82 is revised and new Special Provision N90 is added.

■ e. In paragraph (c)(8), Special Provision TP12 is removed.

The revisions and additions read as follows:

§ 172.102 Special provisions.

* * * * *

(c) * * *

(1) * * *

Code/Special Provisions

* * * * *

62 Oxygen generators (see § 171.8 of this subchapter) are not authorized for transportation under this entry.

* * * * *

130 Dry batteries not specifically covered by another entry in the § 172.101 Table must be described using this entry. Batteries described as ''Batteries, dry, sealed, n.o.s'' are hermetically sealed and generally utilize metals (other than lead) and/or carbon as electrodes. These batteries are typically used for portable power applications. The rechargeable (and some non-rechargeable) types have gelled alkaline electrolytes (rather than acidic) making it difficult for them to generate hydrogen or oxygen when overcharged and therefore, differentiating them from non-spillable batteries. ''Batteries, dry, sealed, n.o.s.'' are not subject to any other requirements of this subchapter except for the following:

(1) Incident reporting requirements. For transportation by aircraft, a telephone report in accordance with § 171.15(a) is required if a fire, violent rupture, explosion or dangerous evolution of heat (*i.e.*, an amount of heat sufficient to be dangerous to packaging or personal safety to include charring of packaging, melting of packaging, scorching of packaging, or other evidence) occurs as a direct result of a dry battery. For all modes of transportation, a written report submitted, retained, and updated in accordance with § 171.16 is required if a fire, violent rupture, explosion or dangerous evolution of heat occurs as a direct result of a dry battery or battery-powered device;

(2) Batteries and battery-powered device(s) containing batteries must be prepared and packaged for transport in a manner to prevent:

(i) A dangerous evolution of heat;

(ii) Short circuits, including but not limited to the following methods:

(a) Packaging each battery or each battery-powered device when practicable, in fully enclosed inner packagings made of non-conductive material;

(b) Separating or packaging batteries in a manner to prevent contact with other batteries, devices or conductive materials (*e.g.*, metal) in the packagings; or

(c) Ensuring exposed terminals or connectors are protected with non-conductive caps, non-conductive tape, or by other appropriate means; and

(iii) Damage to terminals. If not impact resistant, the outer packaging should not be used as the sole means of protecting the battery terminals from damage or short circuiting. Batteries must be securely cushioned and packed to prevent shifting which could loosen terminal caps or reorient the terminals to produce short circuits. Batteries contained in devices must be securely installed. Terminal protection methods include but are not limited to the following:

(a) Securely attaching covers of sufficient strength to protect the terminals;

(b) Packaging the battery in a rigid plastic packaging; or

(c) Constructing the battery with terminals that are recessed or otherwise protected so that the terminals will not be subjected to damage if the package is dropped.

(3) When transported by aircraft, for a battery whose voltage (electrical potential) exceeds 9 volts:

(i) When contained in a device, the device must be packaged in a manner that prevents unintentional activation or must have an independent means of preventing unintentional activation (*e.g.*, packaging restricts access to activation switch, switch caps or locks, recessed switches, trigger locks, temperature sensitive circuit breakers, etc.); and

(ii) An indication of compliance with this special provision must be provided by marking each package with the words ''not restricted'' or by including the words ''not restricted'' on a transport document such as an air waybill accompanying the shipment.

* * * * *

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b. The quantities of hazardous materials do not exceed those specified in § 173.4a of this subchapter; and

* * * * *

137 Cotton, dry; flax, dry; sisal, dry; and tampico fiber, dry are not subject to the requirements of this subchapter when they are baled in accordance with ISO 8115, ''Cotton Bales—Dimensions and Density'' (IBR, see § 171.7 of this subchapter) to a density of not less than 360 kg/m^3 (22.1 lb/ft^3) for cotton, 400 kg/m^3 (24.97 lb/ft^3) for flax, 620 kg/m^3 (38.71 lb/ft^3) for sisal and 360 kg/m^3 (22.1 lb/ft^3) for tampico fiber and transported in a freight container or closed transport vehicle.

138 Lead compounds which, when mixed in a ratio of 1:1,000 with 0.07 M (Molar concentration) hydrochloric acid and stirred for one hour at a temperature of 23 °C ± 2 °C, exhibit a solubility of 5% or less are considered insoluble and are not subject to the requirements of this subchapter unless they meet criteria as another hazard class or division.

* * * * *

150 This description may be used only for uniform mixtures of fertilizers containing ammonium nitrate as the main ingredient within the following composition limits:

a. Not less than 90% ammonium nitrate with not more than 0.2% total combustible, organic material calculated as carbon, and with added matter, if any, that is inorganic and inert when in contact with ammonium nitrate; or

b. Less than 90% but more than 70% ammonium nitrate with other inorganic materials, or more than 80% but less than 90% ammonium nitrate mixed with calcium carbonate and/or dolomite and/or mineral calcium sulphate, and not more than 0.4% total combustible, organic material calculated as carbon; or

c. Ammonium nitrate-based fertilizers containing mixtures of ammonium nitrate and ammonium sulphate with more than 45% but less than 70% ammonium nitrate, and not more than 0.4% total combustible, organic material calculated as carbon such that the sum of the percentage of compositions of ammonium nitrate and ammonium sulphate exceeds 70%.

* * * * *

177 Gasoline, or, ethanol and gasoline mixtures, for use in internal combustion engines (*e.g.*, in automobiles, stationary engines and other engines) must be assigned to Packing Group II regardless of variations in volatility.

* * * * *

188 *Small lithium cells and batteries.* Lithium cells or batteries, including cells or batteries packed with or contained in equipment, are not subject to any other requirements of this subchapter if they meet all of the following:

a. *Primary lithium batteries and cells.*

(1) Primary lithium batteries and cells are forbidden for transport aboard passenger-carrying aircraft. The outside of each package that contains primary (nonrechargeable) lithium batteries or cells must be marked ''PRIMARY LITHIUM BATTERIES—FORBIDDEN FOR TRANSPORT ABOARD PASSENGER AIRCRAFT'' or ''LITHIUM METAL BATTERIES—FORBIDDEN FOR TRANSPORT ABOARD PASSENGER AIRCRAFT'' on a background of contrasting color. The letters in the marking must be:

(i) At least 12 mm (0.5 inch) in height on packages having a gross weight of more than 30 kg (66 pounds); or

(ii) At least 6 mm (0.25 inch) on packages having a gross weight of 30 kg (66 pounds) or less, except that smaller font may be used as necessary to fit package dimensions; and

(2) The provisions of paragraph (a)(1) do not apply to packages that contain 5 kg (11 pounds) net weight or less of primary lithium batteries or cells that are contained in or packed with equipment and the package contains no more than the number of lithium batteries or cells necessary to power the piece of equipment;

b. For a lithium metal or lithium alloy cell, the lithium content is not more than 1.0 g. For a lithium-ion cell, the equivalent lithium content is not more than 1.5 g;

c. For a lithium metal or lithium alloy battery, the aggregate lithium content is not more than 2.0 g. For a lithium-ion battery, the aggregate equivalent lithium content is not more than 8 g;

d. Effective October 1, 2009, the cell or battery must be of a type proven to meet the requirements of each test in the UN Manual of Tests and Criteria (IBR; see § 171.7 of this subchapter);

e. Cells or batteries are separated or packaged in a manner to prevent short circuits and are packed in a strong outer packaging or are contained in equipment;

f. Effective October 1, 2008, except when contained in equipment, each package containing more than 24 lithium cells or 12 lithium batteries must be:

(1) Marked to indicate that it contains lithium batteries, and special procedures should be followed if the package is damaged;

(2) Accompanied by a document indicating that the package contains lithium batteries and special procedures should be followed if the package is damaged;

(3) Capable of withstanding a 1.2 meter drop test in any orientation without damage to cells or batteries contained in the package, without shifting of the contents that would allow short circuiting and without release of package contents; and

(4) Gross weight of the package may not exceed 30 kg (66 pounds). This requirement does not apply to lithium cells or batteries packed with equipment;

g. Electrical devices must conform to § 173.21;

h. For transportation by aircraft, a telephone report in accordance with § 171.15(a) is required if a fire, violent rupture, explosion or dangerous evolution of heat (*i.e.*, an amount of heat sufficient to be dangerous to packaging or personal safety to include charring of packaging, melting of packaging, scorching of packaging, or other evidence) occurs as a direct result of a lithium battery. For all modes of transportation, a written report submitted, retained, and updated in accordance with § 171.16 is required if a fire, violent rupture, explosion or dangerous evolution of heat occurs as a direct result of a lithium battery or battery-powered device; and

i. Lithium batteries or cells are not authorized aboard an aircraft in checked or carry-on luggage except as provided in § 175.10.

* * * * *

189 *Medium lithium cells and batteries.* Effective October 1, 2008, when transported by motor vehicle or rail car, lithium cells or batteries, including cells or batteries packed with or contained in equipment, are not subject to any other requirements of this

subchapter if they meet all of the following:

a. The lithium content anode of each cell, when fully charged, is not more than 5 grams.

b. The aggregate lithium content of the anode of each battery, when fully charged, is not more than 25 grams.

c. The cells or batteries are of a type proven to meet the requirements of each test in the UN Manual of Tests and Criteria (IBR; see § 171.7 of this subchapter). A cell or battery and equipment containing a cell or battery that was first transported prior to January 1, 2006 and is of a type proven to meet the criteria of Class 9 by testing in accordance with the tests in the UN Manual of Tests and Criteria, Third revised edition, 1999, need not be retested.

d. Cells or batteries are separated or packaged in a manner to prevent short circuits and are packed in a strong outer packaging or are contained in equipment.

e. The outside of each package must be marked ''LITHIUM BATTERIES—FORBIDDEN FOR TRANSPORT ABOARD AIRCRAFT AND VESSEL'' on a background of contrasting color, in letters:

(1) At least 12 mm (0.5 inch) in height on packages having a gross weight of more than 30 kg (66 pounds); or

(2) At least 6 mm (0.25 inch) on packages having a gross weight of 30 kg (66 pounds) or less, except that smaller font may be used as necessary to fit package dimensions.

f. Except when contained in equipment, each package containing more than 24 lithium cells or 12 lithium batteries must be:

(1) Marked to indicate that it contains lithium batteries, and special procedures should be followed if the package is damaged;

(2) Accompanied by a document indicating that the package contains lithium batteries and special procedures should be followed if the package is damaged;

(3) Capable of withstanding a 1.2 meter drop test in any orientation without damage to cells or batteries contained in the package, without shifting of the contents that would allow short circuiting and without release of package contents; and

(4) Gross weight of the package may not exceed 30 kg (66 pounds). This requirement does not apply to lithium cells or batteries packed with equipment.

g. Electrical devices must conform to § 173.21 of this subchapter; and

h. A written report submitted, retained, and updated in accordance with § 171.16 is required if a fire, violent rupture, explosion or dangerous evolution of heat (*i.e.*, an amount of heat sufficient to be dangerous to packaging or personal safety to include charring of packaging, melting of packaging, scorching of packaging, or other evidence) occurs as a direct result of a lithium battery or battery-powered device.

* * * * *

198 Nitrocellulose solutions containing not more than 20% nitrocellulose may be transported as paint or printing ink, as applicable. See UN1210, UN1263, UN3066, UN3469, and UN3470.

237 ''Batteries, dry, containing potassium hydroxide solid, *electric storage*'' must be prepared and packaged in accordance with the requirements of § 173.159(a), (b), and (c). For transportation by aircraft, the provisions of § 173.159(b)(2) are applicable.

332 Magnesium nitrate hexahydrate is not subject to the requirements of this subchapter.

335 Mixtures of solids that are not subject to this subchapter and environmentally hazardous liquids or solids may be classified as ''Environmentally hazardous substances, solid, n.o.s,'' UN3077 and may be transported under this entry, provided there is no free liquid visible at the time the material is loaded or at the time the packaging or transport unit is closed. Each transport unit must be leakproof when used as bulk packaging.

* * * * *

(2) * * *

A59 Sterilization devices, when containing less than 30 mL per inner packaging with no more than 300 mL per outer packaging may be transported in accordance with provisions in § 173.4a, irrespective of § 173.4a(b). In addition, after filling, each inner packaging must be determined to be leak-tight by placing the inner packaging in a hot water bath at a temperature and for a period of time sufficient to ensure an internal pressure equal to the vapor pressure of ethylene oxide at 55 °C is achieved. Any inner packaging showing evidence of leakage, distortion or other defect under this test may not be transported under the terms of this special provision. In addition to the packaging required in § 173.4a, inner packagings must be placed in a sealed plastic bag compatible with ethylene oxide and capable of containing the contents in the event of breakage or leakage of the inner packaging. Glass inner packagings must be placed within a protective shield capable of preventing the glass from puncturing the plastic bag in the event of damage to the packaging (*e.g.*, crushing).

A60 Sterilization devices, when containing less than 30 mL per inner packaging with not more than 150 mL per outer packaging, may be transported in accordance with the provisions in § 173.4a, irrespective of § 173.4a(b), provided such packagings were first subjected to comparative fire testing. Comparative fire testing must show no difference in burning rate between a package as prepared for transport (including the substance to be transported) and an identical package filled with water.

* * * * *

(4) * * *

TABLE 2—IP CODES

IBC code	Authorized IBCs
IP1	IBCs must be packed in closed freight containers or a closed transport vehicle.
IP2	When IBCs other than metal or rigid plastics IBCs are used, they must be offered for transportation in a closed freight container or a closed transport vehicle.
IP3	Flexible IBCs must be sift-proof and water-resistant or must be fitted with a sift-proof and water-resistant liner.
IP4	Flexible, fiberboard or wooden IBCs must be sift-proof and water-resistant or be fitted with a sift-proof and water-resistant liner.
IP5	IBCs must have a device to allow venting. The inlet to the venting device must be located in the vapor space of the IBC under maximum filling conditions.
IP6	Non-specification bulk bins are authorized.
IP7	For UN identification numbers 1327, 1363, 1364, 1365, 1386, 1841, 2211, 2217, 2793 and 3314, IBCs are not required to meet the IBC performance tests specified in part 178, subpart N of this subchapter.
IP8	Ammonia solutions may be transported in rigid or composite plastic IBCs (31H1, 31H2 and 31HZ1) that have successfully passed, without leakage or permanent deformation, the hydrostatic test specified in § 178.814 of this subchapter at a test pressure that is not less than 1.5 times the vapor pressure of the contents at 55 °C (131 °F).
IP13	Transportation by vessel in IBCs is prohibited.
IP14	Air must be eliminated from the vapor space by nitrogen or other means.

TABLE 2—IP CODES—Continued

IBC code	Authorized IBCs
IP15	For UN2031 with more than 55% nitric acid, rigid plastic IBCs and composite IBCs with a rigid plastic inner receptacle are authorized for two years from the date of IBC manufacture.
IP20	Dry sodium cyanide or potassium cyanide is also permitted in siftproof, water-resistant, fiberboard IBCs when transported in closed freight containers or transport vehicles.

(5) * * *
Code/Special Provisions

* * * * *

N82 See § 173.115 of this subchapter for classification criteria for flammable aerosols.

* * * * *

N90 Metal packagings are not authorized.

* * * * *

■ 13. In § 172.202, paragraph (a)(3) introductory text, paragraph (a)(4), and (a)(6)(vi) are revised to read as follows:

§ 172.202 Description of hazardous material on shipping papers.

(a) * * *

(3) The hazard class or division number prescribed for the material, as shown in Column (3) of the § 172.101 table. The subsidiary hazard class or division number is not required to be entered when a corresponding subsidiary hazard label is not required. Except for combustible liquids, the subsidiary hazard class(es) or subsidiary division number(s) must be entered in parentheses immediately following the primary hazard class or division number. In addition—

* * * * *

(4) The packing group in Roman numerals, as designated for the hazardous material in Column (5) of the § 172.101 table. Class 1 (explosives) materials; self-reactive substances; batteries other than those containing lithium, lithium ions, or sodium; Division 5.2 materials; and entries that are not assigned a packing group (*e.g.*, Class 7) are excepted from this requirement. The packing group may be preceded by the letters ''PG'' for example ''PG II;'' and

* * * * *

(6) * * *

(vi) For items where ''No Limit'' is shown in Column (9A) or (9B) of the § 172.101 table, the quantity shown must be the net mass or volume of the material. For articles (*e.g.*, UN2800 and UN3166) the quantity must be the gross mass, followed by the letter ''G''; and

* * * * *

■ 14. In § 172.322, paragraphs (d)(1) and (e) are revised to read as follows:

§ 172.322 Marine pollutants.

* * * * *

(d) The MARINE POLLUTANT mark is not required—

(1) On single packagings or combination packagings where each single package or each inner packaging of combination packagings has:

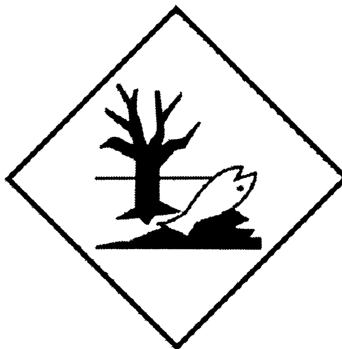
(i) A net quantity of 5 L (1.3 gallons) or less for liquids; or

(ii) A net mass of 5 kg (11 pounds) or less for solids

* * * * *

(e) *MARINE POLLUTANT mark.* Effective January 14, 2010 the MARINE POLLUTANT mark must conform to the following:

(1) Except for size, the MARINE POLLUTANT mark must appear as follows:



Symbol (fish and tree): Black on white or suitable contrasting background.

(2) The symbol and border must be black and the background white, or the symbol, border and background must be of contrasting color to the surface to which the mark is to be affixed. Each side of the mark must be—

(i) At least 100 mm (4 inches) for marks applied to:

(A) Non-bulk packages, except in the case of packages which, because of their size, can only bear smaller marks;

(B) Bulk packages with a capacity of less than 3,785 L (1,000 gallons); or

(ii) At least 250 mm (10 inches) for marks applied to all other bulk packages.

* * * * *

■ 15. In § 172.400a, paragraph (c) is revised to read as follows:

§ 172.400a Exceptions from labeling.

* * * * *

(c) Notwithstanding the provisions of § 172.402(a), a Division 6.1 subsidiary hazard label is not required on a package containing a Class 8 (corrosive) material which has a subsidiary hazard of Division 6.1 (poisonous) if the toxicity of the material is based solely on the corrosive destruction of tissue rather than systemic poisoning. In addition, a Division 4.1 subsidiary hazard label is not required on a package bearing a Division 4.2 label.

* * * * *

■ 16. In § 172.401, a new paragraph (c)(5) is added to read as follows:

§ 172.401 Prohibited labeling.

* * * * *

(c) * * *

(5) The Globally Harmonized System of Classification and Labelling of Chemicals (GHS) (IBR, see § 171.7 of this subchapter).

* * * * *

■ 17. In § 172.402, paragraph (d)(1) is revised to read as follows:

§ 172.402 Additional labeling requirements.

* * * * *

(d) * * *

(1) For a package containing a Class 7 material that also meets the definition of one or more additional hazard classes, whether or not the material satisfies § 173.4a(b)(7) of this subchapter, a subsidiary label is not required on the package if the material conforms to the remaining criteria in § 173.4a of this subchapter.

* * * * *

■ 18. In § 172.446, paragraph (b) is revised to read as follows:

§ 172.446 CLASS 9 Label.

* * * * *

(b) In addition to complying with § 172.407, the background on the CLASS 9 label must be white with seven black vertical stripes on the top half. The black vertical stripes must be spaced, so that, visually, they appear equal in width to the six white spaces between them. The lower half of the label must be white with the class number ''9'' underlined and centered at the bottom. The solid horizontal line dividing the lower and upper half of the label is optional.

■ 19. Section 172.448 is revised to read as follows:

§ 172.448 CARGO AIRCRAFT ONLY label.

(a) Except for size and color, the CARGO AIRCRAFT ONLY label must be as follows:

(b) The CARGO AIRCRAFT ONLY label must be black on an orange background.

(c) A CARGO AIRCRAFT ONLY label conforming to the specifications in § 172.448 on December 31, 2008, may be used until January 1, 2013.

■ 20. In § 172.500, paragraph (b)(5) is revised to read as follows:

§ 172.500 Applicability of placarding requirements.

* * * * *

(b) * * *

(5) Hazardous materials which are packaged as small quantities under the provisions of §§ 173.4, 173.4a, 173.4b of this subchapter; and

* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

■ 21. The authority citation for part 173 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.45, 1.53.

■ 22. Section 173.4, is revised to read as follows:

§ 173.4 Small quantities for highway and rail.

(a) When transported domestically by highway or rail in conformance with this section, small quantities of Class 3, Division 4.1, Division 4.2 (PG II and III), Division 4.3 (PG II and III), Division 5.1, Division 5.2, Division 6.1, Class 7, Class 8, and Class 9 materials that also meet the definition of one or more of these hazard classes, are not subject to any other requirements of this subchapter when—

(1) The maximum quantity of material per inner receptacle or article is limited to—

(i) Thirty (30) mL (1 ounce) for authorized liquids, other than Division 6.1, Packing Group I, Hazard Zone A or B materials;

(ii) Thirty (30) g (1 ounce) for authorized solid materials;

(iii) One (1) g (0.04 ounce) for authorized materials meeting the definition of a Division 6.1, Packing Group I, Hazard Zone A or B material; and

(iv) An activity level not exceeding that specified in §§ 173.421, 173.424, 173.425 or 173.426, as appropriate, for a package containing a Class 7 (radioactive) material.

(2) With the exception of temperature sensing devices, each inner receptacle:

(i) Is not liquid-full at 55 °C (131 °F), and

(ii) Is constructed of plastic having a minimum thickness of no less than 0.2 mm (0.008 inch), or earthenware, glass, or metal;

(3) Each inner receptacle with a removable closure has its closure held securely in place with wire, tape, or other positive means;

(4) Unless equivalent cushioning and absorbent material surrounds the inside packaging, each inner receptacle is securely packed in an inside packaging with cushioning and absorbent material that:

(i) Will not react chemically with the material, and

(ii) Is capable of absorbing the entire contents (if a liquid) of the receptacle;

(5) The inside packaging is securely packed in a strong outside packaging;

(6) The completed package, as demonstrated by prototype testing, is capable of sustaining—

(i) Each of the following free drops made from a height of 1.8 m (5.9 feet) directly onto a solid unyielding surface without breakage or leakage from any inner receptacle and without a substantial reduction in the effectiveness of the package:

(A) One drop flat on bottom;

(B) One drop flat on top;

(C) One drop flat on the long side;

(D) One drop flat on the short side; and

(E) One drop on a corner at the junction of three intersecting edges; and

(ii) A compressive load as specified in § 178.606(c) of this subchapter.

Note to paragraph (a)(6): Each of the tests in paragraph (a)(6) of this section may be performed on a different but identical package; *i.e.*, all tests need not be performed on the same package.

(7) Placement of the material in the package or packing different materials in the package does not result in a violation of § 173.21;

(8) The gross mass of the completed package does not exceed 29 kg (64 pounds);

(9) The package is not opened or otherwise altered until it is no longer in commerce; and

(10) The shipper certifies conformance with this section by marking the outside of the package with the statement ''This package conforms to 49 CFR 173.4 for domestic highway or rail transport only.''

(b) A package containing a Class 7 (radioactive) material also must conform to the requirements of § 173.421(a)(1) through (a)(5) or § 173.424(a) through (g), as appropriate.

(c) Packages which contain a Class 2, Division 4.2 (PG I), or Division 4.3 (PG I) material conforming to paragraphs (a)(1) through (a)(10) of this section may be offered for transportation or transported if specifically approved by the Associate Administrator.

(d) Lithium batteries and cells are not eligible for the exceptions provided in this section.

■ 23. Section 173.4a is added to read as follows:

§ 173.4a Excepted quantities.

(a) Excepted quantities of materials other than articles transported in accordance with this section are not subject to any additional requirements of this subchapter except for:

(1) The shipper's responsibilities to properly class their material in accordance with § 173.22 of this subchapter;

(2) Sections 171.15 and 171.16 of this subchapter pertaining to the reporting of incidents; and

(3) For a Class 7 (Radioactive) material the requirements for an excepted package.

(b) *Authorized materials.* Only materials authorized for transport aboard passenger aircraft and appropriately classed within one of the following hazard classes or divisions may be transported in accordance with this section:

(1) Division 2.2 materials with no subsidiary hazard;

(2) Class 3 materials;

(3) Class 4 (PG II and III) materials except for self-reactive materials;

(4) Division 5.1 (PG II and III);

(5) Division 5.2 materials only when contained in a chemical kit or a first aid kit;

(6) Division 6.1, other than PG I, Hazard Zone A or B material;

(7) Class 7, Radioactive material in excepted packages

(8) Class 8 (PG II and III), except for UN2803 (Gallium) and UN2809 (Mercury); and

(9) Class 9, except for UN1845 (Carbon dioxide, solid or Dry ice), and lithium batteries and cells.

(c) *Inner packaging limits.* The maximum quantity of hazardous materials in each inner packaging is limited to:

(1) 1 g (0.04 ounce) or 1 mL (0.03 ounce) for solids or liquids of Division 6.1, Packing Group I or II or other materials that also meet the definition of a toxic material;

(2) 30 g (1 ounce) or 30 mL (1 ounce) for solids or liquids other than those covered in paragraph (c)(1) of this section; and

(3) For gases a water capacity of 30 mL (1.8 cubic inches) or less.

(d) *Outer packaging aggregate quantity limits.* The maximum aggregate quantity of hazardous material contained in each outer packaging must not exceed the limits provided in the following paragraphs. For outer packagings containing more than one hazardous material, the aggregate quantity of hazardous material must not exceed the lowest permitted maximum aggregate quantity. The limits are as follows:

(1) For other than a Division 2.2 or Division 5.2 material:

(i) Packing Group I—300 g (0.66 pounds) for solids or 300 mL (0.08 gallons) for liquids;

(ii) Packing Group II—500 g (1.1 pounds) for solids or 500 mL (0.1 gallons) for liquids;

(iii) Packing Group III—1 kg (2.2 pounds) for solids or 1 L (0.2 gallons) for liquids;

(2) For Division 2.2 material, 1 L (61 cubic inches); or

(3) For Division 5.2 material, 500 g (1.1 pounds) for solids or 250 mL (0.05 gallons) for liquids.

(e) *Packaging materials.* Packagings used for the transport of excepted quantities must meet the following:

(1) Each inner receptacle must be constructed of plastic, or of glass, porcelain, stoneware, earthenware or metal. When used for liquid hazardous materials, plastic inner packagings must have a thickness of not less than 0.2 mm (0.008 inch).

(2) Each inner packaging with a removable closure must have its closure held securely in place with wire, tape or other positive means. Each inner receptacle having a neck with molded screw threads must have a leak proof, threaded type cap. The closure must not react chemically with the material.

(3) Each inner packaging must be securely packed in an intermediate packaging with cushioning material in such a way that, under normal conditions of transport, it cannot break, be punctured or leak its contents. The intermediate packaging must completely contain the contents in case of breakage or leakage, regardless of package orientation. For liquid hazardous materials, the intermediate packaging must contain sufficient absorbent material that:

(i) Will absorb the entire contents of the inner packaging. In such cases, and

(ii) Will not react dangerously with the material or reduce the integrity or function of the packaging materials.

(iii) The absorbent material may be the cushioning material.

(4) The intermediate packaging must be securely packed in a strong, rigid outer packaging.

(5) Placement of the material in the package or packing different materials in the package must not result in a violation of § 173.21.

(6) Each package must be of such a size that there is adequate space to apply all necessary markings.

(7) The package is not opened or otherwise altered until it is no longer in commerce.

(8) Overpacks may be used and may also contain packages of hazardous material or other materials not subject to the HMR subject to the requirements of § 173.25.

(f) *Package tests.* The completed package as prepared for transport, with inner packagings filled to not less than 95% of their capacity for solids or 98% for liquids, must be capable of withstanding, as demonstrated by testing which is appropriately documented, without breakage or leakage of any inner packaging and without significant reduction in effectiveness:

(1) Drops onto a solid unyielding surface from a height of 1.8 m (5.9 feet):

(i) Where the sample is in the shape of a box, it must be dropped in each of the following orientations:

(A) One drop flat on the bottom;

(B) One drop flat on the top;

(C) One drop flat on the longest side;

(D) One drop flat on the shortest side; and

(E) One drop on a corner at the junction of three intersecting edges.

(ii) Where the sample is in the shape of a drum, it must be dropped in each of the following orientations:

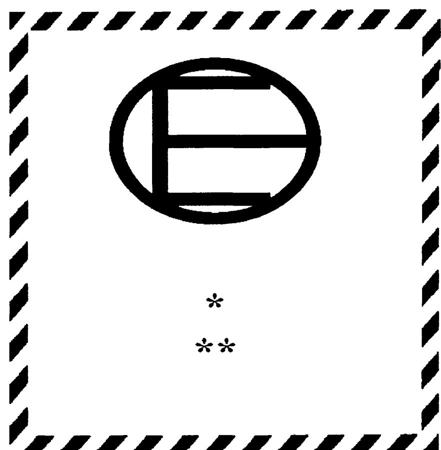
(A) One drop diagonally on the top chime, with the center of gravity directly above the point of impact;

(B) One drop diagonally on the base chime; and

(C) One drop flat on the side.

(2) A compressive load as specified in § 178.606(c) of this subchapter. Each of the tests in this paragraph (f) of this section may be performed on a different but identical package; that is, all tests need not be performed on the same package.

(g) *Marking.* Excepted quantities of hazardous materials packaged, marked, and otherwise offered and transported in accordance with this section must be durably and legibly marked with the following marking:



(1) The ''*'' must be replaced by the primary hazard class, or when assigned, the division of each of the hazardous materials contained in the package. The ''**'' must be replaced by the name of the shipper or consignee if not shown elsewhere on the package.

(2) The symbol shall be not less than 100 mm (3.9 inches) x 100 mm (3.9 inches), and must be durable and clearly visible.

(h) *Documentation.* (1) For transportation by highway or rail, no shipping paper is required.

(2) For transport by air, a shipping paper is not required, except that, if a document such as an air waybill accompanies a shipment, the document must include the statement ''Dangerous Goods in Excepted Quantities'' and indicate the number of packages.

(3) For transport by vessel, a shipping paper is required and must include the statement ''Dangerous Goods in Excepted Quantities'' and indicate the number of packages.

(i) *Training.* Each person who offers or transports excepted quantities of hazardous materials must know about the requirements of this section.

(j) *Restrictions.* Hazardous material packaged in accordance with this section may not be carried in checked or carry-on baggage.

■ 24. Section 173.4b is added to read as follows:

§ 173.4b De minimis exceptions.

(a) Packing Group II and III materials in Class 3, Division 4.1, Division 4.2, Division 4.3, Division 5.1, Division 6.1, Class 8, and Class 9 do not meet the definition of a hazardous material in § 171.8 of this subchapter when packaged in accordance with this section and, therefore, are not subject to the requirements of this subchapter.

(1) The maximum quantity of material per inner receptacle or article is limited to—

(i) One (1) mL (0.03 ounce) for authorized liquids; and

(ii) One (1) g (0.04 ounce) for authorized solid materials;

(2) Each inner receptacle with a removable closure has its closure held securely in place with wire, tape, or other positive means;

(3) Unless equivalent cushioning and absorbent material surrounds the inside packaging, each inner receptacle is securely packed in an inside packaging with cushioning and absorbent material that:

(i) Will not react chemically with the material, and

(ii) Is capable of absorbing the entire contents (if a liquid) of the receptacle;

(4) The inside packaging is securely packed in a strong outside packaging;

(5) The completed package is capable of sustaining—

(i) Each of the following free drops made from a height of 1.8 m (5.9 feet) directly onto a solid unyielding surface without breakage or leakage from any inner receptacle and without a substantial reduction in the effectiveness of the package:

(A) One drop flat on bottom;

(B) One drop flat on top;

(C) One drop flat on the long side;

(D) One drop flat on the short side; and

(E) One drop on a corner at the junction of three intersecting edges; and

(ii) A compressive load as specified in § 178.606(c) of this subchapter. Each of the tests in this paragraph (a)(5) may be performed on a different but identical package; that is, all tests need not be performed on the same package.

(6) Placement of the material in the package or packing different materials in the package does not result in a violation of § 173.21;

(7) The aggregate quantity of hazardous material per package does not exceed 100 g (0.22 pounds) for solids or 100 mL (3.38 ounces) for liquids;

(8) The gross mass of the completed package does not exceed 29 kg (64 pounds);

(9) The package is not opened or otherwise altered until it is no longer in commerce; and

(10) For transportation by aircraft:

(i) The hazardous material is authorized to be carried aboard passenger-carrying aircraft in Column 9A of the § 172.101 Hazardous Materials Table; and

(ii) Material packed in accordance with this section may not be carried in checked or carry-on baggage.

(b) [Reserved]

■ 25. In § 173.12, paragraph (f) is revised to read as follows:

§ 173.12 Exceptions for shipment of waste materials.

* * * * *

(f) *Household waste.* Household waste, as defined in § 171.8 of this subchapter, is not subject to the requirements of this subchapter when transported in accordance with applicable state, local, or tribal requirements.

■ 26. In § 173.21, paragraph (c) is revised to read a follows:

§ 173.21 Forbidden materials and packages.

* * * * *

(c) Electrical devices, such as batteries and battery-powered devices, which are likely to create sparks or generate a dangerous evolution of heat, unless packaged in a manner which precludes such an occurrence.

* * * * *

■ 27. In § 173.24, paragraph (c)(2) is revised to read as follows:

§ 173.24 General requirements for packagings and packages.

* * * * *

(c) * * *

(2) The packaging is permitted under, and conforms to, provisions contained in subparts B or C of part 171 of this subchapter or §§ 173.3, 173.4, 173.4a, 173.4b, 173.5, 173.5a, 173.6, 173.7, 173.8, 173.27, or § 176.11 of this subchapter.

* * * * *

■ 28. In § 173.24b, paragraph (e) is redesignated as paragraph (f) and revised, and a new paragraph (e) is added to read as follows:

§ 173.24b Additional general requirements for bulk packagings.

* * * * *

(e) Stacking of IBCs and Large Packagings. (1) IBCs and Large Packagings not designed and tested to be stacked. No packages or freight (hazardous or otherwise) may be stacked upon an IBC or a Large Packaging that was not designed and tested to be stacked upon.

(2) IBCs and Large Packagings designed and tested to be stacked. The superimposed weight placed upon an IBC or a Large Packaging designed to be stacked may not exceed the maximum permissible stacking test mass marked on the packaging.

(f) *UN portable tanks.* (1) A UN portable tank manufactured in the United States must conform in all details to the applicable requirements in parts 172, 173, 178 and 180 of this subchapter.

(2) *UN portable tanks manufactured outside the United States.* A UN portable tank manufactured outside the United States, in accordance with national or international regulations

based on the UN Recommendations (IBR, see § 171.7 of this subchapter), which is an authorized packaging under § 173.24 of this subchapter, may be filled, offered and transported in the United States, if the § 172.101 Table of this subchapter authorizes the hazardous material for transportation in the UN portable tank and it conforms to the applicable T codes, and tank provision codes, or other special provisions assigned to the hazardous material in Column (7) of the Table. In addition, the portable tank must—

(i) Conform to applicable provisions in the UN Recommendations (IBR, see § 171.7 of this subchapter) and the requirements of this subpart;

(ii) Be capable of passing the prescribed tests and inspections in part 180 of this subchapter applicable to the UN portable tank specification;

(iii) Be designed and manufactured according to the ASME Code (IBR, see § 171.7 of this subchapter) or a pressure vessel design code approved by the Associate Administrator;

(iv) Be approved by the Associate Administrator when the portable tank is designed and constructed under the provisions of an alternative arrangement (see § 178.274(a)(2) of this subchapter); and

(v) The competent authority of the country of manufacture must provide reciprocal treatment for UN portable tanks manufactured in the United States.

■ 29. In § 173.62, in paragraph (b), the Explosives Table is amended by adding entries in the appropriate numerical order, and in paragraph (c), in the Table of Packing Methods, packing instruction entry 114(b) is revised to read as follows:

§ 173.62 Specific packaging requirements for explosives.

* * * * *

(b) * * *

EXPLOSIVES TABLE

ID No.	PI
* * * * *	
UN0505	135
UN0506	135
UN0507	135
UN0508	114(b)
UN0509	114(b)
* * * * *	

(c) * * *

(5) * * *

TABLE OF PACKING METHODS

Packing instruction	Inner packagings	Intermediate packagings	Outer packagings
* * * * * * *			
114(b) This packing instruction applies to dry solids PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN 0077, 0132, 0234, 0235 and 0236, packagings must be lead free. 2. For UN 0160 and UN 0161, when metal drums (1A2 or 1B2) are used as the outer packaging, metal pack-agings must be so constructed that the risk of explosion, by reason of increased internal pressure from internal or external causes is pre-vented. 3. For UN 0160, UN 0161, and UN0508, inner packagings are not necessary if drums are used as the outer packaging. 4. For UN 0508 and UN0509, metal packagings shall not be used.	Bags: paper, kraft, plastics textile, sift-proof woven plastics, sift-proof. Receptacles: fibreboard metal, paper plastics, woven plastics, sift-proof.	Not necessary	Boxes: natural wood, ordinary (4C1). natural wood, sift proof walls (4C2). plywood (4D). reconstituted wood (4F). fibreboard (4G). Drums: steel, removable head (1A2). aluminum, removable head (1B2). plywood (1D). fiber (1G). plastics, removable head (1H2).
* * * * * * *			

■ 30. In § 173.115, paragraph (b) is revised, paragraph (k) is redesignated as paragraph (l), and a new paragraph (k) is added to read as follows:

§ 173.115 Class 2, Divisions 2.1, 2.2, and 2.3—Definitions.

* * * * *

(b) Division 2.2 (*non-flammable, nonpoisonous compressed gas—including compressed gas, liquefied gas, pressurized cryogenic gas, compressed gas in solution, asphyxiant gas and oxidizing gas*). For the purpose of this subchapter, a non-flammable, nonpoisonous compressed gas (Division 2.2) means any material (or mixture) which—

(1) Exerts in the packaging a gauge pressure of 200 kPa (25.9 psig/43.8 psia) or greater at 20 °C (68 °F), is a liquefied gas or is a cryogenic liquid, and

(2) Does not meet the definition of Division 2.1 or 2.3.

* * * * *

(k) For Division 2.2 gases, the oxidizing ability shall be determined by tests or by calculation in accordance with ISO 10156:1996 and ISO 10156–2:2005 (IBR, see § 171.7 of this subchapter).

(l) The following applies to aerosols (see § 171.8 of this subchapter):

(1) An aerosol must be assigned to Division 2.1 if the contents include 85% by mass or more flammable components and the chemical heat of combustion is 30 kJ/g or more;

(2) An aerosol must be assigned to Division 2.2 if the contents contain 1% by mass or less flammable components and the heat of combustion is less than 20 kJ/g.

(3) Aerosols not meeting the provisions of paragraphs (a) or (b) of this section must be classed in accordance with the appropriate tests of the UN Manual of Tests and Criteria (IBR, see § 171.7 of this subchapter). An aerosol which was tested in accordance with the requirements of this subchapter in effect on December 31, 2005, is not required to be retested.

(4) Division 2.3 gases may not be transported in an aerosol container.

(5) When the contents are classified as Division 6.1, PG III or Class 8, PG II or III, the aerosol must be assigned a subsidiary hazard of Division 6.1 or Class 8, as appropriate.

(6) Substances of Division 6.1, PG I or II, and substances of Class 8, PG I are forbidden from transportation in an aerosol container.

(7) Flammable components are Class 3 flammable liquids, Division 4.1 flammable solids, or Division 2.1 flammable gases. The chemical heat of combustion must be determined in accordance with the UN Manual of Tests and Criteria (IBR, see § 171.7 of this subchapter).

* * * * *

■ 31. In § 173.134, paragraph (b)(13)(i) is revised to read as follows:

§ 173.134 Class 6, Division 6.2—Definitions and exceptions.

* * * * *

(b) * * *

(13) * * *

(i) Household waste as defined in § 171.8, when transported in accordance with applicable state, local, or tribal requirements.

* * * * *

■ 32. In § 173.137, paragraph (c)(2) is revised and a note to the section is added to read as follows:

§ 173.137 Class 8—Assignment of packing group.

* * * * *

(c) * * *

(2) That do not cause full thickness destruction of intact skin tissue but exhibit a corrosion on either steel or aluminum surfaces exceeding 6.25 mm (0.25 inch) a year at a test temperature of 55 °C (130 °F) when tested on both materials. The corrosion may be determined in accordance with the UN Manual of Tests and Criteria (IBR, see § 171.7 of this subchapter) or other equivalent test methods.

Note to § 173.137: When an initial test on either a steel or aluminum surface indicates the material being tested is corrosive, the follow up test on the other surface is not required.

■ 33. Section 173.159 is revised to read as follows:

§ 173.159 Batteries, wet.

(a) Electric storage batteries, containing electrolyte acid or alkaline corrosive battery fluid (wet batteries), may not be packed with other materials except as provided in paragraphs (g) and (h) of this section and in §§ 173.220 and 173.222; and any battery or battery-powered device must be prepared and packaged for transport in a manner to prevent:

(1) A dangerous evolution of heat (*i.e.*, an amount of heat sufficient to be dangerous to packaging or personal safety to include charring of packaging, melting of packaging, scorching of packaging, or other evidence);

(2) Short circuits, including, but not limited to:

(i) Packaging each battery or each battery-powered device when practicable, in fully enclosed inner packagings made of non-conductive material;

(ii) Separating or packaging batteries and battery-powered devices in a manner to prevent contact with other batteries, devices or conductive materials (*e.g.*, metal) in the packagings; or

(iii) Ensuring exposed terminals are protected with non-conductive caps, non-conductive tape, or by other appropriate means; and

(3) *Damage to terminals.* If not impact resistant, the outer packaging must not be used as the sole means of protecting the battery terminals from damage or short circuiting. Batteries must be securely cushioned and packed to prevent shifting which could loosen terminal caps or reorient the terminals. Batteries contained in devices must be securely installed. Terminal protection methods include but are not limited to:

(i) Securely attaching covers of sufficient strength to protect the terminals;

(ii) Packaging the battery in a rigid plastic packaging; or

(iii) Constructing the battery with terminals that are recessed or otherwise protected so that the terminals will not be subjected to damage if the package is dropped.

(b) For transportation by aircraft:

(1) The packaging for wet batteries must incorporate an acid- or alkali-proof liner, or include a supplementary packaging with sufficient strength and adequately sealed to prevent leakage of electrolyte fluid in the event of spillage; and

(2) Any battery-powered device, equipment or vehicle must be packaged for transport in a manner to prevent unintentional activation or must have an independent means of preventing unintentional activation (*e.g.*, packaging restricts access to activation switch, switch caps or locks, recessed switches, trigger locks, temperature sensitive circuit breakers, etc.).

(c) The following specification packagings are authorized for batteries packed without other materials provided all requirements of paragraph (a) of this section, and for transportation by aircraft, paragraph (b) of this section are met:

(1) Wooden box: 4C1, 4C2, 4D, or 4F.

(2) Fiberboard box: 4G.

(3) Plywood drum: 1D.

(4) Fiber drum: 1G.

(5) Plastic drum: 1H2.

(6) Plastic jerrican: 3H2.

(7) Plastic box: 4H2.

(d) The following non-specification packagings are authorized for batteries packed without other materials provided all requirements of paragraph (a) of this section, and for transportation by aircraft, paragraph (b) of this section are met:

(1) Electric storage batteries are firmly secured to skids or pallets capable of withstanding the shocks normally incident to transportation are authorized for transportation by rail, highway, or vessel. The height of the completed unit must not exceed 1½ times the width of the skid or pallet. The unit must be capable of withstanding, without damage, a superimposed weight equal to two times the weight of the unit or, if the weight of the unit exceeds 907 kg (2,000 pounds), a superimposed weight of 1814 kg (4,000 pounds). Battery terminals must not be relied upon to support any part of the superimposed weight and must not short out if a conductive material is placed in direct contact with them.

(2) Electric storage batteries weighing 225 kg (500 pounds) or more, consisting of carriers' equipment, may be shipped by rail when mounted on suitable skids. Such shipments may not be offered in interchange service.

(3) One to three batteries not over 11.3 kg (25 pounds) each, packed in strong outer boxes. The maximum authorized gross weight is 34 kg (75 pounds).

(4) Not more than four batteries not over 7 kg (15 pounds) each, packed in strong outer fiberboard or wooden boxes. The maximum authorized gross weight is 30 kg (65 pounds).

(5) Not more than five batteries not over 4.5 kg (10 pounds) each, packed in strong outer fiberboard or wooden boxes. The maximum authorized gross weight is 30 kg (65 pounds).

(6) Single batteries not exceeding 34 kg (75 pounds) each, packed in 5-sided slip covers or in completely closed fiberboard boxes. Slip covers and boxes must be of solid or double-faced corrugated fiberboard of at least 91 kg (200 pounds) Mullen test strength. The slip cover or fiberboard box must fit snugly and provide inside top clearance of at least 1.3 cm (0.5 inch) above battery terminals and filler caps with reinforcement in place. Assembled for shipment, the bottom edges of the slipcover must come to within 2.5 cm (1 inch) of the bottom of the battery. The completed package (battery and box or

slip cover) must be capable of withstanding a top-to-bottom compression test of at least 225 kg (500 pounds) without damage to battery terminal caps, cell covers or filler caps.

(7) Single batteries exceeding 34 kg (75 pounds) each may be packed in completely closed fiberboard boxes. Boxes must be of double-wall corrugated fiberboard of at least 181 kg (400 pounds) test, or solid fiberboard testing at least 181 kg (400 pounds); a box may have hand holes in its ends provided that the hand holes will not materially weaken the box. Sides and ends of the box must have cushioning between the battery and walls of the box; combined thickness of cushioning material and walls of the box must not be less than 1.3 cm (0.5 inch); and cushioning must be excelsior pads, corrugated fiberboard, or other suitable cushioning material. The bottom of the battery must be protected by a minimum of one excelsior pad or by a double-wall corrugated fiberboard pad. The top of the battery must be protected by a wood frame, corrugated trays or scored sheets of corrugated fiberboard having minimum test of 91 kg (200 pounds), or other equally effective cushioning material. Top protection must bear evenly on connectors and/or edges of the battery cover to facilitate stacking of batteries. No more than one battery may be placed in one box. The maximum authorized gross weight is 91 kg (200 pounds).

(e) When transported by highway or rail, electric storage batteries containing electrolyte or corrosive battery fluid are not subject to any other requirements of this subchapter, if all of the following are met:

(1) No other hazardous materials may be transported in the same vehicle;

(2) The batteries must be loaded or braced so as to prevent damage and short circuits in transit;

(3) Any other material loaded in the same vehicle must be blocked, braced, or otherwise secured to prevent contact with or damage to the batteries; and

(4) The transport vehicle may not carry material shipped by any person other than the shipper of the batteries.

(f) Batteries can be considered as non-spillable provided they are capable of withstanding the following two tests, without leakage of battery fluid from the battery:

(1) *Vibration test.* The battery must be rigidly clamped to the platform of a vibration machine, and a simple harmonic motion having an amplitude of 0.8 mm (0.03 inches) with a 1.6 mm (0.063 inches) maximum total excursion must be applied. The frequency must be varied at the rate of 1 Hz/min between the limits of 10 Hz to 55 Hz. The entire range of frequencies and return must be traversed in 95 ± 5 minutes for each mounting position (direction of vibrator) of the battery. The battery must be tested in three mutually perpendicular positions (to include testing with fill openings and vents, if any, in an inverted position) for equal time periods.

(2) *Pressure differential test.* Following the vibration test, the battery must be stored for six hours at 24 °C ± 4 °C (75°F ± 7 °F) while subjected to a pressure differential of at least 88 kPa (13 psig). The battery must be tested in three mutually perpendicular positions (to include testing with fill openings and vents, if any, in an inverted position) for at least six hours in each position.

(g) Electrolyte, acid or alkaline corrosive battery fluid, packed with batteries wet or dry, must be packed in one of the following specification packagings:

(1) In 4C1, 4C2, 4D, or 4F wooden boxes with inner receptacles of glass, not over 4.0 L (1 gallon) each with not over 8.0 L (2 gallons) total in each outside container. Inside containers must be well-cushioned and separated from batteries by a strong solid wooden partition. The completed package must conform to Packing Group III requirements.

(2) Electrolyte, acid, or alkaline corrosive battery fluid included with electric storage batteries and filling kits may be packed in strong rigid outer packagings when shipments are made by, for, or to the Departments of the Army, Navy, or Air Force of the United States. Packagings must conform to military specifications. The electrolyte, acid, or alkaline corrosive battery fluid must be packed in polyethylene bottles of not over 1.0 L (0.3 gallon) capacity each. Not more than 24 bottles, securely separated from electric storage batteries and kits, may be offered for transportation or transported in each package.

(3) In 4G fiberboard boxes with not more than 12 inside packagings of polyethylene or other material resistant to the lading, each not over 2.0 L (0.5 gallon) capacity each. Completed packages must conform to Packing Group III requirements. Inner packagings must be adequately separated from the storage battery. The maximum authorized gross weight is 29 kg (64 pounds). These packages are not authorized for transportation by aircraft.

(h) Dry batteries or battery charger devices may be packaged in 4G fiberboard boxes with inner receptacles containing battery fluid. Completed packagings must conform to Packing Group III requirements. Not more than 12 inner receptacles may be packed in one outer box. The maximum authorized gross weight is 34 kg (75 pounds).

(i) When approved by the Associate Administrator, electric storage batteries, containing electrolyte or corrosive battery fluid in a separate reservoir from which fluid is injected into the battery cells by a power device cartridge assembled with the battery, and which meet the criteria of paragraph (f) are not subject to any other requirements of this subchapter.

■ 34. A new § 173.159a is added to read as follows:

§ 173.159a Exceptions for Non-spillable batteries.

(a) Exceptions for hazardous materials shipments in the following paragraphs are permitted only if this section is referenced for the specific hazardous material in the § 172.101 table or in a packaging section in this part.

(b) Non-spillable batteries offered for transportation or transported in accordance with this section are subject to the incident reporting requirements. For transportation by aircraft, a telephone report in accordance with § 171.15(a) is required if a fire, violent rupture, explosion or dangerous evolution of heat (*i.e.*, an amount of heat sufficient to be dangerous to packaging or personal safety to include charring of packaging, melting of packaging, scorching of packaging, or other evidence) occurs as a direct result of a nonspillable battery. For all modes of transportation, a written report in accordance with § 171.16(a) is required if a fire, violent rupture, explosion or dangerous evolution of heat occurs as a direct result of a nonspillable battery.

(c) Non-spillable batteries are excepted from the packaging requirements of § 173.159 under the following conditions:

(1) Non-spillable batteries must be securely packed in strong outer packagings and meet the requirements of § 173.159(a). A non-spillable battery which is an integral part of and necessary for the operation of mechanical or electronic equipment must be securely fastened in the battery holder on the equipment;

(2) The battery and outer packaging must be plainly and durably marked ‘‘NONSPILLABLE’’ or ‘‘NONSPILLABLE BATTERY.’’ The requirement to mark the outer package does not apply when the battery is installed in a piece of equipment that is transported unpackaged.

(d) Non-spillable batteries are excepted from all other requirements of this subchapter when offered for transportation and transported in accordance with paragraph (c) of this section and the following:

(1) At a temperature of 55 °C (131 °F), the battery must not contain any unabsorbed free-flowing liquid, and must be designed so that electrolyte will not flow from a ruptured or cracked case; and

(2) For transport by aircraft, when contained in a battery-powered device, equipment or vehicle must be prepared and packaged for transport in a manner to prevent unintentional activation in conformance with § 173.159(b)(2) of this Subpart.

■ 35. In § 173.168, paragraph (a) is revised to read as follows:

§ 173.168 Chemical oxygen generators.

* * * * *

(a) *Approval.* A chemical oxygen generator that is shipped with an explosive or non-explosive means of initiation attached must be classed and approved by the Associate Administrator in accordance with the procedures specified in § 173.56 of this subchapter.

* * * * *

■ 36. In § 173.189, paragraph (e) is revised to read as follows:

§ 173.189 Batteries containing sodium or cells containing sodium.

* * * * *

(e) Vehicles, machinery and equipment powered by sodium batteries must be consigned under the entry ''Battery-powered vehicle or Battery-powered equipment.''

■ 37. In § 173.196, paragraphs (a)(1) and (a)(2) are revised to read as follows:

§ 173.196 Category A infectious substances.

(a) * * *

(1) A leakproof primary receptacle.

(2) A leakproof secondary packaging. If multiple fragile primary receptacles are placed in a single secondary packaging, they must be either wrapped individually or separated to prevent contact between them.

* * * * *

■ 38. A new § 173.206 is added to read as follows:

§ 173.206 Packaging requirements for chlorosilanes.

(a) When § 172.101 of this subchapter specifies that a hazardous material be packaged under this section, only non-bulk packagings prescribed in this section may be used for its transportation. Each packaging must conform to the general packaging requirements of subpart B of part 173, to the requirements of part 178 of this subchapter at the Packing Group I or II performance level (unless otherwise excepted), and to the particular requirements of the special provisions of Column (7) of the § 172.101 Table.

(b) The following combination packagings are authorized:

Outer packagings:

Steel drum: 1A2
Plastic drum: 1H2
Plywood drum: 1D
Fiber drum: 1G
Steel box: 4A
Natural wood box: 4C1 or 4C2
Plywood box: 4D
Reconstituted wood box: 4F
Fiberboard box: 4G
Expanded plastic box: 4H1
Solid plastic box: 4H2

Inner packagings:

Glass or Steel receptacle

(c) Except for transportation by passenger aircraft, the following single packagings are authorized:

Steel drum: 1A1
Steel jerrican: 3A1
Plastic receptacle in steel drum: 6HA1

■ 39. In § 173.220, paragraphs (a)(2), (c), (d), and (e)(1), and the last two sentences of paragraph (g)(2) are revised to read as follows:

§ 173.220 Internal combustion engines, self-propelled vehicles, mechanical equipment containing internal combustion engines, and battery-powered vehicles or equipment.

(a) * * *

(2) It is equipped with a wet battery (including a non-spillable battery), a sodium battery or lithium battery; or

* * * * *

(c) *Battery-powered or installed.* Batteries must be securely installed, and wet batteries must be fastened in an upright position. Batteries must be protected against a dangerous evolution of heat, short circuits, and damage to terminals in conformance with § 173.159(a) and leakage; or must be removed and packaged separately under § 173.159. Battery-powered vehicles, machinery or equipment including battery-powered wheelchairs and mobility aids are not subject to any other requirements of this subchapter except § 173.21 when transported by rail, highway or vessel.

(d) *Lithium batteries.* Except as provided in § 173.185 of this subchapter, vehicles, engines and machinery powered by lithium metal batteries that are transported with these batteries installed are forbidden aboard passenger-carrying aircraft. Lithium batteries contained in vehicles, engines or mechanical equipment must be securely fastened in the battery holder of the vehicle, engine or mechanical equipment and be protected in such a manner as to prevent damage and short circuits (*e.g.*, by the use of non-conductive caps that cover the terminals entirely). Lithium batteries must be of a type that have successfully passed each test in the UN Manual of Tests and Criteria as specified in § 173.185, unless approved by the Associate Administrator. Equipment (other than vehicles, engines or mechanical equipment) containing lithium batteries, must be described as ''Lithium batteries contained in equipment'' and transported in accordance with § 173.185 and applicable special provisions.

(e) *Other hazardous materials.* (1) Items containing hazardous materials, such as, fire extinguishers, compressed gas accumulators, safety devices and other hazardous materials which are integral components of the motor vehicle, engine or mechanical equipment and are necessary for the operation of the vehicle, engine or mechanical equipment, or for the safety of its operator or passengers must be securely installed in the motor vehicle, engine or mechanical equipment. Such items are not otherwise subject to the requirements of this subchapter. Equipment (other than vehicles, engines or mechanical equipment) containing lithium batteries must be described as ''Lithium batteries contained in equipment'' and transported in accordance with § 173.185 and applicable special provisions.

* * * * *

(g) * * *

(2) * * * For transportation by aircraft, the provisions of § 173.159(b)(2) as applicable, other applicable requirements of this subchapter, including shipping papers, emergency response information, notification of pilot-in-command, general packaging requirements, and the requirements specified in § 173.27 must be met. For transportation by vessel, additional exceptions are specified in § 176.905 of this subchapter.

■ 40. In § 173.222, the section heading and paragraph (c)(3) are revised to read as follows:

§ 173.222 Dangerous goods in equipment, machinery or apparatus.

* * * * *

(c) * * *

(3) 0.5 kg (1.1 pounds) in the case of Division 2.2 gases. For transportation by aircraft, Division 2.2 gases with

subsidiary risks and refrigerated liquefied gases are not authorized; and

* * * * *

■ 41. a. In § 173.225, in paragraph (c)(8), the Organic Peroxide Table is amended by removing and adding the following entries in the appropriate order; and in the ''NOTES'' immediately following the Table, a new Note ''29,'' ''30'' and ''31'' are added in the appropriate numerical order.

■ b. In paragraph (e), the Organic Peroxide IBC Table is amended by removing and adding the following entries in the appropriate order.

■ c. In paragraph (g), the Organic Peroxide Portable Tank Table is amended by adding and revising the following entries in the appropriate order.

§ 173.225 Packaging requirements and other provisions for organic peroxides.

* * * * *

(c) * * *

(8) * * *

ORGANIC PEROXIDE TABLE

Technical name	ID No.	Concent. (mass %)	Diluent (mass %) A	Diluent (mass %) B	Diluent (mass %) I	Water (mass %)	Packing method	Temp control	Temp emergency	Notes
(1)	(2)	(3)	(4a)	(4b)	(4c)	(5)	(6)	(7a)	(7b)	(8)
[Remove]										
*	*		*	*		*	*		*	
tert-Amyl peroxy-3,5,5-trimethylhexanoate.	3101	≤100					OP5			
*	*		*	*		*	*		*	
Cyclohexanone peroxide(s)	Exempt				≥68		Exempt			
*	*		*	*		*	*		*	
Dibenzoyl peroxide	Exempt	≤35			≥65		Exempt			
*	*		*	*		*	*		*	
Di-(2-tert-butylperoxyisopropyl) benzene(s).	Exempt	≤42			≥58		Exempt			
*	*		*	*		*	*		*	
Di-4-chlorobenzoyl peroxide	Exempt	≤32			>68		Exempt			
*	*		*	*		*	*		*	
Dicumyl peroxide	Exempt	≤52			>48		Exempt			
*	*		*	*		*	*		*	
Di-(2-ethylhexyl) peroxydicarbonate [as a stable dispersion in water].	3117	≤62					OP8	−15	−5	
*	*		*	*		*	*		*	
[Add]										
*	*		*	*		*	*		*	
tert-Amyl peroxyneodecanoate	3119	≤47	≥53				OP8	0	+10	
*	*		*	*		*	*		*	
tert-Amyl peroxypivalate	3119	≤32	≥68				OP8	+10	+15	
tert-Amyl peroxy-3,5,5-trimethylhexanoate.	3105	≤100					OP7			
*	*		*	*		*	*		*	
tert-Butyl peroxy-3,5,5-trimethlyhexanoate.	3106	≤42			≥58		OP7			
*	*		*	*		*	*		*	
Cumyl peroxyneodecanoate	3115	≤87	≥13				OP7	−10	0	
*	*		*	*		*	*		*	
Cyclohexanone peroxide(s)	Exempt	≤32			>68		Exempt			29
*	*		*	*		*	*		*	
2,2-Di-(tert-amylperoxy)-butane	3105	≤57	≥43				OP7			
*	*		*	*		*	*		*	
Dibenzoyl peroxide	Exempt	≤35			≥65		Exempt			29
*	*		*	*		*	*		*	
tert-Butyl peroxybenzoate	3109	≤32	≥68				OP8			
*	*		*	*		*	*		*	
1,1-Di-(tert-butylperoxy)-cyclohexane.	3103	≤72		≥28			OP5			30
*	*		*	*		*	*		*	
1,1-Di-(tert-Butylperoxy) cyclohexane.	3109	≤37	≥63				OP8			

ORGANIC PEROXIDE TABLE—Continued

Technical name	ID No.	Concent. (mass %)	Diluent (mass %) A	Diluent (mass %) B	Diluent (mass %) I	Water (mass %)	Packing method	Temp control	Temp emergency	Notes
(1)	(2)	(3)	(4a)	(4b)	(4c)	(5)	(6)	(7a)	(7b)	(8)
*	*	*		*	*		*		*	
1,1-Di-(tert-butylperoxy)-Cyclohexane + tert-butyl peroxy-2-ethylhexanoate.	3105	≤43 + ≤16	≥41				OP7			
*	*	*		*	*		*		*	
Di-(2-tert-butylperoxyisopropyl) benzene(s).	Exempt	≤42			≥58		Exempt			29
*	*	*		*	*		*		*	
1,1-Di-(tert-butylperoxy)-3,3,5-trimethylcyclohexane.	3103	≤90		≥10			OP5			30
*	*	*		*	*		*		*	
Di-2,4-dichlorobenzoyl peroxide [as a paste].	3118	≤52					OP8	+20	+25	
*	*	*		*	*		*		*	
Di-4-chlorobenzoyl peroxide	Exempt	≤32			≥68		Exempt			29
*	*	*		*	*		*		*	
Dicumyl peroxide	Exempt	≤52			≥48		Exempt			29
*	*	*		*	*		*		*	
Di-(2-ethylhexyl) peroxydicarbonate [as a stable dispersion in water].	3119	≤62					OP8	−15	−5	
*	*	*		*	*		*		*	
Di-(2-neodecanoyl-peroxyisopropyl) benzene, as stable dispersion in water.	3119	≤42					OP8	−15	−5	
*	*	*		*	*		*		*	
3-Hydroxy-1,1-dimethylbutyl peroxyneodecanoate.	3115	≤77	≥23				OP7	−5	+5	
*	*	*		*	*		*		*	
3-Hydroxy-1,1-dimethylbutyl peroxyneodecanoate [as a stable dispersion in water].	3119	≤52					OP8	−5	+5	
*	*	*		*	*		*		*	
3-Hydroxy-1,1-dimethylbutyl peroxyneodecanoate.	3117	≤52	≥48				OP8	−5	+5	
*	*	*		*	*		*		*	
Methyl isopropyl ketone peroxide(s).	3109	(See remark 31).	≥70				OP8			31
*	*	*		*	*		*		*	
3,3,5,7,7-Pentamethyl-1,2,4-Trioxepane.	3107	≤100					OP8			
*	*	*		*	*		*		*	

Notes:

* * * * *

29. Not subject to the requirements of this subchapter for Division 5.2.
30. Diluent type B with boiling point > 130 °C (266 °F).
31. Available oxygen ≤6.7%.

* * * * *

(e) * * *

ORGANIC PEROXIDE IBC TABLE

UN No.	Organic peroxide	Type of IBC	Maximum quantity (liters)	Control temperature	Emergency temperature
[Remove]					
*	* * * *	*		*	
3109	ORGANIC PEROXIDE, TYPE F, LIQUID				
*	* * * *	*		*	
	tert-Butyl peroxy-3,5,5-trimethylhexanoate, not more than 32% in diluent type A	31A	1250.		
		31HA1	1000.		
*	* * * *	*		*	
3119	ORGANIC PEROXIDE, TYPE F, LIQUID, TEMPERATURE CONTROLLED				
*	* * * *	*		*	
	tert-Butyl peroxyneodecanoate, not more than 42%, stable dispersion, in water	31A	1250	−5 °C	+5 °C.
	Di-(2-ethylhexyl) peroxydicarbonate, not more than 52%, staple dispersion, in water	31A	1250	−20 °C	−10 °C.
*	* * * *	*		*	
[Add]					
*	* * * *	*		*	
3109	ORGANIC PEROXIDE, TYPE F, LIQUID				
*	* * * *	*		*	
	tert-Butyl peroxybenzoate, not more than 32% in diluent type A	31A	1250.		
*	* * * *	*		*	
	tert-Butyl peroxy-3,5,5-trimethylhexanoate, not more than 37% in diluent type A	31A	1250.		
		31HA1	1000.		
*	* * * *	*		*	
	1,1-Di-(tert-Butylperoxy) cyclohexane, not more than 37% in diluent type A	31A	1250.		
*	* * * *	*		*	
3119	ORGANIC PEROXIDE, TYPE F, LIQUID, TEMPERATURE CONTROLLED				
*	* * * *	*		*	
	tert-Amyl peroxypivalate, not more than 32% in diluent type A	31A	1250	+10 °C	+15 °C.
*	* * * *	*		*	
	tert-Butyl peroxyneodecanoate, not more than 52%, stable dispersion, in water	31A	1250	−5 °C	+5 °C.
*	* * * *	*		*	
	Di-(2-ethylhexyl) peroxydicarbonate, not more than 62%, staple dispersion, in water	31A	1250	−20 °C	−10 °C.
*	* * * *	*		*	
	Di-(2-neodecanoylperoxyisopropyl) benzene, not more than 42%, stable dispersion, in water.	31A	1250	−15 °C	−5 °C.
*	* * * *	*		*	
	3-Hydroxy-1,1-dimethylbutyl peroxy-neodecanoate, not more than 52%, stable dispersion, in water.	31A	1250	−15 °C	−5 °C.
*	* * * *	*		*	

* * * * *

(g) * * *

ORGANIC PEROXIDE PORTABLE TANK TABLE

UN No.	Hazardous material	Minimum test pressure (bar)	Minimum shell thickness (mm-reference steel) See...	Bottom opening requirements See...	Pressure relief requirements See...	Filling limits	Control temperature	Emergency temperature
[Remove]								
*	*	*	*	*	*	*		
3119	ORGANIC PEROXIDE, TYPE F, LIQUID, TEMPERATURE CONTROLLED							
	Di-(3,5,5-trimethyl-hexanoyl) peroxide, not more than 38% in diluent type A.	4	§ 178.274 (d)(2).	§ 178.275 (d)(3).	§ 178.275 (g)(1).	Not more than 90% at 59 °F (15 °C).	0 °C	+5 °C.
*	*	*	*	*	*	*		
[Add]								
*	*	*	*	*	*	*		
3119	ORGANIC PEROXIDE, TYPE F, LIQUID, TEMPERATURE CONTROLLED							
	tert-Amyl peroxyneodecanoate, not more than 47% in diluent type A.	4	§ 178.274 (d)(2).	§ 178.275 (d)(3).	§ 178.275 (g)(1).	Not more than 90% at 59 °F (15 °C).	−10 °C	−5 °C.
*	*	*	*	*	*	*		
	Di-(3,5,5-trimethyl-hexanoyl) peroxide, not more than 38% in diluent type A or type B.	4	§ 178.274 (d)(2).	§ 178.275 (d)(3).	§ 178.275 (g)(1).	Not more than 90% at 59 °F (15 °C).	0 °C	+5 °C.
*	*	*	*	*	*	*		

■ 42. In § 173.226, paragraph (c) is revised to read as follows:

§ 173.226 Materials poisonous by inhalation, Division 6.1, Packing Group I, Hazard Zone A.

* * * * *

(c) In combination packagings, consisting of an inner packaging system and an outer packaging, as follows:

(1) Outer packagings:

Steel drum: 1A2
Aluminum drum: 1B2
Metal drum, other than steel or aluminum: 1N2
Plywood drum: 1D
Fiber drum: 1G
Plastic drum: 1H2
Steel box: 4A
Aluminum box: 4B
Natural wood box: 4C1 or 4C2
Plywood box: 4D
Reconstituted wood box: 4F
Fiberboard box: 4G
Expanded plastic box: 4H2
Solid plastic box: 4H2

(2) Inner packaging system. The inner packaging system consists of two packagings:

(i) an impact-resistant receptacle of glass, earthenware, plastic or metal securely cushioned with a non-reactive, absorbent material, and

(A) Capacity of each inner receptacle may not exceed 4 L (1 gallon).

(B) An inner receptacle that has a closure must have a closure which is physically held in place by any means capable of preventing back-off or loosening of the closure by impact or vibration during transportation.

(ii) Packed within a leak-tight packaging of metal or plastic.

(iii) This combination packaging in turn is packed within the outer packaging.

(3) Additional requirements:

(i) The total amount of liquid contained in the outer packaging must not exceed 16 L (4 gallons).

(ii) The inner packaging system must conform to the performance test requirements of subpart M of part 178 of this subchapter, at the Packaging Group I performance level when subjected to the following tests:

(A) § 178.603—Drop Test

(B) § 178.604—Leakproofness Test

(C) § 178.605—Hydrostatic Pressure Test

(iii) The inner packaging system must meet the above tests without the benefit of the outer packaging.

(iv) The leakproofness and hydrostatic pressure test may be conducted on either the inner receptacle or the outer packaging of the inner packaging system.

(v) The outer package must conform to the performance test requirements of subpart M of part 178 of this subchapter, at the Packaging Group I performance level as applicable for the type of package being used.

* * * * *

■ 43. Section 173.230 is revised to read as follows:

§ 173.230 Fuel cell cartridges containing hazardous material.

(a) *Requirements for Fuel Cell Cartridges.* Fuel cell cartridges, including when contained in or packed with equipment, must be designed and constructed to prevent fuel leakage under normal conditions of transportation. Fuel cell cartridge design types using liquids as fuels must pass an internal pressure test at a gauge pressure of 100 kPa (15 psig) without leakage. Except for fuel cell cartridges containing hydrogen in metal hydride which must be in conformance with paragraph (d) of this section, each fuel cell cartridge design type including when contained in or packed with equipment, must pass a 1.2 meter (3.9 feet) drop test onto an unyielding surface in the orientation most likely to result in the failure of the containment system with no loss of contents. Fuel cell cartridges installed in or integral to a fuel cell system are regarded as contained in equipment. Fuel cell cartridges containing a Division 2.1, Division 4.3 or Class 8 material must meet the following additional requirements.

(b) A fuel cell cartridge designed to contain a Division 4.3 or a Class 8 material may contain an activator provided it is fitted with two independent means of preventing unintended mixing with the fuel during transport.

(c) Each fuel cell cartridge designed to contain a liquefied flammable gas must:

(1) Be capable of withstanding, without leakage or bursting, a pressure of at least two times the equilibrium pressure of the contents at 55 °C (131 °F);

(2) Contain no more than 200 mL of liquefied flammable gas with a vapor pressure not exceeding 1,000 kPa (150 psig) at 55 °C (131 °F); and

(3) Pass the hot water bath test prescribed in accordance with § 173.306(a)(3)(v).

(d) Each fuel cell cartridge designed to contain hydrogen in a metal hydride must conform to the following:

(1) Each fuel cell cartridge must have a water capacity less than or equal to 120 mL (4 fluid ounces).

(2) Each fuel cell cartridge must be a design type that has been subjected, without leakage or bursting, a pressure of at least two times the design pressure of the cartridge at 55 °C (131 °F) or 200 kPa (30 psig) more than the design pressure of the cartridge at 55 °C (131 °F), whichever is greater. The pressure at which the test is conducted is referred to as the ''minimum shell burst pressure.'' The pressure within the fuel cell cartridge must not exceed 5 MPa (725 psig) at 55 °C (131 °F).

(3) Each fuel cell cartridge must be filled in accordance with the procedure provided by the manufacturer. The manufacturer must provide the following information with each fuel cell cartridge:

(i) Inspection procedures to be carried out before initial filling and before refilling of the fuel cell cartridge;

(ii) Safety precautions and potential hazards to be aware of;

(iii) A method of determining when the rated capacity has been achieved;

(iv) Minimum and maximum pressure range;

(v) Minimum and maximum temperature range; and

(vi) Any other requirements to be met for initial filling and refilling including the type of equipment to be used.

(4) Each fuel cell cartridge must be permanently marked with the following information:

(i) The rated charging pressure in megapascals (MPa);

(ii) The manufacturer's serial number of the fuel cell cartridges or unique identification number; and

(iii) The expiration date based on the maximum service life (yyyy/mm).

(5) *Design type tests:* Each fuel cell cartridge design type must be subjected to and pass the following tests (this includes cartridges integral to a fuel cell):

(i) *Drop test.* A 1.8 m (5.9 feet) drop test onto an unyielding surface must be performed. There must be no leakage. Leakage must be determined using a soap bubble solution or other equivalent means on all possible leak locations, when the fuel cell cartridge is charged to its rated charging pressure. The fuel cell cartridge must then be hydrostatically pressurized to destruction. The burst pressure must be greater than 85% of the minimum shell burst pressure. The drop must be performed in the following four different orientations:

(A) Vertically, on the end containing the shut-off valve assembly;

(B) Vertically, on the end opposite to the shut-off valve assembly;

(C) Horizontally, onto a steel apex with a diameter of 3.8 cm (9.7 in), with the steel apex in the upward position; and

(D) At a 45° angle on the end containing the shut-off valve assembly.

(ii) *Fire test.* A fuel cell cartridge filled to rated capacity (with hydrogen) must be subjected to a fire engulfment test. The cartridge design (including design types with an integral vent feature) is deemed to pass the fire test if:

(A) The internal pressure vents to zero gauge pressure without the rupture of the cartridge; or

(B) The cartridge withstands the fire for a minimum of 20 minutes without rupture.

(iii) *Hydrogen cycling test.* A fuel cell cartridge must be subjected to a hydrogen cycling test to ensure that the design stress limits are not exceeded during use. The fuel cell cartridge must be cycled from not more than 5% rated hydrogen capacity to not less than 95% rated hydrogen capacity and back to not more than 5% rated hydrogen capacity. The rated charging pressure must be used for charging and temperatures must be within the operating temperature range. The cycling must be continued for at least 100 cycles. Following the cycling test the fuel cell cartridge must be charged and the water volume displaced by the cartridge must be measured. The cartridge design is deemed to pass the test if the water volume displaced by the cycled cartridge does not exceed the water volume displaced by an uncycled cartridge charged to 95% rated capacity and pressurized to 75% of its minimum shell burst pressure.

(6) *Production leak test.* Each fuel cell cartridge must be tested for leaks at 15 °C ± 5 °C (59 °F ± 9 °F) while pressurized to its rated charging pressure. There must be no leakage. Leakage must be determined using a soap bubble solution or other equivalent means on all possible leak locations.

(e) The following packagings are authorized provided the general packaging requirements subpart B of part 173 of this subchapter are met:

(1) For fuel cell cartridges, rigid packagings conforming to the requirements of part 178 of this subchapter at the packing group II performance level; and

(2) Strong outer packagings for fuel cell cartridges contained in equipment or packed with equipment. Large equipment containing fuel cell cartridges may be transported unpackaged if the equipment provides an equivalent level of protection.

(i) Fuel cell cartridges packed with equipment must be packed in intermediate packagings together with the equipment they are capable of powering. The fuel cell cartridges and the equipment must be packaged with cushioning material or dividers or inner packaging so that the fuel cell cartridges are protected against damage that may be caused by the shifting or placement of the equipment and the cartridges within the outer packaging; and

(ii) Fuel cell cartridges installed in equipment must be protected against short circuits and the entire system must be protected from unintentional activation.

(f) For transportation by aircraft, the following additional provisions apply:

(1) The package must comply with the applicable provisions of § 173.27 of this subchapter;

(2) For fuel cells contained in equipment, fuel cell systems must not charge batteries during transport;

(3) For transportation aboard passenger aircraft, when contained in equipment, each fuel cell system and fuel cell cartridge must conform to IEC PAS 62282–6–1 Ed. 1 (IBR, see § 171.7 of this subchapter) or a standard approved by the Associate Administrator;

(4) For fuel cell cartridges packed with equipment, the maximum number of fuel cell cartridges in the intermediate packaging must be the minimum number required to power the equipment, plus 2 spares;

(5) Large robust articles containing fuel cells may be transported unpackaged when approved by the Associate Administrator; and

(6) The mass of a fuel cell cartridge containing a Division 4.3 or Class 8 materials must be not more than 1 kg (2.2 lbs).

(7) Fuel cell cartridges intended for transportation in carry-on baggage on board passenger aircraft must comply with paragraphs (a), (b), (c), (d) in this section and the applicable provisions prescribed in § 175.10 of this subchapter.

(g) *Limited quantities.* Limited quantities of hazardous materials contained in fuel cell cartridges are excepted from the labeling, placarding and the specification packaging requirements of this subchapter when packaged according to this section. Each package must conform to the packaging requirements of subpart B of this part and may not exceed 30 kg (66 pounds) gross weight. Limited quantities of fuel cell cartridges are not permitted for transportation by aircraft. For transportation by highway, rail and vessel, the following combination packagings are authorized:

(1) For flammable liquids, in fuel cell cartridges containing not more than 1.0 L (0.3 gallon), packed in strong outer packaging.

(2) For water-reactive substances (Division 4.3 Dangerous when wet material), in fuel cell cartridges containing not more than 0.5 L (16.9 fluid ounces) for liquids or not over 0.5 kg (1.1 pound) for solids, packed in strong outer packaging.

(3) For corrosive materials, in fuel cell cartridges containing not more than 1.0 L (0.3 gallon) for liquids or not more than 1.0 kg (2.2 pounds) for solids packed in strong outer packaging.

(4) For liquefied (compressed) flammable gas, in fuel cell cartridges not over 120 mL (4 fluid ounces) net capacity each, packed in strong outer packaging.

(5) For hydrogen in metal hydride, in fuel cell cartridges not over 120 mL (4 fluid ounces) net capacity each, packed in strong outer packaging.

(h) *Consumer commodities.* A limited quantity which conforms to the provisions of paragraph (g) of this section and is a ''consumer commodity'' as defined in § 171.8 of this subchapter may be renamed ''Consumer commodity'' and reclassed as ORM–D. In addition to the exceptions provided in paragraph (g) of this section, shipments of ORM–D materials are not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, hazardous waste, marine pollutant, and are eligible for the exceptions provided in § 173.156.

■ 44. Section 173.304b is revised to read as follows:

§ 173.304b Additional requirements for shipment of liquefied compressed gases in UN pressure receptacles.

(a) *General.* Liquefied gases and gas mixtures must be offered for transportation in UN pressure receptacles subject to the requirements in this section and § 173.304. In addition, the general requirements applicable to UN pressure receptacles in §§ 173.301 and 173.301b must be met.

(b) *UN pressure receptacle filling limits.* A UN pressure receptacle is authorized for the transportation of liquefied compressed gases and gas mixtures as specified in this section. When a liquefied compressed gas or gas mixture is transported in a UN pressure receptacle, the filling ratio may not exceed the maximum filling ratio prescribed in this section and the applicable ISO standard. Compliance with the filling limits may be determined by referencing the numerical values and data in Table 2 of P200 of the UN Recommendations (IBR, see § 171.7 of this subchapter). Alternatively, the maximum allowable filling limits may be determined as follows:

(1) For high pressure liquefied gases, in no case may the filling ratio of the settled pressure at 65 °C (149 °F) exceed the test pressure of the UN pressure receptacle.

(2) For low pressure liquefied gases, the filling factor (maximum mass of contents per liter of water capacity) must be less than or equal to 95 percent of the liquid phase at 50 °C. In addition, the UN pressure receptacle may not be liquid full at 60 °C. The test pressure of the pressure receptacle must be equal to or greater than the vapor pressure of the liquid at 65 °C.

(3) For high pressure liquefied gases or gas mixtures, the maximum filling ratio may be determined using the formulas in (3)(b) of P200 of the UN Recommendations.

(4) For low pressure liquefied gases or gas mixtures, the maximum filling ratio may be determined using the formulas in (3)(c) of P200 of the UN Recommendations.

(c) Tetraflouroethylene, stabilized, UN1081 must be packaged in a pressure receptacle with a minimum test pressure of 200 bar and a working pressure not exceeding 5 bar.

(d) Fertilizer ammoniating solution with free ammonia, UN1043 is not authorized in UN tubes or MEGCs.

■ 45. In § 173.306, new paragraph (a)(5) is added; and paragraphs (b)(1), (b)(2), (b)(3), (i), and (j) are revised to read as follows:

§ 173.306 Limited quantities of compressed gases.

(a) * * *

(5) For limited quantities of Division 2.2 gases with no subsidiary risk, when in a plastic container for the sole purpose of expelling a liquid, paste or powder, provided all of the following conditions are met. Special exceptions for shipment of aerosols in the ORM–D class are provided in paragraph (i) of this section.

(i) Capacity must not exceed 1 L (61.0 cubic inches).

(ii) Pressure in the container must not exceed 160 psig at 130 °F. If the pressure in the container is less than 140 psig at 130 °F, a non-DOT specification container may be used. If the pressure in the container exceeds 140 psig at 130 °F but does not exceed 160 psig at 130 °F, the container must conform to specification DOT 2S. All non-DOT specification and specification DOT 2S containers must be capable of withstanding, without bursting, a pressure of one and one-half times the equilibrium pressure of the contents at 130 °F.

(iii) Liquid content of the material and gas must not completely fill the container at 130 °F.

(iv) The container must be packed in strong outside packagings.

(v) Each container must be subjected to a test performed in a hot water bath; the temperature of the bath and the duration of the test must be such that the internal pressure reaches that which would be reached at 55 °C (131 °F) or 50 °C (122 °F) if the liquid phase does not exceed 95% of the capacity of the container at 50 °C (122 °F). If the contents are sensitive to heat, the temperature of the bath must be set at between 20 °C (68 °F) and 30 °C (86 °F) but, in addition, one container in 2,000 must be tested at the higher temperature. No leakage or permanent deformation of a container may occur.

(vi) Each outside packaging must be marked ''INSIDE CONTAINERS COMPLY WITH PRESCRIBED REGULATIONS.''

* * * * *

(b) * * *

(1) Foodstuffs or soaps in a nonrefillable metal or plastic container not exceeding 1 L (61.0 cubic inches), with soluble or emulsified compressed gas, provided the pressure in the container does not exceed 140 psig at 130 °F. Plastic containers must only contain Division 2.2 non-flammable soluble or emulsified compressed gas. The metal or plastic container must be capable of withstanding, without bursting, a pressure of one and one-half times the equilibrium pressure of the contents at 130 °F.

(i) Containers must be packed in strong outside packagings.

(ii) Liquid content of the material and the gas must not completely fill the container at 130 °F.

(iii) Each outside packaging must be marked ''INSIDE CONTAINERS

COMPLY WITH PRESCRIBED REGULATIONS.''

(2) Cream in refillable metal or plastic containers with soluble or emulsified compressed gas. Plastic containers must only contain Division 2.2 non-flammable soluble or emulsified compressed gas. Containers must be of such design that they will hold pressure without permanent deformation up to 375 psig and must be equipped with a device designed so as to release pressure without bursting of the container or dangerous projection of its parts at higher pressures. This exception applies to shipments offered for transportation by refrigerated motor vehicles only.

(3) Nonrefillable metal or plastic containers charged with a Division 6.1 Packing Group III or nonflammable solution containing biological products or a medical preparation which could be deteriorated by heat, and compressed gas or gases. Plastic containers must only contain 2.2 non-flammable soluble or emulsified compressed gas. The capacity of each container may not exceed 35 cubic inches (19.3 fluid ounces). The pressure in the container may not exceed 140 psig at 130 °F, and the liquid content of the product and gas must not completely fill the containers at 130 °F. One completed container out of each lot of 500 or less, filled for shipment, must be heated, until the pressure in the container is equivalent to equilibrium pressure of the contents at 130 °F. There must be no evidence of leakage, distortion, or other defect. The container must be packed in strong outside packagings.

* * * * *

(i) *Consumer commodities.* A limited quantity which conforms to the provisions of paragraph (a)(1), (a)(3), (a)(5), or (b) of this section and is a ''consumer commodity'' as defined in § 171.8 of this subchapter, may be renamed ''consumer commodity'' and reclassed as ORM–D material. Each package may not exceed 30 kg (66 pounds) gross weight. In addition to the exceptions provided by paragraphs (a) and (b) of this section—

(1) Outside packagings are not required to be marked ''INSIDE CONTAINERS COMPLY WITH PRESCRIBED REGULATIONS'';

(2) Shipments of ORM–D materials are not subject to the shipping paper requirements of subpart C of part 172 of this subchapter, unless the material meets the definition of a hazardous substance, a hazardous waste, or a marine pollutant or unless offered for transportation or transported by aircraft; and

(3) Shipments of ORM–D materials are eligible for the exceptions provided in § 173.156.

(j) *Aerosols and receptacles small, containing gas with a capacity of less than 50 mL.* Aerosols, as defined in § 171.8 of this subchapter, and receptacles small, containing gas, with a capacity not exceeding 50 mL (1.7 oz.) and with a pressure not exceeding 970 kPa (141 psig) at 55 °C (131 °F), containing no hazardous materials other than a Division 2.2 gas, are not subject to the requirements of this subchapter. The pressure limit may be increased to 2,000 kPa (290 psig) at 55 °C (131 °F) provided the aerosols are transported in outer packages that conform to the packaging requirements of Subpart B of this part. This paragraph (j) does not apply to a self-defense spray (*e.g.*, pepper spray).

■ 46. In § 173.307, new paragraph (a)(5) is added to read as follows:

§ 173.307 Exceptions for compressed gases.

(a) * * *

(5) Manufactured articles or apparatuses, each containing not more than 100 mg (0.0035 ounce) of inert gas and packaged so that the quantity of inert gas per package does not exceed 1 g (0.35 ounce).

* * * * *

■ 47. In § 173.322, paragraph (d) is revised to read as follows:

§ 173.322 Ethyl chloride.

* * * * *

(d) In specification cylinders as prescribed for any compressed gas except acetylene. Cylinders made of aluminum alloy are not authorized.

PART 175—CARRIAGE BY AIRCRAFT

■ 48. The authority citation for part 175 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 44701; 49 CFR 1.45 and 1.53.

■ 49. In § 175.10, paragraphs (a) introductory text, (a)(10), (a)(15)(i) through (iv), (a)(17), and (a)(18) are revised and a new paragraph (c) is added to read as follows:

§ 175.10 Exceptions for passengers, crewmembers, and air operators.

(a) This subchapter does not apply to the following hazardous materials when carried by aircraft passengers or crewmembers provided the requirements of §§ 171.15 and 171.16 (see paragraph (c) of this section) and the requirements of this section are met:

* * * * *

(10) Dry ice (carbon dioxide, solid), with the approval of the operator:

(i) Quantities may not exceed 2.5 kg (5.5 pounds) per person when used to pack perishables not subject to the HMR. The package must permit the release of carbon dioxide gas; and

(ii) When carried in checked baggage, each package is marked ''DRY ICE'' or ''CARBON DIOXIDE, SOLID,'' and marked with the net weight of dry ice or an indication the net weight is 2.5 kg (5.5 pounds) or less.

* * * * *

(15) * * *

(i) The battery meets the requirements of § 173.159a(d) of this subchapter for non-spillable batteries;

(ii) Visual inspection including removal of the battery, where necessary, reveals no obvious defects (removal of the battery from the housing should be performed by qualified airline personnel only);

(iii) The battery is disconnected and the battery terminals are protected to prevent short circuits, unless the wheelchair or mobility aid design provides an effective means of preventing unintentional activation, and

(iv) The battery is—

(A) Securely attached to the wheelchair or mobility aid;

(B) Is removed and placed in a strong, rigid packaging marked ''NONSPILLABLE BATTERY'' (unless fully enclosed in a rigid housing that is properly marked), or

(C) Is handled in accordance with paragraph (a)(16)(iv) of this section.

* * * * *

(17) Except as provided in § 173.21 of this subchapter, portable electronic devices (for example, watches, calculating machines, cameras, cellular phones, lap-top and notebook computers, camcorders, etc.) containing cells or batteries (including lithium cells or batteries) and spare batteries and cells for these devices, when carried by passengers or crew members for personal use. Each spare battery must be individually protected so as to prevent short circuits (by placement in original retail packaging or by otherwise insulating terminals, *e.g.*, by taping over exposed terminals or placing each battery in a separate plastic bag or protective pouch) and carried in carry-on baggage only. In addition, each installed or spare battery must not exceed the following:

(i) For a lithium metal battery, a lithium content of not more than 2 grams per battery; or

(ii) For a lithium-ion battery, an aggregate equivalent lithium content of not more than 8 grams per battery, except that up to two batteries with an aggregate equivalent lithium content of

more than 8 grams but not more than 25 grams may be carried.

(18) Portable electronic devices (for example, cameras, cellular phones, laptop computers, and camcorders) powered by fuel cell systems, and not more than two spare fuel cell cartridges per passenger or crew member, when transported in carry-on baggage for personal use under the following conditions:

(i) Fuel cell cartridges may contain only Division 2.1 liquefied flammable gas, or hydrogen in a metal hydride, Class 3 flammable liquids (including methanol), Division 4.3 water reactive substances, or Class 8 corrosive materials;

(ii) The maximum quantity of fuel in any fuel cell cartridge may not exceed:

(A) 200 mL (6.76 ounces) for liquids,

(B) 120 mL (4 fluid ounces) for liquefied gases in non-metallic fuel cell cartridges, or 200 mL (6.76 ounces) for liquefied gases in metal fuel cell cartridges;

(C) 200 g (7 ounces) for solids; or

(D) 120 mL (4 fluid ounces) for hydrogen in a metal hydride.

(iii) No more than two spare fuel cell cartridges may be carried by a passenger;

(iv) Fuel cell systems containing fuel and fuel cell cartridges including spare cartridges are permitted in carry-on baggage only;

(v) Fuel cell cartridges containing hydrogen in a metal hydride must meet the requirements in § 173.230(d);

(vi) Fuel cell cartridges may not be refillable by the user. Refueling of fuel cell systems is not permitted except that the installation of a spare cartridge is allowed. Fuel cell cartridges that are used to refill fuel cell systems but that are not designed or intended to remain installed (fuel cell refills) in a portable electronic device are not permitted;

(vii) Fuel cell systems and fuel cell cartridges must conform to IEC/PAS 62282–6–1 (IBR; see § 171.7 of this subchapter);

(viii) Interaction between fuel cells and integrated batteries in a device must conform to IEC/PAS 62282–6–1 (IBR, see § 171.7 of this subchapter). Fuel cell systems for which the sole function is to charge a battery in the device are not permitted;

(ix) Fuel cell systems must be of a type that will not charge batteries when the consumer electronic device is not in use; and

(x) Each fuel cell cartridge and system that conforms to the requirements in this paragraph (a)(18) must be durably marked by the manufacturer with the wording: ''APPROVED FOR CARRIAGE IN AIRCRAFT CABIN ONLY'' to certify that the fuel cell cartridge or system meets the specifications in IEC/PAS 62282–6–1 (IBR, see § 171.7 of this subchapter) and with the maximum quantity and type of fuel contained in the cartridge or system.

* * * * *

(c) The requirements to submit incident reports as required under §§ 171.15 and 171.16 of this subchapter apply to the air carrier.

■ 50. In § 175.33, paragraphs (a)(1)(i) and (c)(4) are revised and a new paragraph (a)(11) is added to read as follows:

§ 175.33 Shipping paper and notification of pilot-in-command.

* * * * *

(a) * * *

(1) * * *

(i) Section 172.101 of this subchapter. Except for the requirement to indicate the type of package, any additional description requirements provided in §§ 172.202, and 172.203 of this subchapter must also be shown on the notification.

* * * * *

(11) For UN1845, Carbon dioxide, solid (dry ice), only the UN number, proper shipping name, hazard class, total quantity in each hold aboard the aircraft, and the airport at which the package(s) is to be unloaded must be provided.

* * * * *

(c) * * *

(4) Make available, upon request, to an authorized official of a Federal, State, or local government agency (including an emergency responder(s)) at reasonable times and locations, the documents or information required to be retained by this paragraph. In the event of a reportable incident, as defined in § 171.15 of this subchapter, make immediately available to an authorized official of a Federal, State, or local government agency (including an emergency responders), the documents or information required to be retained by this paragraph.

* * * * *

■ 51. In § 175.75, paragraph (d) and (e) are revised, and add a new paragraph (f) to read as follows:

§ 175.75 Quantity limitations and cargo location.

* * * * *

(d) Each package displaying a ''Cargo Aircraft Only'' label must be loaded on cargo aircraft as follows:

(1) In a manner that a crew member or other authorized person can access, handle and when size and weight permit, separate such packages from other cargo during flight;

(2) In a cargo compartment certified by FAA as a Class C aircraft cargo compartment as defined in 14 CFR 25.857(c); or

(3) In an FAA-certified freight container that has an approved fire or smoke detection system and fire suppression system equivalent to that required by the certification requirements for a Class C aircraft cargo compartment.

(e) For cargo aircraft only, the requirements of paragraph (c) and (d) do not apply to the following hazardous materials:

(1) Class 3—Packing Group III (that do not meet the definition of another hazard class), Division 6.1 (except those also labeled FLAMMABLE), Division 6.2, Class 7, Class 9 or ORM–D.

(2) Division 2.2 in that an additional 75 kg (165 pounds) net weight of Division 2.2 material is authorized in inaccessible locations.

(3) Packages of hazardous materials transported aboard a cargo aircraft, when other means of transportation are impracticable or not available, in accordance with procedures approved in writing by the FAA Regional or Field Security Office in the region where the operator is located.

(4) Packages of hazardous materials carried on small, single pilot, cargo aircraft if:

(i) No person is carried on the aircraft other than the pilot, an FAA inspector, the shipper or consignee of the material, a representative of the shipper or consignee so designated in writing, or a person necessary for handling the material;

(ii) The pilot is provided with written instructions on the characteristics and proper handling of the materials; and

(iii) Whenever a change of pilots occurs while the material is on board, the new pilot is briefed under a hand-to-hand signature service provided by the operator of the aircraft.

(f) At a minimum, quantity limits and loading instructions in the following quantity and loading tables must be followed to maintain acceptable quantity and loading between packages containing hazardous materials. These requirements do not apply to Class 9 or ORM–D materials. For cargo aircraft only packages containing hazardous materials, packages loaded in conformance with paragraph (d) of this section are considered accessible for the purposes of the Cargo Only Aircraft table. The quantity and loading tables are as follows:

* * * * *

■ 52. In § 175.88, paragraph (c) is revised to read as follows:

§ 175.88 Inspection, orientation and securing packages of hazardous materials.

* * * * *

(c) Packages containing hazardous materials must be secured in an aircraft in a manner that will prevent any shifting or any change in the orientation of the packages. Packages containing Class 7 (radioactive) materials must be secured in a manner that ensures that the separation requirements of §§ 175.701 and 175.702 will be maintained at all times during flight.

■ 53. In § 175.700, paragraph (a) is revised to read as follows:

§ 175.700 Special limitations and requirements for Class 7 materials.

(a) Except as provided in §§ 173.4a, 173.422 and 173.423 of this subchapter, no person may carry any Class 7 materials aboard a passenger-carrying aircraft unless that material is intended for use in, or incident to research (See § 171.8 of this subchapter), medical diagnosis or treatment. Regardless of its intended use, no person may carry a Type B(M) package aboard a passenger-carrying aircraft, a vented Type B(M) package aboard any aircraft, or a liquid pyrophoric Class 7 material aboard any aircraft.

* * * * *

PART 176—CARRIAGE BY VESSEL

■ 54. The authority citation for part 176 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.53.

■ 55. In § 176.2, the definition for ''Commandant (G–MSO), USCG'' is revised to read as follows:

§ 176.2 Definitions.

* * * * *

Commandant (CG–522), USCG means the Chief, Office of Operating and Environmental Standards, United States Coast Guard, Washington, DC 20593–0001.

* * * * *

■ 56. In § 176.3, paragraph (a) is revised to read as follows:

§ 176.3 Unacceptable hazardous materials shipments.

(a) A carrier may not transport by vessel any shipment of a hazardous material that is not prepared for transportation in accordance with parts 172 and 173 of this subchapter, or as authorized by subpart C of part 171 of this subchapter.

* * * * *

■ 57. In § 176.84, in paragraph (b), in the Table of provisions, Code ''134'', Code ''139'' and Code ''140'' are removed; and new Codes ''145'' and ''146'' are added in the appropriate numerical order to read as follows:

§ 176.84 Other requirements for stowage and segregation for cargo vessels and passenger vessels.

* * * * *

(b) * * *

Code	Provisions
* * *	* *
145	Stow "separated from" ammonium compounds except for UN1444.
146	Category B stowage applies for unit loads in open cargo transport units.

* * * * *

■ 58. In § 176.172, paragraph (a) introductory text is revised to read as follows:

§ 176.172 Structural serviceability of freight containers and vehicles carrying Class 1 (explosive) materials on ships.

(a) Except for Division 1.4 materials, a freight container may not be offered for the carriage of Class 1 (explosive) materials, unless the container is structurally serviceable as evidenced by a current CSC (International Convention for Safe Containers) approval plate and verified by a detailed visual examination as follows:

* * * * *

PART 178—SPECIFICATIONS FOR PACKAGINGS

■ 59. The authority citation for part 178 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.53.

■ 60. In Subpart B of Part 178, add and reserve § 178.33b and add new §§ 178.33b–1 through 178.33b–9 to read as follows:

Sec.
178.33b Specification 2S; inner nonrefillable plastic receptacles [Reserved]
178.33b–1 Compliance.
178.33b–2 Type and size.
178.33b–3 Inspection.
178.33b–4 Duties of inspector.
178.33b–5 Material.
178.33b–6 Manufacture.
178.33b–7 Design Qualification Test.
178.33b–8 Production Tests.
178.33b–9 Marking.

§ 178.33b Specification 2S; inner nonrefillable plastic receptacles [Reserved]

§ 178.33b–1 Compliance.

(a) Required in all details.

(b) [Reserved]

§ 178.33b–2 Type and size.

(a) Single-trip inside containers.

(b) The maximum capacity of containers in this class shall not exceed one liter (61.0 cubic inches). The maximum inside diameter shall not exceed 3 inches.

§ 178.33b–3 Inspection.

(a) By competent inspector.

(b) [Reserved]

§ 178.33b–4 Duties of inspector.

(a) To inspect material and completed containers and witness tests, and to reject defective materials or containers.

(b) [Reserved]

§ 178.33b–5 Material.

(a) The receptacles must be constructed of polyethylene terephthalate (PET), polyethylene napthalate (PEN), polyamide (Nylon) or a blend of PET, PEN, ethyl vinyl alcohol (EVOH) and/or Nylon.

(b) Material with seams, cracks, laminations or other injurious defects are forbidden.

§ 178.33b–6 Manufacture.

(a) Each container must be manufactured by thermoplastic processes that will assure uniformity of the completed container. No used material other than production residues or regrind from the same manufacturing process may be used. The packaging must be adequately resistant to aging and to degradation caused either by the substance contained or by ultraviolet radiation.

(b) [Reserved]

§ 178.33b–7 Design Qualification Test.

(a) Drop Testing.

(1) To ensure that creep does not affect the ability of the container type to retain the contents, each container type shall be drop tested as follows: three groups of twenty-five filled containers shall be dropped from 1.8m on to a rigid, non-resilient, flat and horizontal surface. One group must be conditioned at 38 °C (100 °F) for 26 weeks, the second group for 100 hours at 50 °C (122 °F) and the third group for 18 hours at 55 °C (131 °F), prior to performing the drop test.

(2) Criteria for passing the drop test: the containers must not break or leak.

(b) [Reserved]

§ 178.33b–8 Production Tests.

(a) *Burst Testing.* (1) One out of each lot of 5,000 containers or less, successively produced per day must be pressure tested to destruction and must not burst below 240 psig. The container

tested must be complete as intended for transportation.

(2) Each such 5,000 containers or less, successively produced per day, shall constitute a lot and if the test container shall fail, the lot shall be rejected or ten additional containers may be selected at random and subjected to the test under which failure occurred. These containers shall be complete as intended for transportation. Should any of the ten containers thus tested fail, the entire lot must be rejected. All containers constituting a lot shall be of like material, size, design construction, finish, and quality.

(b) *Leak Testing.* (1) Each empty container must be subjected to a pressure equal to or in excess of the maximum expected in the filled containers at 55 °C (131 °F) or 50 °C (122 °F) if the liquid phase does not exceed 95 percent of the capacity of the container at 50 °C (122 °F). This must be at least two-thirds of the design pressure of the aerosol dispenser. If any container shows evidence of leakage at a rate equal to or greater than 3.3×10^{-2}mbar.l.s^{-1} at 20 °C (68 °F), at the test pressure, distortion or other defect, it must be rejected.

(2) Prior to filling, the filler must ensure that the crimping equipment is set appropriately and the specified propellant is used. Once filled, each container must be weighed and leak tested. The leak detection equipment must be sufficiently sensitive to detect at least a leak rate of 2.0×10^{-3}mbar.l.s^{-1} at 20 °C (68 °F). Any filled container which shows evidence of leakage, deformation, or excessive weight must be rejected.

§ 178.33b–9 Marking.

(a) Each container must be clearly and permanently marked to show:

(1) DOT–2S.

(2) Name or symbol of person making the mark specified in paragraph (a)(1) of this section. Symbol, if used, must be registered with the Associate Administrator.

(b) [Reserved]

■ 61. In § 178.502, paragraph (d) is revised and a note to the section is added to read as follows:

§ 178.502 Identification codes for packagings.

* * * * *

(d) Identification codes are set forth in the standards for packagings in §§ 178.504 through 178.523 of this subpart.

Note to § 178.502: Plastics materials include other polymeric materials such as rubber.

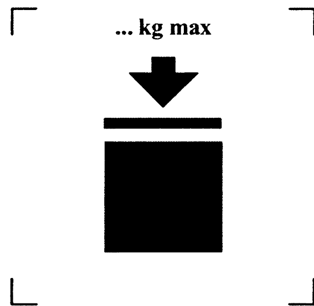
■ 62. In § 178.703, paragraph (a)(1)(vii) is revised to read as follows:

§ 178.703 Marking of IBCs.

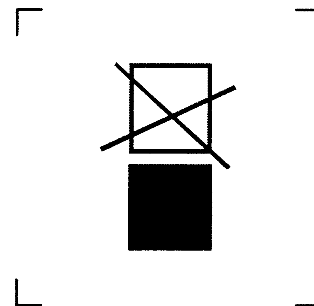
(a) * * *

(1) * * *

(vii)(A) The stacking test load in kilograms (kg). For IBCs not designed for stacking, the figure ''0'' and the symbol for IBCs not capable of being stacked must be displayed. For IBCs designed for stacking, the maximum permitted stacking load applicable when the IBC is in use must be included with the symbol for IBCs capable of being stacked. All IBCs manufactured, repaired or remanufactured after January 1, 2011 must display the applicable symbol as follows:



IBCs capable of being stacked



IBCs NOT capable of being stacked

(B) The symbol shall be not less than 100 mm (3.9 inches) x 100 mm (3.9 inches), be durable and clearly visible. The letters and numbers shall be at least 12 mm high (.48 inches). The mass marked above the symbol shall not exceed the load imposed during the design test divided by 1.8.

* * * * *

■ 63. In § 178.801, paragraph (f)(1)(i) is revised to read as follows:

§ 178.801 General requirements.

* * * * *

(f) * * *

(1) * * *

(i) The IBC need not have its closures fitted, except that the IBC must be fitted with its primary bottom closure.

* * * * *

■ 64. In § 178.810, paragraph (e) is revised to read as follows:

§ 178.810 Drop test.

* * * * *

(e) *Criteria for passing the test.* For all IBC design types, there may be no damage which renders the IBC unsafe to be transported for salvage or for disposable, and no loss of contents. The IBC shall be capable of being lifted by an appropriate means until clear of the floor for five minutes. A slight discharge from a closure upon impact is not considered to be a failure of the IBC provided that no further leakage occurs. A slight discharge (*e.g.*, from closures or stitch holes) upon impact is not considered a failure of the flexible IBC provided that no further leakage occurs after the IBC has been raised clear of the ground.

Issued in Washington, DC on December 30, 2008, under authority delegated in 49 CFR part 1.

Carl T. Johnson,

Administrator, Pipeline and Hazardous Materials Safety Administration.

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Part IV

Department of Labor

Delegation of Authority and Assignment of Responsibility to the Chief Acquisition Officer and Assistant Secretary for Administration and Management, and Related Matters; Notice

DEPARTMENT OF LABOR

Office of the Secretary

[Secretary's Order 02–2009]

Delegation of Authority and Assignment of Responsibility to the Chief Acquisition Officer and Assistant Secretary for Administration and Management, and Related Matters

1. *Purpose and Scope.* The purpose of this Secretary's Order is to delegate authorities and assign responsibilities for implementation of the Services Acquisition Reform Act (SARA) of 2003 and related laws, and to specify those authorities and responsibilities of the Chief Acquisition Officer (CAO).

2. *Authority.* This Order is issued under the authority of 5 U.S.C. 301 (Departmental Regulations); 29 U.S.C. 551 (Establishment of Department; Secretary; Seal); Reorganization Plan No. 6 of 1950 (5 U.S.C. Appendix); Public Law 101–576, the Chief Financial Officers Act of 1990; Title VII of Division B of Public Law 98–369, the Competition in Contracting Act of 1984; Public Law 108–199, Division F, Title VI, Section 647(b) of the Consolidated Appropriations Act, 2004; the Economy Act (31 U.S.C. 1535); Public Law 105–270, the Federal Activities Inventory Reform Act of 1998; Public Law 103–355, the Federal Acquisition Streamlining Act of 1994; the Federal Grant and Cooperative Agreements Act (31 U.S.C. 6301–6308); Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251–266a); Public Law 103–62, the Government Performance and Results Act of 1993; Public Law 93–400, the Office of Federal Procurement Policy Act; Title 40 of the United States Code (Public Buildings, Property and Works); Sections 503(a), 504, and 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793(a), 794, 794d); Section 3 of Public Law 103–141, the Religious Freedom Restoration Act (42 U.S.C. 2000bb–1(b)); Public Law 108–136, Division A, Title XIV, the Services Acquisition Reform Act; Public Law 85–536, the Small Business Act; Executive Order 12615, Performance of Commercial Activities by Private Sector (November 19, 1987); Executive Order 12549, Debarment and Suspension (February 18, 1986); Executive Order 12689, Debarment and Suspension (August 16, 1989); Executive Order 13198, Agency Responsibilities with Respect to Faith-Based and Community Initiatives (January 29, 2001); the Federal Acquisition Regulations System, 48 CFR Chapter 1, parts 1–99; Department of Labor Acquisition Regulation, 48 CFR Chapter 29, parts 2901–2953.

3. *Background.* Section 1421 of SARA (41 U.S.C. 414) amended the Office of Federal Procurement Policy Act to create the position of CAO and assigned principal responsibility for agency acquisition policy and activities to the CAO. Secretary's Order 2–2007 (January 30, 2007) formally created the position of CAO within the Department of Labor. This Secretary's Order supersedes and cancels Secretary's Order 2–2007, and updates the roles and responsibilities of the CAO to delegate responsibility for determining whether a recipient of a grant awarded or administered by the Office of the CAO is entitled, pursuant to the Religious Freedom Restoration Act, to an exemption from a religious non-discrimination provision of a statute or regulation enforced by the Department.

4. *The Chief Acquisition Officer.* The CAO will have acquisition management as his or her primary duty. The CAO will report to the Secretary, but may receive day-to-day guidance and direction from the Deputy Secretary. In addition to the acquisition management responsibilities established by SARA, the CAO also will have responsibility for overseeing other Department activities as set forth below, including the solicitation, award and administration of Departmental assistance instruments (grants, cooperative agreements, and other assistance instruments).

5. *Assignment of Responsibilities to the CAO.*

A. The CAO will have the following duties, which are assigned to the CAO by Section 1421 of SARA (amending Section 16 of the Office of Federal Procurement Policy Act, 41 U.S.C. 414):

(1) Advising and assisting the Secretary on the appropriate business strategy to achieve DOL's mission.

(2) Advising and assisting the Secretary and other DOL officials in ensuring that acquisition activities contribute to achieving DOL's mission.

(3) Monitoring and evaluating the performance of DOL acquisition programs based on applicable performance measurements.

(4) Establishing policies, procedures, and practices that increase the use of full and open competition in the acquisition of goods and services by the executive agency.

(5) Increasing appropriate use of performance-based contracting and performance specifications in DOL acquisition activities.

(6) Making DOL acquisition decisions, consistent with all applicable law, regulations, and policies.

(7) Establishing clear lines of authority, accountability, and responsibility for DOL acquisition decisions.

(8) Managing the direction of DOL acquisition policy, including implementation of DOL's acquisition regulations, policies, and standards.

(9) Developing and maintaining a DOL acquisition career management program to ensure that DOL has an adequate professional acquisition workforce.

(10) As part of DOL's strategic planning and performance evaluation process:

(a) Reviewing current requirements for DOL personnel regarding knowledge and skill in acquisition resources management and determining whether such requirements adequately facilitate the achievement of the performance goals established for DOL acquisition management.

(b) If necessary, developing strategies and specific plans for hiring, training, and professional development for DOL acquisition personnel.

(c) Reporting to the Secretary on the progress made in improving DOL acquisition management capability.

(11) Serving on the Chief Acquisition Officers Council.

B. The CAO will perform any additional duties that are assigned to the CAO by applicable law or regulation.

6. *Delegation of Authorities and Assignment of Additional Responsibilities to the CAO.* Except as otherwise provided by law, regulation, or this or another Secretary's Order, the CAO is delegated the following authority and assigned the following responsibilities:

A. Authorities and responsibilities of the Department or Secretary under the following laws (including any amendments) and any related regulations, executive orders, or OMB circulars or memoranda:

(1) Title VII of Division B of Public Law 98–369, the Competition in Contracting Act of 1984.

(2) Public Law 108–199, Division F, Title VI, Section 647(b), the Consolidated Appropriations Act, 2004 (which requires an annual report on competitive sourcing).

(3) The Economy Act (31 U.S.C. 1535).

(4) In coordination with the ASAM, Sections 2(d) and (e) of Public Law 105–270, the Federal Activities Inventory Reform Act of 1998.

(5) Public Law 103–355, the Federal Acquisition Streamlining Act of 1994.

(6) The Federal Grant and Cooperative Agreements Act (31 U.S.C. 6301–6308).

(7) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251–266a).

(8) Public Law 93–400, the Office of Federal Procurement Policy Act, including:

(a) Designating a Senior Procurement Executive, who will report directly to the CAO without intervening authority and who will be responsible for:

(1) Managing the direction of the DOL procurement system, including implementation of DOL procurement policies, regulations, and standards.

(2) Carrying out all powers, functions, and duties of the Secretary with respect to implementation of Section 37 of the Office of Federal Procurement Policy Act, including the establishment of policies and procedures for the effective management (including accession, education, training, career development, and performance incentives) of the acquisition workforce of the agency.

(b) Designating for the Department and for each procuring activity of the Department one officer or employee (other than the Senior Procurement Executive) to serve as a Competition Advocate, who will be responsible for promoting full and open competition, promoting the acquisition of commercial items, and challenging barriers to such acquisition, as well as performing any other responsibilities assigned to the Competition Advocate by law, regulation, or policy.

(c) In consultation with the Office of Federal Procurement Policy and the DOL Chief Information Officer (CIO), establishing, maintaining, and using, to the maximum extent practicable and cost-effective, procedures and processes that employ electronic commerce in the conduct and administration of the Department's procurement system.

(9) Title 40 of the United States Code, Subtitle I, Chapter 11, Selection of Architects and Engineers.

(10) Public Law 108–136, Division A, Title XIV, the Services Acquisition Reform Act.

(11) Executive Orders 12549 and 12689 on Debarment and Suspension.

(12) Executive Order 12615, Performance of Commercial Activities by Private Sector.

B. Prescribing regulations, policies and procedures regarding the solicitation and award of, and overseeing the administration of, all Departmental acquisitions and assistance instruments (e.g., procurement contracts, cooperative agreements, grants, inter- or intra-agency acquisition instruments, and similar documents) that obligate Federal funds or resources for the purpose of obtaining goods and services for the Department or other Federal agencies, or promoting Departmental programs and objectives through financial assistance. Funds paid out of the appropriation, ''State Unemployment Insurance and Employment Service Operations'' are excluded from this authority.

C. In coordination with the ASAM, CIO, and Assistant Secretary for the Office of Disability Employment Policy (ODEP), establishing and ensuring implementation of policies, procedures and practices to ensure that all DOL acquisitions and assistance instruments comply with Sections 503(a), 504 and 508 of the Rehabilitation Act of 1973 (29 U.S.C. 793(a), 794, 794d).

D. Performing any acquisition or procurement responsibilities assigned to the ASAM under Secretary's Order 5–94, ''Procurement and Use of Environmentally Preferable Products and Services.''

E. Assisting the CIO on the acquisition of information technology.

F. Coordinating with the ASAM to ensure that the Department's acquisition management processes are integrated into its strategic and operational planning processes.

G. Assisting the Director of the Office of Small Business Programs (OSBP) on procurement actions related to OSBP's responsibilities under Secretary's Order 4–2002 and on the Department's Annual Acquisition Plan and Procurement Forecast.

H. Assisting the Director of the Center for Faith-Based and Community Initiatives (CFBCI) on acquisition or assistance actions related to CFBCI's responsibilities under Executive Order 13198 or similar authority.

I. Coordinating with the Chief Financial Officer (CFO):

(1) To ensure that the Department's internal management controls relating to the CAO's responsibilities are consistent with all laws, regulations, OMB guidance, and policies governing DOL management control processes, including Secretary's Order 14–2006, Internal Control Program (dated June 20, 2006).

(2) To ensure that the CFO is informed on a timely basis of all management control issues arising within the scope of the CAO's functions.

(3) On the acquisition of financial management systems and asset management systems throughout the Department.

J. Establishing and overseeing an advisory board (the current Procurement Review Board or equivalent), which will address significant acquisition and assistance issues, as determined by the CAO.

K. Maintaining and publishing, in a prominent manner, a list of DOL contracting and grant officers which also identifies the limits on these officers' authority.

L. Determining whether a recipient of a grant awarded or administered by the Office of the CAO is entitled, pursuant to the Religious Freedom Restoration Act, to an exemption from a religious non-discrimination provision of a statute or regulation applied and/or enforced by the Department.

M. Performing any other related duties that are assigned by the Secretary.

7. *Responsibilities of the Director of the Office of Small Business Programs.* The OSBP Director is responsible for coordinating, as necessary, with the CAO on procurement actions related to OSBP's responsibilities under Secretary's Order 4–2002 and on the Department's Annual Acquisition Plan and Procurement Forecast.

8. *Responsibilities of the Director of the Center for Faith-Based and Community Initiatives.* The CFBCI Director is responsible for coordinating, as necessary, with the CAO on acquisition or assistance actions related to CFBCI's responsibilities under Executive Order 13198 or similar authority.

9. *Responsibilities of the Assistant Secretary for the Office of Disability Employment Policy.* The Assistant Secretary for ODEP is responsible for coordinating with the CAO, ASAM, and CIO to establish policies, procedures and practices ensuring that all DOL acquisitions and assistance instruments comply with Sections 503(a), 504 and 508 of the Rehabilitation Act of 1973.

10. *Responsibilities of the Solicitor of Labor.* The Solicitor of Labor is delegated authority and assigned responsibility for providing legal advice and assistance to all officers of the Department relating to the administration and implementation of this Order. The bringing of legal proceedings, the representation of the Secretary and other officials of the Department, and the determination of whether such proceedings or representations are appropriate in a given case, are delegated exclusively to the Solicitor.

11. *Responsibilities of the Chief Information Officer.* The CIO is responsible for:

A. Consulting with the CAO on the establishment, maintenance, and use (to the maximum extent that is practicable and cost-effective) of procedures and processes employing electronic commerce in the conduct and

administration of the Department's procurement system.

B. Coordinating with the CAO on the acquisition of information technology.

C. Coordinating with the CAO, ASAM, and Assistant Secretary for ODEP to establish policies, procedures and practices ensuring that all DOL acquisitions of information technology are consistent with Sections 503(a), 504 and 508 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794, 794d).

12. *Responsibilities of the Assistant Secretary for Administration and Management.* The ASAM is responsible for:

A. Overseeing the Department's compliance with the Government Performance and Results Act, including coordinating with the CAO to ensure that the Department's acquisition management processes are integrated into its strategic and operational planning processes.

B. Exercising the Secretary's authority under Section 1413 of SARA (41 U.S.C. 433 note) to determine that certain acquisition positions are shortage category positions in order to use the authorities in 5 U.S.C. 3304, 5333 and 5753 to recruit and appoint highly qualified persons directly to such positions in the Department.

C. Coordinating with the CAO and other agency heads, as appropriate, to fulfill the Department's responsibilities under the Federal Activities Inventory Reform Act of 1998.

D. Coordinating with the CAO, CIO and Assistant Secretary for ODEP to establish policies, procedures and practices ensuring that all DOL acquisitions and assistance comply with Sections 503(a), 504 and 508 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794, 794d).

13. *Responsibilities of the Chief Financial Officer.* The CFO is responsible for coordinating with the CAO:

A. To ensure that the Department's internal management controls relating to the CAO's responsibilities are consistent with all laws, regulations, OMB guidance, and policies governing DOL management control processes, including Secretary's Order 14–2006, Internal Control Program (dated June 20, 2006).

B. To ensure that the CFO is informed on a timely basis of all management control issues arising within the scope of the CAO's functions.

C. On the acquisition of financial management systems and asset management systems throughout the Department.

14. *Responsibilities of Agency Heads.* Consistent with their statutory responsibilities and other applicable Secretary's Orders and guidelines, all DOL Agency Heads are assigned responsibility for ensuring compliance by their organizations with the laws identified in Paragraph 6.A. above, as well as related regulations, and DOL and OMB guidance and policies.

15. *Directives Affected:*

A. Secretary's Order 2–2007 is superseded and cancelled. All Secretary's Orders and other DOL documents (including policies and guidance) which reference Secretary's Orders 2–2007 or 4–76 are amended to refer to this Order instead. Delegations or transfers of authority made by the ASAM under Secretary's Order 4–76 will continue in effect unless modified or terminated by the CAO.

B. This Order does not affect the authorities or responsibilities of the Assistant Secretary for Public Affairs under Secretary's Order 8–2006, relating to the review of audio-visual work done under contract, to assure compliance with appropriate contract terms and achievement of minimum acceptable quality.

C. This Order does not affect the authorities and responsibilities assigned by any other Secretary's Order, unless otherwise expressly so provided in this or another Order.

D. This Order does not affect the authorities or responsibilities of the Office of Inspector General (OIG) under the Inspector General Act of 1978, as amended, or under Secretary's Order 4–2006.

E. This Order does not affect the authorities or responsibilities of the Chief Financial Officer under the CFO Act, Secretary's Order 14–2006, Secretary's Order 1–92, or Secretary's Order 1–97.

F. This Order amends Secretary's Order 5–94 to shift acquisition and procurement responsibilities relating to environmentally preferable products and services from the ASAM to the CAO.

G. This Order does not affect Secretary's Order 1–2001, which delegates authorities and assigns responsibilities to the Assistant Secretary for the Office of Disability Employment Policy.

H. This Order does not affect Secretary's Order 1–2008, which delegates authorities and assigns responsibilities to the Assistant Secretary for Employment Standards and Other Officials in the Employment Standards Administration.

I. This Order amends Secretary's Order 4–2002 (which assigns responsibilities and delegates duties related to small businesses) to shift certain procurement responsibilities from the ASAM to the CAO, but does not otherwise affect the responsibilities delegated in that Order.

J. This Order does not affect Secretary's Order 5–2007 which, inter alia, provides grantmaking authority to the Commissioner of Labor Statistics under the Occupational Safety and Health Act.

K. This Order amends Secretary's Order 3–2003 (which assigns responsibilities and delegates duties to the CIO) to shift certain procurement responsibilities from the ASAM to the CAO, but does not otherwise affect the responsibilities delegated in that Order.

L. This Order does not affect Secretary's Order 1–2004 which delegates authorities and assigns responsibilities for DOL's Internal Equal Employment Opportunity Programs.

M. This Order does not affect the authority delegated by the Secretary to the Employment and Training Administration under section 173 of the Workforce Investment Act to administer dislocated worker programs, including national emergency grants.

16. *Reservation of Authority.* The following functions are reserved to the Secretary:

A. No delegation of authority or assignment of responsibility under this Order will be deemed to affect the Secretary's authority to continue to exercise or further delegate such authority or responsibility.

B. The submission of reports and recommendations to the President and Congress concerning the administration of the statutory provisions and executive orders listed above is reserved to the Secretary.

17. *Redelegations and Transfers of Authority.* Unless provided otherwise in this or another Secretary's Order, the authority delegated in this Order may be redelegated or transferred, as permitted by law or regulation.

18. *Effective Date.* This Order is effective immediately.

Dated: January 9, 2009.

Elaine L. Chao,

Secretary of Labor.

[FR Doc. E9–692 Filed 1–13–09; 8:45 am]

BILLING CODE 4510–23–P

Federal Register

Wednesday,
January 14, 2009

Part V

Department of Labor

Delegation of Authorities and Assignment of Responsibilities to the Assistant Secretary for Policy; Notice

DEPARTMENT OF LABOR

Office of the Secretary

[Secretary's Order 01–2009]

Delegation of Authorities and Assignment of Responsibilities to the Assistant Secretary for Policy

1. *Purpose.* To define and delegate authorities and responsibilities to the Assistant Secretary for Policy (ASP).

2. *Authority and Directives Affected.*

A. *Authorities.*

This Order is issued pursuant to 29 U.S.C. 551; 5 U.S.C. 301; Reorganization Plan No. 6 of 1950 (5 U.S.C. Appendix 1); 5 U.S.C. 5315; the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 601 *et seq.*); the Small Business Paperwork Relief Act of 2002 (44 U.S.C. 3506(i)); Executive Order 12131 (''The President's Export Council,'' May 4, 1979); Executive Order 12866 (''Regulatory Planning and Review,'' September 30, 1993), as amended by Executive Order 13258 (''Amending Executive Order 12866 on Regulatory Planning and Review,'' February 26, 2002) and Executive Order 13422 (''Strengthening Federal Environmental, Energy, and Transportation Management,'' January 18, 2007); Executive Order 13228, (''Establishing the Office of Homeland Security and the Homeland Security Council,'' October 8, 2001); Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking,'' August 13, 2002); and Homeland Security Presidential Directive-1 (''Organization and Operation of the Homeland Security Council,'' October 29, 2001).

B. *Directives Affected.*

1. Secretary's Order 13–2006, which delegated authority and assigned responsibilities to the Assistant Secretary for Policy (ASP), is cancelled.

2. This Order does not affect the authorities and responsibilities assigned by any other Secretary's Order, unless otherwise expressly so provided in this or another Order.

3. *Background.* The Office of the Assistant Secretary for Policy (OASP) provides advice and assistance to the Secretary and Deputy Secretary in a number of areas, including policy development, program implementation and evaluation, research, budget and performance analysis, and regulatory, legislative issues and other policy support. The Secretary of Labor advises the President and represents the Department of Labor (DOL or Department) in Cabinet deliberations dealing with significant regulatory, programmatic policy and legislative issues, including those related to economic data and trends, particularly as they relate to promoting the competitiveness of the American workforce in the 21st century economy. The presence of rapid technological and economic change in the economy compels the need for skilled analysts to be available to quickly assist the Secretary in response to urgent policy and programmatic matters. Thus, this Order sets forth OASP's role of providing support, analysis, and advice to the Secretary and Deputy Secretary on policy, programmatic, economic, regulatory, and compliance assistance matters.

This Order also addresses OASP's role under Executive Order (E.O.) 12866, amendments thereto, and related guidance from the Office of Management and Budget (OMB); the requirements of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA); the Small Business Paperwork Relief Act of 2002; the management of the U.S. Government Accountability Office Reports (see Secretary's Order 05–2008); the administration of the Policy Planning Board (see Secretary's Order 12–2006); and the administration of the DOL Working Partners for an Alcohol- and Drug-Free Workplace program.

Executive Order 12866, as amended by E.O. 13422, requires the head of each Executive Branch Agency to designate a Regulatory Policy Officer who shall be responsible for ensuring the Department's compliance with the Executive Order. The Secretary has designated the Assistant Secretary for Policy as the Department's Regulatory Policy Officer and this Order describes OASP responsibilities for the implementation of these functions.

This order also describes OASP's responsibilities regarding the policy development process within DOL, including management of the Policy Planning Board, and the Department's interaction with the Office of the Federal Register.

4. *Delegation of Authorities and Assignment of Responsibilities.*

A. *The Assistant Secretary for Policy* is delegated authority and assigned responsibility for:

1. Advising the Secretary and Deputy Secretary and coordinating and developing the preparation of studies, analyses, public statements and policies with respect to the Secretary's duties in the areas of regulatory, programmatic and compliance assistance policy, as well as economic policy formulation, including the impact of Departmental policies and programs on general economic policy.

2. Establishing the following offices and positions within OASP:

a. An Office of Regulatory and Programmatic Policy, to be headed by a Director, that implements, manages, and coordinates Departmental regulatory and programmatic policy.

b. An Office of Compliance Assistance Policy, to be headed by a Director, that develops, manages, and coordinates Departmental compliance assistance policies, initiatives and programs.

c. An Office of Economic Policy and Analysis, to be headed by the Department's Chief Economist, that implements, manages, and coordinates Departmental economic policy, research and analysis.

3. Serving as the Department's Regulatory Policy Officer under E.O. 12866, including:

a. Ensuring the Department complies with the regulatory and guidance development requirements of E.O. 12866, as amended, and any other related OMB Circulars or Bulletins, including OMB's Final Bulletin for Agency Good Guidance Practices.

b. Serving as the Department's regulatory liaison overseeing the exchange of information between the Department and OMB, including:

(1) Following Secretarial approval of draft regulations or guidance, transmitting the documents to OMB for review.

(2) Facilitating discussion between DOL and OMB staff about comments on regulations and guidance documents undergoing OMB review.

(3) Serving as the point of intake, concurrent with SOL and DOL agency staff, for OMB passback of comments on the Department's draft regulations and guidance documents.

(4) Coordinating the resolution of outstanding issues raised by OMB with affected DOL agencies, SOL, and the Office of the Secretary.

4. Serving as the Department's liaison to the Office of the Federal Register:

a. Electronically transmitting regulatory documents for submission to the **Federal Register**.

b. Coordinating and providing technical assistance to DOL agencies on the document submission process.

5. Providing general oversight of, and guidance for, the Department's compliance with the Regulatory Flexibility Act (as amended by SBREFA), Small Business Paperwork Reduction Act, and related laws and Executive Orders, OMB Circulars and Bulletins. This effort is done in consultation with SOL as needed and includes such activities as:

a. Developing and implementing written Departmental policies and procedures concerning the potential impact of draft rules on small entities, as required by Section 3(a) of E.O. 13272.

b. Providing analysis, guidance, review, and technical assistance, as necessary, to Departmental agencies that are preparing required studies such as regulatory impact and flexibility studies.

c. Providing guidance and technical assistance, as necessary, to Departmental agencies during the Small Business Advocacy Review Panel process.

d. Preparing, coordinating, and reviewing the Department's Semi-Annual Regulatory Agenda and Semi-Annual Peer Review Agenda.

e. In coordination with the Office of Small Business Programs, acting as the Department's liaison with the Small Business Administration (SBA), including the Office of the National Ombudsman and Chief Counsel for Advocacy.

f. Serving as the Department's point of contact with small businesses pursuant to the Small Business Paperwork Relief Act of 2002.

g. Providing the public with a list of compliance assistance resources consistent with SBREFA.

6. Providing leadership, analysis and operational support for the Policy Planning Board (Secretary's Order 12–2006), including preparing the Department's semi-annual Research Agenda.

7. Reviewing cross-cutting activities within the Department as they pertain to the Secretary's broader policy functions, including reports, budgets, legislative proposals, and other documents submitted to the Secretary or Deputy Secretary for review and approval; and coordinating selected reports to OMB and other agencies.

8. Consistent with Secretary's Order 05–2008, coordinating, reviewing and processing U.S. Government Accountability Office reports.

9. Consistent with Secretary's Order 02–2008, providing analysis and advice to the Secretary and Deputy Secretary on policies and programs related to developing, coordinating, implementing and institutionalizing compliance assistance initiatives, including reviewing Agency compliance assistance plans; identifying and promoting best practices; coordinating with agencies on cross-cutting initiatives; and providing leadership in development of Departmental compliance assistance tools, such as the *elaws* Advisors (Employment Laws Assistance for Workers and Small Businesses) and worker and small business guides.

10. Supporting and advancing the Department's involvement in homeland security and emergency management policy development and coordination matters involving the White House Homeland Security Council, the Department of Homeland Security, and other federal agencies to address policy issues relevant to the Department, its programs and agencies, and the functions and responsibilities of OASP.

11. Providing the analytical support required by the Secretary as a member of the President's Export Council.

12. Providing the economic analysis required to support the Secretary, Deputy Secretary, and PPB with respect to policy and regulatory issues under consideration by the Department including:

a. Preparing recommendations and analyses with respect to long- and short-term economic trends; preparing macroeconomic and microeconomic studies and analyses related to the formulation of policy or the economic impact of Departmental policies, regulations, and programs.

b. Compiling economic data and analysis for the Secretary and Deputy Secretary on current economic developments, particularly with respect to the Bureau of Labor Statistics' release of the Monthly Employment Situation report and in support of the Secretary's role as an economic advisor to the President.

13. Advising the Secretary, Deputy Secretary and Director of the Office of Jobs Corps on research, evaluations and policy initiatives related to the Job Corps program.

14. Administering the Department's Working Partners for an Alcohol- and Drug-Free Workplace program.

15. Representing the Secretary in a variety of forums attended by U.S. government officials and maintaining continuous and personal liaison with those groups and the White House on matters involving policy, Departmental programs, economic issues, regulations, or compliance assistance.

16. Conducting appropriate research, analysis and evaluation activities in accord with the Secretary's selected policy priorities.

17. Performing any additional duties that may be assigned by the Secretary.

B. *The Assistant Secretary for Administration and Management* is delegated authority and assigned responsibility for:

1. Providing budgetary resources arising from this Order, fully consistent with the established requirements of the Department.

2. Providing appropriate administrative and management support, as required, for the efficient and effective operation of these programs.

C. *The Solicitor of Labor* is responsible for providing legal advice and assistance to all Department of Labor officials relating to implementation and administration of all aspects of this Order.

D. *DOL Agency heads* are responsible for coordinating with OASP on policies and activities relating to the mission of their respective agencies, including:

1. Complying with the regulatory and guidance development requirements of E.O. 12866, as amended, and any other relevant OMB Directives, including OMB's Final Bulletin for Agency Good Guidance Practices.

2. Fulfilling the requirements of the Regulatory Flexibility Act, as amended by SBREFA, and related laws, including appropriate coordination with small entities in the development of rules, production of plain language compliance guides, and response to requests for information.

3. Developing annual compliance goals, timetables and objectives for their agencies and submitting their Annual Compliance Assistance Plans to the PPB for review and approval; planning and developing informational materials and compliance assistance tools (such as *elaws* Advisors), programs or activities to inform the public about the agencies' laws, policies, programs and activities; appointing one or more Compliance Assistance Liaisons to work with OCA on implementing and institutionalizing DOL compliance assistance initiatives, identifying and promoting best practices, and participating in DOL-wide compliance assistance programs.

4. Expeditiously reviewing and commenting on GAO's findings and recommendations contained in GAO reports, and submitting all responses to OASP for clearance through the Executive Secretariat.

5. Ensuring that reports requested by OASP concerning the achievement of the objectives of this order, including the semi-annual Regulatory Agenda, the semi-annual Peer Review Agenda and the semi-annual Research Agenda, are accurate and submitted in a timely manner.

5. *Reservation of Authority and Responsibility.*

A. The submission of reports and recommendations to the President and the Congress concerning the administration of statutory or

administrative provisions is reserved to the Secretary.

B. This Secretary's Order does not affect the authorities or responsibilities of the Office of Inspector General under the Inspector General Act of 1978, as amended, or under Secretary's Order 4–2006 (February 21, 2006).

6. *Redelegation/Reassignment of Authority.* All authorities and responsibilities enumerated in this Order may be redelegated or reassigned within OASP.

7. *Effective Date.* This Order is effective immediately.

Dated: January 8, 2009.

Elaine L. Chao,

Secretary of Labor.

[FR Doc. E9–693 Filed 1–13–09; 8:45 am]

BILLING CODE 4510–23–P

Federal Register

Wednesday,

January 14, 2009

Part VI

Department of Labor

Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Employment and Training; Notice

DEPARTMENT OF LABOR

Office of the Secretary

[Secretary's Order 03–2009]

Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Employment and Training

1. *Purpose and Scope*. The purpose of this Secretary's Order is to delegate and assign to the Assistant Secretary for Employment and Training (ASET) the authorities and responsibilities of the Secretary of Labor for organizing, implementing, and putting into operation employment and training policies, programs, and activities.

2. *Authority and Directives Affected*.

A. *Authorities*. This Order is issued under 5 U.S.C. 301 (Departmental Regulations); 29 U.S.C. 551 (Establishment of the Department; Secretary; Seal); and Reorganization Plan No. 6 of 1950 (5 U.S.C. Appendix).

B. *Directives Affected*. Secretary's Order 3–2007 is hereby superseded and cancelled by this Order. Any Secretary's Orders or other DOL document (including policies and guidance) which references Secretary's Orders 4–75 (Manpower Programs), 2–79 (Targeted Jobs Tax Credit), 3–81 (Trade Act of 1974), or 2–85 (Job Training Partnership Act), which were superseded and cancelled by Secretary's Order 3–2007, and the delegation of authority and assignment of responsibility of the ASET under Secretary's Order 3–81, are deemed to refer to this Order instead.

3. *Background*. This Order, which repeals and supersedes Secretary's Order 3–2007, updates the roles and responsibilities of the ASET to include responsibility for determining whether a recipient of a grant awarded or administered by the Employment and Training Administration is entitled, pursuant to the Religious Freedom Restoration Act, to an exemption from a religious non-discrimination provision of a statute or regulation enforced by the Department. In general, this Order constitutes the primary Secretary's Order for the Employment and Training Administration (ETA). This Order consolidates all of the authority delegated and the responsibilities assigned to the ASET for the employment and training policies, programs, and activities of ETA. The ASET is responsible for overseeing and managing a budget that funds the nation's publicly funded workforce investment system. This system contributes to the more efficient functioning of the U.S. labor market by providing a wide array of employment and training services to employers, job seekers, and youth, including job training, employment services, labor market information, and income maintenance services. The ASET manages the agency responsible for carrying out these responsibilities.

4. *Delegation of Authority and Assignment of Responsibilities*.

A. The Assistant Secretary for Employment and Training is hereby delegated authority and assigned responsibility for carrying out the standards, policies, programs, and activities of the Department of Labor, including grant making and contract procurement activities in accordance with existing governmental and Departmental regulations, relating to workforce development activities such as employment services, benefit assistance, and training, including those functions to be performed by the Secretary of Labor under the designated provisions of the following statutes, except as provided in paragraph 5 of this Order.

(1) American Competitiveness and Workforce Improvement Act, Section 414(c), Public Law 105–277, as amended by Division J, Section 428, Public Law 108–447, 29 U.S.C. 2916a.

(2) Appalachian Regional Development Act of 1965, as amended, 40 U.S.C. 14101 *et seq.*

(3) Federal Unemployment Tax Act, as amended, 26 U.S.C. 3301–3311, including the Federal-State Extended Unemployment Compensation Act of 1970, as amended, 26 U.S.C. 3304 note.

(4) Health Coverage Tax Credit, section 31 of the Internal Revenue Code of 1986, 26 U.S.C. 31.

(5) Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101 *et seq.* and related laws, subject to (i) Secretary's Order 4–2001 which remains in effect, which in relevant part, delegates authority and assigns responsibility to the Assistant Secretary for Employment Standards for the enforcement of alien labor certification, attestation, and labor condition application programs, and (ii) Secretary's Order 18–2006 which remains in effect, which in relevant part, delegates authority and assigns responsibility to the Deputy Undersecretary for International Affairs for assisting the Secretary of Homeland Security in the preparation of immigration reports and assisting in the coordination of information on immigration and migration policy within the Department and coordinating the Department's participation in international forums on discussions of migration and immigration.

(6) Intergovernmental Cooperation Act of 1968, as amended, 31 U.S.C. 6501 *et seq.*

(7) National Apprenticeship Act (Fitzgerald Act), as amended, 29 U.S.C. 50 *et seq.*

(8) Older Americans Act of 1965, as amended, 42 U.S.C. 3056 *et seq.*

(9) Public Works Acceleration Act, Public Law 87–658, 42 U.S.C. 2641 *et seq.*

(10) Rehabilitation Act of 1973, as amended, 29 U.S.C. 795.

(11) Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, sections 410 and 423, 42 U.S.C. 5177 and 5189a; Executive Order 12381, ''Delegation of Emergency Management Functions'' (September 8, 1982), which delegates the authority of the President to exercise powers of the President with respect to Federal disaster assistance to the Federal Emergency Management Agency; ''Delegation of Authority to the Department of Labor,'' from the Federal Emergency Management Agency to provide Federal disaster assistance (February 10, 1986).

(12) Rural Development Act of 1972, as amended, 7 U.S.C. 1932(d)(4).

(13) Small Business Act, as amended, 15 U.S.C. 644(n).

(14) Social Security Act of 1935, as amended, Title III—Grants to States for Unemployment Compensation Administration, 42 U.S.C. 501–504; Title IX—Unemployment Security Administration Financing, 42 U.S.C. 1101–1110; Title XI, Section 1137—Income and Eligibility Verification System, 42 U.S.C. 1320b–7; Title XII—Advances to State Unemployment Funds, 42 U.S.C. 1321–1324.

(15) Trade Act of 1974, as amended, 19 U.S.C. 2101–2321 and 2395; North American Free Trade Agreement Transitional Adjustment Assistance Program (NAFTA–TAA), Public Law 103–182, Title V, 19 U.S.C. 2331, repealed by section 123(c) of the Trade Reform Act of 2002, Public Law 107–210, except with respect to workers eligible for NAFTA–TAA under petitions filed before November 4, 2002.

(16) Unemployment Compensation for Federal Civilian Employees Program, 5 U.S.C. 8501–8509; and Unemployment Compensation for Ex-servicemembers Program, 5 U.S.C. 8521–8525.

(17) Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 3689, 3694, 4106, 4107(c), 4110, and 4212(a)(2)(B) and (C).

Note: Secretary's Order 4–2001 remains in effect, which in part, delegates authority and assigns responsibility to the Assistant Secretary for Employment Standards for affirmative action provisions of the Vietnam

Era Veterans' Readjustment Assistance Act of 1974, including 38 U.S.C. 4212(a)(1), 4212(a)(2)(A), and 4212(b)(2004) and 38 U.S.C. 4212(a) and (b) (2002). Subject to the above delegation to ETA, Secretary's Order 3–2004 remains in effect, which in part, delegates authority and assigns responsibility to the Assistant Secretary of Labor for Veterans' Employment and Training for administering the Federal Contractor Veteran's Employment Report (VETS–100), 38 U.S.C. 4212(d), and determining compliance pursuant to 20 CFR 1001.130 regarding Federal contractor priority of employment referral and employment listings under 38 U.S.C. 4212(a)(2)(B) and (C).

(18) Vocational Education Act of 1963, as amended, the Carl D. Perkins Vocational and Applied Technology Act, 20 U.S.C. 2301 *et seq.*

(19) Wagner-Peyser Act, as amended, 29 U.S.C. 49 *et seq.*

(20) Work Opportunity Tax Credit, section 51 of the Internal Revenue Code of 1986, 26 U.S.C. 51.

(21) Worker Adjustment and Retraining Notification Act, as amended, 29 U.S.C. 2101 *et seq.*

(22) Workforce Investment Act of 1998, as amended, title I and title V, Public Law 105–220, 29 U.S.C. 2801–2945, 20 U.S.C. 9271–9276 except for title I, subtitle D § 168 which pertains to the Veterans' Workforce Investment Program, 29 U.S.C. 2913, and title I, subtitle C which pertains to the Job Corps program, 29 U.S.C. 2881–2901.

(23) YouthBuild Transfer Act of 2005, Public Law 109–281, 29 U.S.C. 2918a.

(24) Executive Order 10582, ''Prescribing Uniform Procedures for Certain Determinations under the Buy American Act'' (December 17, 1954), as amended by Executive Order 11051, ''Prescribing Responsibilities of the Office of Emergency Planning in the Executive Office of the President'' (September 27, 1962), and Executive Order 12148, ''Federal Emergency Management'' (July 20, 1979).

(25) Executive Order 12656, ''Assignment of Emergency Preparedness Responsibilities'' (November 18, 1988).

(26) Executive Order 12789, ''Delegation of Reporting Functions under the Immigration Reform and Control Act of 1986'' (February 10, 1992), as amended by Executive Order 13286, ''Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security'' (February 28, 2003).

(27) Executive Order 12073, ''Federal Procurement in Labor Surplus Areas'' (August 16, 1978).

(28) Executive Order 13198, ''Agency Responsibilities With Respect to Faith-Based and Community Initiatives'' (January 29, 2001).

(29) Executive Order 13279, ''Equal Protection of the Laws for Faith-Based and Community Organizations'' (December 12, 2002).

(30) Such additional Federal acts, Executive Orders, or regulations that may assign to the Secretary or the Department duties and responsibilities relating to workforce development activities including employment services, benefit assistance and training, similar to those listed under subparagraphs (1)–(29) of this paragraph, including, but not limited to, the extension of unemployment compensation provided under Federal law.

B. The Assistant Secretary for Employment and Training is delegated authority for making organizational changes in accordance with policies established by the Secretary.

C. The Assistant Secretary for Employment and Training is also delegated the authority and assigned responsibility to carry out departmental liaison and committee representative duties as provided in the relevant authorities listed in paragraph 4(A) above, except as provided in paragraph 5 of this Order.

D. The Assistant Secretary for Employment and Training is also delegated the authority and assigned responsibility to determine whether a recipient of a grant awarded or administered by the Office of the Assistant Secretary for Employment and Training is entitled, pursuant to the Religious Freedom Restoration Act, 42 U.S.C. 2000bb–1(b), to an exemption from a religious non-discrimination provision of a statute or regulation applied and/or enforced by the Department.

E. The Solicitor of Labor is delegated authority and assigned responsibility for providing legal advice and assistance to officials of the Department relating to the administration of this Order and the statutory provisions, regulations, and Executive Orders listed above.

5. *Reservation of Authority*.

A. No delegation of authority or assignment of responsibility under this Order will be deemed to affect the Secretary's authority to continue to exercise or further delegate such authority or responsibility.

B. The submission of reports and recommendations to the President and Congress concerning the administration of the statutory provisions and Executive Orders listed above is reserved to the Secretary.

C. Nothing in this Order shall limit or modify the delegation of authority and assignment of responsibility to the Administrative Review Board by Secretary's Order 1–2002 (September 24, 2002).

D. Nothing in this Order shall limit or modify the provision of any other Order, including Secretary's Order 04–2006 (February 21, 2006), Office of the Inspector General, except as expressly provided.

E. The Secretary reserves the authority to enter into and terminate an agreement with any state or state agency to act as an agent of the United States under section 239(a) of the Trade Act of 1974, as amended, 19 U.S.C. 2311(a), in the administration of the Trade Adjustment Assistance and NAFTA-Transitional Adjustment Assistance programs; under 5 U.S.C. 8502 in the administration of the Unemployment Compensation for Federal Employees and Unemployment Compensation for Ex-servicemembers programs; under section 410(a) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5177(a), in the administration of the Disaster Unemployment Assistance program; as well as under any federal program providing for the extension of unemployment compensation.

6. *Redelegation of Authority*. The Assistant Secretary for Employment and Training may further redelegate, unless otherwise prohibited, the authority and responsibilities herein delegated by this Order.

7. *Effective Date*. This Order is effective immediately.

Dated: January 9, 2009.

Elaine L. Chao,

Secretary of Labor.

[FR Doc. E9–691 Filed 1–13–09; 8:45 am]

BILLING CODE 4510–23–P

Federal Register

Wednesday,
January 14, 2009

Part VII

The President

Executive Order 13484—Amending the Order of Succession Within the Department of Agriculture

Executive Order 13485—Providing an Order of Succession Within the Department of Transportation

Executive Order 13486—Strengthening Laboratory Biosecurity in the United States

Federal Register
Vol. 74, No. 9
Wednesday, January 14, 2009

Presidential Documents

Title 3—

The President

Executive Order 13484 of January 9, 2009

Amending the Order of Succession Within the Department of Agriculture

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.*, it is hereby ordered that Executive Order 13241 of December 18, 2001, as amended, is further amended as follows:

Section 1. Section 2 is amended to read as follows:

''**Sec. 2.** *Order of Succession.*

''(a) General Counsel of the Department of Agriculture;

''(b) Chief Financial Officer of the Department of Agriculture;

''(c) Assistant Secretary of Agriculture for Administration;

''(d) Under Secretary of Agriculture for Farm and Foreign Agricultural Services;

''(e) Under Secretary of Agriculture for Natural Resources and Environment;

''(f) Under Secretary of Agriculture for Marketing and Regulatory Programs;

''(g) Under Secretary of Agriculture for Rural Development;

''(h) Under Secretary of Agriculture for Food, Nutrition, and Consumer Services;

''(i) Under Secretary of Agriculture for Food Safety;

''(j) Under Secretary of Agriculture for Research, Education, and Economics;

''(k) Assistant Secretary of Agriculture for Congressional Relations;

''(l) Assistant Secretary of Agriculture for Civil Rights;

''(m) Director, Kansas City Commodity Office, Farm Service Agency (consistent with the time of service and rate of pay requirements of section 3345(a)(3) of title 5, United States Code); and

''(n) State Executive Directors of the Farm Service Agency for the States of Missouri, Kansas, Iowa, and Nebraska, in order of seniority fixed by length of unbroken service as State Executive Director of that State (consistent with the time of service and rate of pay requirements of section 3345(a)(3) of title 5, United States Code).''.

Sec. 2. Section 3(a) is amended by striking ''2(a)-(j)'' and inserting ''2(a)-(n)'', and a new section 3(c) is added to read as follows:

''(c) No individual listed in section 2 shall act as the Secretary unless that individual is otherwise eligible to so serve under the Federal Vacancies Reform Act of 1998.''

Sec. 3. This order is intended to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 9, 2009.

[FR Doc. E9–811
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Federal Register
Vol. 74, No. 9
Wednesday, January 14, 2009

Presidential Documents

Title 3—

The President

Executive Order 13485 of January 9, 2009

Providing an Order of Succession Within the Department of Transportation

By the authority vested in me as President under the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.*, it is hereby ordered that:

Section 1. *Order of Succession.* Subject to the provisions of section 2 of this order, the following officials of the Department of Transportation, in the order listed, shall act as and perform the functions and duties of the office of the Secretary of Transportation (Secretary), during any period in which the Secretary, the Deputy Secretary of Transportation, the Under Secretary of Transportation for Policy, and the officials designated by the Secretary pursuant to 49 U.S.C. 102(e) have died, resigned, or otherwise become unable to perform the functions and duties of the office of Secretary, until such time as the Secretary or one of the officials listed above is able to perform the duties of that office:

(a) Administrator of the Federal Highway Administration;

(b) Administrator of the Federal Aviation Administration;

(c) Administrator of the Federal Motor Carrier Safety Administration;

(d) Administrator of the Federal Railroad Administration;

(e) Administrator of the Federal Transit Administration;

(f) Administrator of the Maritime Administration;

(g) Administrator of the Pipeline and Hazardous Materials Safety Administration;

(h) Administrator of the National Highway Traffic Safety Administration;

(i) Administrator of the Research and Innovative Technology Administration;

(j) Administrator of the Saint Lawrence Seaway Development Corporation;

(k) Regional Administrator, Southern Region, Federal Aviation Administration;

(l) Director, Resource Center, Lakewood, Colorado, Federal Highway Administration; and

(m) Regional Administrator, Northwest Mountain Region, Federal Aviation Administration.

Sec. 2. *Exceptions.* (a) No individual who is serving in an office listed in section 1 in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this section.

(b) No individual who is serving in an office listed in section 1 shall act as Secretary unless that individual is otherwise eligible to so serve under the Federal Vacancies Reform Act of 1998.

(c) Notwithstanding the provisions of this order, the President retains discretion, to the extent permitted by law, to depart from this order in designating an acting Secretary.

Sec. 3. This order supersedes the President's Memorandum of March 19, 2002 (Designation of Officers of the Department of Transportation).

Sec. 4. This order is intended to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 9, 2009.

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Presidential Documents

Title 3—

The President

Executive Order 13486 of January 9, 2009

Strengthening Laboratory Biosecurity in the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* It is the policy of the United States that facilities that possess biological select agents and toxins have appropriate security and personnel assurance practices to protect against theft, misuse, or diversion to unlawful activity of such agents and toxins.

Sec. 2. *Establishment and Operation of the Working Group.* (a) There is hereby established, within the Department of Defense for administrative purposes only, the Working Group on Strengthening the Biosecurity of the United States (Working Group).

(b) The Working Group shall consist exclusively of the following members:

(i) the Secretary of State;

(ii) the Secretary of Defense, who shall be a Co-Chair of the Working Group;

(iii) the Attorney General;

(iv) the Secretary of Agriculture;

(v) the Secretary of Commerce;

(vi) the Secretary of Health and Human Services, who shall be a Co-Chair of the Working Group;

(vii) the Secretary of Transportation;

(viii) the Secretary of Energy;

(ix) the Secretary of Homeland Security;

(x) the Administrator of the Environmental Protection Agency;

(xi) the Director of National Intelligence;

(xii) the Director of the National Science Foundation; and

(xiii) the head of any other department or agency when designated:

(A) by the Co-Chairs of the Working Group with the concurrence of such head; or

(B) by the President.

(c) The Co-Chairs shall convene and preside at meetings of the Working Group, determine its agenda, and direct its work. The Co-Chairs may establish and direct subgroups of the Working Group, as appropriate to deal with particular subject matters, that shall consist exclusively of members of the Working Group.

(d) A member of the Working Group may designate, to perform the Working Group or Working Group subgroup functions of the member, any person who is a part of the member's agency and who is an officer of the United States appointed by the President, a member of the Senior Executive Service (SES), or the equivalent of a member of the SES.

Sec. 3. *Functions of the Working Group.* Consistent with this order, and to assist in implementing the policy set forth in section 1 of this order, the Working Group shall:

(a) review and evaluate the efficiency and effectiveness, with respect to Federal and nonfederal facilities that conduct research on, manage clinical

or environmental laboratory operations involving, or handle, store, or transport biological select agents and toxins, of the following:

(i) existing laws, regulations, and guidance with respect to physical, facility, and personnel security and assurance; and

(ii) practices with respect to physical, facility, and personnel security and assurance;

(b) obtain information or advice, as appropriate for the conduct of the review and evaluation, from the following:

(i) heads of executive departments and agencies;

(ii) elements of foreign governments and international organizations with responsibility for biological matters, consistent with functions assigned by law or by the President to the Secretary of State; and

(iii) representatives of State, local, territorial, and tribal governments, and other entities or other individuals in a manner that seeks their individual advice and does not involve collective judgment or consensus advice or deliberation; and

(c) submit a report to the President, through the Co-Chairs, not later than 180 days after the date of this order that is unclassified, with a classified annex as required, and sets forth the following:

(i) a summary of existing laws, regulations, guidance, and practices with respect to security and personnel assurance reviewed under subsection (a) of this section and their efficiency and effectiveness;

(ii) recommendations for any new legislation, regulations, guidance, or practices for security and personnel assurance for all Federal and nonfederal facilities described in subsection (a);

(iii) options for establishing oversight mechanisms to ensure a baseline standard is consistently applied for all physical, facility, and personnel security and assurance laws, regulations, and guidance at all Federal and nonfederal facilities described in subsection (a); and

(iv) a comparison of the range of existing personnel security and assurance programs for access to biological select agents and toxins to personnel security and assurance programs in other fields and industries.

Sec. 4. *Duties of Heads of Departments and Agencies.* (a) The heads of departments and agencies shall provide for the labor and travel costs of their representatives and, to the extent permitted by law, provide the Working Group such information and assistance as it needs to implement this order.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of Defense shall provide the Working Group with such administrative and support services as may be necessary for the performance of its functions.

Sec. 5. *Termination of the Working Group.* The Working Group shall terminate 60 days after the date of the report submitted under subsection 3(c) of this order.

Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 9, 2009.

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